S. HRG. 110–403

OVERSIGHT HEARING ON UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

HEARING

BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

OCTOBER 31, 2007

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OVERSIGHT HEARING ON UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

WEDNESDAY, OCTOBER 31, 2007

U.S. SENATE,
COMMITTEE ON VETERANS' AFFAIRS,
Washington, D.C.

The Committee met, pursuant to notice, at 9:30 a.m., in room 562, Dirksen Senate OfficeBuilding, Hon. Daniel K. Akaka, Chairman of the Committee, presiding.

Present: Senators Akaka, Murray, Tester, and Burr.

OPENING STATEMENT OF HON. DANIEL K. AKAKA, CHAIRMAN, U.S. SENATOR FROM HAWAII

Chairman AKAKA. This hearing will come to order. I want to say aloha and welcome to all of youto the Committee's oversight hearing on the Uniformed Services Employment and Reemployment RightsAct. We are going to call it from now on USERRA.

As our troops are returning home from battle, many of them seek to return to the jobs thatthey held prior to their military service, particularly those serving in the Guard and Reserveunits. USERRA provides these servicemembers with certain protections. USERRA also sets outcertain new responsibilities for employers, including to reemploy returning veterans in theirprevious jobs. This protection applies to virtually all jobs, including those in the Federalsector.

I must admit to being particularly upset at the volume of USERRA claims related to Federalservice. It is simply wrong that individuals who were sent to war by their government should, upontheir return, be put in the position of having to do battle with that same government in order toregain their jobs and benefits.

Several years ago, Congress created a demonstration projects in the Veterans' BenefitsImprovement Act of 2004, the Public Law 108–454 under which the Office of the Special Counsel,OSC, rather than the Department of Labor's Veterans' Employment and Training Service, VETS, wasgiven the authority to receive and investigate certain Federal sector USERRA claims. GAO was toreport to the Congress on the operation and results of the demonstration project together with anassessment of the advisability of transferring the responsibility for all Federal sector USERRAclaims from VETS to OSC.

The GAO report was received on July 20, 2007, and I will ask that it be included in itsentirety in the proceedings of this hearing.

Chairman AKAKA. Unfortunately, it is not clear to me that results of the demonstration projectand the GAO report provide sufficient evidence to permit this Committee to decide on the properjurisdiction of these claims. I believe that a good case can be made for retaining jurisdiction byboth VETS and OSC. Thus, this morning, we will be hearing from each of the parties who will havethe opportunity to make their case to the Committee as to which organization should have theresponsibility.

We will also be hearing testimony from a firsthand perspective from Mr. Matthew Tully, whowill share with the Committee his experiences and his expertise.

We will need to move through this hearing in a timely fashion so I ask that our witnessesadhere to the five-minute rules for your oral presentation. Your full statements, of course, willbe made a part of the Committee's record.

Again, I want to say welcome and I look forward to hearing from each of you this morning.

For the information of others present today, let me explain that the Filipino veterans andfamily members who are here today are expressing their support for Senate action on an omnibusbenefits bill reported by our Committee that contains provisions which would recognize the serviceof Filipino veterans during World War II as service in the U.S. Armed Forces. As I have explainedto those supporting this bill, I am working hard to get floor action, but the Senate calendar iscrowded and since I am not able to predict how much time there will be needed to debate the bill,it has been difficult to have the bill scheduled and so I am still trying to deal with thatagreement on time for the floor. I am continuing to work on bringing the bill before the fullSenate.

I would like at this time to call on Senator Tester for any opening remarks that the Senatormay have.

STATEMENT OF HON. JON TESTER,
U.S. SENATOR FROM MONTANA

Senator TESTER. Well, thank you, Mr. Chairman. I am sorry I didn't have more time to get here to hear your remarks so I will keep my opening statement very, very short.

This is a different kind of war than what we have had in previous times, where a large number of Guard and Reservists are being called onto the battlefield. When they come back, they need to have the labor opportunities there that they had when they left.

I come from a small town in north central Montana and I am still a bit of an outsider when I come here, but one of the things that always amazes me about Washington, D.C. is the size of the bureaucracy. I mean, it is huge. If we are not ensuring that the veterans who come back have the job opportunities and the agencies that serve them are not living by the law, they don't have the opportunities under the law, it is a serious misstep by the Federal Government.

