

**A Report To Congress
From The
Office of Special Counsel**

Fiscal Year 1983

“If I cannot make the office work . . . I will lead the parade to seek to do away with it, because I think that to lean on the public with ineffective agencies is a gross misrepresentation of the appropriate forms of Federal government.”

**K. William O’Connor
before the Senate Committee on Governmental Affairs,
September 23, 1982**

“ . . . formation of that parade is not necessary. The office is, in my view, beginning to work properly.”

**K. William O’Connor
before the House Subcommittee on Post Office and
Civil Service, March 10, 1983**

“For the first time in its history, the Office of the Special Counsel appears to be fully assuming its role as the shield of the Federal employee, and this Administration deserves credit for not only selecting an official of the caliber of Bill O’Connor but for seeing to it that the system works the way Congress intended.”

**Senator Ted Stevens
Senate floor Statement, April 7, 1983**

OFFICE OF THE SPECIAL COUNSEL
U. S. Merit Systems Protection Board



The Special Counsel

1120 Vermont Avenue, N.W.
Washington, D. C. 20419

September 30, 1983

The Honorable George Bush
President of the Senate
and
The Honorable Thomas P. O'Neill, Jr.
Speaker of the House of Representatives

Dear Mr. President and Mr. Speaker:

In accordance with the Civil Service Reform Act of 1978, Section 1206 (m) of Title 5 of the United States Code, I respectfully submit this annual report to the Congress covering the activities of the Office of the Special Counsel of the United States Merit Systems Protection Board.

This report differs from those issued in the past in that it covers the operations of the office for Fiscal Year 1983. Previous reports were issued on a calendar year basis.

As is customary, a copy of this report will be forwarded to each member of Congress.

With respect,

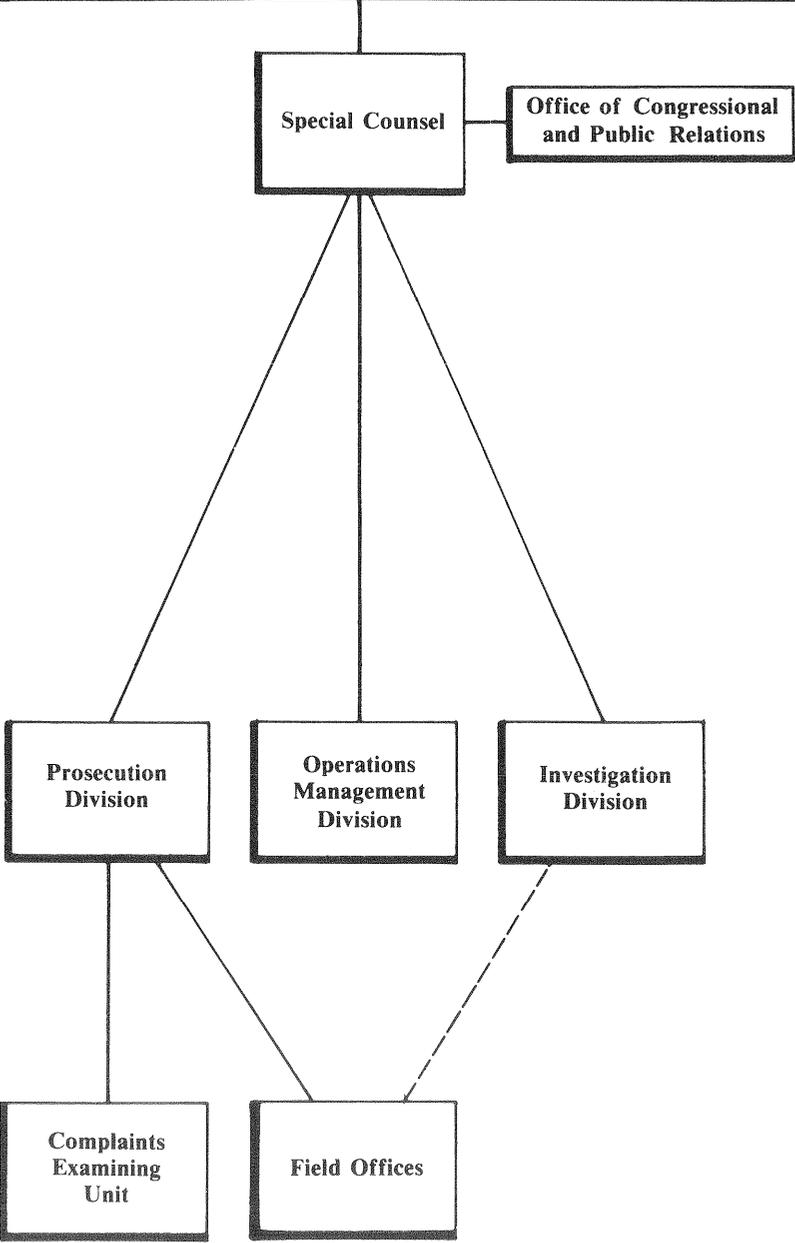
A handwritten signature in black ink, appearing to read "K. William O'Connor". The signature is stylized and written over the typed name below it.

K. William O'Connor

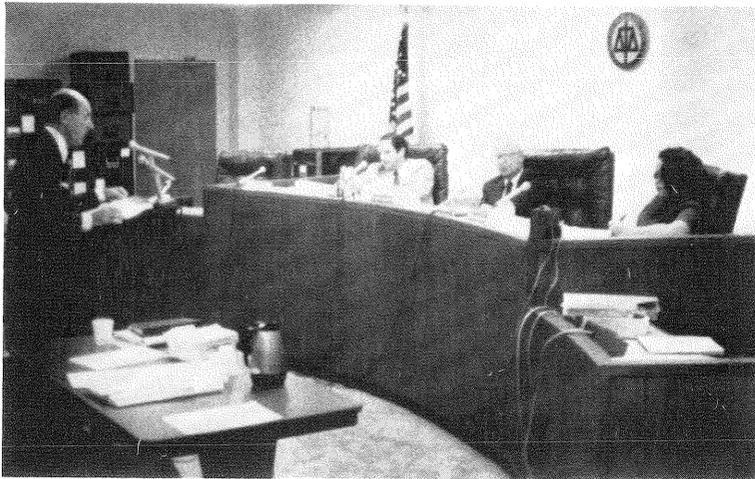
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OFFICE OF THE SPECIAL COUNSEL



August, 1983



Introduction

The Office of the Special Counsel (OSC) was established in 1979 by Reorganization Plan No. 2 of 1978; its functions and powers were enlarged by the Civil Service Reform Act of 1978. The OSC is an independent investigative and prosecutive component of the U.S. Merit Systems Protection Board (MSPB).

The relationship of the OSC to the MSPB may be likened to that of a judge and prosecutor, the Board performing the former function and the OSC the latter. Both components work to protect the merit system.

The primary responsibilities of the OSC are:

- (1) to investigate allegations of activities prohibited by civil service law, rule or regulation, primarily allegations of prohibited personnel practices and, if warranted, to initiate corrective or disciplinary actions;
- (2) to provide a secure channel through which allegations of waste, fraud, mismanagement, abuse of authority or a substantial and specific danger to public health or safety may be made without fear of retaliation and without disclosure of identity except with the employee's consent;
- (3) to enforce the Hatch Act.



