

March 11, 2016

To: Whom It May Concern

Subject: Request the Senate Homeland Security and Governmental Affairs Committee (HSGAC) delay Carolyn Lerner's unprecedented nomination to a second term as Special Counsel

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Related Websites

www.broken-covenant.org

www.carsonversusdoe.com

I make these unclassified "whistleblower disclosures" as public statements consistent with my positive legal and professional duty as a licensed professional engineer (PE) licensed in Tennessee to be "truthful and objective." The codes of ethics of my engineering professional societies impose similar requirements.¹

If these concerns are valid then America is at unnecessarily increased risk of a WMD terrorist attack or other catastrophe and they explain much about what has befallen America since 1978 and besets America now.

Outline of "Broken Covenant" of CSRA

Note: The relevant law is not extensive, 5 U.S.C. §§ 1201-1221 and 2301-2306, with particular focus on §§1204(a)(3), 1213, 1214, 2301, 2302, and 2305.

Civil Service Reform Act of 1978 (CSRA), Pub. L. 95-454

CSRA's objectives - create the statutory framework and implementing agencies for the regulation of the management culture in every federal agency so that federal employees could perform their duties, without fear or favor, per the "merit system principles" - defined in §2301(b) - because they were adequately protected from reprisal and other types of "prohibited personnel practices (PPP's)" - defined in §2302(b)."²

¹ In 2015, the Tennessee Board of Architectural and Engineering Examiners considered a complaint that my claims are not "truthful and objective" and closed it without action. John Cothron, the Executive Director of the Board, can verify this. <John.Cothon@tn.gov> (800) 256-5758.

² Pub. L. 95-454 is the CSRA. The endnotes of 5 U.S.C. §1101 contains Section 3 of the CSRA, "Findings and Statements of Purpose." The nine "Merit System Principles" are the statutory bedrock for regulating the management culture in every federal agency, including

Why does CSRA not provide for agencies to self-regulate their management culture? Two reasons: 1) create a comprehensive system for over 200 federal agencies, and 2) Congress knew better than to trust agencies to self-regulate their management cultures.³

The “3-legged stool” model Congress created for regulating the management culture in **almost** every federal agency (except government corporations, FBI, and intelligence agencies) and the President’s responsibility - shared with agency heads in government corporations, FBI, and intelligence agencies - is to ensure the “3-legged stool” is together, upright, and able to support weight. The “three legs” are: 1) agency heads, 2) OSC, and 3) MSPB.

Agency heads: “prevent PPPs” in almost all agencies, see §2302(c) - this duty does not apply in government corporations, FBI, and intelligence agencies.⁴

Office of Special Counsel (OSC) -

1) protect employees in (almost all) agencies from PPPs - this duty does NOT apply in FBI and intelligence agencies,⁵ and

2) be a confidential, secure, independent disclosure channel for federal employees in ALL agencies (including FBI and intelligence agencies), particularly for disclosures containing information that cannot be publicly disclosed, see §§1213 and 1214. OSC is unique in providing a direct, confidential, disclosure route from the concerned employee in ANY agency to House and Senate Intelligence Committees when their disclosure involves

government corporations, FBI, and intelligence community agencies, but they are not “self-implementing” - the verb “shall” is absent from their definition. To implement the merit system principles, Congress defined 13 types of “prohibited personnel practices (PPPs)” as agency violations of one or more merit system principles. The merit system principles are implemented indirectly, by protecting federal employees from PPPs. When federal employees are adequately protected from PPPs in their agency, it implies the agency “embodies” the merit system principles.

³ By 31 U.S.C. §9101, there are about 35 government corporations, many of which have regulatory roles in various financial markets.

⁴ By 5 U.S.C. §2301(c), the President, as the heads of government corporations, FBI, and intelligence agencies, have the duty to “take any action necessary” to ensure federal agency employment “embodies” the merit system principles.

⁵ For government corporations OSC has jurisdiction for the reprisal-type PPPs.

classified foreign intelligence or counter-intelligence information, see §1213(j).⁶

Merit Systems Protection Board (MSPB) - conduct reactive “special studies” of OSC and EVERY type of agency (i.e. including government corporations, FBI, intelligence agencies and components, and other agencies) to determine whether scandals/dysfunction/failures in federal agencies resulted from federal employees not being adequately protected from PPPs and/or federal employees not being able to effectively voice concerns, particularly classified ones, see §1204(a)(3) and (e)(3)

The President - based on MSPB special studies and OSC public reports, “take any action....necessary” to ensure the federal civil service “embodies” the merit system principles, see §2301(c).

Heads of Government Corporations, Director of FBI, and heads of intelligence agencies: because OSC does NOT have PPP jurisdiction at these agencies, they have a larger duty, similar to that of President for overall federal civil service - based on MSPB special studies, results of disclosures made to OSC, and other input, “take any action....necessary” to ensure that government corporations, FBI, and intelligence agencies “embodies” the merit system principles, see §2301(c).

