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## **Reinvigorating the U.S Office of Special Counsel: Suggestions for the Next Administration**

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# Reinvigorating the U.S. Office of Special Counsel: Suggestions for the Next Administration

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## I. Introduction

A recurring theme of this year's election season has been the need for change, reform, accountability, and transparency in government. If the next President is serious about achieving those goals, he needs to know that there already exists an important and untapped resource to help him do so: the United States Office of Special Counsel (OSC).

OSC is a very small and relatively unknown federal agency, with a broad mission and an unfulfilled potential. The independent investigative and prosecutorial agency was created as part of the Civil Service Reform Act of 1978,<sup>1</sup> which implemented the first comprehensive reform of the federal civil service system since the establishment of the modern merit-based civil service in the Pendleton Act of 1883.<sup>2</sup> OSC's primary mission "is to protect current and former federal employees, and applicants for federal employment, especially whistleblowers, from prohibited employment practices."<sup>3</sup> In addition, OSC serves as a safe channel for current and former employees of the federal government who wish to secure an investigation of their whistleblower disclosures.<sup>4</sup> OSC also has the authority to issue advisory opinions and enforce the Hatch Act, which places limitations on the political activity of federal employees as well as employees of state and local agencies who have responsibility for programs funded by federal money.<sup>5</sup>

Notwithstanding its broad jurisdiction and ambitious mission, successive Congresses and Administrations have underfunded and ignored OSC. Further, OSC itself has had great difficulty establishing its own credibility and has attracted intense criticism during nearly all of its 30 years of existence. That criticism and controversy has reached its zenith under the current Special Counsel, Scott Bloch, who is under grand jury investigation at the time of this writing, reportedly based on allegations of obstruction of justice.<sup>6</sup>

A strong and effective OSC would be an invaluable ally to a new Administration that is truly committed to reducing fraud, waste, and abuse, enforcing accountability in government, and stemming the tide of politicization that has become standard operating procedure over the

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<sup>1</sup> Civil Service Reform Act of 1978, 5 U.S.C. § 1101-1105 (2000) (effective Jan. 11, 1979).

<sup>2</sup> See *Frazier v. Merit Sys. Protection Bd.*, 672 F.2d 150, 153-54 (D.C. Cir. 1982) (discussing shortcomings of Pendleton Act and events leading to the enactment of the CSRA).

<sup>3</sup> U.S. OFFICE OF SPECIAL COUNSEL, FISCAL YEAR 2006 REPORT TO CONGRESS 17 (2006), available at <http://www.osc.gov/documents/reports/ar-2006.pdf>.

<sup>4</sup> 5 U.S.C. § 1213 (2000).

<sup>5</sup> The Hatch Act is codified at 5 U.S.C. §§ 7321-7326 (2000). OSC's jurisdiction to investigate Hatch Act matters, and to seek disciplinary action for violations, is provided by 5 U.S.C. § 1216(a) and (c).

<sup>6</sup> See *infra* pp.7-8.

last eight years. In this Issue Brief, we argue that the next Administration must directly tackle the current crisis of confidence at OSC. In Part II, we provide background information on the history, mission, and structure of OSC. In Part III, we outline the criticisms that have historically been leveled against OSC. In Part IV, we recommend general steps that might be taken by the next President to reinvigorate OSC so that it might be used to further his agenda of reform.

## II. OSC's Mission

In enacting its major reform of the federal civil service in the CSRA in 1978, and creating OSC, Congress intended that OSC's primary mission would be to investigate and prosecute complaints alleging the commission of certain prohibited personnel practices (PPPs),<sup>7</sup> with a special emphasis upon protecting whistleblowers against reprisal.<sup>8</sup> Congress empowered OSC to secure corrective action on behalf of the victims of PPPs,<sup>9</sup> and to seek discipline of officials who commit such practices.<sup>10</sup> OSC obtains corrective action and discipline through either voluntary compliance by federal agencies, or, where such compliance is not forthcoming, by prosecuting cases before the Merit Systems Protection Board (MSPB).

In addition to giving OSC the authority to investigate and prosecute PPPs, Congress also gave OSC the exclusive authority to enforce the Hatch Act, and to provide advisory opinions interpreting that Act. The Hatch Act prohibits federal employees and certain state and local employees from engaging in specified types of political activity. As amended in 1993, the Act permits most federal workers to actively engage in many partisan political activities, but

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<sup>7</sup> "Prohibited personnel practices" (as enumerated at 5 U.S.C. § 2302(b)) are personnel actions that are not only unjustified but that are infected by "particularly heinous motivations." *Carducci v. Regan*, 714 F.2d 171, 175 (D.C. Cir. 1983). Such practices directly offend the core principles of the merit-based civil service, which are codified at 5 U.S.C. § 2302(a). In addition to reprisal for whistleblowing or other protected activity, section 2302(b) prohibits political coercion or discrimination based on political affiliation (such as that which recently occurred at the Department of Justice). See OFFICE OF THE INSPECTOR GEN. & THE OFFICE OF PROF'L RESPONSIBILITY, DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING IN THE DEPARTMENT OF JUSTICE HONORS PROGRAM AND SUMMER LAW INTERN PROGRAM, (2008), available at <http://www.usdoj.gov/oig/special/s0806/index.htm>; OFFICE OF THE INSPECTOR GEN. & THE OFFICE OF PROF'L RESPONSIBILITY, DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL, (2008), available at <http://www.usdoj.gov/opr/goodling072408.pdf>. In addition, section 2302(b) makes it a prohibited personnel practice to discriminate based on race, age, nationality, gender, or religion; to obstruct an individual's right to compete for employment; to grant unauthorized employment preferences; to engage in nepotism; to discriminate against employees on the basis of off duty conduct that does not adversely affect job performance; and to violate laws, rules, or regulations which concern merit system principles.

<sup>8</sup> According to Sen. Patrick Leahy's comprehensive report on federal whistleblowers, the term "whistleblower" was coined as "a catch-all word used to describe almost any case involving a federal employee who encounters career problems after bringing information to public light." STAFF OF S. COMM. ON GOVT. AFFAIRS, 95TH CONG., THE WHISTLEBLOWERS: A REPORT ON FEDERAL EMPLOYEES WHO DISCLOSE ACTS OF GOVERNMENTAL WASTE, ABUSE, AND CORRUPTION 10 (Comm. Print 1978) (hereinafter LEAHY REPORT). See also S. REP. No. 95-969, at 8 (1978), reprinted in 1978 U.S.C.C.A.N. 2723, 2730 (defining whistleblowers as federal employees "who disclose illegal or improper government activities"). The statute defines protected whistleblowing as the disclosure of information that an employee reasonably believes evidences a violation of a law, rule or regulation, gross waste of funds, gross mismanagement, a substantial and specific danger to the public health and safety, or an abuse of authority. 5 U.S.C. § 2302(b)(8) (2000).