Summary

In general, FY 1983 may be viewed as a year of budgetary stability, reorganization, consolidation and unprecedented investigative and litigative activity for the OSC.

The Special Counsel

As the fiscal year opened, a new Special Counsel, K. William "Bill" O'Connor, was sworn into office. Mr. O'Connor, a former Inspector General and prosecutor with over 25 years of federal service, succeeded Special Counsel Alex Kozinski, who had been appointed Chief Judge of the United States Claims Court in August of 1982.

The Special Counsel has continued association with the Inspector General community as an ex-officio member of the President's Council on Integrity and Efficiency (PCIE).

The PCIE was established by Executive Order in March of 1981 as part of the Administration's campaign to coordinate and strengthen the role of the Inspectors General. The Office of the Special Counsel plays a unique and important part in this campaign. As an ex-officio member

of the Council, the Special Counsel spearheads efforts to protect federal employees who wish to "blow the whistle" on wrongdoing within their agencies. On request, the Special Counsel provides investigative assistance to the Inspectors General in matters involving Civil Service laws and political activities banned by the Hatch Act.

Particular emphasis has been placed by the Special Counsel on maintaining strong ties with the Inspector General community. The Special Counsel has appointed the Associate Special Counsel for Investigation as Inspector General of OSC and charged him with maintaining this liaison and other duties. This is the first such liaison role created in the office since its inception.

Coordination and cooperation between the OSC and the IG community can conserve scarce monetary resources, and avoid duplication of investigations. On occasion the OSC relies on the results of investigations conducted by an Inspector General in making prosecutive determinations. When the agency concerned is amenable to taking appropriate corrective action on the basis of the IG in-



investigation, OSC may withdraw from the matter in order to obtain prompt resolution and avoid protracted litigation.

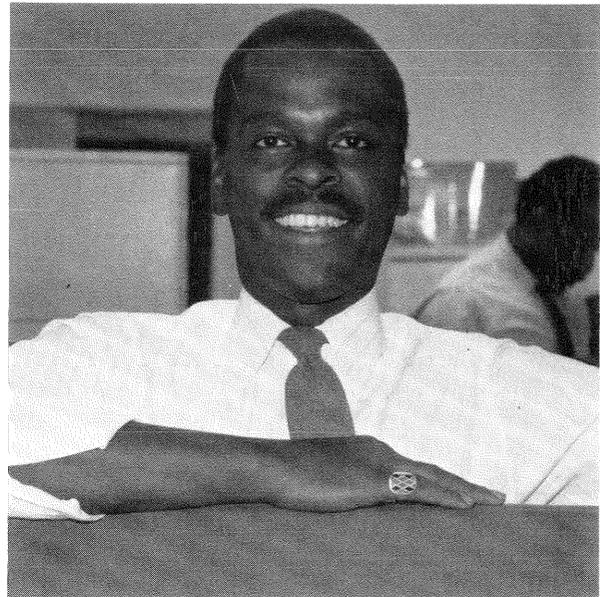
For example, in June 1983 the Office of Inspector General and the United States Department of Agriculture (OIG/USDA) and OSC concurrently initiated investigations into an allegation of a prohibited personnel practice by a USDA employee. When OSC learned of the OIG investigation, OSC suspended further inquiry pending completion of the OIG investigation. The OIG provided OSC its report as soon as it was issued. Review of the report disclosed sufficient grounds for initiating disciplinary action against the offending employee. However, the agency agreed disciplinary action was warranted. Accordingly, OSC withdrew and allowed the agency removal action to proceed. This coordination resulted in resolution of the matter in about 60 days. Whereas further investigation and prosecution by the Special Counsel would have protracted the matter for many more months. Cost savings to OSC were in excess of \$15,000.

In addition to being responsible for giving technical direction to the OSC investigative program and procedures, the Associate Special

Counsel for Investigation is responsible as OSC/IG for developing and implementing internal control systems and conducting inspections and audits of all administrative and program operations. The initial thrust of OSC/IG efforts has been in developing ways to improve the productivity and quality of the work performed by the office. The OSC/IG is also responsible for reviewing and inquiring into any complaint against individual staff members or actions by the office (other than those relating to legal and prosecutive determinations). The OSC/IG assists the Special Counsel to assure that the work performance of the staff and all organizational units measure up to the highest professional standards.

OSC Outreach

In an effort to improve communication and achieve legislative objectives consistent with the overall OSC program, the Special Counsel established an Office of Congressional and Public Relations in December 1982. The Director of that office is charged with maintaining a liaison with the Congress, the press and the public.



Since December 1982, that office has distributed over 2,400 copies of informational materials dealing with OSC to the public and Congress and responded to approximately 200 press and Congressional inquiries per month.

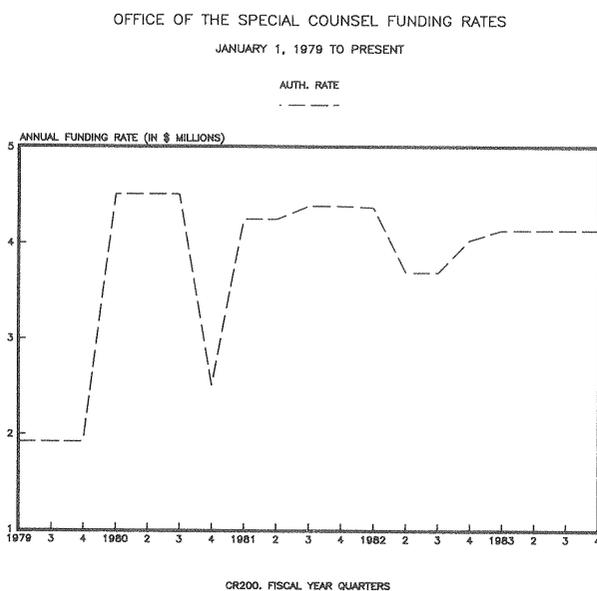
These communications will increase aware-

ness of the OSC among federal employees so that they will understand the scope of OSC responsibility and know that the OSC can and will execute its statutory obligations.

Budget and Administration

The Office of the Special Counsel experienced budgetary uncertainties from January of 1979 until FY 1983, which was the first year without significant budgetary fluctuations. From the beginning of FY 1983, the Office has operated on a budget of \$4.0 million. In August of 1983 a supplemental appropriation of \$139,000 was approved to cover the October 1982 pay increases.

Proposed authorizations for Fiscal Year 1983 called for a staff level of 113 full time equivalent (FTE) positions and a budget of \$4.0 million. In a government-wide effort to reduce federal expenditures, the FTE limit was reduced 27 percent by the Office of Management and Budget (OMB) to 86 with no decrease in funding. The Office of Special Counsel supported the OMB recommendation and undertook major management initiatives to meet the 27 percent FTE reduction.