Congress - do the necessary oversight of the complex scheme it created for the regulation of the management culture in every federal agency. When scandal or failure occurs involving any agency, take larger view and ascertain if OSC and MSPB are implicated, given their essential roles in the regulation of the management culture in agencies, including FBI and intelligence agencies. Task the Government Accountability Office, per §2305, to conduct the requisite audits and review to determine whether the President, OSC, MSPB, and agency heads are complying with their respective duties for ensuring the sound management of the federal civil service.

Comptroller General of the United States - use his independent authority to direct Government Accountability Office (GAO) audits and reviews of OSC, MSPB, and federal agencies, per 5 U.S.C. §2305, when “considered necessary” to determine whether the federal civil service embodies the merit system principles.⁷

⁶ FBI and intelligence agency employees are almost universally unaware of their singular disclosure rights at OSC - and OSC apparently does not have the specialized equipment/people with requisite clearances to receive highly classified disclosures to transmit, confidentially, to House and Senate Intelligence Committees.

⁷ In almost 40 years, no Comptroller General has “considered necessary” that he direct such GAO audits or reviews - what is he waiting for? Does he need something as a member of the Secret Service assassinating the President or member of his family? A federal agency employee actively participating in a terrorist attack on America?

Why is this system so broken for almost 40 years?

OSC - grossly under-resourced. It has about 110 employees when it probably needs 450-500.⁸

MSPB - renounced its duty to conduct the required “special studies” of OSC, apparently at its creation. Has never conducted one, particularly of OSC’s disclosure function. Falsely claimed to a federal court it had issued regulations for its “special studies” function when it never has.

MSPB is supposed to be the check and balance on OSC via its adjudicatory and special studies functions. If OSC is overly zealous in protecting federal employees from PPP’s, MSPB can rein it in via its adjudicatory function. MSPB’s special studies function is supposed to determine whether OSC is properly complying with its statutory duties as a disclosure channel and is protecting feds from reprisal and other types of PPPs. Because MSPB renounced this function at its creation, and because neither OSC nor MSPB have Inspector Generals, OSC’s nearly 40 year long law-breaking by omission - it fails to do what the law directs it to do - remains hidden.⁹

Agency heads in almost all agencies (excepting government corporations, FBI and intelligence agencies) - “in the dark” about whether they are, in objective fact, “preventing PPPs” in their agencies, because of this compounded OSC/MSPB law-breaking.

Heads of Government Corporations, director of FBI and heads of intelligence agencies: “in the dark” about whether the federal civil service “embodies” the merit system principles in their agencies, because of this compounded OSC/MSPB lawbreaking.

The President - “in the dark” about whether the federal civil service “embodies” the merit

⁸ PPPs are now so rife in federal agencies that OSC will need a “surge” of resources to bring them under control. If and when MSPB determines federal agency employees - in government corporations, in intelligence community agencies, in FBI, and in other agencies are, as a rule, where adequately protected from PPPs, then OSC’s appropriate permanent size could be determined.

Special interests, particularly so-called “whistleblower advocacy/watchdog” groups benefit from a weak, worthless, corrupt, fraud of an OSC. They enable/collude with OSC law-breaking because it benefits their business models.

⁹ Why is MSPB the “Merit System(S) Protection Board” and not the “Merit System Protection Board”? Because the “System” to ensure federal agency employment “embodies” the merit system principles (which requires employees are adequately protected from PPPs) is different in government corporations, in FBI and intelligence agencies (and agency components), than in other federal agencies - but MSPB is responsible to conduct “special studies” of the various “systems” to protect federal agency employees from PPPs and to ensure employment “embodies” the merit system principles.

system principles, because of this compounded OSC/MSPB lawbreaking.

Congress - “largely in the dark” - it outsourced its oversight of OSC/MSPB to the so-called “whistleblower advocacy groups” which benefit from status quo.¹⁰

Comptroller-General of United States: has not, in almost 40 years “considered necessary,” per 5 U.S.C. §2305, to direct GAO to conduct audit and reviews to determine whether the federal civil service “embodies” the merit system principles.”

America - much diminished and more threatened because of the battered federal civil service which manifests in repeated scandal in various agencies, contributing to a corrosive distrust by Americans to their federal government and its agencies.

Fundamental, falsifiable, claims about “broken covenant” of CSRA:

1) Contrary to law, federal employees cannot, as a rule, effectively bring forward concerns, particularly one involving classified information (Where “effectively” means their concerns receive a timely and objective resolution.) This is particularly the case in FBI and intelligence agencies, where most employees are unaware of their statutory right to make disclosures to OSC and of OSC’s duty to directly transmit their classified concerns to House and Senate Intelligence Committees if they involve foreign intelligence or counter-intelligence.