I will just tell you that if we don't know who is doing or who is supposed to be doing this job, I would hope that, Mr. Chairman, we don't create another bureaucracy to do it. I hope we hold the people accountable who are supposed to do the job to do the job, because that is really what needs to happen. I think this is a very,

very serious issue. I think we are holding this hearing, because quite honestly, if you put yourselves in the shoes of the Guard or the Reservists, or active military, as far as that goes, that get pulled into the field of battle, away from their family, in a foreign country, under incredible pressures, under incredible duress, and then to have them come home and they aren't given the opportunities that they were promised when they left is unforgivable.

So with that, Mr. Chairman, I look forward to this hearing and I appreciate you calling it and I look forward to the testimony.

Chairman AKAKA. Thank you very much, Senator Tester.

Senator Murray?

STATEMENT OF HON. PATTY MURRAY, U.S. SENATOR FROM WASHINGTON

Senator MURRAY. Well, Mr. Chairman, thank you very much, and I know that Ranking Member Burr is right behind me here, as well, but I want to thank you for calling this important hearing on the employment rights of our Nation's veterans.

We all know that our brave men and women are called upon to serve our country. They put their lives on the line for us and our safety, and when they return home, it is our responsibility to fulfill all of our promises to them. So one of them should be that they shouldn't have to worry about whether or not they are going to lose their jobs if they leave to work and serve us overseas.

Mr. Chairman, this hearing is really going to ask us a pivotal question. Are we adequately protecting the employment rights of today's servicemembers and veterans?

Despite the laws that we have put in place to protect them, I still hear from my constituents who have run into problems at work because of their military obligations. We have to do everything we can in our power to ensure that our veterans, our Guard and Reserve members, and their families aren't penalized by their service to our country. These citizen-soldiers make the all-volunteer military possible and we have got to make certain that we aren't driving people out of the military because they are concerned about protecting their jobs.

Mr. Chairman, I have to leave this hearing, unfortunately, early, but I am looking forward to hearing the witnesses today and reviewing their testimony about what we can do to strengthen the protection of veteran employment rights.

I just want to mention two main concerns. The first I have is about a test program that is looking at which Federal agency should be responsible for our Federal employees' claims under USERRA. Over the last 2 years, the Labor Department's Veterans' Employment and Training Service in the Office of Special Counsel participated in that demonstration project which applies two different approaches to review the Federal claims under the law, and as we move forward on that issue, I want to make sure that we avoid unnecessary confusion for veterans who are seeking claims under that system. I have some concern about splitting the responsibility between two agencies that might do that and might lead to some of our veterans asking why some of them go through a different process than others. I think that is the wrong message to

send to our veterans and I look forward to working with my colleagues to find the right approach to that.

The second concern I wanted to mention really quickly is complaints by Guard and Reserve members and how they are being handled. This year, I have met with many veterans, especially Guard and Reserve, who have told me that they have had difficulty getting employment assistance once they are demobilized and others who have said that they had no idea that employment services were available and weren't aware that USERRA protected their rights to get their old jobs back.

So given those concerns, I am looking forward to hearing the testimony this morning about how the Labor Department has worked with the Office of Special Counsel to ensure that our servicemembers receive the attention they deserve, and for Mr. Byrne, I hope to hear how the OSC can make a connection with our veterans and how we can prevent any of this confusion for our veterans who are seeking claims.

So thank you very much, Mr. Chairman. I look forward to the testimony this morning.

Chairman AKAKA. Thank you very much, Senator Murray.

Senator BURR?

STATEMENT OF HON. RICHARD BURR, RANKING MEMBER, U.S. SENATOR FROM NORTH CAROLINA

Senator BURR. Mr. Chairman, thank you. I apologize for my tardiness to you and to our witnesses today. I would ask unanimous consent that my opening statement be included in the record.

Chairman AKAKA. Without objection.

Senator BURR. I will forego reading it, even though it is great practice for me. I welcome all of our witnesses today and I thank you for holding this hearing, Mr. Chairman.

[The prepared statement of Senator Burr follows:]

PREPARED STATEMENT OF HON. RICHARD BURR,
U.S. SENATOR FROM NORTH CAROLINA

Thank you, Mr. Chairman, and all of our panelists for being here today. We are here to discuss a very important topic: whether we as a Nation are doing enough to protect the civilian careers of those who serve in our Armed Forces, particularly members of the Guard and Reserve.

It is incumbent on all of us to recognize and honor the tremendous sacrifices that these servicemembers and their families continue to make and help ease their transition as they move forward. More than 60 years ago Congress recognized that those who serve our country in a time of need should be entitled to resume their civilian jobs when they return home. After Congress passed the first law providing reemployment rights to servicemembers in 1940, President Roosevelt said these rights were part of "the special benefits which are due to the members of our armed forces—for they 'have been compelled to make greater economic sacrifice and every other kind of sacrifice than the rest of us.'".