OSC FIELD OFFICE JURISDICTION



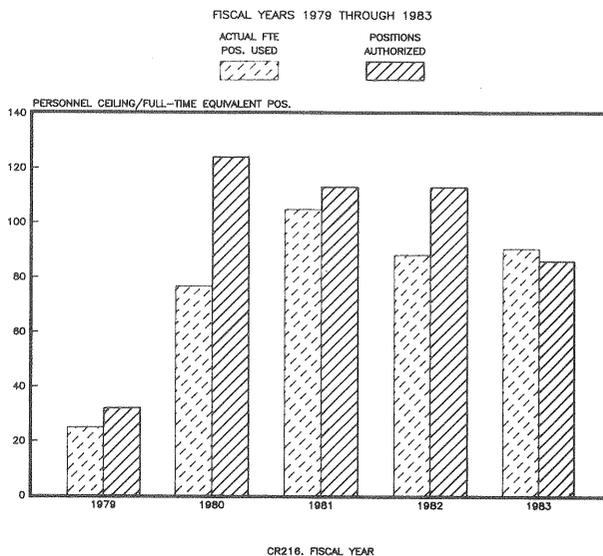
Primary initiatives included requiring more field work of fewer staff, with an increase in the amount of travel and court reporter expenses necessary to support increased investigative and prosecutorial activities. In FY 1983, operations required exceeding the 86 FTE slightly (90.3 FTE) with the concurrence of the Office of Management and Budget. The 86 FTE level will be met during FY 1984. On September 30, 1983, the OMB staff level mark was met; staff level was 81.

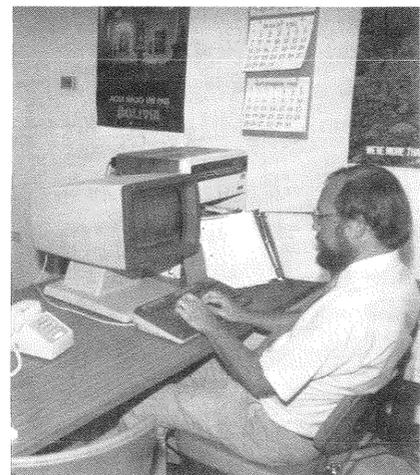
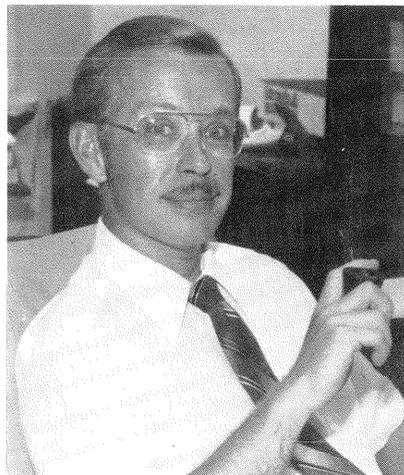
With the help of a stable budget for the first time since the office was established, plans to reorganize and streamline operations have been initiated. The objective is a responsive, efficient operation, affording protection to the merit system and ensuring statutory protections for federal employees.

A field office was opened in Chicago in February 1983, in order to establish a base of operations in the North Central United States. The field offices in Philadelphia, Seattle, Los Angeles, Atlanta and Washington, D.C. were all closed in FY 1983. The work was redistributed and the field staffs reassigned to enhance control and efficiency of operations.

As part of this effort all new matters are now being processed in the central office through the Complaints Examining Unit (CEU) established September 19, 1983, before assignment for field investigation. The new procedure relieves the field offices of administrative work,

PERSONNEL CEILINGS AND ON BOARD STRENGTH





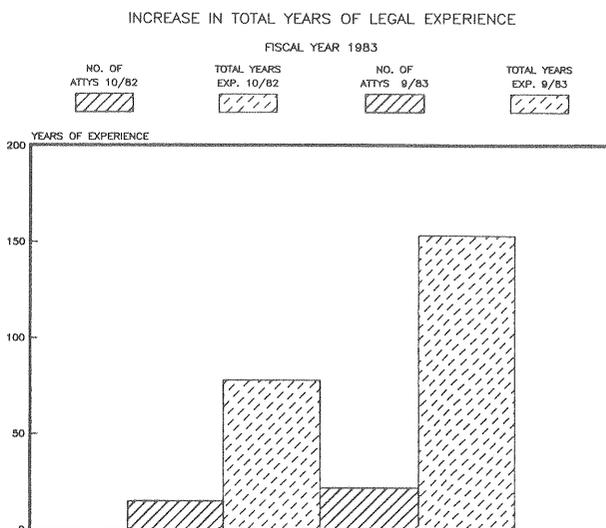
reduces paperwork and accelerates processing of matters. It also provides for more effective control and management of investigative activities nationwide. The CEU is supervised by an experienced attorney and has eight permanent staff members. Field office professional staff are rotated through the CEU to give them broader experience and to amplify CEU staff resources.

Payroll functions previously processed through OPM were converted to the Department of Interior Payroll System (DIPS). Broader utilization of the OSC computer improves case-load tracking and resource allocation. In addition, as a collateral economy, the MSPB appeals Case Tracking System was placed on the OSC computer during FY 1983. A program is underway to develop an in-house accounting system on the OSC computer for both the OSC and MSPB.

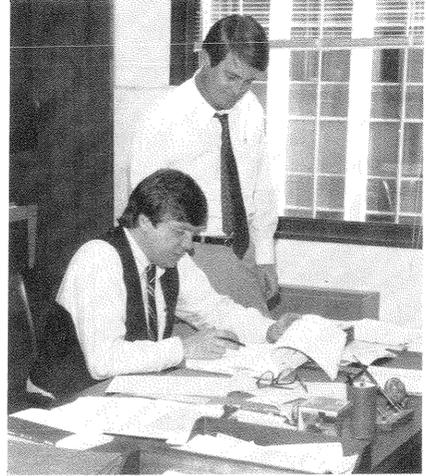
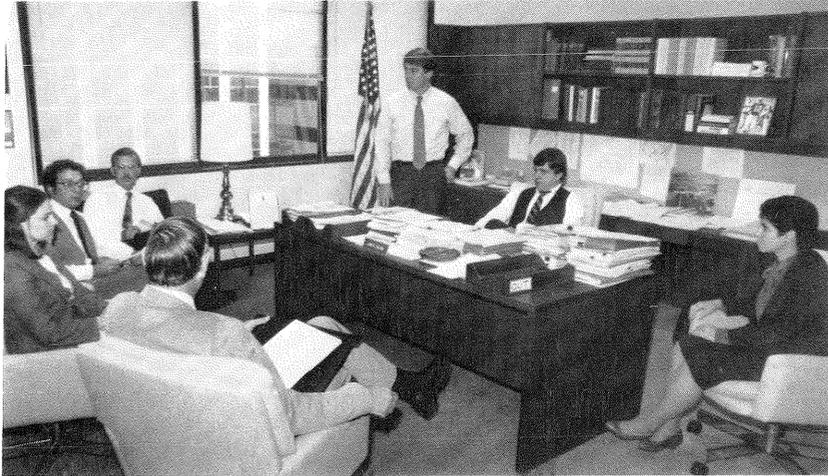
Prosecution Division

