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May 27, 2005

The President  
The White House  
Washington, DC 20500

Re: OSC File Nos. DI-01-1264 and DI-02-0911

Dear Mr. President:

As a “uniformed law enforcement arm of the Department of Homeland Security,” U.S. Border Patrol (Border Patrol) is charged with securing the borders of the United States against illegal entry, including entry “by terrorists and their weapons.”<sup>1</sup> In other words, Border Patrol is literally a law enforcement presence on the front lines of the war against terrorism. Larry E. Davenport, a former Senior Patrol Agent, and Willie A. Forester, a former Supervisory Border Patrol Agent, disclosed, however, that numerous employees of this law enforcement agency, including some among its management personnel, were themselves engaged in extensive kickback and fraudulent reimbursement schemes in violation of federal law. After significant delays, the Department of Homeland Security failed to thoroughly investigate the whistleblowers’ allegations, particularly as they apply to upper-level management personnel.

Specifically, the whistleblowers disclosed to the Office of Special Counsel (OSC) that agents detailed to the Douglas, Arizona Border Patrol Station (Douglas Station) as part of “Operation Safeguard 99” rented rooms from other employees of Border Patrol, who charged rent at rates lower than the per diem rates or refunded a portion of the rent charged, and provided their tenants with false receipts reflecting payment of the full per diem amount. The whistleblowers further alleged that many detailed agents accepted cash rebates, credits, and other kickbacks from local lodging facilities while claiming the full per diem amount for reimbursement. Finally, the whistleblowers alleged that management of Border Patrol was aware of these improprieties but refused to take any action to address the problem. On January 8, 2003, the Office of Inspector General (OIG) of the Department of Justice<sup>2</sup> issued a report substantiating the whistleblowers’ allegations regarding kickbacks and fraudulent reimbursement claims.

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<sup>1</sup> See U.S. Customs and Border Protection, *U.S. Border Patrol Overview*, [http://www.cbp.gov/xp/cgov/border\\_security/border\\_patrol/overview.xml](http://www.cbp.gov/xp/cgov/border_security/border_patrol/overview.xml) (accessed May 10, 2005); U.S. Customs and Border Protection, *National Border Protection Strategy* (September 2004).

<sup>2</sup> Prior to March 1, 2003, Border Patrol was a component of the Immigration and Naturalization Service within the Department of Justice. On March 1, 2003, Border Patrol merged into the Department of Homeland Security as a component of U.S. Customs and Border Protection.

Acting on the whistleblowers' disclosure, OSC contacted Border Patrol representatives in February 2003. For nine months, Border Patrol representatives repeatedly indicated that disciplinary action would be taken against personnel involved once the Department of Justice Inspector General provided their names. In November 2003, however, OSC was informed that Border Patrol intended to do nothing further in the matter because the "Chief, Employee Relations Section" in the Human Resources unit of another office, the Bureau of Immigration and Customs Enforcement, wrote a memorandum indicating that disciplinary action would be an "administrative burden." At this point, the agency's position was that it would not administratively discipline any of the federal law enforcement agents that engaged in criminal acts -- even seek remuneration in the amount of the fraudulent kickbacks -- based on the faulty employment law analysis and recommendation of a human resource office.<sup>3</sup>

As a result of Border Patrol's refusal to take any disciplinary action, OSC required the Honorable Thomas J. Ridge, former Secretary of Homeland Security, to conduct an investigation into the whistleblowers' disclosures pursuant to 5 U.S.C. § 1213(c) and (d). A special panel assembled by U.S. Customs and Border Patrol (CBP) reviewed the findings of OIG's investigation and recommended corrective action to CBP, including disciplinary action against forty-five agents. Secretary Ridge submitted to this office on March 23, 2004, an initial report summarizing the work of CBP's special panel. OSC determined that the Secretary's initial report was deficient because the agency had failed to address the involvement of management in the wrongdoing identified by the whistleblowers and neglected to interview the whistleblowers. In response to OSC's concerns, the agency submitted a supplemental report, prepared by the Office of Internal Affairs for CBP, to this office on December 29, 2004. This supplemental report reflects the results of an investigation that included more than twenty-five interviews of management employees. Again, however, the agency failed to interview the whistleblowers. Moreover, the agency accepted the contentions of the management personnel under investigation despite the existence of contravening evidence. The whistleblowers commented on both agency reports. As required by law, 5 U.S.C. § 1213(e)(3), I am now transmitting the agency's reports along with the whistleblowers' comments to you.

I have reviewed the original disclosures, the agency's reports, and the whistleblowers' comments. I have determined that the agency's reports contain all of the information required by statute. However, as discussed in the attached report, I am unable to conclude that the agency's findings regarding the involvement and/or acquiescence of management personnel in the kickback and fraudulent reimbursement schemes identified by the whistleblowers were reasonable.

As required by law, 5 U.S.C. § 1213(e)(3), I have sent copies of the agency's reports and the whistleblowers' comments to the Chairmen of the Senate Committee on Homeland Security

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<sup>3</sup> The July 29, 2003, Memorandum bases its conclusion, in part, on comments made by a Washington, D.C. think tank attorney in a magazine article. While the full context of the comment is not included, OSC is hard pressed to believe that disciplinary action based on criminal activity, as in this case, whether a few months or several years in the past, would not be immediately sustainable in any appeal to the Merit System Protection Board. Further, agency attorneys with whom OSC spoke indicated that they did not agree with the rationale and overall analysis of the personnel office's memorandum.

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and Governmental Affairs, the Senate Committee on Finance, the Senate Committee on the Judiciary, the House Committee on Homeland Security, and the House Committee on the Judiciary. We have also filed copies of the agency's reports and the whistleblowers' comments in our public file and closed the matter.

Respectfully,

Scott J. Bloch

Enclosures