

1981  
ANNUAL REPORT  
OFFICE OF THE SPECIAL COUNSEL

Office of the Special Counsel  
U.S. Merit Systems Protection Board  
Submitted as required by 5 U.S.C. § 1206(m)



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## INTRODUCTION

As required by 5 U.S.C. § 1206(m), this annual report is submitted to the Congress relating the activities of the Office of the Special Counsel during calendar year 1981. The office has two basic functions: (1) to receive and investigate alleged violations of civil service law, rule or regulation, primarily the prohibited personnel practices defined by the Civil Service Reform Act of 1978 (5 U.S.C. § 2302(b)) and to initiate corrective and disciplinary actions when warranted; and (2) to provide federal employees a safe channel for disclosing information evidencing government wrongdoing without fear of retaliation and with assurance that their identities are not revealed without their consent. These disclosures are commonly referred to as "whistleblowing."

In the office's brief existence, it was headed for one year by a Special Counsel on a recess appointment and thereafter for almost a year and a half by a career civil servant in an acting capacity. On June 5, 1981, Alex Kozinski, an attorney in the Office of the Counsel to the President and formerly with the Washington, D.C., law firm of Covington and Burling, was appointed Special Counsel, the first to be confirmed by the United States Senate. The position of Deputy Special Counsel was also filled in June 1981 with the appointment of H. Robert Mayer, an attorney from the law firm of Baker and McKenzie. For the first time, therefore, the organization was provided with permanent appointments to its two top positions.

During 1981, the office was hampered by severe budgetary problems. Along with struggling with substantial fiscal constraints, the office pursued cases before the Merit Systems Protection Board, informally settled

numerous complaints, reduced a sizeable backlog of longstanding cases, improved internal performance, established a performance measurement system and moved from overcrowded, substandard office space to new and better quarters.

During the year, more cases were closed than received. The number of pending cases dropped dramatically from a high of over 1,200 cases in May to about 700 in December. In July, more than 350 cases over nine months old were on the docket. By the end of the year that number had been reduced to slightly over 100.

In June 1981, the new Special Counsel initiated training programs for investigators and attorneys. An automated time reporting and measurement system was instituted for investigators, attorneys and supervisors. This allows for the systematic review of cases worked on during a given time period and provides management with an important performance measurement tool.

Because central office employees had been subjected to cramped office space since the office was first established, the Office of the Special Counsel moved to new facilities at 1120 Vermont Avenue, N.W., in October. The new building provides the office with adequate space and a more dignified and professional setting.

On June 30, 1981, the United States District Court for the District of Columbia dismissed the lawsuit filed by the former Chairwoman of the Merit Systems Protection Board against the Office of the Special Counsel. This ended the dispute concerning the separate administrative authorities of the Office of the Special Counsel and the Board.

## WHISTLEBLOWING

The Special Counsel is authorized by 5 U.S.C. § 1206(b)(2) to receive and transmit to the appropriate agency head information from employees, former employees or applicants evidencing a violation of law, rule or regulation, mismanagement, a gross waste of funds, an abuse of authority or a substantial and specific danger to public health or safety.

Reports requested on whistleblower allegations may take two forms. If the Special Counsel determines there is a substantial likelihood that the information discloses a violation of law, rule or regulation, mismanagement, a gross waste of funds, an abuse of authority or a substantial and specific danger to public health or safety, he may require the agency head to investigate the allegations and submit a written report in compliance with the requirements of 5 U.S.C. § 1206(b)(3) and (4). These sections require that a written report be reviewed and signed by the agency head within 60 days after the information is transmitted and that it contain: (1) a summary of the information received; (2) a description of the investigation the agency conducted; (3) a summary of the evidence found as a result of the agency's investigation; (4) a listing of any violation or apparent violation of law, rule or regulation; and (5) a description of any corrective action taken or planned as a result of the agency's investigation. These reports are submitted to the Congress and the President and a copy is sent to the complainant. The reports are reviewed by the Special Counsel to determine whether the findings appear reasonable and whether the reports comply with the statutory requirements. The reports are placed in a public file maintained by the Office of the Special Counsel.

When the Special Counsel determines that information received from the complainant does not warrant the type of investigation and report discussed above, the allegation is submitted to the agency head for a report pursuant to 5 U.S.C. § 1206(b)(7), which requires the agency to inform the Special Counsel, within a reasonable time, of what action has been or is to be taken with respect to the allegation.

The statute provides that the identity of the whistleblower may not be revealed without his consent, unless the Special Counsel determines that the disclosure of identity is necessary to carry out his functions. If the complainant or whistleblower does not consent to disclosure of his name to the agency, all identifying information is deleted from the material transmitted to the agency for investigation or report.

During 1981, the Office of Legal Counsel, Department of Justice, issued two opinions concerning the Special Counsel's authority to require agency reports on whistleblower allegations. In response to a request from the Nuclear Regulatory Commission, OLC advised on March 13, 1981, that the Special Counsel was without authority to require agency reports on allegations from private citizens. In response to a Special Counsel inquiry, OLC advised on July 1, 1981, that the Special Counsel may not require agency reports in response to anonymous allegations. The Office of the Special Counsel published proposed regulations on December 11, 1981 (46 Fed. Reg. 60,591), clarifying the requirements for whistleblower allegations. The proposed regulations also make clear that agency heads are required to personally review and sign reports submitted pursuant to 5 U.S.C. § 1206(b)(4).

During 1981, 59 reports from agencies were received. Of these, 12 were reports of investigation under 5 U.S.C. § 1206(b)(3). Seven of the (b)(3) investigations resulted in changes in agency policies, operating procedures or regulations. Five investigations (including two of the seven) led to disciplinary action being taken against offending employees. Only two of the allegations were not substantiated upon investigation.

In one case, a former employee reported the falsification of records, reports and travel vouchers. The Secretary of the Department ordered a nationwide review of the program. His report to the Special Counsel indicated that the allegations were largely substantiated. As a result of this investigation, disciplinary action was proposed against four employees and a nationwide system to survey work reports and records was begun.

Although there is no requirement for investigation of allegations transmitted under 5 U.S.C. § 1206(b)(2) for a (b)(7) report, agencies are taking these referrals no less seriously. Of the 47 reports received pursuant to 5 U.S.C. § 1206(b)(7), nine reported disciplinary action taken against offending employees and 17 resulted in changes in policy, procedure or regulations. Twenty-one of the allegations were unsubstantiated.