During FY 1983, several structural and functional changes were made in organization and work flow. In order to sharpen staff focus on the

prosecutive ends towards which investigations should be conducted, frontend review of new complaints and allegations was assigned to attorneys. New procedures were instituted for: (1) assigning all matters received to attorneys for



CRG214. PROFESSIONAL LEGAL WORK

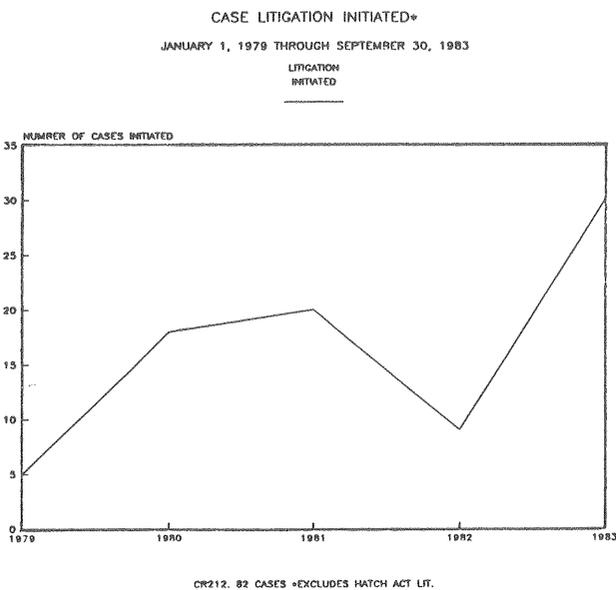


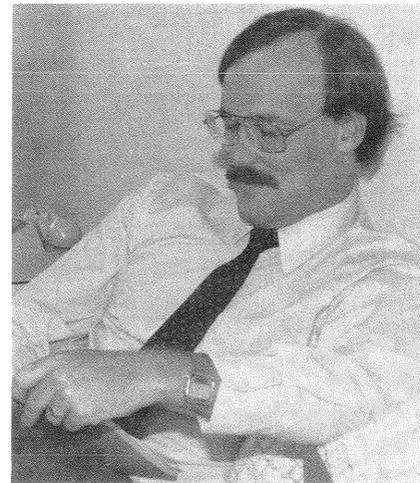
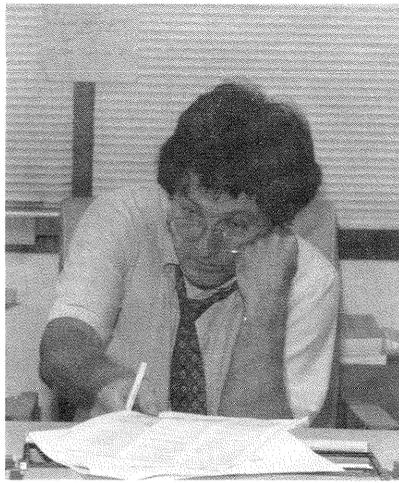
initial evaluation for prosecutive potential and review and analysis of results of investigations; (2) giving top priority to matters involving alleged reprisal for whistleblowing and other matters evidencing prosecutive merit; (3) review and approval by the Associate Special Counsel for Prosecution of all prosecutive recom-

mendations and declinations; (4) supervision of the three OSC field offices and oversight and evaluation of all ongoing and proposed litigation by the Deputy Associate Special Counsel; (5) establishment of a headquarters special investigative unit to work closely with the Prosecution Division in the investigation of particularly sensitive or complex investigations; (6) active recruitment of attorneys with significant litigation experience; and (7) training sessions for attorneys and investigators.

To further develop staff attorney skills, the Special Counsel has arranged with the U.S. Attorney for the District of Columbia for selected OSC trial attorneys to be sequentially detailed to the U.S. Attorney's office as Special Assistant U.S. Attorneys for 120 days to gain intensive litigation experience.

The Prosecution Division initiated disciplinary action against six employees for reprisal against whistleblowers, four employees for other prohibited personnel practices, and two employees for engaging in prohibited political activities. The Division sought corrective action in nine cases, and 17 stays or extensions of stays in 6 cases involving 21 employees.





The Special Counsel has statutory authority to intervene in matters pending before the Board. During FY 1983, the Special Counsel intervened in two matters. In one, OSC supported the legal position of the employee; in the other, OSC supported the legal position of the agency.

When OSC investigations evidence a criminal violation of the law, those matters, pursuant to 5 U.S.C. § 1206(c)(2)(A) are referred to the Department of Justice. During FY 1983 three matters were so referred.

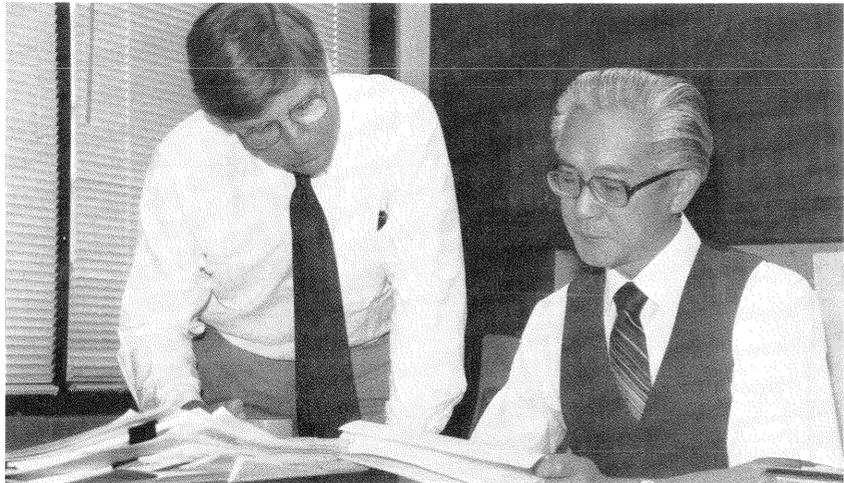
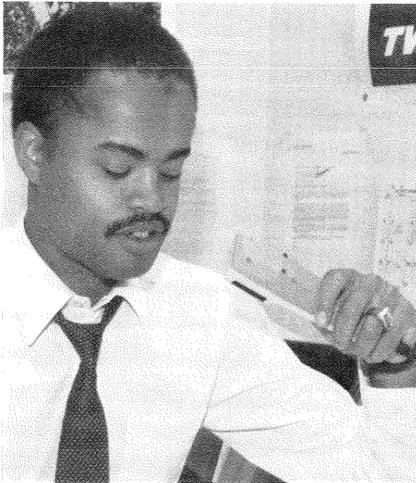
The Special Counsel was a party defendant in seven individual lawsuits and one class action lawsuit during FY 1983. For example, in October 1982, the Special Counsel was served with a complaint for a temporary restraining order and declaratory and injunctive relief in Federal District Court. The complaint sought to restrain the investigation and prosecution of an alleged Hatch Act violator based upon the assertion that its application to him was improper and unconstitutional and that he was exempt from coverage of the Act. The District Court Judge dismissed the case for lack of

jurisdiction to enjoin the investigatory and prosecutorial functions of the Office of Special Counsel.