2) Contrary to law, federal employee, are not adequately protected from reprisal and other types of PPPs, this is particularly true in FBI and intelligence agencies, where OSC does NOT have jurisdiction for PPP complaints and agency heads have NOT created equivalent systems.

3) Contrary to law, the neither the President, nor any agency head, nor the Comptroller General has an objective basis to dispute points one and two.

What to do?

I claim about a dozen civil service laws have been violated, by omission, for decades, in OSC and MSPB.

For OSC, these include:

- 5 U.S.C. § 1212(a)(4)

¹⁰ Their business models depend on concerned federal employees going to them with their whistleblower disclosures, if the federal civil service “embodied” the merit system principles, there would be little reason for concerned federal agency employees to reach out to them.

- 5 U.S.C. § 1213(g)(1) ¹¹
- 5 U.S.C. § 1213(b) and (c) for employees of Tennessee Valley Authority (TVA) and other wholly-owned government corporations, particularly given the wording of 5 U.S.C. §2302(a)(2)(C)(i and 2302(b)(8) that states such employees are within OSC’s whistleblower reprisal protection jurisdiction if they make whistleblower disclosures to OSC.
- 5 U.S.C. § 1214(a)(1)(A), (a)(1)(C), (a)(1)(D), (a)(2)(A), (a)(4), (b)(2)(A)(i) and (ii), (b)(2)(D), (e), and requirements of the “termination statement” found in endnotes of 5 U.S.C. § 1214, citing Pub. L. 103-424 Section 12(b) ¹²

For MSPB, these include:

- 5 U.S.C. §1204(a)(3) and (e)(3)

Carolyn Lerner has been Special Counsel, the head of OSC, for almost five years. She has been nominated for an unprecedented second term as Special Counsel, with the public backing of so-called whistleblower advocacy groups. For five years, she has evaded all efforts to obtain any objective review of how OSC interprets and applies the laws I claim it is violating. Apparently, she uses legal ethics to claim she has an attorney-client relationship with OSC, therefore her

¹¹ In Carson v. Department of Energy, docket no. AT-1221-0520-W-1, the full MSPB, determined, in a final, non-precedential, decision dated May 21, 2015, at ¶10 (page 6 of decision) that, “Section 1213(g)(1) places no limits on OSC’s authority to determine which disclosures to refer to agency heads.....” Despite this, Special Counsel Lerner still claims that OSC, by this law, only has jurisdiction to refer disclosures from current or former federal agency employees and only when their disclosure 1) involves another agency, and 2) is unrelated to their work duties in the federal agency which employs or employed them. Not surprisingly, OSC has not made a single referral by this law since its creation in 1989.

How might the Flint, Michigan public health and safety disaster been averted if only Ms. Lerner followed this law? She is the only federal official, outside of the President, who could have, by referring a whistleblower disclosure about Flint water quality from a local official, a State official, a local doctor, a local citizen, etc., required EPA Administrator Gina McCarthy to investigate the matter, per §1213(g)(1), and report, in a permanent, publicly available record, per §1219(a)(4), what EPA had done or was going to do to correct the concern.

¹² Since 1994, OSC has been required to provide extensive information to complainants, subsequent to closing its investigation of their PPP complaints, per the “termination statement” of the statutory note to §1214, which quotes section 12(b) of P.L. 103-424. A federal judge found OSC in non-compliance with that section of law in Carson v. Office of Special Counsel, 514 F.Supp. 2d 54, (D.C.D. September 27, 2007), even though he did not order the “extraordinary” relief of mandamus. OSC did not appeal this decision but did not change its practice of ignoring this law.

primary professional duty is to protect OSC - not ensure OSC is following the law to protect federal employees from reprisal and other types of PPPs.

The Senate Homeland Security and Governmental Affairs Committee (HSGAC) is now considering her nomination. It has the power to force Ms. Lerner to answer questions about how OSC interprets and applies its duties to protect federal employees from reprisal, something Ms. Lerner claims no Court in America has the power to do.

PLEASE CONTACT THE HSGAC AND REQUEST IT DELAY VOTING ON MS. LERNER'S NOMINATION UNTIL SHE ANSWERS QUESTIONS ABOUT HOW OSC INTERPRETS AND APPLIES ITS DUTIES TO PROTECT FEDERAL EMPLOYEES

Senator Ron Johnson (R-WI) is Chairman of the HSGAG. Please send an email to whistleblower@ronjohnson.senate.gov requesting the HSGAC obtain answers from Ms. Lerner before further considering her nomination. Please send a copy of your email to Joe Davidson, a reporter at Washington Post who covers federal agency matters, davidsonj@washpost.com.