One (b)(7) report responded to the allegations of a former employee concerning violations of law, mismanagement, a gross waste of funds and abuse of authority by a district director. Investigation established that the official abused time and attendance procedures and submitted false and improper claims for travel expense reimbursement. He falsified a wide

array of official documents, abused the FTS system and used excessive employee time to make travel arrangements. Further, he attempted to obstruct the investigation by trying to influence witnesses' statements and provided a false statement under oath to the investigator. He was removed from his position with the agency.

## Whistleblower Reports Received In 1981 By Agency

	Submitted pursuant to § 1206(b)(3)	Submitted pursuant to § 1206(b)(7)
Agriculture		2
Community Service Administration		1
Consumer Product Safety Commission		1
Defense		1
Air Force		4
Army		4
Navy	2	6
Equal Employment Opportunity Commission		2
Energy	1	2
Environmental Protection Agency		1
Federal Emergency Management Administration		1
General Services Administration	2	1
Health and Human Services	3	
Housing and Urban Development		1
Interior		2
Justice		1
Labor	2	5
National Aeronautics and Space Administration		1
Railroad Retirement Board		1

	§ 1206(b)(3)	§ 1206(b)(7)
State		1
Transportation	1	4
Treasury	1	1
Veterans Administration		4
	—	—
	12	47

The office began the year with 107 pending whistleblower cases and received 201 new allegations. Fifty-four cases were referred to agencies, 49 under section 1206(b)(7) and five under section 1206(b)(3). At the end of December, there were 60 cases pending.

## Actions on Whistleblower Allegations During 1981

On hand (1/1/81) -----	107
Received -----	201
Referred to agencies -----	54
§ 1206(b)(7) -----	49
§ 1206(b)(3) -----	5
Reports received -----	59
§ 1206(b)(7) -----	47
§ 1206(b)(3) -----	12
Closed -----	248
§ 1206(b)(2) reports -----	58
§ 1206(b)(3) reports -----	11
Other referrals to agencies -----	22
Miscellaneous, e.g., complainant did not respond to request for information; information received from nonfederal or anonymous com- plainant -----	157
Pending (12/31/81) -----	60

### CORRECTIVE ACTION

The Special Counsel is authorized to recommend corrective action to agencies when, on the basis of an investigation, he determines that there are reasonable grounds to believe a prohibited personnel practice has occurred, exists or is to be taken. Copies of the findings of the investigation and recommendations are submitted to the agency concerned, the Merit Systems Protection Board and the Office of Personnel Management, and may be submitted to the President. If the agency does not take the corrective action recommended by the Special Counsel after a reasonable

period of time, the Special Counsel may request the Board to order such corrective action as he considers appropriate, after opportunity for comment by the agency and OPM. 5 U.S.C. § 1206(c).

During 1981, the Acting Special Counsel made formal recommendations for corrective actions to agency heads in four cases. In March, the office made several recommendations to the Administrator of Veterans Affairs, relating to certain promotions to career SES positions based on a finding of age discrimination at the Veterans Administration. The VA declined to adopt the recommendations. Based on a review of the file and the response of the VA, the Special Counsel, in October, determined not to proceed further in the case.

In April, the office recommended that the VA offer a former probationary employee reinstatement with back pay, based on a finding that his removal was in reprisal for protected disclosures of information to the agency inspector general. In June, the VA notified the Special Counsel that the agency concurred with the finding and would take the corrective action.

In August, the office recommended that the Federal Election Commission give priority consideration for promotion to a GS-14 attorney, based on a finding of racial discrimination. The matter was settled by agreement in October and the attorney was subsequently promoted to grade GS-15.

The office also recommended priority consideration for promotion of an employee of the Social Security Administration, Department of Health and Human Services, in May. After review of the agency's response, the office concluded that the facts did not support a finding of a prohibited personnel practice.

During 1980, the Office of the Special Counsel filed five complaints for corrective action with the Merit Systems Protection Board. These were pending at the close of 1980. Following is a summary of action that occurred in each of them during 1981:

*Coffield.* The Special Counsel requested the Board to order the Department of Labor to cancel the removal of a coal mine safety inspector in West Virginia, alleging that the removal was in reprisal for Coffield's having reported safety violations and for exercising appeal rights. The Board stayed Coffield's removal at the Special Counsel's request and the Special Counsel intervened in Coffield's adverse action appeal. The Board's administrative law judge who heard the appeal ordered the removal cancelled, but found no reprisal and directed that Coffield be suspended for 30 days. A petition for reconsideration of the ALJ's decision was filed.

A year later, in December 1981, the Board affirmed the ALJ's decision. The Special Counsel is planning to withdraw the request for order of corrective action that is pending before the Board.

*Rohrmann.* The Special Counsel requested the Board to order cancellation of a proposed geographic reassignment of Rohrmann, an employee in the State Department's New York Passport Office. It was alleged that the reassignment was directed in reprisal for Rohrmann's disclosing information concerning the failure of the Passport Office to seek law enforcement action in cases involving passport fraud. The reassignment was stayed at the request of the Special Counsel.

In September 1981, the Board's Administrative Law Judge issued a decision recommending that the Special Counsel's petition for corrective

action be denied, and in January 1982, the Board adopted the ALJ's findings of fact, but modified his conclusions of law,<sup>1</sup> and denied the Special Counsel's request for order of corrective action.

*SBA District Directors.* During 1980, the Special Counsel requested the Board to order the Small Business Administration to cancel the rotation of a number of district directors, alleging that they had been targeted for reassignment based upon their political affiliation (Republican).

The Administrator of SBA reviewed the rotation policy and decided to afford most of the rotated district directors an opportunity for reassignment. In light of this action, in January 1982, the Special Counsel and SBA filed a joint motion to dismiss the complaint for corrective action.

*Munoz.* The Special Counsel filed a corrective action complaint against the Air Force alleging that a proposed removal of an employee of Kelly Air Force Base was in reprisal for exercising employee appeal rights. The Special Counsel asked that the proposed removal be cancelled.

A settlement was negotiated in 1981 in which the agency agreed to voluntarily take the corrective action. The Special Counsel's complaint was formally withdrawn in July 1981.

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<sup>1</sup> The Board applied the method for allocating burdens of proof enunciated by the Supreme Court in *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977), stating that the Special Counsel first has the burden of establishing by a preponderance of the evidence that the protected conduct (e.g. whistleblowing) was a "significant factor" in the agency action. If the Special Counsel establishes this, the burden is shifted to the agency to show by a preponderance of the evidence that the action would have been taken regardless of the protected conduct. If the agency meets this burden, the Special Counsel has the burden of proving that the reason stated by the agency was a pretext for a prohibited personnel practice.

