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The Honorable Chairman Patrick J. Leahy, *Chairman*
The Honorable Chuck Grassley, *Ranking Member*
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Via: Fax 202-224-9516 (majority); 202-224-9102 (minority)

Subject: Ms. Elaine Kaplan's nomination to U.S. Court of Federal Claims, PN202-113

Dear Honorable Senators Leahy and Grassley:

I am writing to express my concerns related to the nomination of Elaine D. Kaplan to the U.S. Court of Federal Claims. I am a lawyer in private practice in Knoxville, Tennessee who represents whistleblowers and aggrieved federal employees and have studied and interacted with the U.S. Office of Special Counsel (OSC), which Ms. Kaplan led from 1998-2003.

The Civil Service Reform Act of 1978 ("CSRA" or "the Act" or "Act") codified merit principles and provided that employees who experience prohibited personnel practices (PPPs) obtain corrective action, that employees who commit PPPs receive disciplinary action, and concerned federal employees have an effective disclosure channel to report perceived improper government conduct. The Act defines what constitutes a "protected disclosure" and what actions are "prohibited personnel practice."¹ The Act was passed in an environment of serious concern about the integrity of the merit system in federal employment² and significant evidence of disturbingly aggressive retaliation

¹See, 5 USC § 2302.

²See, e.g., *Violations and Abuses of Merit Principles in Federal Employment Part 1; 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).*

against whistleblowers.³ The Whistleblower Protection Act ("WPA") was passed in 1989 to strengthen the Office of Special Counsel (OSC), created under the CSRA. OSC exists to protect whistleblowers from retaliation.⁴ The WPA instructed the strengthened OSC its mission is to "protect employees, especially whistleblowers, from prohibited personnel practices."⁵ Of paramount significance is the mandate OSC is to "act in the interests of employees"⁶ who petition for its protection and assistance. It cannot be overstated that rather than commissioning OSC to be an independent body deciding complaints in the fashion of an impartial court, rather, the WPA obligated OSC to assist whistleblowers.⁷ OSC is intended to be a whistleblower advocate office.

OSC's power is broad. For example, an employee may disclose to OSC evidence or data classified or confidential according to law and OSC can direct the agency to investigate the disclosure in a way that keeps the concerned employee involved and results in a publicly available report to the President and Congress.⁸ When OSC finds "reasonable grounds," to believe a prohibited personnel practice "occurred, exists, or is to be taken" and such needs "corrective action" it must report the findings and recommendations to the Merit Systems Protection Board ("MSPB"), the Office of Personnel Management ("OPM") and the agency involved.⁹ In whistleblower cases, if OSC proves a protected disclosure was a contributing factor to the personnel action, corrective action is ordered by the MSPB unless the agency proves by clear and convincing evidence it would have taken the disputed personnel action even had the protected disclosure never occurred.

It strongly appears those in charge of MSPB and OSC have failed to implement both the letter and the spirit of the CSRA and WPA,¹⁰ leaving both MSPB and OSC largely impotent. One is left to suspect if OSC acted as aggressively for whistleblowers as the law mandates, significant failings in the integrity of the federal civil service would have been avoided and federal agencies would have more fairly and competently protected the public. My respectful concern about Ms. Kaplan is what would appear to be a

³Select Committee on Presidential Campaign Activities, Executive Session Hearings, *Watergate and Related Activities: Use of Incumbency -- Responsiveness Program*, 93rd Cong., 2nd Sess. (1974). See also, *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

⁴See S. REP. No. 103-358, at 2 (1994), reprinted in 1994 U.S.C.C.A.N. 3549, 3550.

⁵Whistleblower Protection Act of 1989, Pub. L. No. 101-12, § 2(b)(2)(A), 103 Stat. 16.

⁶*Id.* § 2(b)(2)(B).

⁷S. 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.

⁸5 U.S.C. § 2302(b)(8)(B).

⁹5 U.S.C. § 1213(a)(1)(A) (1994); *Id.* § 1214(b)(2)(A).