<sup>9</sup> 5 U.S.C. § 1214 (2000).

<sup>10</sup> 5 U.S.C. § 1215 (2000).

important restrictions remain upon political activity while on duty or at a federal worksite, running for partisan political office, the solicitation of political contributions, the use of official authority to influence the outcome of an election, and other abuses.<sup>11</sup>

The 1978 establishment of an independent agency to enforce the Hatch Act and protect federal employee whistleblowers, as well as the merit system, had its genesis in a number of forces that converged in the post-Watergate era.<sup>12</sup> These forces included the growth of the federal government and its associated bureaucracy,<sup>13</sup> growing distrust of government by the public,<sup>14</sup> emerging public employee free speech protections,<sup>15</sup> increasing attention to the plight of federal employee whistleblowers and the lack of effective remedies for such employees,<sup>16</sup> and widespread political support for whistleblower reform.<sup>17</sup>

In the 15 years after the CSRA was enacted, Congress returned not once, but twice, to enact significant reforms of OSC as well as to the underlying whistleblower protection law OSC is tasked with enforcing. In 1989, Congress enacted the Whistleblower Protection Act (WPA).<sup>18</sup>

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<sup>11</sup> 5 U.S.C. §§ 7321-7326 (2000). Most Hatch Act cases involve violations committed by rank and file government employees. Many of the cases involve state and local employees who are prohibited from running for partisan political office where they work on programs funded by federal dollars. Recently, however, OSC has been investigating complaints of Hatch Act violations committed by political appointees holding high level positions, including allegations that Hatch Act violations were committed in connection with political briefings that the White House political office held at a number of federal agencies. See Tom Hamburger, *High-Profile Probe by Low-Key Office*, L.A. TIMES, April 24, 2007, available at <http://www.latimes.com/news/politics/la-na-probe24apr24,0,5629429,full.story?coll=la-home-headlines>.

<sup>12</sup> For a general discussion of the factors leading to the CSRA's enactment of statutory whistleblower protections see Robert Vaughn, *Statutory Protection of Whistleblowers in the Federal Executive Branch*, 1982 U.ILL.L.REV. 615, 616-18 (1982); see also, Bruce Fong, *Whistleblower Protection and the Office of Special Counsel: The Development of Reprisal Law in the 1980's*, 40 AM. U. L. REV. 1015, 1017-18 (1991).

<sup>13</sup> See LEAHY REPORT, *supra* note 8, at 10 n.5 (as the federal government grew "larger and more complex, the opportunities for inefficiency, corruption, mismanagement, abuse of power, and other inappropriate activities bec[a]me more frequent.")

<sup>14</sup> The Watergate scandal, in particular, led the public to be suspicious of government, more accustomed to the expression of dissent, and increasingly supportive of additional controls to prevent government wrongdoing. See Vaughn, *supra* note 12, at 618.

<sup>15</sup> See Vaughn, *supra* note 12, at 637-41 (discussing First Amendment and CSRA whistleblower protections).

<sup>16</sup> On often-cited case involved Ernest Fitzgerald, a civilian auditor with the Air Force, who in 1968 revealed to Congress extensive mismanagement and billion-dollar cost overruns in the development of the Lockheed C5-A transport program. Fitzgerald became famous not only for the mismanagement and waste he disclosed, but also for the extent of the retaliation against him by the Air Force, and others, including, ultimately, President Nixon. When Fitzgerald sued the Air Force for unlawful discharge, the lack of effective legal remedies available to even the most-celebrated federal employee whistleblowers became readily apparent. See generally *Nixon v. Fitzgerald*, 457 U.S. 731 (1982)(holding President absolutely immune from damages arising from his official acts); *id.* at 735-36 & nn.6-9 (chronicling White House involvement in efforts to reassign Fitzgerald, including memorandum from White House aide Alexander Butterfield to White House chief of staff H.R. Haldeman noting that Fitzgerald "must be given very low marks in loyalty; and after all loyalty is the name of the game" and recommending that "we should let him bleed, for a while at least); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)(holding that Presidential aides enjoy only qualified immunity from damage suits). Fitzgerald is referred to by some as the "grandfather" of whistleblower protection.

<sup>17</sup> During the presidential campaign of 1976, then-Governor Jimmy Carter promised to pursue significant reforms of the civil service system, including the introduction of legislation to protect whistleblowers. See Vaughn, *supra* note 12, at 618-20.

<sup>18</sup> Pub. L. No. 101-12, 103 Stat. 16 (1989)(provisions setting forth OSC responsibilities and functions were codified at 5 U.S.C. § 1211-1222 (2000)).

That law made OSC, which was originally part of the MSPB, an independent agency within the Executive Branch. It also enhanced protections against reprisal for whistleblowers, provided whistleblowers with an independent right of action where OSC did not pursue their case, and strengthened OSC's ability to enforce whistleblower protections.<sup>19</sup> In the U.S. Office of Special Counsel Reauthorization Act of 1994, Congress again expanded protections for federal employees, and imposed new "customer service" obligations on OSC.<sup>20</sup>

In addition to its investigative and prosecutorial mission, Congress empowered OSC to create a secure channel through which federal employees, former federal employees, or applicants for federal employment may make whistleblower disclosures – that is, information they reasonably believe evidences a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety.<sup>21</sup> Upon receipt of the disclosure, if OSC determines that there is a "substantial likelihood" that the information evidences one of these types of wrongdoing, OSC must report the information to the head of the agency involved (without disclosing the identity of the employee), and the head of the agency is required to investigate the matter and report back to OSC on its findings.<sup>22</sup> OSC provides the agency report to the whistleblower for comment.<sup>23</sup> The Special Counsel must review the final investigative report to ensure that its findings appear reasonable.<sup>24</sup> Finally, OSC releases the agency report, any comments by the whistleblower, and any recommendations by OSC, to the President, congressional oversight committees, and to the public.<sup>25</sup>

Finally, OSC also plays a role in the enforcement in the federal sector of the Uniformed Services Employment and Reemployment Rights Act (USERRA), which prohibits employers (including the federal government) from denying employment benefits on the basis of membership or service in the uniformed services, and protects the rights of veterans, reservists, and National Guard members to reclaim their civilian employment after being absent due to military service or training.<sup>26</sup> OSC's involvement in USERRA enforcement is triggered by referrals of possible violations by federal agencies from the Veterans' Employment and Training Service (VETS), at the U.S. Department of Labor. In cases OSC believes have merit, it acts as attorney for the aggrieved employee by initiating an action before the MSPB.<sup>27</sup>

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<sup>19</sup> See Fong, *supra* note 12 at 1060-62 & nn.239-257, 1018 n.12 (describing effect of WPA amendments).