*Mortensen.* The Special Counsel filed a corrective action complaint against the Department of the Army requesting the Board to cancel the proposed removal of an employee at Dugway Proving Ground, Utah, alleging that the removal was in reprisal for her filing discrimination complaints.

The case was still pending at the end of 1981. A hearing was conducted before the Board's administrative law judge in March 1982.

Although the office filed no new complaints requesting the Board to order agencies to take corrective action during 1981, agencies frequently corrected situations giving rise to employee complaints during the course of a Special Counsel inquiry. When a complaint is resolved informally, there is no need for the Special Counsel to submit formal recommendations to the agency head or to file complaints for corrective action with the Board.

Agency officials are normally agreeable to correcting a problem once it is brought to their attention by the Special Counsel, even where an investigation may not lead to a finding of a prohibited personnel practice. Where it appears that the facts will show that an agency official's action resulted from a prohibited personnel practice, the agency usually will agree to correct the problem to avoid having it brought to the attention of the agency head or being made public by a Special Counsel complaint filed with the Board. Thus, it can be expected that only the borderline cases or cases involving new questions of law will need to be prosecuted before the Board under 5 U.S.C. § 1206(c).

Following is a summary of informal agency resolutions of employee problems in 65 cases in which we have information concerning the resolu-

tion. In three cases (two involving reprisal for whistleblowing and one involving reprisal for exercising appeal rights), an OSC investigation concluded that a prohibited personnel practice had occurred. Adverse actions against the three employees concerned were cancelled by the agency. In the remaining 62 cases, remedial action was taken to resolve the problems after the OSC inquiry was initiated, but where no determination of a prohibited personnel practice had yet been made. Those cases were resolved as follows:

- The agencies either cancelled or modified the personnel actions or corrected the procedures which gave rise to allegations of reprisal in 16 cases.
- The agencies took more expeditious action to resolve allegations of discrimination, in some cases reaching satisfactory settlements, under the established discrimination complaint procedures in eight cases.
- The agencies corrected their procedures, with the employees involved directly benefiting, in eight cases in which employees were adversely affected by harmful procedural errors.
- Procedural errors or shortcomings which gave the appearance of obstructing the right of employees to compete for promotion or other employment opportunities were corrected in six cases and the employees adversely affected were given favorable consideration.

- More expeditious agency responses to employee requests for information under the Freedom of Information Act or Privacy Act resulted from OSC inquiries in six cases.
- The agencies either cancelled the questionable actions or changed the procedures to assure more fair and equitable treatment for all employees in five cases where the procedures being used gave the appearance of giving unauthorized preferential advantage to certain employees.
- In two cases, local government employees gave up their covered employment to avoid violation of the Hatch Act in pursuing their off-the-job political activities.

In a third Hatch Act case, the agency involved stopped a supervisor from giving unauthorized and incorrect advice concerning prohibited political activities to his subordinate federal employees.

- In a case involving possible discrimination on the basis of nonjob related conduct, the Special Counsel's intervention before the Board in the adverse action appeal hearing led to a settlement of the matter between the two employees and agency management.
- The remaining eight cases involved disputes between employees and agency management concerning their

employment status and related matters which were satisfactorily resolved between the parties involved as a result of OSC inquiries.

The office also was successful in persuading several agency offices to withdraw or clarify internal memoranda to employees that might have been construed to limit their right to constitutionally protected free speech and their right to petition the Congress. These efforts of the office were preventive in nature.

### DISCIPLINARY ACTION COMPLAINTS

The Special Counsel is authorized to file complaints with the Board for disciplinary action against federal officials (5 U.S.C. § 1206(g)). The statute entitles employees against whom disciplinary complaints have been filed to answer the complaint, to be represented, to a hearing before the Board or an administrative law judge to a transcript of the hearing, to a written decision and to reasons therefor. The Board is authorized to impose disciplinary action such as removal, reduction in grade, debarment from federal employment for up to five years, suspension, reprimand or a civil penalty of up to \$1,000. 5 U.S.C. § 1207.

In addition, the office is responsible for enforcement of the Hatch Act and is authorized to file disciplinary complaints against certain state and local employees, as well as federal employees, for Hatch Act violations.

In July 1980, the Special Counsel filed a complaint against the Associate Deputy Administrator for Support Services, Small Business Administration, after an investigation of allegations that SBA district directors had been targeted for reassignment based on their political affiliation.

In June 1981, the Board dismissed the Special Counsel's charges. The Special Counsel's petition for reconsideration was also dismissed by the Board.

Complaints for disciplinary action that had been filed against three officials of the Department of the Navy in Norfolk, Virginia, alleging that they had proposed the removal of an employee in reprisal for whistleblowing, were dismissed by an administrative law judge in 1981. The Special Counsel has filed exceptions with the Board.

The Office of the Special Counsel filed six new complaints for disciplinary action in 1981, five of which alleged Hatch Act violations. The other case involved a Department of Agriculture employee who was charged with nepotism (hiring a relative). The accused employee resigned from the federal service and the Special Counsel withdrew the complaint.

In two of the Hatch Act cases, an employee of the Department of the Army and an employee of the U.S. Postal Service were charged with soliciting votes during a partisan political campaign. In one case, the administrative law judge recommended that the employee be suspended for 60 days. In the other case, the parties filed a joint motion for settlement, but it was rejected by the administrative law judge in early 1982.

In the third Hatch Act complaint, a Postal Service employee was charged with holding a partisan political office. A joint motion for settlement was approved by an administrative law judge in 1982 and it is awaiting decision by the Board.

The fourth case involved a Department of the Army employee who ran for, but lost, an office in a partisan political election. The ad-

ministrative law judge recommended the employee's removal. The case is awaiting a Board decision.

The fifth case also involved an Army employee, charged with management of a political party in violation of the Hatch Act. A joint motion for settlement was approved by an administrative law judge but was subsequently rejected by the Board. The case is still pending.

