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

***“Safeguarding the Merit System Principles: A Review of the
Merit Systems Protection Board and the Office of Special
Counsel.”***

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In 1776, John Adams wrote that “Good government is an empire of laws.” I have quoted this often in my tenure, and I believe in its emphasis on enforcing laws and the rule of law, holding our officials and managers in the federal government to a higher standard of fidelity to the law, and holding ourselves accountable to the law and our public charge to make a difference.

I’d like to thank the committee for inviting me to testify. It’s an honor to be here before Chairman Akaka, Ranking Member Voinovich and the subcommittee. It’s also an honor to be here beside Chairman Neil McPhie, who’s done so much for the Merit System and the rule of law.

My name is Scott Bloch and I am the Special Counsel of the U.S. Office of Special Counsel, or OSC. I am here to seek reauthorization of the U.S. Office of Special Counsel because it is upholding our small empire of laws that keep our federal government accountable, honest, efficient, and just for more people in a timely way than at any time in its history. Building on the excellent work of my predecessor in outreach and whistleblower disclosure publicity, we have sought to bring to the attention of the public, and in particular the federal employees, the fine work that our career staff is doing in government accountability and protections for the ordinary heroes who blow the whistle. I have written and spoken often about these matters, as have my staff, because it is important that people know there is someone there who will stand up for them, who has powers to bring redress, who will not countenance reprisal when citizens show their concern by blowing the whistle on waste, fraud and abuse.

I also come before the Committee to request several legislative fixes that, while not complicated, may allow our agency to improve on our record for the benefit of the federal government. I am also pleased to note that Chairman Akaka has himself endorsed several of these fixes in legislation of his own.

Three and a half years ago I had the high privilege to receive a favorable recommendation from the Committee on Homeland Security and Government Affairs, and I return again to report on our agency's status in upholding our statutory obligations.

Senators of the Committee, it is my pleasure to tell you that our agency is functioning better than at any other time in its history, and I believe that we will continue to improve on even that record.

To support my bold claim, I have brought with me today early copies of the final language from our annual report for Fiscal Year 2006, and charts demonstrating our improved numbers. Unfortunately the report is currently at the Government Printing Office, but I can assure you the materials I have distributed to your staff in recent days will not change substantively. It will have a very pretty green cover that is not part of the handout, and you can look forward to that in a few weeks.

OSC, as most of you know, is an independent watchdog agency established as part of the post-Watergate reforms of the late 1970s. We essentially operate within the executive branch to protect worker rights and the merit system under four statutory functions. Those are:

Number One, to review and validate whistleblower disclosures,

Number Two, to investigate and prosecute complaints of Prohibited Personnel Practices, with a special focus on discrimination against whistleblowers,

Number Three, to enforce the Hatch Act, the law that limits the political activity of government employees,

And Number Four, to enforce the Uniformed Services Employment and Reemployment Rights Act, or USERRA. USERRA, of course, is the law that protects the job rights of military servicemembers when they return from active duty.

Right now OSC has part of the federal sector jurisdiction over USERRA in a demonstration project with the Labor Department. Congress established the demonstration project in 2004 as part of the Veterans Benefits Improvement Act. The demonstration project expires this year, and I know, Chairman Akaka, that you and your fine staff over at the Committee on Veterans Affairs will be sorting through that later this year. In fact, I'm told that here at this committee there may be consideration of USERRA matters, and we certainly will be happy to have discussions about our enforcement powers in whatever venue Congress sees fit.

On matters of general agency functioning, when I was taking office, we were heavily criticized – and rightly so – by the Government Accountability Office. The GAO issued a report pointing up our essential dysfunction as an agency. We were saddled with a tremendous backlog and bureaucratic disorganization that made it a challenge to fulfill our mission of protecting the rights of federal workers and the merit system.

And previously, during my confirmation process this committee was justifiably firm with me that I was expected to dramatically improve the operations of the agency.

I believe we've done that. Our central achievement is our backlog resolution and increased enforcement in all areas. Hundreds of cases stacked up, moldering away for years, and I cited Gladstone as my rallying cry that **Justice Delayed is Justice Denied**. Over the first year and a half, we were able to get that backlog down and find some great cases in the process. I remind the committee that while the career staff resolved the backlog, we doubled the percentage of positive findings in whistleblower disclosure and PPPs. I was proud to be a part of that effort; I and my political team rolled up our sleeves and worked files along with the career staff. I cannot claim that I worked very many. Perhaps two or three. But sometimes you have to lead by example and show others that you are serious about what you want to accomplish. Leadership is often simply knowing what is inside others and finding a way to let that out. We did that at OSC. And I am quite proud of their achievements.

