

Testimony of Beth Daley

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**“Ensuring a Merit-Based Employment System: An Examination of the
Merit Systems Protection Board and the Office of Special Counsel”
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Chairman Davis and Ranking Member Marchant, thank you for inviting me to testify today. My name is Beth Daley and I am the Director of Investigations for the Project On Government Oversight (POGO). POGO is an independent nonprofit that has, for more than 25 years, investigated and exposed corruption and misconduct in order to achieve a more accountable federal government.

Whistleblowers are the Congress’ most important allies in the war against Executive Branch corruption, waste, fraud, and abuse. In POGO’s long history, our organization has seen that almost all of the information coming from government agencies only tells the good news. The bad news is locked away where it festers. In this age of increasing government secrecy, it has become even more difficult to find out what is really going on inside the Executive Branch. Whistleblowers and concerned insiders who disclose information about wrongdoing are, in most cases, the only way for Congress, watchdogs, and the news media to get an uncensored reality check.

Yet these whistleblowers face enormous risks. Their managers often retaliate against them if they are discovered. Over and over again, I hear the same stories of retaliation by managers who want to make an example of whistleblowers inside the agency: A whistleblower’s desk is moved to the basement or into the hallway; computers are taken away; job responsibilities and authorities are stripped away. But blowing the whistle can have far more serious repercussions. Whistleblowers are frequently fired from their jobs, or are blackballed and therefore lose their entire careers. And these examples don’t even touch on the personal costs to the whistleblowers and their families.

Because of POGO’s role as a watchdog, I hear from many whistleblowers who are seeking assistance and justice from the U.S. Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB). I am sad to report that very few of the whistleblowers I hear from find the help they need from these agencies. Instead, the whistleblowers are frequently frustrated by the OSC’s and MSPB’s unwillingness to act on their concerns, to provide a fair hearing of their evidence, or to act as a means of reigning in agency abuses. The OSC and MSPB are failing in their missions.

Although the House of Representatives recently passed H.R. 985, the Whistleblower Protection Enhancement Act of 2007, as an effort to remedy the situation, I fear that the OSC and MSPB will continue to fail as they have for most of their history. Both OSC and MSPB are small, weak institutions located in the Executive Branch, which is persistently hostile to whistleblowers. As we approach the 30-year anniversary of these institutions, I believe the time has come for Congress to seriously consider ending this failed experiment, and to explore whether justice would be better served by relocating the OSC's and MSPB's functions to other agencies. Efforts to repair the agency's failures have resembled an extended game of whack-a-mole.

The OSC and the MSPB were created by the 1978 passage of the Civil Service Reform Act to protect merit-based civil service rules. These rules are meant to ensure that federal civil servants are qualified and can serve the public free of management abuse and partisan political interference. From the very beginning, however, OSC and MSPB demonstrated an inability to fulfill their mission. This pattern of failure has persisted over the decades.

Since 1980, the Government Accountability Office (GAO) has issued numerous reports documenting the failures of the OSC and MSPB. There are several reasons for these failures. Some failures were the result of poorly-crafted policies.

For instance, the GAO reported in 1985 that in the first five years, the OSC and MSPB had gained corrective or disciplinary action in only 16 of the estimated 1,500 whistleblower cases that had been closed—in other words, just *one percent* of the whistleblowers who filed a claim to challenge retaliation received some sort of relief. According to the GAO's review of a sample of cases, the criteria for determining whether whistleblower reprisal took place were simply too stringent. OSC had also failed to successfully prosecute even a single whistleblower case in front of the MSPB in its first five years. Even at this early juncture, Members of Congress contemplated abolishing the OSC given its abysmal failure.¹ According to a Senate report:

The Whistleblower Protection Act was passed in 1989, in large part because the Office of Special Counsel was perceived as being ineffectual. At that time, OSC had not brought a single corrective action case since 1979 to the Merit Systems Protection Board on behalf of a whistleblower. A former Special Counsel had been quoted in the press advising whistleblowers "Don't put your head up, because it will get blown off." Whistleblowers told the Governmental Affairs Committee that they thought of the OSC as an adversary, rather than an ally, and urged the Committee to abolish the office altogether.

The Committee chose to strengthen the office instead, giving it another chance to act aggressively on behalf of whistleblowers.²

To remedy these and other problems, Congress passed the Whistleblower Protection Act in 1989, which enacted a series of structural reforms to the OSC and MSPB. Central to these reforms was an attempt to ease the burden of proof for the whistleblower that retaliation had occurred.

¹ General Accounting Office, "Whistleblower Complainants Rarely Qualify for Office of the Special Counsel Protection," May 1985. <http://archive.gao.gov/d9t2/126924.pdf>

² Senate Report 103-358, "Authorization Appropriations for the United States Office of Special Counsel, the Merit Systems Protection Board, and for other Purposes," Senate Committee on Governmental Affairs, August 23, 1994.