### STAYS OF PERSONNEL ACTIONS

The Special Counsel is authorized to request the Merit Systems Protection Board, or any member of the Board, to order a stay of any personnel action if the Special Counsel determines that there are reasonable grounds to believe that the personnel action was taken or is to be taken as a result of a prohibited personnel practice. 5 U.S.C. § 1208. Under paragraph (a) of section 1208, the Special Counsel may request a 15-day stay and the stay is automatically granted on the fourth calendar day (excluding Saturdays, Sundays and legal holidays) unless the Board or Board member determines that the stay "would not be appropriate." 5 U.S.C. § 1208(a)(2). The Special Counsel may request an extension of the stay for up to 30 additional days under paragraph (b) of section 1208 and for a further period of time under paragraph (c). Under paragraph (c), the Board may extend the stay for any further period if it concurs with the Special Counsel's determination that there are reasonable grounds to believe that a prohibited personnel practice occurred or is to occur, after opportunity is provided for oral or written comment by the Special Counsel and the agency involved.

The Board granted an extension of a stay under paragraph (c) in one case, in January 1981. During the year, the Special Counsel filed

stay requests in five new cases. An initial 15-day stay was granted by the Board in one case, became effective by operation of law in two cases and was denied in one case. The other stay request was pending at the end of the year and was granted in January 1982. Requests for 30-day extensions under paragraph (b) were filed in two cases. One was granted and the other denied by the Board.

The personnel action involved in each of the five new stay requests was removal. Two of the cases alleged discrimination based on nonjob related conduct, one alleged discrimination based on sex and handicapping condition, one alleged discrimination based on national origin and one alleged reprisal for whistleblowing.

Requests from federal employees for stays of personnel actions are immediately reviewed by Special Counsel attorneys and a determination is made by the following workday on whether a petition for a stay should be filed with the Board. Except in unusual circumstances, the office consults with the agency prior to filing a petition for a stay of personnel action. In some instances, agencies voluntarily defer an adverse personnel action against an employee pending a Special Counsel investigation, thus obviating a formal request to the Board. The length of an informal stay is agreed upon by the Special Counsel and the agency involved. During 1981, plans to file stay requests were dropped in three cases when the agencies agreed to informally stay the actions.

## INTERVENTIONS

The Special Counsel may, as a matter of right, intervene or otherwise participate in any proceeding before the Merit Systems Protection

Board. 5 U.S.C. § 1206(i). During 1981, the Special Counsel intervened in ten employee adverse action appeals to the Board. In most of the cases, the employee had been removed by his or her agency. One case involved an allegation of constructive suspension by the agency in placing the employee on involuntary leave. In each of the cases, the employee's defense was based at least in part on one or more prohibited personnel practices.

Three of the cases, involving employees of the Departments of Health and Human Services, the Treasury and the Interior, were settled between the parties after the Special Counsel intervened. In three of the appeals, the Board presiding officials ordered reinstatement of employees of the Veterans Administration and the Departments of Health and Human Services and the Air Force. In one of these cases, the presiding official found the penalty of removal too severe and directed a 30-day suspension instead. The agency's petition for review by the Board is pending. In two of the appeals, the Special Counsel withdrew from the cases after an OSC investigation. In the remaining two appeals, the agency action was sustained.

#### NUMBER AND TYPES OF CASES

Tremendous achievement best describes the efforts of the Office of the Special Counsel in reducing the pending caseload during 1981. Although the number of cases received during the year increased, more than twice as many cases were closed than during the previous year.

There were 1,317 cases pending as the year began, 833 in the central office and 484 in the field.<sup>2</sup> In addition, 2,404 new cases were

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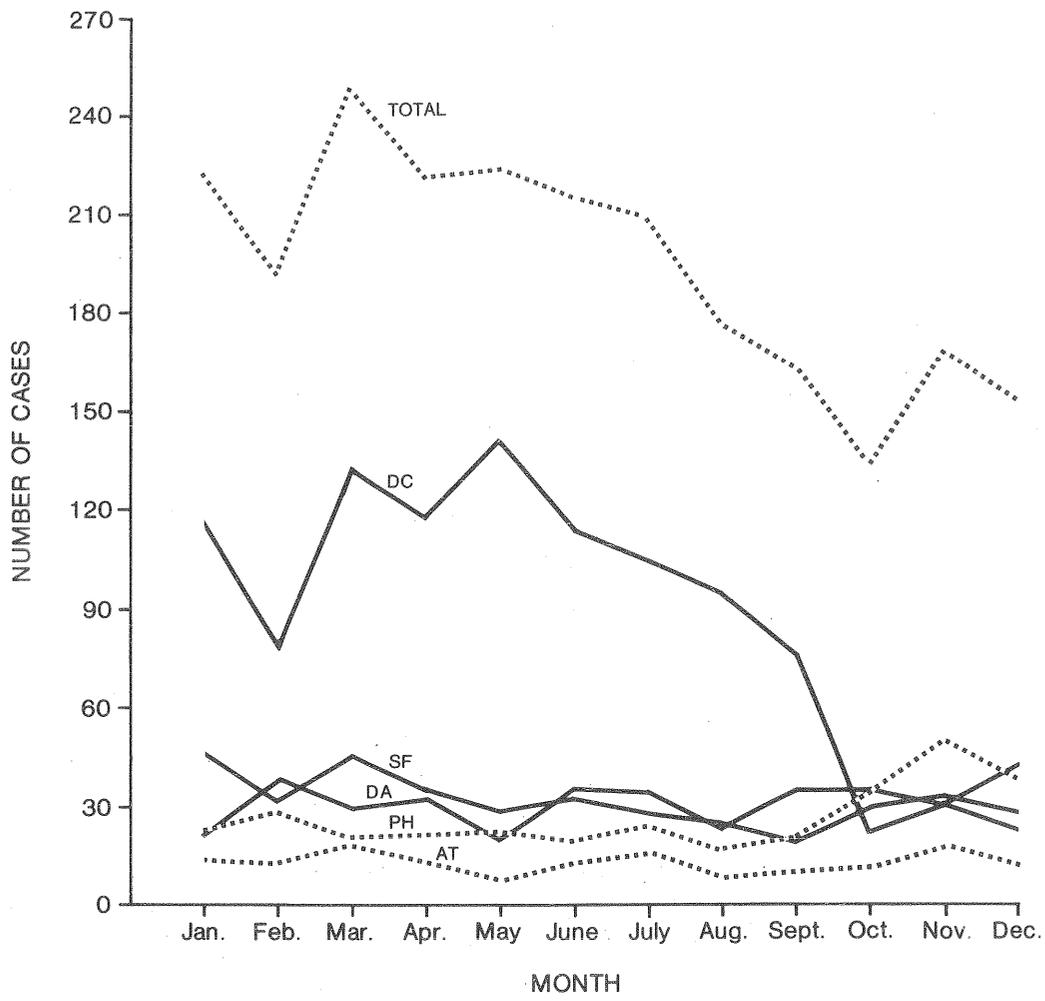
<sup>2</sup> This includes 57 pending cases not counted in last year's annual report and 40 cases handled in Washington, D.C., rather than in the field.