We also had transparency to the process, and we were very gratified by the review of our backlog resolution effort that took place in the spring of 2005. The House Committee on Government Reform (now Oversight and Government Reform) sent staffers from both then-Chairman Tom Davis and then-Ranking Member Henry Waxman to review OSC's work. These staffers pored over OSC's case files and interviewed numerous career attorneys over a three-week period to examine each aspect of the operation. At the conclusion, all the staffers expressed satisfaction, and Mr. Davis and Subcommittee Chairman Jon Porter sent us a very kind letter praising our hard work and smart work for whistleblowers.

But that's not all. Our agency had been saddled with a dysfunctional system of organization that was a major cause of the backlog. One example is our Investigation and Prosecution Division, or IPD, which goes after Prohibited Personnel Practices. Here in our headquarters we had three different IPDs, and each had different operating procedures and approaches to policy implementation.

By melding the procedures here in DC we were able to create a stable order. But we felt it was also important for geographic balance to establish a third field office in the Midwest to balance offices in Dallas, Oakland, California and, of course, here in Washington. But we also had organizational problems abetting the backlog. An example was our Investigation and Prosecution Division, or IPD,

which goes after PPPs. Well, we had three different IPDs, with **different operating policies**.

We also felt it was important for geographic balance and to provide equivalent smaller teams that could aid each other but also work in a sort of team work model, and also compete amongst each other, to establish a third field office in the Midwest to balance offices in Dallas; Oakland, California; and, of course, here in Washington. So now we have four field offices, and we are not so DC-centric, which I believe presented some morale and case assignment problems.

We worked with GSA, which offered us space at minimal cost to the taxpayer in Senator Levin's great state of Michigan, in the city of Detroit, an office I just returned from visiting. It's thriving and contributing mightily to our success. I was quite impressed with the view in the federal building looking out on the river, and into Windsor, Ontario to the North. It is a very impressive view.

Now the results speak for themselves. We have no backlogs. The cases in the pipeline are appropriate by age and status, and each field office is keeping up and providing strong production and strong results. We're doing aggressive outreach to educate federal workers, and geographic balance has helped there as well as it has in the arena of investigations.

I'd like to show a few charts that we've brought along today – here is our chart [Disclosure Unit Cases Pending at End of Fiscal Year] showing the steep dropoff in the number of cases we were rolling over from one year to the next, starting here at the end of Fiscal Year 2003 and through our backlog effort in Fiscal Year 2004 and continuing through the present day. Here we have another chart [Disclosures Referred to Agency Heads and IGs] showing the increase we have been able to generate of whistleblower referrals to agencies. This is critical, and results from good case analysis by the hard-working attorneys in that unit and also from the common-sense fix we instituted early on in my tenure to have our standard be more in line with what other agencies practice.

When our agency receives whistleblower disclosures, we were looking to see whether the allegation merited a Preponderance of the Evidence finding, which equates to about an 80 or 90% likelihood of the allegation being true. But the agencies themselves only use a Substantial Likelihood finding – which is to say,

just more likely than not. It was absurd for OSC to have a higher standard of proof than the agencies to whom we refer these claims. So, we changed the standard, and literally doubled the number of solid agency referrals.

And this is the meat of whistleblower disclosures – where we're able to contact an agency and tell them, you have a problem that needs fixing, and we're going to be grading you.

We've had some signature successes in recent years. Many of you should remember the Anne Whiteman case involving aircraft near-misses at Dallas-Fort Worth International Airport, one of the world's busiest. I believe issues at DFW were also the topic of a recent ABC news piece, and we've been encouraged by congressional interest in the matter as well. We are looking at the continuing issues of whistleblower retaliation there, as well as problems in the follow through with the IG investigation of DFW.