As we all know, the sacrifices by this generation of servicemembers are just as profound. More than one and a half million Americans have been deployed to fight in the War on Terror. In North Carolina alone, nearly 1,600 members of the Guard and Reserves are serving today. Many left behind not only family and friends, but valued civilian careers. For them, the modern reemployment law, the Uniformed Services Employment and Reemployment Rights Act, or USERRA, requires that they be given their jobs back when they return home, with all the benefits and seniority that would have accumulated during their absence.

Many employers are not only complying with this law but are going above and beyond what's required in taking care of their Guard and Reserve employees. In fact, last year a company in my home state—Skyline Membership Corporation—

joined a distinguished list of employers that have received the Secretary of Defense Employer Support Freedom Award. This award is the highest recognition that is given to an employer who demonstrates extraordinary support of their employees who serve in the Guard and Reserves. I am proud of Skyline's leadership, and I encourage more employers to follow their lead.

While every employer should strive to meet or exceed the requirements of USERRA, Congress has stressed that "the Federal Government should be a model employer" when it comes to complying with this law. In my view, this means the Federal Government should make sure that *not a single returning servicemember* is denied re-instatement to a Federal job. But unfortunately, we aren't completely there yet.

For those who encounter problems when they attempt to resume their Federal jobs, Congress authorized a demonstration project to determine whether they would be better served by having their complaints investigated by the Office of Special Counsel rather than the Department of Labor. Having looked over today's testimony on the results of that demonstration project, I would make this general observation: Many of the recommendations offered involve process—such as improving data reliability and ensuring internal reviews. However, the truly critical issue—and the one I am most interested in hearing about today—is not about the process but about outcomes.

I want to know whether we are preventing USERRA violations from occurring in the first place. When problems arise, are servicemembers getting timely resolutions to their concerns? And are they satisfied with the service they receive? Whether it is done by the Office of Special Counsel or the Department of Labor, it must be our goal to make sure that the answer to these questions is always "yes." We owe nothing less to those who have served and sacrificed so much for our Nation. And I hope today we will come closer to determining how best to structure this system to achieve that result.

As for the second focus of the hearing today, the Dole-Shalala Commission recently recommended that Congress amend the Family and Medical Leave Act to provide up to 6 months of leave for family members caring for seriously wounded servicemembers. As we consider this legislative change, I hope employers across the Nation will not wait, but will act now to provide whatever accommodations they can to protect the jobs of these family members. I hope employers will show their gratitude for the sacrifices of our wounded servicemembers and the sacrifices of their family members who are a critical part of their recoveries.

Mr. Chairman, I take very seriously the Commission's recommendation that we change the law to*ensure* that the jobs of these family members are protected, and I look forward to hearing from our witnesses about how we can best go about implementing that recommendation. Given thetremendous sacrifices of these family members, protecting their livelihoods is simply the rightthing to do.

Thank you, Mr. Chairman, I yield the floor.

Chairman AKAKA. I am pleased to introduce our first panel this morning. Mr. George Stalcup is the Director of Strategic Issues for the Government Accountability Office.

Mr. Stalcup, I want to also take a moment to thank you for your cooperation with the Committee and the Committee staff during preparation of this hearing. I know that it was set up on a relatively short notice and I do appreciate your "can do" approach and also the patience of our Committee Members, as well.

It is good to have you, and I would now ask you to proceed with your opening statement.

STATEMENT OF GEORGE H. STALCUP, DIRECTOR, STRATEGIC ISSUES, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

Mr. STALCUP. Thank you, Mr. Chairman. Chairman Akaka, Ranking Member Burr, Senator Murray, Senator Tester, I am pleased to be here today to discuss our work looking at the demonstration project that has been described by the Chairman.

Today, I want to make three points. I want to talk about the claims processing under the demonstration project. I want to talk about the findings of our work, the recommendations that we have

made, and what actions have been taken against those recommendations today. And I want to talk about some factors that the Congress might consider related to extending or not extending the demonstration project.

Under the demonstration, DOL continued to process USERRA claims as it had prior to the demonstration, that is, using its network nationwide and over 100 investigators. To investigate its share of the USERRA claims, OSC instituted a centralized approach within its Washington, D.C. headquarters with about a half-a-dozen investigators and attorneys. OSC's other role under USERRA, is handling claims referred to it at the request of claimants after an initial investigation by Labor did not resolve the claim, remained unchanged during the demonstration project.