¹⁰Please see my analysis attached as Exhibit 1.

failure to act to fulfill OSC's statutory mandate to serve as a whistleblower advocacy agency, vigorously protecting the federal merit system. As the CSRA and WPA provide, OSC is an important agency that should be as well-known as the EPA or the FDA but to all appearances, it is budget starved and obscure to the general public. I would respectfully like for Ms. Kaplan to explain all she did to ensure OSC had appropriate resources to fulfill its critical, but apparently, largely forgotten mission.

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. Should that be the case? What did Ms. Kaplan do and what does she think should be done to ensure, federal employees who want to provide protected disclosures know where to go?

I know two other areas demonstrating OSC's apparent long-standing non-compliance with its duties to ensure the integrity of the federal civil service.

- OSC, under Ms. Kaplan, failed or refused to perform its statutory duty to review Office of Personnel Management regulations for prohibited personnel practices (PPPs), resulting in tens of thousands of veterans experiencing a PPP - losing their right to use their veteran's preference - in applying for positions in the federal civil service between 2001 and 2010.¹¹

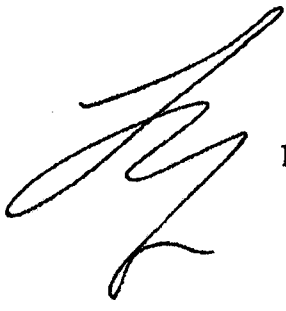
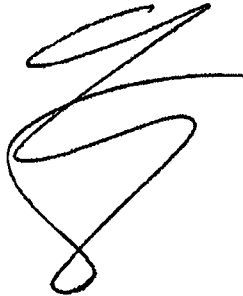
- OSC, under Ms. Kaplan, failed or refused to perform its statutory

¹¹This duty is detailed at 5 U.S.C. § 1212(a)(4). I understand OSC reported it has no records of ever having performed this duty and that the Merit Systems Protection Board (MSPB) reported it had no records of ever receiving a written complaint from OSC about an OPM regulation creating a PPP, under 5 U.S.C. § 1204(f)(1)(C) and 5 C.F.R. § 1203.11. During Ms. Kaplan's tenure as Special Counsel, OPM created the Federal Career Intern Program (FCIP), which was later determined to illegal by the MSPB for not allowing veterans to use their veteran preference in competing for at least a hundred thousand - and possibly many more - new openings in the federal civil service between 2001 and 2010. This appears to be a PPP, under 5 U.S.C. § 2302(b)(11). Is it not the case, had Ms. Kaplan complied with her duty as Special Counsel to review OPM regulations, possibly tens of thousands of veterans of Iraq and Afghanistan would have been hired - instead of discriminated against - into these positions?

<http://www.washingtonpost.com/wpdyn/content/article/2010/12/25/AR2010122502099.html>

duty to be a confidential, secure, independent disclosure channel for concerned employees of FBI, CIA, and other intelligence agencies, particularly for classified disclosures. OSC is, by law, the only legally authorized external disclosure channel these employees have for classified disclosures, the only one mandated to provide confidentiality, the only one that can direct an agency investigation of their concerns, and the only one that serves as a direct conduit to Congress if the classified disclosure involved foreign intelligence or counter-intelligence.¹²

I bear no ill-will or animosity to Ms. Kaplan. I just cannot understand, consistent with good government, the role of OSC is seemingly intentionally or negligently diminished, even by those who head it. I hope the Committee will investigate and resolve these concerns, in determining Ms. Kaplan's suitability for confirmation. I respectfully submit it would not only benefit the confirmation hearing but the country as a whole. Please contact me with any questions. Thank you.

 Sincerely,
Loring Justice 

¹²See 5 U.S.C. § 1213 for these duties. I understand, based on information asserted to be derived from interviews with OSC staff, the staff of the Senate Intelligence Committee, FOIA responses and a review of OSC's Annual Reports to Congress, OSC, under Ms. Kaplan, claimed employees of agencies outside of OSC's PPP jurisdiction were excluded from its disclosure channel jurisdiction and that OSC did not have employees with requisite security clearances to receive highly classified disclosures. I understand the current Special Counsel, Carolyn Lerner, recognizes OSC has a duty to receive classified disclosures and its jurisdiction as a disclosure channel is broader than its PPP jurisdiction and all federal agency employees are within its disclosure channel jurisdiction, even if they are employed by agencies completely or partially (such as mixed-ownership government corporations) outside OSC's PPP jurisdiction.