However, studies conducted by the GAO subsequently found that, despite the reforms, not much had improved:

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. 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.³

In 1994, the Congress was forced to act once again to repair the failed system by making amendments through the reauthorization process. In its report on the legislation, the House Committee on Post Office and Civil Service noted:

Contrary to its rhetoric, the OSCs [sic] empirical track record is one of hostility to its stated mission as the rule, rather than the exception. Despite 400-500 cases yearly and the most sympathetic legal standards in history, the Office still has not litigated a single case to restore a whistleblowers job since the Acts 1989 passage, or indeed since 1979.

During the last two fiscal years, the OSC has sought from the MSPB only three stays of prohibited personnel practices, out of some 4,000 complaints. Last year GAO concluded the OSC has not improved on its traditional claim of obtaining relief for 5% of complaints. Significantly, 35% of those whom the OSC turned away got help elsewhere, often through settlements a no-fault, constructive approach the OSC routinely refuses to attempt during MSPB appeals. The Office ordered full agency investigations under 5 U.S.C. 1213(c) into whistleblowers charges of waste, fraud or abuse for only five out of 149 whistleblowing disclosures in FY 1992, and 14 out of 209 new disclosures in FY 1993.⁴

Unfortunately, things have generally not improved, and, in some regards, are much worse since the 1994 amendments.

³ General Accounting Office, "Whistleblower Protection: Employees' Awareness and Impact of the Whistleblower Protection Act of 1989," March 31, 1993. <http://archive.gao.gov/d43t14/148871.pdf>

⁴ House Report 103-769, "Reauthorization of the Office of Special Counsel," House Committee on Post Office and Civil Service, September 30, 1994.

The OSC's 2006 annual report proudly declares: "The next seven pages graphically tell the story of the successes of the last three years at OSC, especially the decreased case processing times and the elimination of the backlogs, including those backlogs mentioned by GAO in 2004."⁵ But what is really in the first few pages of this report is a razzle-dazzle of data charts showing all kinds of statistics regarding the closures of case files, but none showing who—if anyone—was helped. There is a reason why. Fewer and fewer whistleblowers and employees who are subjected to illegal personnel practices and retaliation are actually helped by OSC.

In the past ten years, favorable actions obtained by the OSC for whistleblowers and others have declined. In 2005 and 2006, only about 2.5 percent of the cases coming before the OSC resulted in a favorable action for the employee who filed the complaint. The total number of favorable actions obtained for whistleblowers declined from 120 in 1995 to just 40 in 2006. Finally, the OSC continues to issue a miniscule number of enforcement actions against managers who engage in retaliation: on average, between zero to five total annually. With odds like these, it is easy to see why whistleblower retaliation continues to be a deeply-entrenched practice throughout the federal government.

Another reason for the failures of the OSC and MSPB has been a lack of adequate leadership. Although former Special Counsel Elaine Kaplan did a notable job, other leaders of the OSC and MSPB have simply not been committed enough to fulfilling the mission of their agencies. As a result, Congress' policy reforms have been doomed to failure.

For instance, current leaders at the OSC have brought the agency to a point where it has itself become mired in a series of scandals that have undermined its credibility and authority as the federal government's protector of whistleblowers. Special Counsel Scott Bloch has a history of taking prohibited personnel actions and retaliating against whistleblowers at his own agency. In early 2004, OSC insiders blew the whistle on Mr. Bloch's refusal to enforce anti-discrimination statutes. Shortly after, Mr. Bloch was quoted in a *Federal Times* article stating, "It's unfortunate that we have a leaker or leakers in our office who went to the press rather than coming to me...."⁶

On the heels of this interview, Mr. Bloch sent an email to his staff directing "that any official comment on or discussion of confidential or sensitive internal agency matters with anyone outside OSC must be approved in advance by an [Immediate Office of the Special Counsel] official."⁷ The email was an illegal gag order, and exemplified the kind of communication which Congress has annually determined cannot be issued by Executive Branch officials using federal funds.⁸ In April 2004, the Government Accountability Project, and Public Employees for Environmental Responsibility, and POGO issued a letter denouncing this email.