To assess the reliability of data, we reviewed a random sample of claims processed by both entities. Our review of the sample showed reliability problems with data at VETS. This is the same data that they use to report to the Congress. For the period of our review, the VETS database showed 202 claims being opened. We determined, however, that this number included duplicate, reopened, and transferred claims; and, in fact, only 166 unique claims had actually been investigated.

We also found errors in the data for both case closure dates and for codes used to indicate the outcomes of its investigations. Using corrected closure dates from our review of the sample of cases, we estimated that VETS average processing time for investigations opened and closed during our review ranged from 53 to 86 days.

During the period of our review, OSC processed 269 claims in an average of 115 days. In terms of data, we found the OSC's case closed dates to be sufficiently reliable, but not the code used to indicate outcomes of claim investigations.

Our review of the sample case files at DOL also showed the claimants were not consistently notified of their right to have their claims referred to OSC or to bring their claims directly to MSPB. VETS failed to provide any written notice to half of the claimants with unresolved cases, notified others of only some options, and inaccurately advised others. Two contributing factors may have been the lack of clear guidance in the VETS USERRA users manual as well as a lack of an internal process for reviewing investigator determinations before claimants were notified.

During our review and citing our preliminary findings, DOL officials required each region to revise its guidance concerning the notification of rights, and then since our review, DOL has taken additional actions. They have provided more guidance to the field in terms of case closing procedures to help ensure that claimants are clearly apprised of their rights. They have drafted policy changes for the operations manual that are due out in January. And they have begun to conduct mandatory training on these revised requirements.

In addition, DOL officials have indicated to us that beginning in January, all claim determinations will be reviewed before closure letters are sent to claimants. These are very positive steps, but it is important that DOL follow through on these efforts.

If Congress decides to extend the demonstration project, it will be important that clear objectives be set. There were no such objec-

tives in the legislation creating the current demonstration project. For example, objectives could focus on several areas that could help measure the quality of service to claimants. Clearly articulated goals would also facilitate any follow-on review to determine the extent to which those objectives are achieved. In this regard, our earlier work could provide a valuable baseline.

Congress may also want to consider some potential pros and cons of options if the demonstration project is not extended. For example, Congress could choose to return to the predemonstration set-up where Labor investigated all USERRA claims. In this regard, Labor has an infrastructure in place. Further, all USERRA claims, both Federal and non-Federal, would then be processed by a single agency. At the same time, however, DOL has only recently taken or is still in process of taking actions to correct the deficiencies we found and the effectiveness of these actions has not yet been determined.

Congress could also decide to provide OSC the responsibility and authority to handle all USERRA claims, Federal claims. This would eliminate the lengthy two-phase process currently carried out by DOL on all USERRA cases when they are referred to OSC, but this may also require OSC to expand its overall infrastructure, hire additional staff, and make other operational changes.

As you stated, Mr. Chairman, most importantly, with the Nation's attention so focused on those who serve our country, it is vital that their employment and reemployment rights are protected.

This concludes my prepared remarks and I would be happy to answer any questions.

[The prepared statement of Mr. Stalcup follows:]

PREPARED STATEMENT OF GEORGE H. STALCUP, DIRECTOR, STRATEGIC ISSUES, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

GAO
Accountability·Integrity·Reliability
Highlights

Highlights of GAO-08-229T, a testimony before the Committee on Veterans' Affairs, U.S. Senate

October 31, 2007

MILITARY PERSONNEL

Considerations Related to Extending Demonstration Project on Servicemembers' Employment Rights Claims

Why GAO Did This Study

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) protects the employment and reemployment rights of federal and nonfederal employees who leave their employment to perform military or other uniformed service.

Under a demonstration project from February 8, 2005, through September 30, 2007, and subsequently extended through November 16, 2007, the Department of Labor (DOL) and the Office of Special Counsel (OSC) share responsibility for receiving and investigating USERRA claims and seeking corrective action for federal employees.

In July 2007, GAO reported on its review of the operation of the demonstration project through September 2006. This testimony describes the findings of our work and actions taken to address our recommendations. In response to your request, we also present GAO's views on (1) factors to consider in deciding whether to extend the demonstration project and the merits of conducting a follow-up review and (2) options available if the demonstration is not extended.

In preparing this statement, GAO interviewed officials from DOL and OSC to update actions taken on recommendations from our July 2007 report and developments since we conducted that review.