In May 1982, a complaint was filed in a District Court of South Carolina seeking disclosure of reports of investigation and other documents withheld by the Special Counsel under the Freedom of Information Act. In February 1983, at a hearing the court ruled in favor of the Special Counsel and declined to order disclosure of the Special Counsel's investigation.

Investigation Division

The Investigation Division was also reshaped and assigned additional responsibilities. While the investigators and attorneys of the office as a whole completed necessary legal review and investigative action on over 2,100 of the 3,000 pending and new matters, the Division concentrated its efforts on improving the investigative skills, knowledge, and performance of the investigators and attorneys. Concurrently, during the year the Division's headquarters investigators supervised investigations of major sensitivity and complexity.



The first complete manual on the office's investigative jurisdiction, methods and procedures was issued to all OSC attorneys and investigators in December 1982. In June, the final chapter of the manual covering federal personnel systems and law was issued. The investigative and legal staff of the office now have complete instructions on the conduct of the OSC's investigative activities and a basic

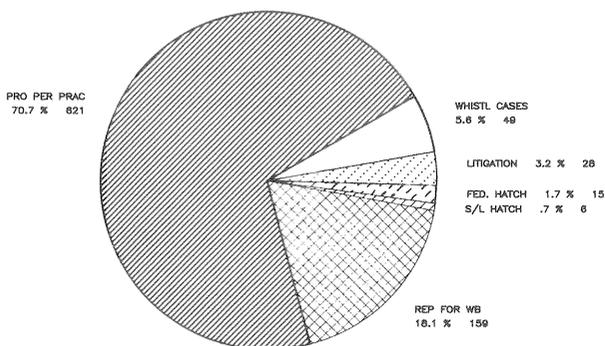
reference manual dealing with civil service laws, rules, and regulations.

In addition, all staff were provided training seminars in the new instructions to improve the quality and effectiveness of investigative activities and work products, policies and standards.

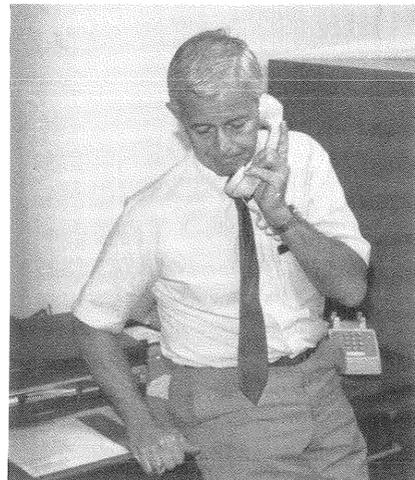
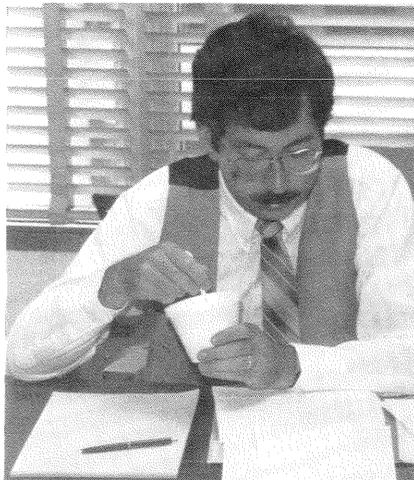
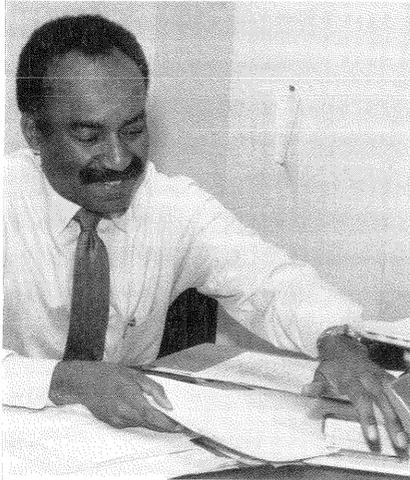
The Investigative Division recruited new investigators with extensive prior experience (averaging 12 years) in conducting and supervising criminal investigations. Two new, experienced, supervisory officials, the Assistant Special Counsel for Investigation and the Senior Inspector, were added under the direction of the Associate Special Counsel for Investigation. The Division's investigators provide technical advice and assistance to the field office investigators and attorneys. The Division's investigators are also, as previously noted, assigned to investigate matters of particular sensitivity or exceptional complexity and to coordinate investigations being conducted by more than one office.

The Division was staffed leanly during FY 1983, notwithstanding expanding responsibility for oversight of two major functions of

PROFILE OF PENDING WORKLOAD BY TYPE
AS OF SEPTEMBER 30, 1983



CR215, TOTAL OF 878 MATTERS AND CASES



INCREASE IN TOTAL YEARS OF INVEST. EXPERIENCE

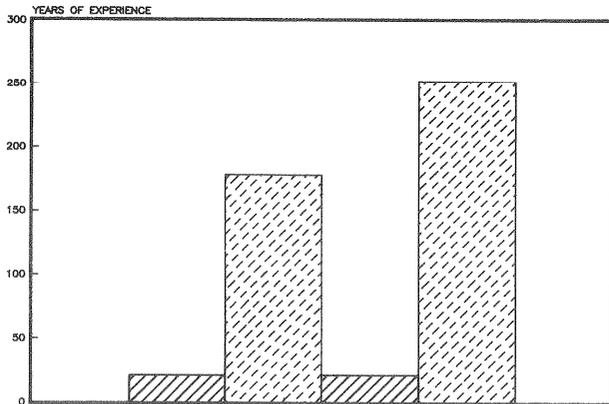
FISCAL YEAR 1983

NO. OF IN-VEST. 10/82

TOTAL YEARS EXP. 10/82

NO. OF IN-VEST. 9/83

TOTAL YEARS EXP. 9/83



ORG213. PROFESSIONAL INVESTIGATIVE WORK FORCE

the Office—investigations and review and action on whistleblower allegations. Investigation Division staff will be expanded in FY 1984 as consolidation and staff realignment continues.

Particular attention was given to achieving greater efficiency in review of whistleblower disclosures and, where appropriate, referral to the concerned agency head. Review and action on information received from employees which evidenced violations of law not otherwise within OSC's investigative jurisdiction, or of mismanagement, a gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety, was performed and supervised by a program manager under the immediate direction of the Associate Special Counsel for Investigation.



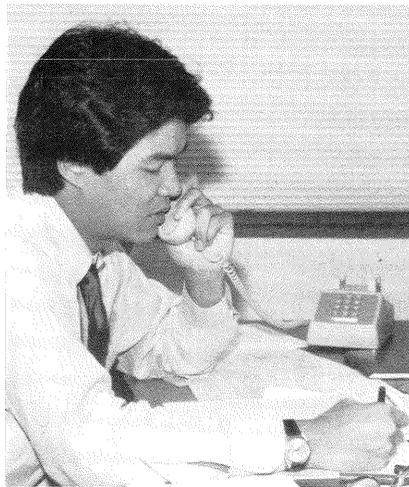
Prohibited Personnel Practices

The personnel practices specifically prohibited by law are codified at 5 U.S.C. § 2302(b). Complainants generally allege violations of one or more of these provisions.