⁵ U.S. Office of Special Counsel, "Report to Congress," FY 2006. <http://www.osc.gov/documents/reports/ar-2006.pdf>

⁶ Debra Katz, Katz, Marshall and Banks, "Complaint of Prohibited Personnel Practices Against Special Counsel Scott Bloch, March 3, 2005. <http://pogo.org/m/gp/gp-OSCcomplaint-03032005.pdf>

⁷ Letter to Scott Bloch, U.S. Office of Special Counsel, April 24, 2004. <http://www.peer.org/docs/osc/OSClletter.pdf>

⁸ Project On Government Oversight, *Homeland and National Security Whistleblower Protections: The Unfinished Agenda*, April 28, 2005. <http://www.pogo.org/p/government/go-050402-whistleblowerB.html#uacommunication>

These opening salvos in Mr. Bloch's tenure have set the stage for a tumultuous reign. In January 2005, we learned that Bloch ordered 12 headquarters employees to accept involuntary transfers to field offices in Dallas, Oakland, and Detroit, on penalty of removal. The employees were given only ten days to decide whether they would uproot their families, or lose their jobs.⁹ Most simply resigned and moved on to other jobs.

Furthermore, whistleblowers have alleged that Mr. Bloch violated personnel rules, engaged in cronyism, and violated whistleblower free speech statutes. In March 2005, employees, who remained anonymous, and public interest groups including POGO, GAP, Public Employees for Environmental Responsibility and the Human Rights Campaign filed a complaint, which was filed with the OSC as required by law.¹⁰ After six months of confusion regarding who should conduct the investigation, the President's Council on Integrity and Efficiency (PCIE) assigned the investigation to the Office of Personnel Management Inspector General (OPM IG) in October 2005. That investigation has not yet been completed.

Ironically, the complaint seems to have spurred more retaliation and prohibited personnel actions within the OSC. High level OSC staff inappropriately attempted to interfere with the investigation on several occasions, and have conducted themselves in a manner that is intimidating to employees. On January 30, 2007, a high-level OSC official sent an email to all of OSC's employees outlining a series of procedures for the investigation which, in effect, would allow managers to monitor who was interviewed by the OPM IG. This seemed to be an attempt to find out who the agency's internal critics were. The contents of the email revealed a startling lack of acumen concerning proper procedures for handling sensitive investigations.^{11 12}

In September 2006, Debra Katz, an attorney representing the complainants wrote to the Office of Management and Budget's Clay Johnson to express concern about Mr. Bloch's interference with the investigation:

One witness already informed OPM IG investigators that shortly after the investigation began and the first staff witnesses were interviewed, Mr. Bloch seriously considered and debated whether he could and should compel employees who had been interviewed by the IG's staff to complete affidavits describing what they had been asked and what they had told investigators. We have been advised that Mr. Bloch discussed this plan with members of the senior staff, who apparently talked him out of this bizarre and patently

⁹ "Staff Purge at Office of Special Counsel: Whistleblower Staff Claim Retaliation, Forced Moves to New Midwest Field Office," Press release from POGO, GAP & PEER, January 10, 2005. <http://www.pogo.org/p/government/ga-050101-whistleblower.html>

¹⁰ "Documents Concerning the Special Counsel," <http://pogo.org/p/government/OSCcompendium.html>

¹¹ Debra Katz, Katz, Marshall and Banks, Letter to Clay Johnson III, Chairman, President's Council on Integrity and Efficiency, February 1, 2007. http://www.peer.org/docs/osc/07_12_2_protest_ltr.pdf

¹² Williamson, Elizabeth, "Special Counsel Accused Of Intimidation in Probe: Contact with Investigators Controlled, Employees Say," *Washington Post*, February 16, 2007. <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/15/AR2007021501725.html>

illegal plan. Nonetheless, his consideration of a plan to compel employees to reveal what they had told investigators, and his continuing involvement, have become widely known at OSC, causing current employees—including several of the complainants—to be reluctant, and thus far to refuse to meet with OPM IG investigators.¹³

These keystone-cops antics would be disturbing to hear about under any circumstances. However, they are even more disturbing given that the Office of Special Counsel is the agency to which whistleblowers must turn to for help, for confidentiality, and for support. It is simply not possible for the whistleblower community to have any confidence in Mr. Bloch's ability to perform his duties when he has repeatedly demonstrated a fundamental lack of understanding about whistleblowers, proper investigation procedures, employee free speech laws, and his responsibilities as a government manager.

Even the 2006 recipient of OSC's own Public Servant Award expressed frustration with the agency's failures. In a speech he prepared regarding his acceptance of the award, Bureau of Prisons whistleblower Leroy Smith described how the OSC failed to follow up on his disclosures and dismissed his retaliation claims, which he then pursued on his own. He noted: "as I stand here with my award for being the 'Public Servant of the Year,' I cannot help but feel that my experience is a beacon of false hope for public servants who are trying to correct wrongdoing."¹⁴

Recommendations

It is time for Congress to conduct a series of vigorous oversight activities aimed at evaluating the OSC's and the MSPB's performance, determining why these agencies have largely failed, and analyzing whether their activities could be better performed by other government bodies. As a start, it would be appropriate for this Committee to commission a series of GAO and Congressional Research Service studies on the overall performance of the OSC and MSPB, something that has not been done since the mid-1990s.