To view the full product, including the scope and methodology, click on GAO-08-229T. For more information, contact George H. Stalcup at (202) 512-9490 or stalcupg@gao.gov.

What GAO Found

Under the demonstration project, OSC receives and investigates claims for federal employees whose social security numbers end in odd numbers; DOL investigates claims for individuals whose social security numbers end in even numbers. Among GAO's findings were the following:

- DOL and OSC use two different models to investigate federal USERRA claims, with DOL using a nationwide network and OSC using a centralized approach, mainly within its headquarters.
- Since the demonstration project began, both DOL and OSC officials have said that cooperation and communication increased between the two agencies concerning USERRA claims, raising awareness of the issues related to servicemembers who are federal employees.
- DOL did not consistently notify claimants concerning the right to have their claims referred to OSC for further investigation or to bring their claims directly to the Merit Systems Protection Board if DOL did not resolve their claims.
- DOL had no internal process to routinely review investigators' determinations before claimants were notified of them.
- Data limitations at both agencies made claim outcome data unreliable.

DOL officials agreed with GAO's findings and recommendations and are taking actions to address the recommendations. In July 2007, DOL issued guidance concerning case closing procedures, including standard language to ensure that claimants (federal and nonfederal) are apprised of their rights, and began conducting mandatory training on the guidance in August 2007. In addition, according to DOL officials, beginning in January 2008, all claims are to be reviewed before the closure letter is sent to the claimant. These are positive steps and it will be important for DOL to follow through with these and other actions.

If the demonstration project were to be extended, it would be important that clear objectives be set. Legislation creating the current demonstration project was not specific in terms of the objectives to be achieved. Clear project objectives would also facilitate a follow-on evaluation. In this regard, GAO's July 2007 report provides baseline data that could inform this evaluation. Given adequate time and resources, an evaluation of the extended demonstration project could be designed and tailored to provide information to inform congressional decision making. GAO also presents potential benefits and limitations associated with options available if the demonstration project is not extended.

Chairman Akaka, Senator Burr, and Members of the Committee:

I am pleased to be here today to discuss the results from our review of a demonstration project established by the Veterans Benefits Improvement Act of 2004 (VBIA),[1] related to servicemember rights under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA),[2] which protects the employment and reemployment rights of federal and nonfederal employees who leave their employment to perform military or other uniformed service. USERRA also prohibits discrimination in employment against individuals because of their uniformed service, obligation to perform service, or membership or application for membership in the uniformed services. USERRA further prohibits employer retaliation against any individual who engages in protected activity under USERRA, regardless of whether the individual has performed service in the uniformed services. USERRA applies to a wide range of employers, including federal, state, and local governments as well as private sector firms. The demonstration project authorized the Office of Special Counsel (OSC) along with the Department of Labor (DOL) to receive and investigate certain federal employee USERRA claims. DOL's Veterans' Employment and Training Service (VETS) investigates and attempts to resolve USERRA claims. In July, we issued a report responding to a mandate in VBIA on our evaluations of the demonstration project.[3] Our report focused on agency (1) processes, (2) outcomes, and (3) major changes during the demonstration project.

For today's hearing, I will discuss

- USERRA claims processing under the demonstration project for servicemembers of federal executive branch agencies,[4]

[1]See section 204 of Pub. L. No. 108-454, 118 Stat. 3598, 3606-3608, 38 U.S.C. § 4301 note.

[2]Pub. L. No. 103-353, 108 Stat. 3149, 38 U.S.C. §§ 4301-4334.

[3]GAO, *Military Personnel: Improved Quality Controls Needed over Servicemembers' Employment Rights Claims at DOL*, GAO-07-907 (Washington, D.C.: July 20, 2007).

[4]USERRA rights extend to servicemembers who are federal employees, prior employees of, and applicants to federal executive branch agencies. Servicemembers include members of the National Guard and Reserves. For purposes of this testimony, we are using the term servicemember, although individuals who are not servicemembers (or who have merely applied to become a servicemember) may also be protected by USERRA's discrimination and retaliation prohibitions.

- the findings of our work and actions taken to address our recommendations, and
- considerations related to extending the demonstration project.