We also substantiated Leroy Smith's disclosure involving environmental hazards within federal prison facilities. That case resulted in pushing and pulling between us and the Bureau of Prisons, and really required some work on our part to get attention to a frankly deficient report delivered by the target agency. As a result of our efforts, and that of the Whistleblower, the investigation by the DOJ IG has expanded to other prison facilities, and it has changed the system for how such facilities function. Safety and health have benefited because of his brave disclosures. We awarded him our Public Servant Award at the end of last fiscal year.

The next chart I'd like to look at is our Prohibited Personnel Practice results [Complaints Examining Unit – Average Processing Time of PPP Cases]. Here you can see the reduction in case processing times, from just over a hundred days in Fiscal Year 2002 to less than half of that in Fiscal Year 2006 – again, this is just time spent in our screening unit to determine whether the case should be referred to our Investigation and Prosecution Division for further action. And speaking of that Division, here [Average Age of Open Cases in IPD] we see the steady decline in the average age of cases. We have also had some higher-profile cases here, including the forced resignation of the Agriculture Department's state rural

director for Alaska because of some real abuses on his part – political malfeasance as well as discrimination.

Moving on to our Hatch Act results [Hatch Act Results – Average Processing Time Per Complaint], this chart shows a similar decrease in processing times over the past four years. Again, as in all of our units, we have a group of hardworking career employees getting good results. And speaking of results, that downward trend in processing times has corresponded with spikes in complaints the past two election cycles, which has helped produced this chart [Hatch Act Unit – Disciplinary and Corrective Actions]. Here we see an upward trend, with a dip for the 2005 off-year. We've had a variety of interesting cases involving the Hatch Act lately – there were the NASA cases that got quite a bit of attention involving names like Senator John Kerry and former Congressman Tom DeLay, although in neither case was the member of congress the target of the complaint.

But of more relevance to Hatch Act-covered employees has been our work on email. Recent decisions by the Merit Systems Protection Board have affirmed our belief that government email must not be used for political purposes.

The final chart I want to show you [USERRA Demonstration Project] is on our USERRA Demonstration Project work. Starting in February of 2005, you can see we've been able to take on several hundred cases and help a number of servicemembers without negatively affecting our work in other units. We've always had some involvement in USERRA as it overlapped with our work on PPPs, but it was minimal. It wasn't until 2004 that we filed OSC's first-ever case at the Merit Systems Protection Board.

Some signal cases here involve a military truck driver who injured his back in Iraq and then was denied his rights to equivalent employment when he returned. He came to OSC and we achieved full corrective action for him.

Another case involved a military serviceman who was illegally denied reemployment, and then he was told by multiple sources within the federal government that his case was a dead end.

Senators of the Committee, I'm proud to say that when this serviceman finally arrived at the U.S. Office of Special Counsel, we wasted no time in getting

him his job back, a promotion that the law requires him to be considered for, and Eighty-Five Thousand Dollars in back pay that he was owed. That may not be much to the government, but it's quite a lot for a person without a job.

Now, for the legislative matters I wanted to bring before the committee: An overzealous provision in the PPP law allows our agency to be tagged with attorneys fees in any case in which OSC's request for disciplinary action has been denied. You can see how this might have a chilling effect on OSC's vigorous pursuit of disciplinary cases. We would ask that the Committee modify this provision, which threatens to inhibit our prosecutorial discretion.

I would also ask the Committee to give our agency the power to file Amicus Briefs in cases of ours that go beyond the Merit Systems Protection Board. This would allow our expertise in both our statutes and the specific cases to complement the work of the Justice Department.

Another provision is the inability of our agency to provide one-stop shopping of the Veterans Preference provision in the Prohibited Personnel Practice law. I know again of Chairman Akaka's interest in this issue, and I candidly admit my desire to foster good relations with the Committee.

It is the case that OSC is able to seek corrective action under other PPP provisions, like the blanket (b)6 and (b)12 provisions against any unauthorized preference, or even under USERRA, as the cases frequently overlap. However, we think it would be much less confusing for service members to understand that we can seek corrective or disciplinary action under any of the PPPs, as well as USERRA – that brings up another point, that USERRA does not have a provision for disciplinary action, but I don't want to get ahead of myself.

It's my hope that these stories of real people who have benefited from OSC's existence, combined with our slashing of processing times and increased enforcement, show that our agency has improved and is promoting good government. Together with this committee, and other agencies like MSPB and OGE, we can indeed look back on the next five years with the same pride of the last five. I look forward to taking any questions you may have. Thank you.