received during the year, making a total workload of 3,721 cases. Action was completed on 3,009 cases by the end of the year, with 712 cases pending. The following chart, based on information from the case reporting system, shows the number of cases received and closed by field offices:

Office	Cases at Beginning of Year	Cases Received During 1981	Cases Closed During 1981	Cases at End of 1981
Washington, D.C.	833	1,085	1,724	194
San Francisco	177	412	425	164
Dallas	163	375	388	150
Philadelphia	94	347	314	127
Atlanta	50	185	158	77
Total	1,317	2,404	3,009	712

*Cases received.* During the year, the office received 2,404 cases, an increase of almost 18 percent over the previous year. The following graph shows the number of cases received during each month in each office:

### Cases Received In 1981 By Office



Based on a sampling of approximately 1,000 cases, the types of allegations received, as characterized by the complainants, are shown below:

Type of Allegation Received	Percent of Sample
Discrimination	29.6
Reprisal for whistleblowing	13.0
Reprisal for exercising appeal rights	13.5
Other prohibited personnel practices	19.6
General allegation of violation of merit system principles	21.6
Other	2.7
	<hr/>
Total	100.0

*Cases closed.* During 1981, the Office of the Special Counsel was able to close more cases than it received. Action was completed on 3,009 cases during the year, an increase of 236 cases over the previous two years combined. The number of cases closed represents 125.2 percent of the number of cases received for the year.

The statute requires the Special Counsel to notify persons submitting allegations of the termination of an investigation and of the reasons for closing the case. 5 U.S.C. § 1206(a)(2). When a case is closed after an initial review or an inquiry or on-site investigation, the complainant is notified of the reasons for closing the case and, if possible, advised of other grievance or appeal channels. An investigation is terminated when it does not result in sufficient evidence to support a prima facie finding of a prohibited personnel practice or other violation of

civil service law. Following is a breakout of the types of cases closed based on a sampling of approximately 1,000 cases:

Type of Allegation	Percent of Sample
Discrimination	27.2
Reprisal for whistleblowing	13.0
Reprisal for exercising appeal rights	12.6
Other prohibited personnel practices	18.5
General allegation of violation of merit system principles	19.7
Hatch Act	1.2
Whistleblowing allegations not referred for reports <sup>3</sup>	5.7
Other	2.1
	<hr/>
Total	100.0

Of 3,050 cases<sup>4</sup> closed during 1981, on site investigations were conducted in 238, or slightly less than 8 percent. Slightly more than one

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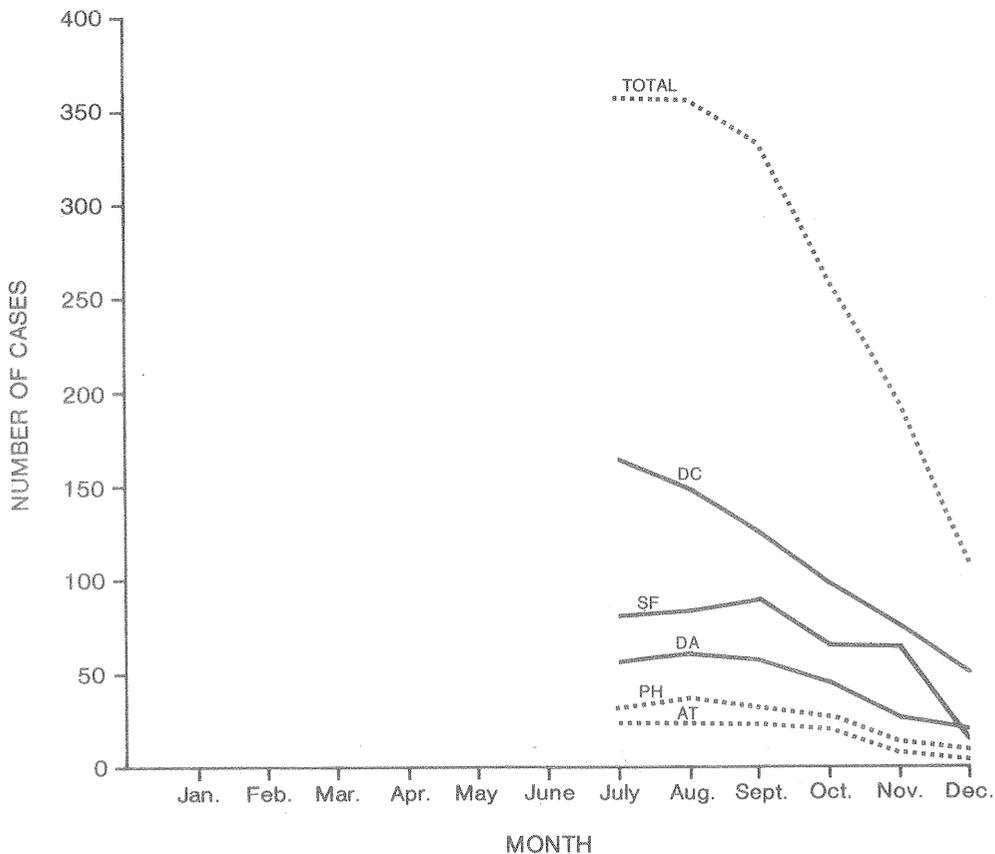
<sup>3</sup> Although a complaint of abuse of authority or mismanagement may be considered whistleblowing under 5 U.S.C. § 1206(b), most of these cases relate to the individual employment situation of the complainant (e.g., an allegation that the assignment of duties or a disciplinary action is an abuse of authority.) Most of these cases, therefore, are treated as an alleged prohibited personnel practice rather than whistleblowing. To a lesser extent, the same is true of alleged violations of law and waste of funds.

<sup>4</sup> Does not include Hatch Act cases or whistleblower allegations referred to agencies for investigation or report.

third of the cases were closed after an inquiry other than an on-site investigation. Fifty-seven percent of the cases (1,742) were closed after initial review of the material submitted by the complainants. Due to the small staff and budget of the office, cases were closed without inquiry or investigation when complainants could not provide sufficient facts to support their allegations.