<sup>20</sup> Pub. L. No. 103-424, 108 Stat. 4361 (1994).

<sup>21</sup> See generally 5 U.S.C. § 1213 (2000).

<sup>22</sup> 5 U.S.C. § 1213(c).

<sup>23</sup> 5 U.S.C. § 1213(e)(1).

<sup>24</sup> 5 U.S.C. § 1213(e)(2).

<sup>25</sup> 5 U.S.C. § 1213(e)(3). OSC has recently been responsible for referring for investigation a number of safety-related disclosures made by whistleblowers at the Federal Aviation Administration, including a well-publicized matter involving the failure of the FAA to ground Southwest Airlines aircraft for maintenance problems. See *Critical Lapses in FAA Safety Oversight of Airlines: Abuses of Regulatory "Partnership Programs": Hearing Before the H. Comm. on Transp. & Infrastructure*, 110th Cong. (2008).

<sup>26</sup> Uniformed Services Employment and Reemployment Rights Act (USERRA), Pub. L. No. 103-353, 108 Stat. 3149 (1994) (codified at 38 U.S.C. § 4301-4433).

<sup>27</sup> In 2004, Congress created a demonstration project that gave OSC an expanded role in investigating possible USERRA violations. Veterans Benefits Improvement Act of 2004 (VBIA), Pub. L. No. 108-454, 118 Stat. 3598 (2004). During the project, which began in February, 2005, OSC, rather than DOL VETS, investigated half of all federal sector USERRA claims. The project expired on December 31, 2007 and was not renewed by Congress.

The Office of Special Counsel is a uniquely independent Executive Branch agency. While there are a number of boards and commissions within the Executive Branch that are composed of individuals who may not be removed by the President except for cause, we are unaware of any other agency led by a single individual (in this case, the Special Counsel) who does not serve at the pleasure of the President. Congress mandated that the Special Counsel be appointed by the President, with Senate confirmation, to serve a five-year term, removable “by the President only for inefficiency, neglect of duty, or malfeasance in office.”<sup>28</sup> Like the now-defunct “independent counsels” appointed under the Ethics in Government Act of 1978,<sup>29</sup> these limitations on the President’s authority were imposed by Congress because OSC’s work may put it at odds with officials in high-level positions in other Executive Branch agencies.

In order to provide further protection of OSC’s independence, the Special Counsel may appoint personnel without approval by the White House, or the U.S. Office of Personnel Management.<sup>30</sup> In addition, OSC is one of only a few federal agencies that may communicate directly with Congress about any matter, including its appropriations, without securing the approval of the White House.<sup>31</sup>

### III. A History of Criticism and Controversy

OSC has had difficulty obtaining credit and visibility for the positive work it does. Instead, the agency and its leadership have been the subjects of almost unrelenting criticism and controversy from the time the agency was created, over 30 years ago.

In its first six years of existence, OSC received negative reviews on an ongoing basis from federal employee representatives, the Government Accounting Office (GAO), and Congress. They charged that the new agency was administratively inept, ineffective in prosecuting violations, and even actively hostile to federal employee whistleblowers.<sup>32</sup> This intense criticism continued throughout the 1980s. By 1989, when Congress enacted the Whistleblower Protection Act, the Senate Committee on Government Affairs stated that the new law was necessary “in large part because the Office of Special Counsel was perceived as being ineffectual.”<sup>33</sup> Indeed, during consideration of the WPA, “[w]histleblowers told the Government Affairs Committee that they thought of the OSC as an adversary, rather than an ally.”<sup>34</sup>

Notwithstanding the enhancements made by the WPA to OSC’s independence and enforcement authorities, OSC continued to disappoint interested observers. Five years after the

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<sup>28</sup> 5 U.S.C. § 1211(b) (2000). The Special Counsel may stay on for up to one year after the end of his/her term, or until a successor is appointed.

<sup>29</sup> See generally, *Morrison v. Olson*, 487 U.S. 654 (1988)(appointment of independent counsel did not violate Appointments Clause or separation of powers principles).

<sup>30</sup> 5 U.S.C. § 1212(d)(2) (2000).

<sup>31</sup> 5 U.S.C. §1217 (2000).

<sup>32</sup> See COMPTROLLER GEN., WHISTLEBLOWER COMPLAINTS RARELY QUALIFY FOR OFFICE OF SPECIAL COUNSEL PROTECTION 35 (1985); Fong, *supra* note 12, at 1018 n.12; Thomas Devine and Donald Aplin, *Abuse of Authority: The Office of Special Counsel and Whistleblower Protection*, 4 ANTIOCH L.J. 5, 12-14 (1986); Morton Rosenberg, *Symposium: Separation of Powers and the Executive Branch: The Reagan Era in Retrospect*, 57 GEO.WASH.L.REV. 627, 665-667 & nn.219-225 (1989)(citing S. REP. No. 100-413 (1988)).

<sup>33</sup> S. REP. No. 103-358 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3549, 3550.

<sup>34</sup> *Id.*

WPA was enacted, in 1994, “the consensus among Federal workers, unions, and outside commentators [was] that OSC remain[ed] a barrier to achieving merit systems principles in general, and whistleblower protection in particular.”<sup>35</sup>

After a brief hiatus,<sup>36</sup> criticism of OSC has once again intensified during the troubled term of the current Special Counsel, Scott Bloch.<sup>37</sup> Only one month after taking office, Bloch ignited a firestorm of negative publicity when he scrubbed OSC’s website of any mention of its role enforcing prohibitions against discrimination based on sexual orientation. His actions prompted a rebuke from the White House that “[l]ongstanding federal policy prohibits discrimination against federal employees based on sexual orientation.”<sup>38</sup> Since then, he has faced charges brought in March 2005 by a group of OSC employees and a coalition of whistleblower protection and civil rights groups, that he improperly reassigned employees from OSC’s Washington, D.C., headquarters to a newly-created Detroit field office in retaliation for perceived press leaks, as well as other misconduct, including crony hiring, abuse of office, mismanagement, and political favoritism in enforcement of the Hatch Act.<sup>39</sup> Those charges were assigned for investigation to the Office of Personnel Management’s Inspector General, and have not yet been resolved, instead expanding in scope to include possible criminal charges of obstruction of justice, focusing on Bloch’s alleged hiring of “Geeks on Call” to erase files he kept on his government computer.<sup>40</sup> Most recently, the investigation took a dramatic turn when FBI agents raided OSC’s offices and Bloch’s home to execute search warrants and serve grand jury subpoenas on nearly 20 OSC employees.<sup>41</sup>