For our July 2007 report, we reviewed relevant documentation and interviewed knowledgeable DOL and OSC officials on their policies and procedures for processing federal employees' USERRA claims under the demonstration project. We also reviewed and analyzed data from VETS's database, the USERRA Information Management System,[5] and OSC's case tracking system, OSC 2000,[6] from the start of the demonstration project on February 8, 2005, through fiscal year 2006. We also assessed the reliability of selected data elements on federal employee claims from VETS's database and OSC's case tracking system by tracing a statistically random sample of data to source case files.[7] We did not assess the quality of the claims' investigations or the quality of the outcomes of those investigations. Considerations related to extending the demonstration are based on our knowledge of the demonstration project and requirements for effective program evaluation. We conducted our work for this statement in October 2007 in accordance with generally accepted government auditing standards.

USERRA Claims Processing under the Demonstration Project

Under a demonstration project established by VBIA, from February 8, 2005, through September 30, 2007, and subsequently extended through November 16, 2007,[8] OSC and DOL share responsibility for receiving and investigating USERRA claims and seeking corrective action for federal employees. While the legislation did not establish specific goals for the demonstration project, the language mandating that GAO conduct a

[5]The USERRA Information Management System is a Web-based case management and reporting tool implemented by VETS in October 1996 that allows for automated collection and investigator input of information regarding USERRA claims and generation of reports for analysis of USERRA operations and outcomes.

[6]OSC 2000 was implemented by OSC in July 1999 and was designed to capture and record data from the initial filing of a claim until the closure and archiving of the case file and allows for queries that create a number of management and workload reports.

[7]The period of the sample was from the start of the demonstration project on February 8, 2005, through July 21, 2006. Unless otherwise stated, the data were sufficiently reliable for the purposes of our review.

[8]See section 30 of Pub. L. No. 110-92 (Sept. 29, 2007).

review suggested that duplication of effort and delays in processing cases were of concern to Congress.[9]

The demonstration project gave OSC, an independent investigative and prosecutorial agency, authority to receive and investigate claims for federal employees whose social security numbers end in odd numbers. VETS investigated claims for individuals whose social security numbers end in even numbers. Under the demonstration project, OSC conducts an investigation of claims assigned to determine whether the evidence is sufficient to resolve the claimants' USERRA allegations and, if so, seeks voluntary corrective action from the involved agency or initiates legal action against the agency before the Merit Systems Protection Board (MSPB).[10] For claims assigned to DOL, VETS conducts an investigation, and if it cannot resolve a claim, DOL is to inform claimants that they may request to have their claims referred to OSC.[11]

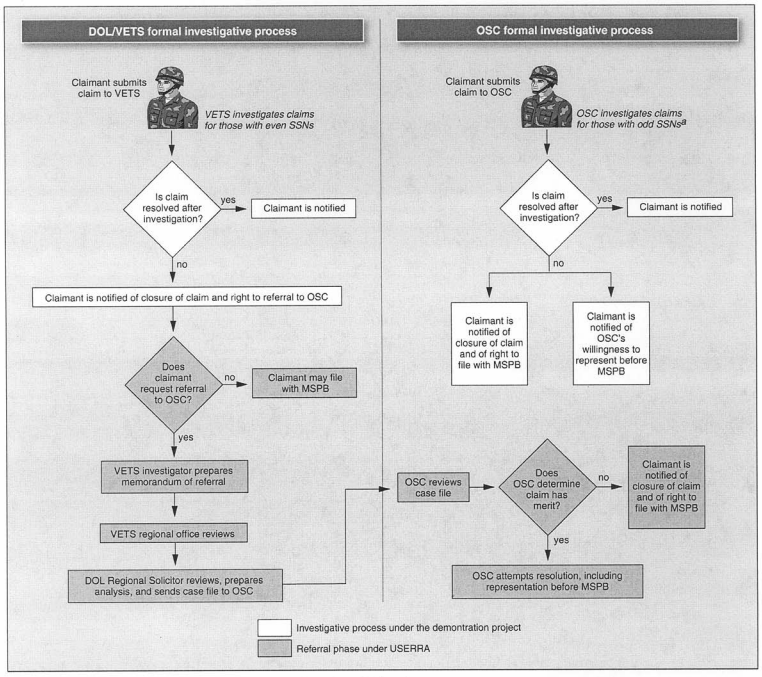
OSC's responsibility under USERRA for conducting independent reviews of referred claims after they are investigated but not resolved by VETS remained unchanged during the demonstration project. Before sending the referred claim to OSC, two additional levels of review take place within DOL. After OSC receives the referred claim from DOL, it reviews the case file, and if satisfied that the evidence is sufficient to resolve the claimant's allegations and that the claimant is entitled to corrective action, OSC begins negotiations with the claimant's federal executive branch employer. According to OSC, if an agreement for full relief via voluntary settlement by the employer cannot be reached, OSC may represent the servicemember before MSPB. If MSPB rules against the servicemember, OSC may appeal the decision to the U.S. Court of Appeals for the Federal Circuit. In instances where OSC finds that referred claims do not have merit, it informs servicemembers of its decision not to represent them and that they have the right to take their claims to MSPB without OSC representation. Figure 1 depicts USERRA claims' processing under the demonstration project.