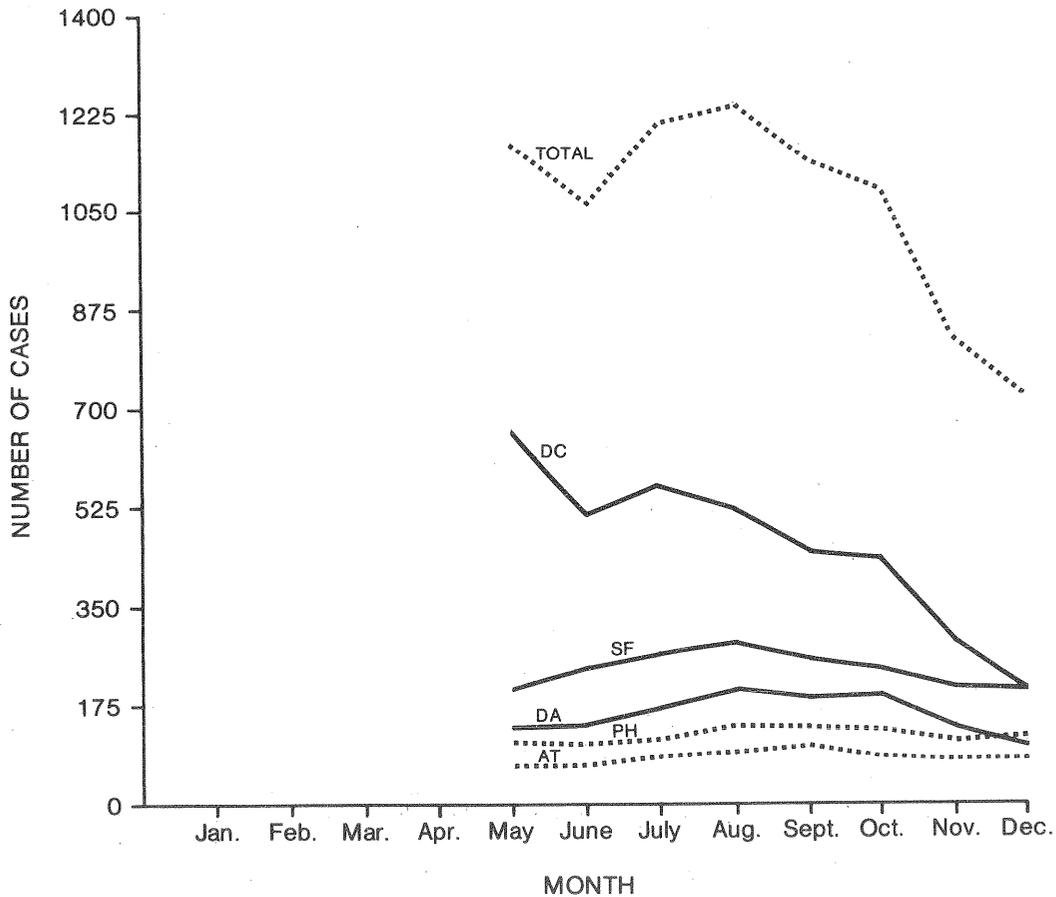
A management initiative was launched in July to complete action on all cases not in prosecution which were more than nine months old. These cases were in various stages of investigation or inquiry. At the end of July, there were 358 cases on the docket which had been pending for more than nine months. By mid-December, that total had dropped to 105. These figures include those cases in prosecution before the Merit Systems Protection Board.

**Cases In Process More Than Nine Months By Office**



A significant downward trend also occurred in the pending caseload during the latter half of the year. On the first of May, there was a pending docket of 1,172 cases. By the end of the year this had been reduced to 700.

**Pending Caseload By Office**



*Hatch Act cases.* The Office of the Special Counsel is also responsible for enforcing the Hatch Act. 5 U.S.C. §§ 1501-08, 7324-27. Federal employees are prohibited from engaging in political activity such as management of a partisan political campaign, campaigning for a partisan candidate, or being a candidate in a partisan election. Certain state and local employees are prohibited from being a candidate in a partisan election or engaging in political coercion of employees.

In 1981, the office received 69 new cases alleging Hatch Act violations, 37 of which involved state or local employees. During the same period, 99 Hatch Act cases were closed, 83 involving federal employees and 16 involving state or local employees. The office also responded to 647 written requests for advisory opinions on the interpretation of the Hatch Act.

*Referrals to Department of Justice.* The office referred two cases involving potential criminal violations to the Department of Justice in 1981. One case involved an allegation that a Department of Energy employee received compensation from a private corporation. The Department declined prosecution in April 1981.

The other case involved an allegation by employees of the Internal Revenue Service that their agency had illegally disclosed grand jury information in violation of the Federal Rules of Criminal Procedure. The allegation was sent to the Department of Justice on October 29, 1981.

In a case that had been referred to the Department in 1980, an employee of the Department of Agriculture pleaded guilty to one misdemeanor violation of 18 U.S.C. § 601 (threatening to terminate federal benefits to generate political activity) and resigned from his position in June 1981.

## ADMINISTRATIVE MATTERS

New leadership, continued budget cuts, strengthened data processing capabilities and a move to new office space dominated the administrative aspects of the Office of the Special Counsel in 1981. At a time of many activities, however, the office faced the requirement to do more with less.

Although adequate staffing remains a problem, the two top posts in the Office of the Special Counsel were filled for the first time during the year. On June 5, Alex Kozinski was sworn in as the first Special Counsel appointed by the President and confirmed by the Senate. Shortly thereafter, H. Robert Mayer was appointed to fill the previously vacant position of Deputy Special Counsel.

The new Special Counsel immediately hired outside analysts to conduct management surveys in the areas of investigations, investigative techniques and files and data processing resources. These studies confirmed some of the findings set forth in 1980 and previous General Accounting Office reports concerning the need for improved program management within the organization. Stronger management support for data processing systems already in place was also urged.

In part based on recommendations from these studies, the following changes were implemented:

- an intense training program for investigators and attorneys, including a writing seminar given by the U.S. Department of Agriculture Graduate School;
- quality control standards for all written materials;

- reduced investigation time for prohibited personnel practice cases;
- ambitious and detailed performance standards for all staff and official performance appraisals initiated for the first time;
- a computerized time accounting system for monitoring time spent by lawyers and investigators on case work; and
- planned reorganization of the office to clarify supervisory functions.

A major facet of the reorganization was an increase in the number of Senior Executive Service (SES) positions. The Special Counsel requested an increase from five to nine positions, eight of which were approved by the Office of Personnel Management.