The incumbent Special Counsel’s troubles have inflicted fresh damage upon the agency. As recently as last year, good government groups--the very constituencies that one would think

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<sup>35</sup> H.R. REP. NO. 103-769 (1994), 1994 WL 534747. See also, S. REP. NO. 103-358, at 3 (1994), reprinted in 1994 U.S.C.C.A.N. 3549, 3551 (observing that “the statistics on OSC’s overall performance, the cases reviewed by the Committee, and the allegations raised by [the Government Accountability Project] raise serious concerns about the extent to which OSC is aggressively acting to protect whistleblowers from prohibited personnel practices”).

<sup>36</sup> At the risk of immodesty, we note that criticisms of OSC by good government groups, as well as OSC’s perennial Congressional critics, abated during between 1998 to 2003 when the authors of this article were at the helm of the agency. See *Whistleblower Protection Act Amendments: Hearing on S. 995 Before the S. Comm. on Gov’t Affairs*, 107th Cong. 56 (2001) (testimony of Thomas Devine, Legal Director, Government Accountability Project). See also *id.* at 17-18 (Statement of Sen. Carl Levin, long-time critic of OSC). During that time, substantial efforts were made to improve OSC’s responsiveness to its stakeholders. See *infra* note 48.

<sup>37</sup> See generally Project on Government Oversight, Documents Concerning the Office of Special Counsel, <http://pogo.org/p/government/OSCcompendium.html> (last visited Oct. 8, 2008) (containing links to numerous news articles and other documents chronicling controversies during Bloch term).

<sup>38</sup> See *Employees Are Protected From Bias for Sexual Orientation, White House Says*, FEDERAL TIMES, Mar. 31, 2004.

<sup>39</sup> See John Wilke, *Crying Foul at Whistle-Blower Protector*, WALL ST. J., Mar. 31, 2005, at A4; see also Complaint of Prohibited Personal Practices Against Special Counsel Scott Blach, <http://pogo.org/m/gp/gp-OSCComplaint-03032005.pdf> (Mar. 5, 2005); Amendment to Complaint of Prohibited Personal Practices Against Special Counsel Scott Blach, <http://pogo.org/m/gp/gp-swecker-03312005.pdf> (Mar. 31, 2005).

<sup>40</sup> See John Wilke, *Head of Rove Inquiry in Hot Seat Himself*, WALL ST. J., Nov. 28, 2007, at A6.

<sup>41</sup> See Carrie Johnson & Christopher Lee, *Federal Agents Raid Office of Special Counsel*, WASH. POST, May 8, 2008, at A1; Carrie Johnson & Christopher Lee, *GOP’s Davis Urges Bloch to Quit Special Counsel’s Office*, WASH. POST, May 8, 2008, at A21.

might champion OSC and advocate for its full funding—have renewed their call for OSC to be abolished.<sup>42</sup>

#### IV. Reinvigorating OSC

As the steady drumbeat of criticism described above reflects, OSC has never realized its potential or firmly established itself as an effective protector of, and advocate for, whistleblowers, notwithstanding its broad mission and the high expectations that accompanied its establishment 30 years ago. As a result, government employees remain fearful of coming forward to blow the whistle on waste, mismanagement, and dangers to the public health and safety,<sup>43</sup> and the public impression is that there is no real accountability for those who inject partisan politics into the federal civil service.<sup>44</sup>

There are no silver bullet solutions to the nagging problems that have plagued OSC since its inception. Nonetheless, there are four general areas that we believe the next Administration should turn its concentration to immediately. They are: 1) new leadership at OSC, 2) increased staffing and funding, 3) a government-wide education program to advise federal employees of their rights under the laws OSC enforces, and 4) a complaint process for investigating charges of misconduct by the Special Counsel, including those brought by OSC employees.

##### A. New Leadership

OSC is sorely in need of new leadership. The good news is that the next President will have a unique opportunity that no prior President has enjoyed: the ability to appoint a new Special Counsel at the beginning of his Administration. Thus, the term of the current incumbent,

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<sup>42</sup> See *Ensuring a Merit-Based Employment System: An Examination of the Merit Systems Protection Board and the Office of Special Counsel: Hearing Before the Subcomm. On the Fed. Workforce, Postal Serv., and the Dist. of Columbia of the H. Comm on Gov't Oversight and Reform*, 110th Cong. 2 (2007) (statement of Adam Miles and Thomas Devine, Government Accountability Project, noting that during “the campaign to pass the 1989 Whistleblower Protection Act, [the Government Accountability Project] advocated [OSC’s] abolition”), & 14 (noting that nearly 20 years later, in July 2007, “[t]he overwhelming opinion among federal government whistleblowers . . . is that [OSC] should be abolished.”).

<sup>43</sup> Surveys of the government workforce continue to show that the majority of government employees do not feel that they will be protected against retaliation when they make whistleblower disclosures. See U.S. OFFICE OF PERS. MGMT., FEDERAL HUMAN CAPITAL SURVEY 53 (2006), available at [http://www.fhcs2006.opm.gov/Published/FHCS\\_2006\\_Report.pdf](http://www.fhcs2006.opm.gov/Published/FHCS_2006_Report.pdf) (only 48% of surveyed employees believe that they can disclose a violation of a law, rule or regulation without fear of reprisal).

<sup>44</sup> See Eric Lichtblau, *Mukasey Won't Prosecute for Hiring Bias*, N.Y. TIMES, Aug. 13, 2008 (expressing angry Congressional reactions to the fact that DOJ officials who made hiring decisions on the basis of political affiliation would not be penalized for violating civil service laws). Although the politicized hiring practices at DOJ fall squarely within the jurisdiction of OSC, and although OSC alone has the authority to seek corrective action for passed-over job applicants, and disciplinary sanctions against violators of civil service laws, the DOJ IG, and not OSC, investigated the hiring scandal. See *supra* note 7. According to an internal OSC memo that was obtained by the Project on Government Oversight, Special Counsel Bloch rejected the recommendation of career staff, made within days after the hiring scandals surfaced, that OSC actively investigate the matter. See Memorandum from the Office of Special Counsel's Special Task Force to Scott Bloch (Jan. 18, 2008), <http://pogoarchives.org/m/wi/osc-tf-summary-20080118.pdf>; See also Christopher Lee, *Memo Shows Frustration With Special Counsel*, WASH. POST, May 11, 2008 at A4. By the time the DOJ IG completed his investigation, the violators had left the government.