[9]See section 204 of Pub. L. No. 108-454, 118 Stat. 3598, 3606-3608, 38 U.S.C. § 4301 note.

[10]An independent, quasi-judicial agency in the executive branch, MSPB serves as the guardian of federal merit principles.

[11]DOL is also to inform claimants that they may file a complaint directly with the MSPB. If DOL/VETS cannot resolve nonfederal USERRA claims, DOL is to inform claimants that they may request to have their claims referred to the U.S. Attorney General. The Department of Justice prosecutes nonfederal sector USERRA claims.

Figure 1: USERRA Claims Processing under the Demonstration Project



Source: GAO (data), PhotoDisc (images).

Note: VBIA did not change VETS's formal investigative process or the referral phase under the demonstration project.

[a]OSC is also authorized to handle any USERRA claim where OSC has authority to handle a related claim—that is, one alleging a related prohibited personnel practice—brought by the USERRA claimant.

Key Findings on the Demonstration Project and Actions Taken to Address Recommendations

Under the demonstration project, VETS and OSC used two different models to investigate federal employee USERRA claims. Both DOL and OSC officials have said that cooperation and communication increased between the two agencies concerning USERRA claims, raising awareness of the issues related to servicemembers who are federal employees. In addition, technological enhancements have occurred, primarily on the part of VETS since the demonstration project. For example, at VETS, an enhancement to its database enables the electronic transfer of information between agencies and the electronic filing of USERRA claims. However, we found that DOL did not consistently notify claimants concerning the right to have their claims referred to OSC for further investigation or to bring their claims directly to MSPB if DOL did not resolve their claims. We also found data limitations at both agencies that made claim outcome data unreliable. DOL agreed with our findings and recommendations and has begun to take corrective action.

Agencies Used Two Models for Processing USERRA Claims

Since the start of the demonstration project on February 8, 2005, both DOL/VETS and OSC had policies and procedures for receiving, investigating, and resolving USERRA claims against federal executive branch employers. Table 1 describes the two models we reported DOL and OSC using to process USERRA claims.

Table 1: Characteristics of DOL's and OSC's USERRA Claims' Processing Models

Characteristic	DOL	OSC
Structure of office	Nationwide network with over 100 investigators working together on fact-finding at VETS's offices in each state, six regional offices, and one national office.	Centralized USERRA Unit within OSC headquarters with the Unit Chief, three investigators, and three attorneys working together on fact-finding and legal analysis at the time of our review.[a]
Responsibilities of staff	Investigators process both federal and nonfederal USERRA and veteran's preference claims,[b] provide outreach and education to servicemembers (at mobilizations and demobilizations) and employers (federal and nonfederal), and respond to informal requests for information.	Investigators and attorneys process federal employees' USERRA claims, process prohibited personnel practice claims filed by servicemembers, and provide outreach and education to employees and employers.
Investigative approach	Investigators are to investigate and attempt to resolve claims, prepare an investigative plan for claims taking more than 30 days, and send a letter notifying claimant of the determination. For referrals, investigators prepare a memorandum of referral with supporting documentation. Attorneys from the Office of the Solicitor are available for consultations during an investigation if an investigator has a question or needs legal assistance, but attorneys are not assigned to every case.[c]	Investigators or attorneys are to investigate and attempt to resolve claims, prepare a summary of investigation with supporting documentation, and provide a detailed letter to each claimant (and for a claim with merit, to the agency) containing the factual and legal basis for its conclusions.
Oversight	There is no required internal review of investigative findings and closure letters prior to closure letters being sent to the claimant. VETS senior investigators are to review claims taking longer than 90 days and a random sample of 25 percent of all closed claims and 10 percent of all open claims at the regional level.	At the time of our review, the USERRA Unit Chief provided ongoing guidance, reviewed all work products in a case, and reviewed and approved the letter notifying the claimant of OSC's determination and, in a case with merit, the letter to the agency, prior to sending the letters.

Source: GAO.

Note: VBIA did not change VETS's formal investigative process or the referral phase under the demonstration project.