However, significant changes in organizational structure have been precluded by the office's budget. Of the eight authorized SES positions, only three were filled by the end of the year. Plans to open a branch office in Denver were cancelled, the proposal for a Chicago field office was abandoned and by the end of the year it was decided to close the Boston branch office. Although one reduction in force (RIF) notice was issued, the employee was placed in another federal agency before its effective date.

In January 1981, the office was getting back on its feet following the severe budget rescission of 1980, which reduced the office's budget to \$2.5 million. Due to a continuing resolution, the \$2.5 million rate con-

tinued to prevent hiring, travel, overtime, promotions and the purchase of many supplies until December 15, 1980.

A second continuing resolution in fiscal 1981 provided \$2.369 million for the period December 16, 1980, through June 5, 1981. This amount did not allow the office to overcome its previous budgetary restrictions or hiring freeze. President Reagan placed a freeze on hiring and budget uncertainties persisted from late January until June 1981. The office continued a policy of no hiring and minimal expenditures until the appointment of the new Special Counsel and receipt of budget and personnel ceilings from OMB in June.

During the final period of the fiscal year, a third continuing resolution firmly established \$4.390 million as the funding rate for the year, the highest appropriation ever received. This enabled the office to restock depleted supplies and provide training for staff.

The office again faced budgetary constraints in October. Under the first continuing resolution of fiscal 1982, a funding rate was initially set not to exceed \$4.373 million. A number of uncontrollable fixed expenses representing large increases over fiscal 1981 had to be charged against that amount:

- a 4.8 percent salary increase for General Schedule employees and merit pay increases beginning October 1 and a raise for executive personnel beginning January 1, 1982. In the past, 85 percent of the office's annual budget has gone toward salaries and benefits.

- an increase of \$131,000 annually for rental of office space because of the central office relocation;
- an increase of about \$25,000 annually assessed by the Office of Personnel Management for payroll and accounting; and
- increased equipment maintenance costs.

Beginning in October, measures were taken to live within this budget. The office requested a supplemental appropriation for the uncontrollable increases. OMB supported supplemental appropriations for one half of the salary increase and 80 percent of the rent and equipment maintenance increases.

However, in December 1981, Congress authorized a continuing resolution of \$3.694 million, a 16 percent reduction from the fiscal 1981 level. Restrictions were once again internally imposed on all expenditures, including overtime and travel for on-site investigations. To reduce rental expense, field managers were asked to cut back on office space wherever possible. Public outreach efforts were curtailed. Approval of all expenses, including the purchase of supplies, was centralized in Washington. The office also discontinued health services for employees and maintenance contracts on some essential equipment.

Steady progress was made in the development of data processing systems throughout the year, further enhancing office productivity, management and performance measurement. By the end of January 1981, all field offices were connected on-line and trained in the use of the Case Report-

ing System. All OSC cases are now maintained on the system with each field office and the central office able to directly access the data at any time. Productivity and caseload reports by office and other management reports are generated regularly from the system.

A time accounting data base was also developed to track the number of hours devoted to each case by investigators and attorneys. This system is used for performance measurement and provides better control of time expenditure on cases.

As the year ended, the office was also exploring the possibility of putting the Merit Systems Protection Board's case tracking system on its computer to more fully utilize the computer's capabilities and to provide the Board with better service at reduced cost.

The authorized personnel ceiling of 120 full-time permanent positions for fiscal year 1981 was never reached. For fiscal year 1982, the ceiling is 111 full-time permanent positions or 113 full-time equivalent positions, neither of which can be reached under the current funding level.

#### RECOMMENDATIONS FOR LEGISLATION OR OTHER ACTION BY THE CONGRESS

The annual reports of the Office of the Special Counsel for the past two years made several recommendations for legislation or other action by the Congress. The position of the Special Counsel on some of these proposals is as follows:

1. *Litigation authority.* There is no express statutory authority for the Special Counsel to appeal adverse decisions by the Merit Systems Protection Board in cases in which the Special Counsel is a party. These

decisions are therefore not subject to judicial review unless an affected employee, former employee or applicant files an appeal in the United States Court of Appeals. One such decision in a Special Counsel complaint for an order for corrective action against the Department of Justice, *Robert J. Frazier, Jr.*, 1 MSPB 159 (1979), was recently affirmed by the U.S. Court of Appeals for the District of Columbia Circuit, *Frazier v. Merit Systems Protection Board*, No. 80-1067, slip op. (D.C. Cir. Mar. 1982). A request by the Office of the Special Counsel to participate in the case as *amicus curiae* was rejected by the Solicitor General of the United States.

The Special Counsel should be given express statutory authority to appeal, intervene or otherwise participate in appeals from the Board in cases initiated by the Special Counsel or in which the Special Counsel has intervened. See, e.g., for example, 5 U.S.C. § 7703(d), which authorizes the Director of the Office of Personnel Management to petition the U.S. Court of Appeals for the District of Columbia for judicial review of final orders or decisions of the Board.

2. *Additional forms of reprisal.* The Special Counsel may petition the Board to stay an action he reasonably believes to be in reprisal for protected disclosures of information or for filing an employee appeal only if a personnel action is involved. There are, however, reprisals that can be taken against an employee that do not involve a personnel action as defined by 5 U.S.C. § 2302(a). For example, an agency may direct the employee to take a psychiatric fitness-for-duty examination or may insti-

tute an unwarranted agency investigation of the employee. The Special Counsel cannot request the Board to stay these actions because they do not involve personnel actions as currently defined in the law. The stay provision, 5 U.S.C. § 1208, should be broadened so as to apply in at least these two areas.

3. *Disciplinary actions against former employees.* Section 1206(g) of title 5, United States Code, authorizes the Special Counsel to file a complaint for disciplinary action "against any employee" after an investigation or on the basis of a knowing or willful refusal or failure to comply with a Board order. The Special Counsel believes that a federal employee who leaves the government after the Special Counsel initiates an investigation concerning his activities should be subject to a possible \$1,000 fine and five year debarment from federal employment under 5 U.S.C. § 1207(b), if the investigation discloses misconduct on the part of the employee. In *Robert H. Smith, Jr.*, No. HQ120600034, the Board ruled

that it had jurisdiction over former employees only if the Special Counsel filed the complaint while the person was still employed by a federal agency. Congress should consider amending the statute to permit complaints to be filed against former employees. Otherwise, employees who are the subject of a Special Counsel investigation could escape punishment for violations of civil service laws by leaving the government and getting rehired later after the Special Counsel's investigation has been terminated.