Mr. Bloch, expires on January 5, 2009.<sup>45</sup> While the statute permits the Special Counsel to hold over for as long as one year after the expiration of his term, the one year holdover period ends “when a successor is appointed and has qualified.”<sup>46</sup> Given the importance of the agency and its present discredited state, the next Administration should give priority to the selection of a new Special Counsel.

The statute requires that the Special Counsel “shall be an attorney who, by demonstrated ability, background, training or experience, is especially qualified to carry out the functions of the position.”<sup>47</sup> To that rather generic requirement, we would add a few other important characteristics. Like any other prosecutor, it is crucial that the Special Counsel be impartial, both in fact, and in appearance. To avoid the appearance of a conflict, the Special Counsel’s job most emphatically should not be filled on the basis of political patronage, as are so many other lower-level executive branch appointments. The next President should seek out someone with a solid reputation of impartiality and ethical conduct.

While the Special Counsel should be apolitical, he or she must have the instincts and experience necessary to navigate the agency through the politically charged atmosphere of Washington D.C. It is crucial that the Special Counsel’s work not be influenced by pressure brought to bear either by the Administration itself, or by Members of Congress intent on embarrassing the Administration.

Further, to be effective, the Special Counsel must be able to win the trust of two OSC constituencies that are by definition in conflict: the federal agencies that OSC investigates, on the one hand, and the federal employee and good government groups that represent whistleblowers and other complainants, on the other. This trust cannot be built on the basis of favorable outcomes in particular cases (since one or the other of these two constituencies will necessarily be the “loser” in every case), but upon keeping open channels of communication so that all affected parties will perceive the process itself as a fair one.<sup>48</sup>

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<sup>45</sup> See The Office of Special Counsel, [www.osc.gov/specialcounsel/htm](http://www.osc.gov/specialcounsel/htm) (last visited Oct. 9, 2008).

<sup>46</sup> 5 U.S.C. § 1211(b) (2000).

<sup>47</sup> *Id.*

<sup>48</sup> During the authors’ stint at OSC, substantial efforts were made to improve the agency’s relationships with its stakeholders. Meetings were held at the outset of Special Counsel Kaplan’s term with both agency representatives and whistleblower advocacy organizations. Both groups made suggestions for changes in OSC procedures. In those cases where the suggestions were not adopted, OSC provided written explanations to the groups for its reasoning. During Special Counsel Kaplan’s five year term at OSC, a formal “agency liaison” program was established, to ensure that agencies under investigation understood what was expected of them, and would cooperate with OSC. See Office of Special Counsel, Designated Agency Liasons, <http://www.osc.gov/documents/pubs/dr-memo.htm> (last visited Oct. 9, 2008). New policies were established to require that every complainant with a matter before OSC have the opportunity to personally discuss a case with staff, before it could be closed. In addition, at the suggestion of good government groups, OSC created a “Public Servant Award” to recognize the contributions made by federal employee whistleblowers. Finally, the Deputy Special Counsel (and sometime the Special Counsel) made themselves personally available to complainants and their representatives (including good government groups) to explain the status and/or OSC’s disposition of particularly sensitive and complex matters. Again at the risk of immodesty, we believe that this open door policy was very effective in gaining the trust of former harsh critics of OSC.

The next Special Counsel must understand OSC's role as both a watchdog and an advocate for the merit system. This view of the Special Counsel's role finds its roots in the statute itself, which gives OSC the authority to investigate and remedy prohibited personnel practices even in the absence of an employee complaint, and to resolve complaints as it sees fit, regardless of the views of the individual employee.<sup>49</sup> The Special Counsel was expected "to act as an ombudsman responsible for investigating and prosecuting violations of the Act."<sup>50</sup> His or her enforcement actions "are comparable to criminal proceedings designed to vindicate the public interest."<sup>51</sup> We submit that while the complaining employee is not OSC's client, in order to represent the merit system, OSC must be an active advocate on behalf of an expansive view of the protections afforded employees under the civil service laws.<sup>52</sup>

Finally, several legislative changes are necessary in order for OSC to become a more aggressive advocate for the merit system. First, OSC should be granted independent litigating authority so that it can represent itself in federal court.<sup>53</sup> Under current law, OSC is represented instead by the Department of Justice, which has an obvious bias in favor of protecting managerial prerogatives and construing civil service protections (including whistleblower protection) narrowly. Indeed, it is DOJ that represents federal agencies in court when they defend themselves against allegations of reprisal. As a result, the laws within OSC's jurisdiction are authoritatively interpreted (in the Court of Appeals for the Federal Circuit) without any independent input from OSC.<sup>54</sup>

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<sup>49</sup> See *Frazier v. Merit Sys. Prot. Bd.*, 672 F.2d 150 (D.C. Cir. 1982).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Thus, for example, we disagree with the narrow approach taken by the current Special Counsel, Mr. Bloch, in concluding that 5 U.S.C. § 2302(b)(10) (which prohibits discrimination based on off duty *conduct*—including *sexual conduct*--that does not affect job performance), does not prohibit discrimination based on *sexual orientation*. See Press Release, Office of Special Counsel, Results of Legal Review of Discrimination Statute, (Apr. 8, 2004), [http://www.osc.gov/documents/press/2004/pr04\\_03.htm](http://www.osc.gov/documents/press/2004/pr04_03.htm). We disagree with Mr. Bloch's claim that there is a meaningful distinction between "sexual conduct" and "sexual orientation" in this context. In fact, that position is contrary to the view of the rest of the Executive Branch even under the current Administration. See Letter from Human Rights Campaign and Federal GLOBE to Senators Daniel Akaka and George Voinovich (May 25, 2005), <http://www.hrc.org/issues/workplace/2230.htm>. But more to the point, taking Mr. Bloch's explanation for his reasoning at face value, the principle he espouses—that the Special Counsel must take a narrow view of the laws he enforces—is the wrong one. Unless and until there is a controlling precedent to the contrary, we believe that it is the Special Counsel's obligation to pursue any reasonable interpretation of the law that promotes the underlying principles of the merit-based civil service. Strict or narrow construction of the laws OSC enforces is antithetical to that obligation.

