

LORING E. JUSTICE, P.L.L.C.

Attorney at Law
11911 Kingston Pike, Suite 201
Knoxville, TN 37934

Telephone: (865) 584-8620

Fax: (865) 584-8621

May 5, 2013

President Barack Obama
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Via: fax 202-456-2461

Attention: Leslie Kiernan, Deputy Counsel to President Obama

Subject: Failings of the U.S. Office of Special Counsel and "regulatory capture"

Dear President Obama:

I write to you with great respect as a concerned citizen and lawyer who in representing federal employees has encountered critical federal laws related to the integrity of the federal merit system that are valid and on the books, yet dramatically under enforced. The Civil Service Reform Act of 1978 (CSRA)¹ and the Whistleblower Protection Act of 1989 (WPA)² created a statutory mechanism, involving multiple independent agencies performing complementary duties to ensure:

- 1) Federal agency employees, particularly in law enforcement and intelligence, had a secure, independent, confidential, and effective disclosure channel in the U.S. Office of Special Counsel (OSC), for concerns involving classified information or other information that could not be publicly disclosed;

¹The CRSA was passed in an environment of serious concern about the integrity of the merit system in federal employment and the manipulation of the federal bureaucracy for improper ends. *See, e.g., Violations and Abuses of Merit Principles in Federal Employment Part I; Hearings Before the Subcommittee on Manpower and Civil Service, Serial no. 94-19, 94th Cong., 1st Sess. (1975); Violations and Abuses of Merit Principles in Federal Employment Part II. Hearings Before the Subcommittee on Manpower and Civil Service, Serial no. 94-20, 94th Cong., 1st Sess. (1975).*

²The WPA instructed the strengthened OSC its mission is to "protect employees, especially whistleblowers, from prohibited personnel practices." *Whistleblower Protection Act of 1989*, Pub. L. No. 101-12, § 2(b)(2)(A), 103 Stat. 16. It cannot be overstated that rather than commissioning OSC to be an independent body that decided complaints in the fashion of an impartial court, rather, the WPA obligated OSC to assist whistleblowers. *See, S. REP. No. 103-358, at 2 (1994), reprinted in 1994 U.S.C.C.A.N. 3550.* The WPA requires "that the Office . . . shall act in the interests of employees who seek assistance" from it.

The Honorable President Barack Obama
May 5, 2013

- 2) Federal employees in all agencies are adequately protected from reprisal and other types of prohibited personnel practices (PPPs), by OSC in most agencies and in those agencies where the OSC system is not applicable, employees are similarly protected by systems created by the agency head (FBI, intelligence agencies and government corporations);
- 3) The Merit Systems Protection Board (MSPB) conducted "special studies" of: a) OSC's functioning as a disclosure channel for all agencies, particularly intelligence agencies, b) OSC's functioning as an investigatory agency in protecting federal employees from PPP's in the agencies where it has PPP jurisdiction, c) agency heads' performance in "preventing PPPs" in the agencies within OSC's PPP jurisdiction, and d) agency heads' performance in "taking any action....necessary" to ensure their agencies embodied the merit system principles in the agencies outside of OSC's PPP jurisdiction. Based on the results of such "special studies," MSPB would determine and report to the President and Congress "as to whether the public interest in a civil service free of PPPs was adequately protected."

The statutory intent is the President would have the information and confidence necessary to perform his duty to "take any action....necessary" to ensure the federal agencies within OSC's PPP jurisdiction embodied the merit system principles and agency heads' in the agencies outside OSC's PPP jurisdiction could do the same in those agencies.³ Congress created this intricate scheme for two reasons: 1) it wanted a "comprehensive" system for over 200 federal agencies, and 2) it did not trust agencies to self-regulate in providing effective disclosure channels for their concerned employees and in protecting their employees from reprisal and other PPPs.

This system is broken and has been for decades. The CSRA and WPA are an amazing testament to transparency in that they created a whistleblower advocacy agency, with broad powers inside the very federal government about which the whistle would be blown. However, OSC is almost never mentioned in the popular or even elite media despite significant issues about potential manipulation of federal employees.

Recently, I was struck by a television documentary regarding the intelligence failures that led to the Iraq War. A nuclear scientist with great experience at our nearby Oak Ridge National Laboratory claimed he knew that alleged Iraqi regime tubing, asserted to be capable of use in uranium enrichment for nuclear weapons, could not possibly be used for that purpose. He asserted he would have like to have informed someone of this but he did not know to whom to go. The obvious answer is OSC, either directly or via a federal employee who shared his concern. While the nuclear scientist was the employee of a government contractor, I have frequently heard the same thing from a number of federal whistleblowers, who seemed totally unaware of the OSC mechanism. Respectfully, this lack of awareness should be remedied.

The private organizations that claim to champion concerned federal employees are not fully fulfilling their expected role of agitating for OSC to fulfill its statutory mission. The reason for

³See, 5 U.S.C. § 2301(c).

The Honorable President Barack Obama
May 5, 2013

this would seem to be that if OSC was as functional as intended, these private organizations who charge federal employees to represent them might be unnecessary and they would certainly be less necessary. OSC and MSPB are tiny and weak (OSC has 110 full time employees and an annual budget of \$18 million to police a federal workforce of over 2 million; MSPB's annual budget for "special studies" is \$2 million dollars.)⁴

In the wake of Watergate in 1978 a system was put in place the proponents of which believed would make the federal bureaucracy a model of technocratic integrity and efficiency. But the CSRA framework is not implemented and OSC has taken a strikingly narrow view of its powers to protect federal employees and receive confidential whistleblower disclosures.

The President can direct the Office of Legal Counsel (OLC) of the Justice Department to resolve these concerns.⁵ I respectfully submit you should do so, without delay. The answer seems obvious in light of the following question: would American history since 1978 have been more positive if concerned federal employees, knowledgeable of misconduct, fraud, waste or abuse, had a competent, secure channel to express their concerns in full confidentiality and those concerns were then subject to transmittal to the President? Please direct an OLC review, Mr. President. Thank you.

 Sincerely,
Loring Justice 

⁴I understand we are in a time of budgetary difficulties but if fraud, waste and abuse were more effectively policed would the taxpayers not save exponentially more?

⁵ Specifically, OLC should review how OSC is interpreting and applying all its nondiscretionary statutory duties: 1) as an investigatory agency for protecting federal employees from PPPs, 2) as an independent disclosure channel, particularly for disclosures containing information that cannot be publicly released, and 3) in reviewing Office of Personnel Management regulations for possible PPPs. OLC should also review how MSPB is interpreting and applying its nondiscretionary statutory duties to conduct the "special studies" necessary to determine and report "as to whether the public interest in a civil service free of PPPs is being adequately protected."