The statute provides that any person who has the authority to take, direct others to take, recommend or approve any personnel action may *not*:

- Discriminate on the basis of race, color, religion, sex, national origin, age, handicapping condition, marital status or political affiliation;
- Solicit or consider employment recommendations based on factors other than personal knowledge or records of job related abilities or characteristics;
- Coerce the political activity of any person;
- Deceive or willfully obstruct any person from competing for employment;
- Influence any person to withdraw from competition for any position in order to improve or injure the employment prospects of any other person;
- Give unauthorized preference or advantage to any person to improve or injure the employment prospects of any particular employee or applicant;
- Engage in nepotism (hire or promote relatives or advocate such activity);
- Take reprisal against a whistleblower;
- Take reprisal for the exercise of an appeal right;
- Discriminate on the basis of personal conduct which does not adversely affect job performance by the employee, applicant or others;
- Violate any law, rule or regulation implementing or directly concerning merit system principles codified at 5 U.S.C. § 2301.

While unlawful discrimination is a prohibited personnel practice within OSC jurisdiction, Congress has left intact the procedures for investigating discrimination complaints already established in the agencies and the Equal Employment Opportunity Commission. Accordingly, the Special Counsel normally defers such matters to agency or EEO Commission procedures rather than initiate a redundant independent investigation. (5 C.F.R. 1251.3.) During FY 1983, 706 such complaints were so deferred.



During FY 1983, 14 complaints were resolved by OSC through informal channels. The OSC may otherwise use its authority in one or more ways:

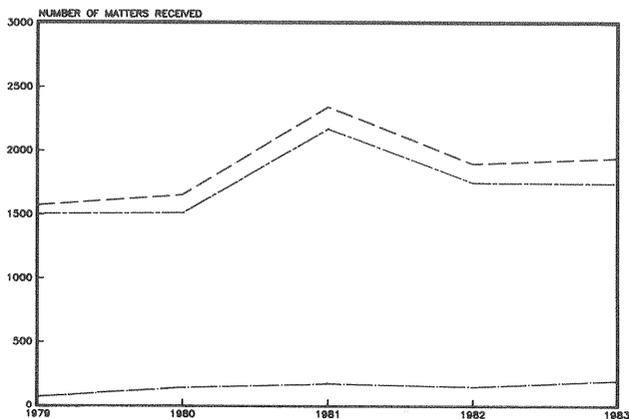
- (1) initiate an investigation and, if necessary, request that any intended adverse personnel actions be postponed pending comple-

- tion of the investigation (defined as a "stay of personnel action");
- (2) recommend corrective action by the agency and send a report of the investigation to the agency head, the Merit Systems Protection Board, the Office of Personnel Management and, if appropriate, to the President. If the corrective action recommended by the Special Counsel is not taken, he may ask the Merit Systems Protection Board to order corrective action.
- (3) initiate disciplinary action before the MSPB against the offending employees. The array of sanctions which may be ordered by the MSPB include: removal, reduction in grade, debarment from federal employment for a period not to exceed five years, suspension, reprimand, or an assessment of a civil penalty not to exceed \$1,000.

PROHIBITED PERS. PRACTICE MATTERS RECEIVED

JANUARY 1, 1979 THROUGH SEPTEMBER 30, 1983

TOTAL REPRISAL FOR WHISTL. ALL OTHER PPP



CR201. FISCAL YEAR

During FY 1983, 1,944 complaints were received that fell within the category of alleged prohibited personnel practices. This number represents 91.0 percent of the 2,136 complaints received by the OSC during FY 1983.

“... Federal employees or private citizens who wish to report incidents of illegal or wasteful activities are not only encouraged to do so but will be guaranteed confidentiality and protected against reprisals. . . . They must be assured that when they ‘blow the whistle’ they will be protected and their information properly investigated.”

**President Ronald Reagan
April 16, 1981**

Whistleblowing

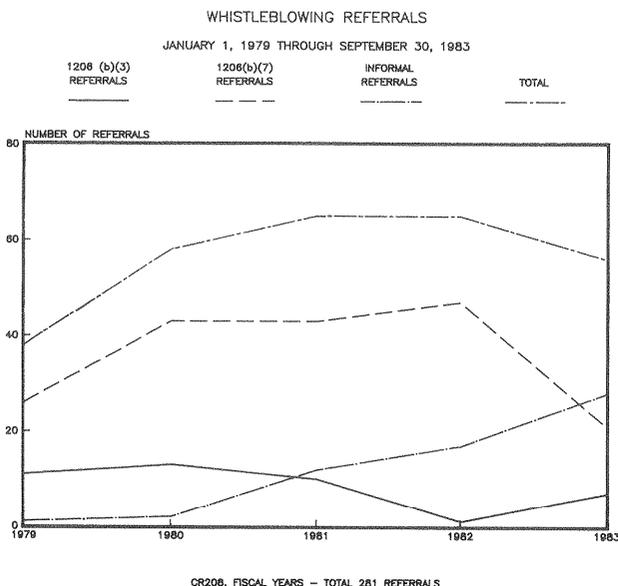
The Civil Service Reform Act provided special channels through which whistleblowers could make disclosures without fear of retaliation. The Office of the Special Counsel and the statutory Inspectors General are responsible for maintaining such channels. Unlike the Inspectors General, the Special Counsel is not

authorized by Congress to conduct substantive investigations of such disclosures. The Special Counsel receives and evaluates disclosures and refers appropriate matters to the respective agency, providing anonymity to the employee making the disclosures.

Since January 1979, when the office was established, the OSC has received 524 disclosures. Of that number, 282, or 54 percent were, found appropriate for referral to the involved agency.

Of the 90 disclosures received in FY 1983, 55 or 61 percent have been found appropriate for referral to the agencies. Referral is done in three ways:

- (1) to the agency head under 5 U.S.C. § 1206(b)(3), which authorizes the OSC to require that the agency conduct an investigation and prepare a report which must be personally signed by the agency head,
- (2) to the agency head under 5 U.S.C. § 1206(b)(2) and (7) which requires the agency to review the information and report to the OSC,
- (3) to the agency Inspector General.





During FY 1983, 13 percent (7) of the referrals made were under 5 U.S.C. § 1206(b)(3); 36 percent (20) were referred under 5 U.S.C. § 1206(b)(2) and (7); and 51 percent (28) were referred to the agencies' Inspectors General.

In FY 1983, over 75 percent of all 5 U.S.C. § 1206(b)(3) referrals resulted in disciplinary or corrective action, and over 50 percent of all 5 U.S.C. § 1206(b)(2) and (7) referrals resulted in disciplinary or corrective action.

The following examples of whistleblowing allegations have led to the improvement of government management in FY 1983.

- The Special Counsel asked the Secretary of the Army to investigate allegations of poor quality work resulting in safety hazards, waste of funds and serious personnel problems, such as excessive use of alcohol by certain work crews. A thorough investigation resulted in substantiation of most of the allegations. As a result, several employees were suspended and others reprimanded.