4. *Extension of protection to other federal employees.* Certain federal employees are excluded from the prohibited personnel practice provisions of the statute, such as employees of the Library of Congress and employees of government corporations. The protections of the statute should be extended to those employees. The Comptroller General has recommended extending coverage to government corporations with employees in covered positions.

The Special Counsel makes the following additional recommendations for the consideration of the Congress:

5. Board authority to enter into settlement agreements for less than the minimum penalty in Hatch Act cases. The Hatch Act, which proscribes partisan political activity by civil service employees, 5 U.S.C. § 7325. In *Jim J. Dukes*, No HQ120600020 (MSPB Oct. 29, 1981), the Special Counsel, who had filed a Hatch Act complaint, agreed to settle the case provided the respondent would be suspended without pay for 15 days. The Board refused to enforce the settlement agreement, holding that it could impose so less than the statutory minimum penalty of 30 days in cases brought

before it. In dictum the Board "[did not] necessarily dispute" the Special Counsel's authority to settle a case on terms different from those provided by section 7324 *before* bringing the case to the Board. See also *Alfred W. Halx*, No. HQ120600028, at 12 (MSPB Nov. 16, 1981); *Johnny A. Tacker*, No. HQ120600027, at 2 (MSPB Nov. 16, 1981); *Rudolfo M. Trujillo*, No. HQ12068110014, at 2 (MSPB Nov. 16, 1981); 44 Fed. Reg. 40,702 (1981) (to be codified at 5 C.F.R. § 1201.126(f)) (proposed Aug. 11, 1981).

The Special Counsel recommends that Congress give the Merit Systems Protection Board the authority to accept a settlement agreement less than the minimum penalty, as long as the Board finds the settlement reasonable. This would allow the Special Counsel to exercise broader discretion in handling cases and greater leeway in responding to mitigating circumstances.

## Appendix A: FUNCTIONS OF THE SPECIAL COUNSEL

1. Receive and investigate allegations of prohibited personnel practices (§ 1206(a)(1)).\*
2. Notify complainants when investigations are terminated (§ 1206(a)(2)).
3. Conduct investigations in the absence of an allegation (§ 1206(a)(3)).
4. Transmit disclosures of information concerning agency wrongdoing to agency heads for investigation where the Special Counsel determines there is a substantial likelihood the allegations are true (§ 1206(b)(3)).
5. Transmit disclosures of information to the President and to the Congress when the agency fails to submit a report (§ 1206(b)(5)).
6. Review the agency investigative report and determine whether the agency head's findings appear reasonable and comply with section 1206(b)(4) (§ 1206(b)(6)).
7. Transmit disclosures of information to agency heads for a report on action taken or to be taken by the agency (§ 1206(b)(7)).
8. Transmit intelligence information received to House and Senate Intelligence Committees (§ 1206(b)(9)).
9. If the Special Counsel determines there are reasonable grounds to believe a prohibited personnel practice has or will occur, report de-

\* References are to title 5, United States Code, except as otherwise noted.

terminations, findings and recommendations to the Board and agency involved (§ 1206(c)(1)(A)).

10. Request the Board to order agencies to take corrective action (§ 1206(c)(1)(B)).
11. If the Special Counsel determines there is reasonable cause to believe a criminal violation by an employee has occurred, report the determination to the Attorney General and the head of the agency involved and submit a copy of the report to the Directors of OPM and OMB (§ 1206(c)(2)).
12. If the Special Counsel determines there is reasonable cause to believe that any other violation of law, rule or regulation has occurred, report it to the head of the agency involved (§ 1206(c)(3)).
13. Maintain a public list of noncriminal matters referred to agency heads under § 1206(b)(3) and (c)(3) (§ 1206(d)).
14. Investigate allegations of Hatch Act violations, arbitrary and capricious withholding of information under the Freedom of Information Act (FOIA), activities prohibited by any civil service law, rule or regulation, involvement by any employee in prohibited discrimination found by a court or administrative authority to have occurred (§ 1206(e)).
15. Determine whether allegations may be resolved more appropriately under an administrative appeals procedure (§ 1206(e)(2)).
16. Approve or disapprove an agency's taking of disciplinary action against an employee during the course of a Special Counsel investigation (§ 1206(f)).

17. File complaints for disciplinary action with the Board (§ 1206(g)(1)).
18. Submit complaint for disciplinary action against an employee appointed by the President with the advice and consent of the Senate, to the President, together with the employee's response (§ 1206(g)(2)).
19. File complaints for corrective action with the Board in cases where the Special Counsel believes there is a pattern of prohibited personnel practices (§ 1206(h)).
20. Intervene or otherwise participate in proceedings before the Board (§ 1206(i)).
21. Prescribe regulations for the receipt and investigation of allegations (§ 1206(k)).
22. Request the Board or any member of the Board to stay personnel actions (§ 1208).
23. Administer oaths, examine witnesses, take depositions and receive evidence (§ 1205(b)(1)).
24. Designate employees of the Office of the Special Counsel to administer oaths, examine witnesses, take depositions and receive evidence (§ 1205(b)(1)).
25. Issue subpoenas, order the taking of depositions and order responses to written interrogatories (§ 1205(b)(2)).
26. File complaints with the Board requesting review of OPM rules or regulations (§ 1205(e)).

27. Initiate proceedings to determine whether disciplinary action is warranted when a court finds that the circumstances surrounding withholding of information under FOIA raise questions whether agency employees acted arbitrarily or capriciously (§ 552(a)(4)(F)). Recommend corrective action to the administrative authority of the agency concerned.
28. Initiate proceedings to determine whether disciplinary action is warranted against an employee after court determination of willful or intentional violation of the Right to Financial Privacy Act of 1978. Submit findings and recommendations to the administrative authority of the agency (12 U.S.C. § 347(b)).
29. Submit an annual report to the Congress on the activities of the Special Counsel, including recommendations for legislation or other action by Congress (§ 1206(m)).
30. Appoint legal, administrative and support personnel for the Office of the Special Counsel (§ 1206(j)).
31. Prepare and submit through the Board an annual budget to the President and to the appropriate Committees of the Congress (§ 1205(j)).
32. Prepare procurement requests.
33. Provide for internal personnel programs, such as EEO, grievance procedures, merit promotion policy, discipline and adverse action, awards, RIF procedures, performance appraisal system, training, recruitment, employee development and labor-management relations.