<sup>53</sup> As of this writing, the Senate has passed amendments to the WPA that includes a provision providing the Special Counsel with at least some level of independent litigating authority. Section 7702a(i) of S. 274, which was passed by the Senate on December 17, 2007 would give the Special Counsel the authority to appear as *amicus curiae* in the Court of Appeals for the Federal Circuit in cases involving whistleblower reprisal or the Hatch Act. See Federal Employee Protection of Disclosure Act, S. 274, 110th Cong. (2007).

<sup>54</sup> In the past, the Justice Department has opposed the grant of litigating authority to OSC, most recently on the grounds that it would undermine the President's "centralized control" over personnel litigation and executive branch policies. See *Federal Employee Protection of Disclosures Act: Amendments to the Whistleblower Protection Act: Hearing on S. 1358 Before the S. Comm. on Homeland Sec. and Gov't Affairs*, 108th Cong. 48-49 (2003) (statement of Peter Keisler, Assistant Att'y Gen., Civil Division). Indeed, President Reagan pocket-vetoed the earlier 1988 version of the Whistleblower Protection Act which would have granted OSC independent litigating authority, purportedly because of constitutional concerns. Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 691, 693-694 (2005). When the WPA was enacted in 1989, President Bush observed in his signing statement that one of the reasons for his assent to

Similarly, under current law, while OSC has the authority to issue subpoenas,<sup>55</sup> it does not have the authority to seek enforcement where there is non-compliance. That authority is vested in the General Counsel of the Merit Systems Protection Board, who is under no obligation to comply with OSC's application or even respond to it within any fixed time frame.<sup>56</sup> The MSPB is no longer OSC's parent agency, and there is no justification for requiring OSC to secure permission from the MSPB to compel the production of testimony and evidence OSC needs to complete an investigation. The next Administration should support legislation that would correct this anachronistic arrangement.

## B. Increased Staffing and Funding

OSC has historically had to balance competing priorities: its obligation to perform comprehensive high quality investigations and the demand that it do so expeditiously, while also ensuring that complainants are kept aware of the status of the complaints, and informed of the reasons for OSC's disposition of their cases. In addition to new leadership and legislative changes that will make OSC a more potent protector of the merit system, OSC is in desperate need of additional staffing and funding that will allow it to more effectively perform its mission and also improve its customer service.

OSC receives thousands of new PPP complaints and whistleblower disclosures every year, as well as hundreds of new Hatch Act complaints and thousands of requests for Hatch Act advisory opinions.<sup>57</sup> And yet, for FY 2008, OSC had a budget of only 17.5 million dollars, and a staff of only 110 employees, of which some percentage must necessarily be dedicated to administrative or other non-mission related tasks.<sup>58</sup> These scant resources mean that every Special Counsel must constantly make Hobson's choices between quality, production, and customer service. When OSC shifts resources from one program to another, and/or places a priority on increased production, it necessarily sacrifices other equally important goals.<sup>59</sup>

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the new bill was that the provision giving OSC independent litigating authority had been taken out of the bill. Statement on the Signing of the Whistleblower Protection Act of 1989, 1989 PUB. PAPERS 392 (Apr. 10, 1989). These constitutional objections, however, are of dubious merit. See Rosenberg, *supra* note 32, at 627 n.32.

<sup>55</sup> 5 U.S.C. § 1212(b)(2) (2000).

<sup>56</sup> 5 U.S.C. § 1212(b)(3)(A).

<sup>57</sup> According to OSC's most recent annual report, since 2003 the agency has received an average of 1850 new prohibited personnel practice complaints annually. U.S. OFFICE OF SPECIAL COUNSEL, FISCAL YEAR 2007 REPORT TO CONGRESS 21 (2007), available at <http://www.osc.gov/documents/reports/ar-2007.pdf>. It has also received an average of 254 new Hatch Act complaints and 500 new whistleblower disclosures annually. *Id.* at 31-32. In addition it has issued an average of over 3,000 Hatch Act advisory opinions each year since 2003. *Id.* at 31.

<sup>58</sup> Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, 121 Stat. 1844.

<sup>59</sup> OSC's most recent annual report shows that in the last several years (FY 2004-2007) the agency has placed greater priority and resources on processing whistleblower disclosures and PPP cases more quickly. While these are important goals and while OSC has been criticized over the years for accumulating case backlogs—improvement in those areas has come at a cost. Fewer and fewer PPP cases are being referred for a full field investigation and the number of complainants who secured relief for alleged prohibited personnel practices, including whistleblower reprisal, has decreased substantially. U.S. OFFICE OF SPECIAL COUNSEL, FISCAL YEAR 2007 REPORT TO CONGRESS 21, 27 (2007), available at <http://www.osc.gov/documents/reports/ar-2007.pdf>. By contrast, between FY 2001 and FY 2003, there were fewer PPP cases processed to conclusion each year, but more referred for a full field investigation and more corrective action for victims of PPPs. U.S. OFFICE OF SPECIAL COUNSEL, FISCAL YEAR 2003 REPORT TO CONGRESS 6, 10 (2003), available at <http://www.osc.gov/documents/reports/ar-2003.pdf>. In

There is no question that the lack of adequate staffing cripples OSC. It is extremely time consuming to sift through the matters that are brought before the agency. The vast majority of complainants who come to OSC alleging reprisal are not represented by counsel. The complainants frequently come to OSC armed with boxes of documents to be combed through, and without any familiarity with the niceties of the laws that OSC enforces. A substantial portion of the complainants come to OSC as a last resort, where other complaint procedures have failed. In some cases, the complaints filed involve trivial matters or are clearly meritless. In most cases, significant staff time is required to determine whether, in fact, a complaint may have merit. Sometimes, where complainants have meritorious cases, or at least cases worthy of a full investigation, they fall by the wayside because of the crushing volume of other matters.

Similarly, the whistleblower disclosures that OSC is charged with examining often involve extremely complex matters such as space shuttle design, the security of nuclear facilities and materials, and air safety.<sup>60</sup> Unlike IG offices, which gain a familiarity with the subject matter of their parent agency, OSC staff are generalists and must be able to understand the broadest possible range of issues. They must often educate themselves on highly technical subjects before they can determine the strength of a whistleblower's disclosure, assess the validity of an agency's investigation of that disclosure, or judge the adequacy of the corrective measures an agency takes in response to the disclosures.

The overwhelming case load makes it very difficult for OSC to separate the wheat from the chaff at an early stage so that the best reprisal cases and the most important whistleblower disclosures receive the highest priority. The volume of cases also makes it nearly impossible for staff to adequately respond to questions that complainants raise regarding the status or disposition of their cases, thus leaving the substantial majority of those seeking OSC's assistance with a sense of injustice when their cases are closed, even if the closures are entirely justified. Finally, the lengthy delays in the resolution of cases provide a disincentive to would-be whistleblowers, who understand that if they suffer reprisal, they are unlikely to receive timely relief, even if they are ultimately vindicated.