- The Inspector General of the Department of the Interior responded to allegations of contract irregularities in the Bureau of Land Management. Two contracts were not completed and although the work performed did not meet contract specifications, the work had been accepted and final payment was certified by the Supervisory Engineer. Although the U.S. Attorney declined prosecution, the involved federal supervisor resigned.
- The Secretary of Agriculture responded to allegations of abuse of authority, misuse of funds and a conflict of interest in a county office of the Farmers Home Administration. It was alleged that loan approvals were contingent upon purchasing farm products from a person who had authority to recommend approval. The employee involved resigned and the Inspector General referred criminal violations to the U.S. Attorney.



- The Special Counsel referred allegations of improper payment of a service contract and abuses in the assignment of overtime to the director of the Federal Emergency Management Agency pursuant to 5 U.S.C. § 1206(b)(3). The contract irregularities were substantiated. One employee was reprimanded and policies for handling similar matters were clarified.
- The Special Counsel referred allegations to the Secretary of Transportation concerning an alleged failure to properly account for over one million gallons of diesel fuel and the alleged cover-up of a loss of 134,513 gallons of the fuel, as well as other allegations of

violations of law, mismanagement and abuse of authority. The Secretary referred the matter to the Inspector General, who immediately dispatched a team of auditors and investigators. After a thorough investigation and an audit of all records, no fraud or cover-up was discovered. However, the alleged recurring shortages were found to be the result of inadequate accountability and poor recordkeeping practices. As a consequence of the investigation, regular inventory reconciliations and accountability procedures were improved.



Hatch Act

The Act to Prevent Pernicious Political Activities, commonly known as the Hatch Act, was passed by Congress in April of 1939, and signed by the President in August of that same year. For almost half a century, this statute, as amended, has regulated the political activity of federal, state and local employees.

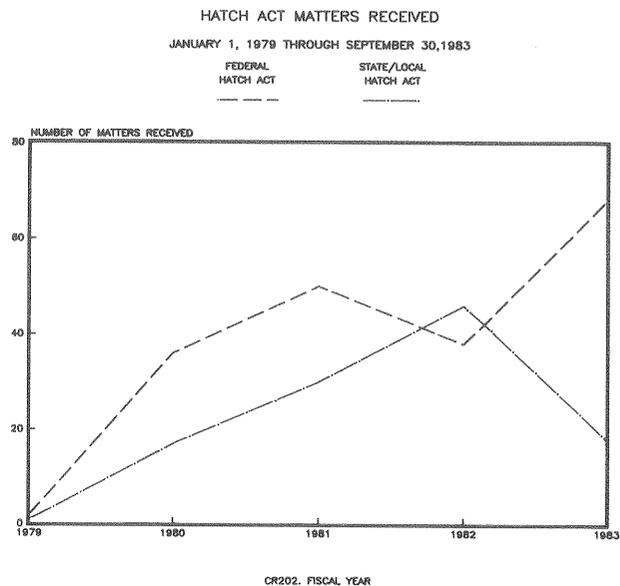
The Office of the Special Counsel is the only federal agency responsible for enforcing the provisions of the Hatch Act. By statute, the office is required to investigate allegations of prohibited political activity and, when appropriate, prosecute employees who violate the law.

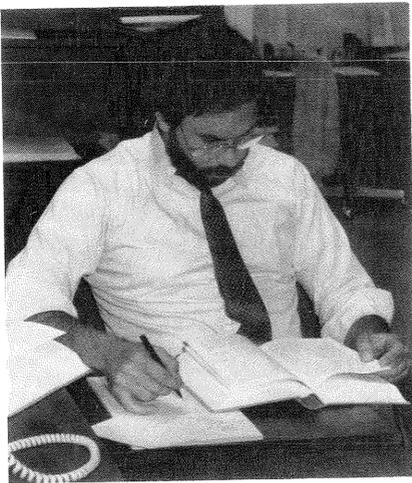
The present Special Counsel has emphasized the need for a prophylactic approach to Hatch Act enforcement. To this end, approximately 4,000 advisory opinions were issued by letter or telephone to the public and Congressional staffs during FY 1983.

During FY 1983 a total of 86 allegations of Hatch Act violations were received by the OSC. A total of 80 complaints were carried from FY 1982. By the end of FY 1983, a total of 134 Hatch Act matters had been closed.

Hatch Act prosecution was suspended early in fiscal year 1983, because of perceived policy issues arising in the context of *Special Counsel v. Jim J. Dukes* (HQ120600020).

The facts were not in issue and may be succinctly stated. Dukes, a federal law enforcement officer, was enrolled in a master's degree





program in a local college. As a requirement of one of the courses, he was instructed to actively participate in a political enterprise. He did so by briefly operating the telephone bank in a political campaign for the U.S. Senate. The OSC and the attorney for *Dukes* agreed on a limited sanction in a plea bargain for this technical violation. The ALJ expanded the sanction over the objection of the Special Counsel. The Special Counsel thereupon appealed to the Board raising the question of the scope of permissible sanctions in resolution of Hatch Act cases. The OSC suspended prosecution, with Board acquiescence, in several Hatch Act matters until the pending resolution of *Dukes*.

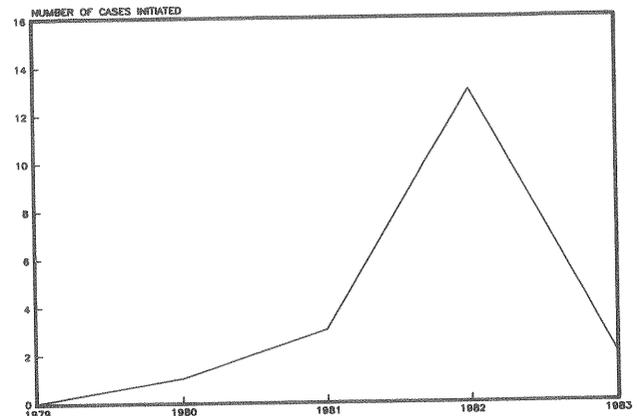
When the Board decided *Dukes*, in which prosecution was ultimately dismissed by OSC, the OSC reviewed the pending Hatch Act matters, closed those as to which prosecution seemed inappropriate, and moved the Board to dismiss one pending case brought before the Board's decision in *Dukes*.

At this writing, the OSC is in the process of the prosecution of nine Hatch Act cases; there are 23 additional Hatch Act investigations ongoing.