In conducting this analysis, I would encourage the Committee to consider what role the legislative branch could play in assisting whistleblowers. Congress should consider whether taking the OSC's budget and moving it into a Congressional agency tasked with conducting investigations into whistleblower allegations might be a more effective expenditure of funds. Half of a whistleblower's battle against retaliation is gaining a fair review of his or her concerns. A Congressional agency would be better suited to this task, given its independence from the political constraints inherent in the Executive Branch.

At the same time, Congress must consider how to improve those procedures which allow whistleblowers to legally challenge actions against them, whether that is loss of a job, decrease of in salary, or other retaliation. Yet, no analysis has been done by the GAO to compare the various frameworks and establish which are functioning most effectively. For example, one basis

¹³ Debra Katz, Katz, Marshall and Banks, Letter to Clay Johnson III, Chairman, President's Council on Integrity and Efficiency, September 7, 2006. http://www.peer.org/docs/osc/07_12_2_protest_ltr.pdf

¹⁴ Leroy Smith, "Beacon of False Hope," September 7, 2006. Mr. Smith was never able to give his speech at OSC's "Public Servant Award" presentation: OSC had cancelled the event after it learned Mr. Smith planned to be critical of its performance. http://www.peer.org/docs/osc/06_7_9_lsmith_stmt.pdf.

of comparison might be the process in the Department of Labor. Some statutes allow whistleblowers to file complaints with the Department of Labor and have a hearing with an Administrative Law Judge. A 2006 law review article by a City University of New York law Professor presented statistics on the disposition of whistleblower cases filed under the Sarbanes-Oxley Act, finding that out of 393 cases completed, the Department of Labor found merit in 64 cases (or 16%). Out of those 64 cases, 49 subsequently settled. This is a fairly high settlement rate, even given how few of the Sarbanes-Oxley cases are reported to have prevailed before the Department of Labor's Administrative Judges or in federal court.¹⁵

Furthermore, Congress should only extend reauthorization of the OSC and MSPB for two more years, rather than five as is usually done. The failures of OSC and MSPB are simply too grave to allow to continue unchecked. These two years will give Congress more time to study the situation and, if whistleblower protection legislation passes in the Senate in the near term, as is hoped, it will perhaps provide an opportunity to see if the reforms of H.R. 985 work.

Finally, there has been unnecessary delay and confusion surrounding who should investigate allegations involving the OSC's Special Counsel and Deputy Special Counsel in the 2005 complaint by public interest groups and anonymous OSC employees. As part of the reauthorization, Congress should clarify that allegations made by OSC employees can be investigated by the Integrity Committee of the President's Council on Integrity and Efficiency (PCIE). The GAO reported on this problem in November 2005, noting:

OSC employees could be afforded an external investigation of their prohibited personnel practice allegations against the Special Counsel or Deputy Special Counsel through an independent entity. Most of the current and former OSC officials we spoke with acknowledged that the option of such an external investigation is warranted.¹⁶

There is precedent for such action. In 1988, President Ronald Reagan issued Executive Order 12625, adding the Special Counsel to the PCIE's membership.¹⁷ In 1996, President Bill Clinton authorized the Integrity Committee of the PCIE to be the independent investigative body which would "ensure that administrative allegations against IGs and certain staff members of the OIGs are appropriately and expeditiously investigated and resolved."¹⁸ The Integrity Committee has continued to serve as the body to which whistleblowers can turn to in cases involving Inspectors General, including the recent high-profile investigations of the NASA IG and the Commerce Department IG, and others as noted by this Committee. However, the Integrity Committee has not been authorized to investigate and resolve allegations involving the Special Counsel or the Deputy Special Counsel.

¹⁵ Valerie J. Watnick, "Whistleblower Protections under the Sarbanes-Oxley Act: A Primer and a Critique," *bepress Legal Series*, Working Paper 1822, October 3, 2006.

¹⁶ Government Accountability Office, "U.S. Office of Special Counsel: Selected Contracting and Human Capital Issues," November, 2005. <http://www.gao.gov/new.items/d0616.pdf>

¹⁷ Executive Order 12625, "Integrity and Efficiency in Federal Programs," January 27, 1988. <http://www.presidency.ucsb.edu/ws/index.php?pid=36201>

¹⁸ Executive Order 12993, "Administrative Allegations Against Inspectors General," March 21, 1996. <http://www.ignet.gov/pande/gporettri.html>

Again, thank you for inviting me to testify today. I look forward to working with you and the Committee to further explore how our nation's patriots, the whistleblowers, can be protected from retaliation and supported in their efforts to make the government more honest, open, and accountable.