Simply put, OSC's mission is too broad for its small staff and budget. While budgets are tighter than ever, we submit that the benefits of adequately funding a reinvigorated OSC would outweigh the relatively modest costs. Even if OSC's annual budget were increased by a full

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addition, the devotion of greater time to customer service during those years enhanced the agency's credibility among its stakeholders. See *supra* notes 36, 48. By contrast, OSC is now once again being criticized for being unresponsive to those who seek its assistance.

<sup>60</sup> See Press Release, Office of Special Counsel, U.S. Office of Special Counsel Transmits to President and Congress NASA Report of Investigation in Response to Whistleblower's Allegations of Space Shuttle Safety Concern, (Dec. 6, 1999), [http://www.osc.gov/documents/press/1999/pr99\\_23.htm](http://www.osc.gov/documents/press/1999/pr99_23.htm) (safety concerns of electromagnetic interference between space shuttle systems); Press Release, Office of Special Counsel, U.S. Office of Special Counsel Sends Report Confirming Gross Mismanagement of FAA's Red Team, Resulting in Substantial and Specific Danger to Public Safety (Mar. 18, 2003), [http://osc.gov/documents/press/2003/pr03\\_07.htm](http://osc.gov/documents/press/2003/pr03_07.htm) (mismanagement of airport security "red teams" before 9/11); Press Release, Office of Special Counsel, U.S. Office of Special Counsel Transmits report Substantiating Whistleblower's Allegation of Defective Pipe Welds on USS Kitty Hawk (May 9, 2004), [http://www.osc.gov/documents/press/2005/pr05\\_09.htm](http://www.osc.gov/documents/press/2005/pr05_09.htm) (defective aircraft carrier welds); Press Release, Office of Special Counsel, FAA Whistleblower Anne Whiteman Receives 2005 Special Counsel's Public Servant Award (Oct. 6, 2005), [http://www.osc.gov/documents/press/2005/pr05\\_17.htm](http://www.osc.gov/documents/press/2005/pr05_17.htm) (cover-up of near-miss aircraft collision reporting).

50% (to approximately 26 million dollars), it would still have to be considered “decimal dust” relative to the overall federal budget. On the other hand, encouraging federal employee whistleblowers to come forward and protecting them against reprisal would make it more likely that at least some of the waste and mismanagement that adds to our annual budget deficit could be averted.<sup>61</sup>

Further, the public’s opinion of the integrity and competence of the federal government has taken a substantial beating over the last eight years. Secrecy, and not transparency, has become the watchword. The next Administration can demonstrate its commitment to combating corruption by providing OSC with the staffing and resources it needs to become the powerful force for good government that its creators intended it to be.

### C. An Education Program for Agencies to Educate their Workforces About their Rights to be Free of Prohibited Personnel Practices

In order for OSC to accomplish its mission, federal employees must know the rights and the remedies available to them. Yet surveys routinely show that the majority of federal employees have never received any information from their agencies about their rights to be free of PPPs, or about the role of OSC.<sup>62</sup>

This widespread ignorance persists notwithstanding that since 1994, the law has provided that agency heads shall “ensur[e] (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies that are available to them” under Chapters 12 and 23 of Title 5. This provision, codified at 5 U.S.C. 2302(c), remains largely ignored because there has been little coordinated effort on the part of past Administrations to secure compliance.

In 2001, in response to this problem, OSC launched a 2302(c) “Certification Program” to assist federal agencies in following the law to inform employees of their whistleblower rights.<sup>63</sup> The program was designed to provide assistance to federal agencies in meeting their statutory obligation by establishing certain minimum requirements for compliance with section 2302(c). Under the program, once an agency completes five required steps (including displaying informational posters, offering training to managers, providing information to new employees, and posting an OSC web-link on the agency’s internal website), OSC issues a certificate of

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<sup>61</sup> For example, in 2001, Donald Sweeney, an economist with the Army Corps of Engineers, came to OSC and disclosed the manipulation of a cost-benefit analysis of a project to expand locks along the Upper Mississippi River. The estimated cost of the project was between 750 million and 1.1 billion dollars. Sweeney’s disclosure was substantiated pursuant to an investigation ordered by OSC and the project was scrapped. As a result of his courage, Sweeney received the Special Counsel’s Public Servant Award and was one of the first recipients of a “Service to America” medal, awarded by the Partnership for Public Service. *See* Service to America Medals, [http://servicetoamericamedals.org/SAM/recipients/profiles/sem02\\_sweeney.shtml](http://servicetoamericamedals.org/SAM/recipients/profiles/sem02_sweeney.shtml) (last visited Oct. 10, 2008); Press Release, Office of Special Counsel, U.S. Office of Special Counsel Announces Establishment of Special Counsel’s Public Servant Award, and its First Recipient, Dr. Donald Sweeney (Mar. 6, 2001), [http://osc.gov/documents/press/2001/pr01\\_09.htm](http://osc.gov/documents/press/2001/pr01_09.htm).

<sup>62</sup> *See* U.S. OFFICE OF SPECIAL COUNSEL, FISCAL YEAR 2007 REPORT TO CONGRESS 47 (2007), available at <http://www.osc.gov/documents/reports/ar-2007.pdf> (of 258 respondents who filed complaints with OSC, 189 did not receive any information about their rights from their agency).

<sup>63</sup> Office of Special Counsel, OSC Outreach Program and 2302(c) Certification Program, <http://www.osc.gov/outreach.htm> (last visited Oct. 10, 2008).

compliance, which is valid for three years. While OSC certification provides no guarantee that all federal employees will become completely familiar with all of their rights and remedies, the program was designed to at least raise general awareness across the federal government of OSC and the laws it enforces.

Unfortunately, because the Certification Program was an OSC initiative, there is no mandate requiring agencies to participate. Further, the program itself appears to have received little attention from OSC since 2003, perhaps due to the staffing and funding shortages identified above. Indeed, OSC's website reveals that numerous agencies (including such major departments as the Department of Veterans Affairs, the Department of the Army, the Department of Housing and Urban Development, and the Department of Education) registered for the program as long ago as 2002 or 2003, but never completed the steps necessary to secure certification.<sup>64</sup> Similarly, in 22 of the 32 agencies that have been certified (including, among others, the Departments of Justice, Transportation, and Health and Human Services), the certification has expired, in many cases several years ago.<sup>65</sup> Even the Office of Personnel Management, which has listed compliance with the program as a "suggested performance indicator" for "getting to green" on the Strategic Management of Human Capital element of the President's Management Agenda, has failed to renew its certification, which expired more than three years ago.<sup>66</sup>

There really is no excuse for almost 15 years of non-compliance with this straightforward statutory mandate. The next Administration should issue an Executive Order directing all federal agencies to secure certification under the OSC program. And in order to ensure that they do so, the Administration should also hold its agency appointees accountable for failing to achieve certification, and should enforce compliance with the order through the Office of Management and Budget.