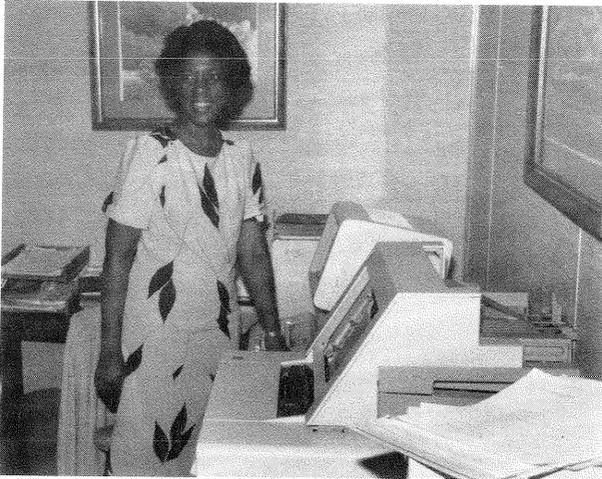
Typical Hatch Act cases resolved in FY 1983 included:

- In *Special Counsel v. Mary Lou Daniel* (HQ12068210031), the respondent was employed in connection with a federally funded program (Housing) in Pittsburgh, Pa. She

HATCH ACT LITIGATION INITIATED
 JANUARY 1, 1979 THROUGH SEPTEMBER 30, 1983
 LITIGATION INITIATED



CR220. TOTAL OF 19 CASES



took a leave of absence to run for public office in a partisan election. OSC received information of her candidacy prior to the election and sent her a certified letter asking her to withdraw her candidacy or face disciplinary action. She refused to withdraw. OSC filed a complaint for disciplinary action with MSPB. Ms. Daniel waived her right to a hearing and the case was submitted to the Administrative Law Judge by stipulation of the parties. The ALJ recommended and the Board ordered Daniel's removal from her federally funded position.

- *In Special Counsel v. Nathaniel Sims* (HQ12068210011), the respondent was employed by the Government of the District of Columbia, ran as a partisan candidate for city council contrary to advice he had received from D.C. Government Officials. OSC filed a complaint for disciplinary action. The ALJ found that Sims conduct violated the Hatch Act and recommended that Sims be suspended from duty for 60 days. The appeal is pending with the MSPB.



Merit Systems Protection Board Decisions

During the year, the Merit Systems Protection Board on several occasions dealt with the issue of the relationship between the Board and the Office of the Special Counsel. In 1981, in *Department of Justice v. Special Counsel (Stacy)*, No. HQ12068110061 (MSPB Nov. 18, 1981), the Board held that because the relationship of the Special Counsel to the Board is analogous to that of a criminal prosecutor to a court, the Board has no authority to interfere with the independent investigative or prosecutorial authority of the Special Counsel.

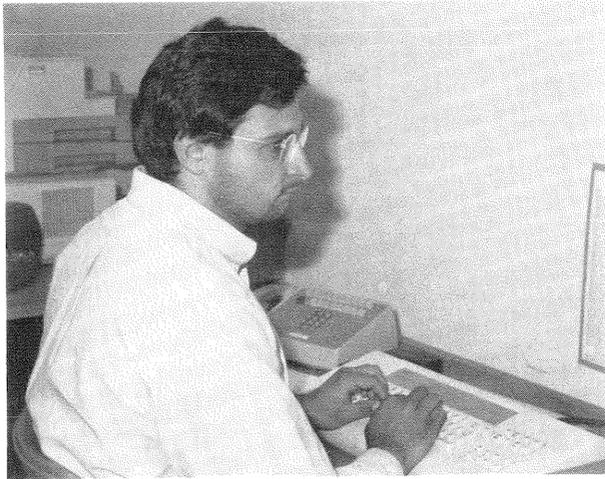
Three Board decisions issued during FY 1983 reaffirmed the Board concept of Special Counsel autonomy.

- In *Special Counsel v. Department of Housing and Urban Development (Lesht)*, No. HQ12088310002 (MSPB May 17, 1983), during a stay proceeding, the Special Counsel moved the Board to issue an "Order in the Nature of an Injunction" to restrain attorneys from the General Counsel's office of the

agency from appearing at Special Counsel investigative interviews holding themselves out as representing both the agency and the employee being interviewed. Citing *Stacy*, a Board majority held that "the Special Counsel alone is responsible for investigating allegations of prohibited personnel practices." The Board reasoned that there was no "statutory grant of jurisdiction to the Board over Special Counsel investigations," and that "the statutory scheme and legislative history of the Civil Service Reform Act of 1978 reveals no indication that Congress intended the Board to have the authority to order injunctive relief in Special Counsel investigations." The dissenting Board Member concluded that the Board had the authority to grant the relief requested under 5 U.S.C. § 1208.



- In *Special Counsel v. Department of Defense (DeCarlo)*, No. HQ12088210049 (MSPB March 22, 1983), the Special Counsel obtained a stay of an employee's reassignment. Thereafter, the Special Counsel and the agency reached a settlement agreement, which the Special Counsel moved the Board to approve. The Board held that it lacked authority under 5 U.S.C. § 1208 to approve the agreement. The dissenting Member disagreed with the Board's decision, citing *Lesht, supra*.
- In *Department of Energy v. Special Counsel (Gorsey)*, No. HQ120008310016 (MSPB July 8, 1983), during a Special Counsel investigation and before any action had been filed before the Board, the agency moved the Board to order the Special Counsel to produce certain information and documents and to postpone a Special Counsel investigative interview pursuant to subpoena. Citing *Stacy*, the Board unanimously held that it lacked the authority to grant the relief requested.



New Legislation Sought by the Special Counsel

Legislative Recommendation

In July 1983, Senator Ted F. Stevens (Alaska) introduced legislation (S. 1662) on the Senate floor on behalf of the Office of the Special Counsel.

The proposed legislation seeks to define the relationship of the OSC to the MSPB and to clarify and expand the authorities of the Special Counsel. As matters stand, the functional independence of the OSC is fostered by the excellent and sensitively balanced relationship maintained between the Board Chairman and the Special Counsel, which avoids confrontation and ensures administrative cooperation. However, there is a need for a carefully drawn legislative boundary between the Board and the OSC. The systemic relationship of MSPB and OSC should properly depend on the law and not on the disposition of the incumbent Chairman and Special Counsel of the MSPB.

The proposed legislation has four parts:

- The bill authorizes the Special Counsel to propose a separate budget to the President to be transmitted to Congress, to insure that

in budgetary matters the Special Counsel is totally independent from the Merit Systems Protection Board.

- The bill empowers the Special Counsel to litigate before the courts on its own behalf on any matter in which the Special Counsel has been previously involved. Current law is ambiguous as to the scope of OSC litigating authority. The bill proposes to empower the Special Counsel to litigate separately from the Merit Systems Protection Board and to appeal any decision of the Merit System Board in which the Special Counsel has been involved.
- The bill clarifies the Special Counsel's authority to administer oaths, examine witnesses, take depositions, and receive evidence, without prior staff designation by the Board.
- The bill empowers the Special Counsel to submit directly to Congress any legislative recommendations the Special Counsel deems necessary to further enhance the ability of the office to perform its duties under the law.

The Special Counsel has requested and supports the legislative requests.



Conclusion

The primary objective of OSC has been, and will continue to be, the investigation and prosecution of violations of civil service laws, rules or regulations that contravene the merit system. Although staff reorganization and realignment of resources designed to improve the professional investigation, prosecution and processing of matters dominated OSC activities during FY 1983, more litigation was undertaken during the year than in any prior year.

Action upon OSC legislative proposals and the results of OSC litigation now pending before the MSPB will significantly influence the management of the office in the future. In the past year substantial new legal activity was initiated; this trend will continue during the coming fiscal year.