#### D. A Process for Resolving Complaints Against the Special Counsel

While the Special Counsel is a watchdog charged with protecting federal employees against PPPs, who investigates complaints of misconduct against the Special Counsel, including those brought by his own employees? Although OSC employees are theoretically entitled to the same complaint redress mechanism as all other federal employees when they believe a PPP has been committed—that is, they may file a complaint with OSC—this avenue is plainly unworkable when an OSC employee raises an allegation of a PPP violation against the Special Counsel or his Deputy.

This very problem was presented in March 2005, when a group of anonymous OSC employees (and several public interest organizations) filed a complaint against Special Counsel Bloch alleging retaliation and other misconduct.<sup>67</sup> The complaint cited a potential conflict of interest by Mr. Bloch, and requested that the complaint be forwarded for investigation to the President's Council on Integrity and Efficiency (PCIE). The complaint was first referred,

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *See supra* note 39.

however, directly to the PCIE’s “Integrity Committee,” which rejected it because the Executive Order that established that Committee (No. 12993) only encompasses complaints against Inspector Generals. After a six month delay, during which the complaint was bounced between the Integrity Committee, the White House Counsel, and back again to the PCIE, OMB Deputy Director Clay Johnson eventually assigned the case for investigation to the Office of Inspector General at the Office of Personnel Management (OPM IG).

The OPM IG investigation has been hampered by the lack of an established procedure for investigating a complaint against the Special Counsel.<sup>68</sup> In fact, even beyond the investigation itself, there is no established process in place governing what will be done with the investigative findings, should the OPM IG conclude that PPPs were committed.<sup>69</sup> Because there is no formal process, it remains unclear at this point what the complaining employees can expect, regardless of the outcome of the OPM IG’s investigation. Indeed, after lengthy delays, the OPM IG investigation is still pending as of the time of this article, likely because of the intervening criminal investigation against Special Counsel Bloch. In the meantime, the injured employees remain remediless, and the Special Counsel remains in his post.

In November 2005, the Government Accountability Office (GAO) issued a report noting “the unique nature of OSC and the difficulties involved when a prohibited personnel practice allegation is made against the Special Counsel . . . .”<sup>70</sup> Among the possible solutions for this problem, GAO recommended that “Congress should consider affording OSC employees . . . alternative means of addressing prohibited personnel practice allegations other than going through OSC,” possibly by establishing “a right to an external investigation through an independent entity, where the entity would forward its findings to the President, who would decide the appropriate action . . . .”<sup>71</sup>

We agree with GAO’s recommendation that, at the very least, OSC employees should be allowed access to an external investigation by an independent entity. This can actually be partially accomplished by an amendment to Executive Order 12993 (March 21, 1996). As noted above, under that Order, the PCIE’s “Integrity Committee” receives and refers for investigation complaints alleging wrongdoing by federal agency Inspectors General (and certain high-level IG officials). The investigative reports are then reviewed by OMB, with recommendations provided to the President for further action. Amending the Executive Order to permit the Integrity Committee to consider complaints against the Special Counsel would not only provide at least some complaint redress mechanism for OSC employees, but it would also provide the President with a formal investigative procedure to support, if necessary, an action taken against the Special Counsel for cause.

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<sup>68</sup> See Elizabeth Williamson, *Special Counsel Accused of Intimidation in Probe*, WASH. POST, Feb. 16, 2007, at A21.

<sup>69</sup> By statute, when an OSC investigation reveals a reasonable likelihood that a PPP has been committed, OSC notifies the head of the agency involved, and asks that he or she provide corrective action to the injured employee, and/or discipline the offending manager. 5 U.S.C. § 1214(b)(2)(B) (2000). If the agency declines to voluntarily provide relief, the Special Counsel may seek relief on their behalf, by prosecuting their case before the MSPB. 5 U.S.C. § 1214(b)(2)(C). For obvious reasons, an analogous process is not feasible in the context of the investigation of Mr. Bloch.

<sup>70</sup> See GOV’T ACCOUNTABILITY OFFICE, U.S. OFFICE OF SPECIAL COUNSEL: SELECTED CONTRACTING AND HUMAN CAPITAL ISSUES 4 (2005), available at <http://www.gao.gov/new.items/d0616.pdf>.

<sup>71</sup> *Id.*

In addition to amending the Executive Order, we believe that legislation should be pursued that would permit OSC employees with whistleblower retaliation complaints against the Special Counsel (or his/her deputy) to exercise an individual right of action before the MSPB, in the same manner as other government employees.<sup>72</sup> The creation of this process would provide equity and fairness to OSC employees, and would ensure that the Special Counsel can be held to the same standards as those against whom he/she enforces the law.

## V. Conclusion

The next Administration will have a lot on its plate. In that context, OSC, a small and relatively unknown federal agency, is likely to be overlooked as it has been in the past. As we have described above, it would be a mistake and a missed opportunity if that occurred. Federal employees are optimally positioned to detect hidden government waste, mismanagement and malfeasance. In an unstable economic climate and an era of constrained budgets, the next Administration should be encouraging, not discouraging them from bringing these matters to light. Further, at a time when we need the best and most talented federal workers, the nation cannot afford to leave those workers exposed to destructive and demoralizing prohibited personnel practices which undermine the foundation of the merit-based civil service. Finally, after an election season when partisan emotions have run high, we must take extra measures to prevent the continued erosion of the public's confidence in our federal agencies that has arisen from the perception that political loyalty is more highly prized in the civil service than basic competence. Frankly, our federal government will need to function better than ever and a strong and effective OSC can help it do so. The next Administration should pay heed and take immediate action to repair and rejuvenate OSC, and to enlist the agency in its agenda of reform.

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<sup>72</sup> One possible option would be to give OSC employees alleging whistleblower retaliation the right to file an individual right of action with the MSPB within 120 days after they initiate the Integrity Committee process, or within 30 days after their complaints are closed without action. This process would parallel the procedure available to federal employees generally, which requires exhaustion of the OSC complaint process before an MSPB complaint may be filed.