[a]Since our report was issued, OSC now has seven attorneys and two investigators.

[b]Under the Veterans Employment Opportunities Act of 1998, Pub. L. No. 105-339 (Oct. 31, 1998), an individual who believes his or her preference rights have been violated may file a complaint with VETS within 60 days after the alleged violation, and if VETS's efforts do not result in resolution of the complaint, the individual may appeal the matter to MSPB, 5 U.S.C. § 3330a.

[c]An official from DOL's Office of the Solicitor said that attorneys from the office are only assigned when contacted by VETS investigators or when a regional office is contacted by the public. He added that an attorney from the Office of the Solicitor is assigned to every case that is a referral, which involves a legal review of a completed case file.

VETS Is Taking Action to Help Ensure That It Consistently Notifies Claimants of the Right to Referral

Once a VETS investigator completes an investigation and arrives at a determination on a claim, the investigator is to contact the claimant, discuss the findings, and send a letter to the claimant notifying him or her of VETS's determination. When VETS is unsuccessful in resolving servicemembers' claims, DOL is to notify servicemembers who filed claims against federal executive branch agencies that they may request to have their claims referred to OSC or file directly with MSPB. Our review of a random sample of claims showed that for claims VETS was not successful in resolving (i.e., claims not granted or settled), VETS (1) failed to notify half the claimants in writing, (2) correctly notified some claimants, (3) notified others of only some of their options, and (4) incorrectly advised some claimants of a right applicable only to nonfederal claimants—to have their claims referred to the Department of Justice or to bring their claims directly to federal district court. In addition, we found that the VETS *USERRA Operations Manual* failed to provide clear guidance to VETS investigators on when to notify servicemembers of their rights and the content of the notifications. VETS had no internal process to routinely review investigators' determinations before claimants are notified of them. According to a VETS official, there was no requirement that a supervisor review investigators' determinations before notifying the claimant of the determination. In addition, legal reviews by a DOL regional Office of the Solicitor occurred only when a claimant requested to have his or her claim referred to OSC. A VETS official estimated that about 7 percent of claimants ask for their claims to be referred to OSC or, for nonfederal servicemembers, to the Department of Justice.

During our review, citing our preliminary findings, DOL officials required each region to revise its guidance concerning the notification of rights. Since that time, DOL has taken the following additional actions:

- reviewed and updated policy changes to incorporate into the revised *Operations Manual* and prepared the first draft of the revised *Manual*;
- issued a memo in July 2007 from the Assistant Secretary for Veteran's Employment and Training to regional administrators, senior investigators, and directors requiring case closing procedure changes, including the use of standard language to help ensure that claimants (federal and nonfederal) are apprised of their rights; and
- began conducting mandatory training on the requirements contained in the memo in August 2007.

In addition, according to DOL officials, beginning in January 2008, all claims are to be reviewed before the closure letter is sent to the claimant. These are positive steps. It is important for DOL to follow through with its plans to complete revisions to its *USERRA Operations Manual*, which according to DOL officials is expected in January 2008, to ensure that clear and uniform guidance is available to all involved in processing USERRA claims.

Number of Claims and Average Processing Time under the Demonstration Project

Our review of data from VETS's database showed that from the start of the demonstration project on February 8, 2005, through September 30, 2006, VETS investigated a total of 166 unique claims. We reviewed a random sample of case files to assess the reliability of VETS's data and found that the closed dates in VETS's database were not sufficiently reliable. Therefore, we could not use the dates for the time VETS spent on investigations in the database to accurately determine DOL's average processing time. Instead, we used the correct closed dates from the case files in our random sample and statistically estimated the average processing time for VETS's investigations from the start of the demonstration project through July 21, 2006—the period of our sample. Based on the random sample, there is at least a 95 percent chance that VETS's average processing time for investigations ranged from 53 to 86 days. During the same period, OSC received 269 claims and took an average of 115 days to process these claims. We found the closed dates in OSC's case tracking system to be sufficiently reliable.

In his July 2007 memo discussed above, the Assistant Secretary for Veteran's Employment and Training also instructed regional administrators, senior investigators, and directors that investigators are to ensure that the closed date of each USERRA case entered in VETS's database matches the date on the closing letter sent to the claimant.

Data Limitations at Both Agencies

We found data limitations at both agencies that affected our ability to determine outcomes of the demonstration project and could adversely affect Congress's ability to assess how well federal USERRA claims are processed and whether changes are needed. At VETS, we found an overstatement in the number of claims and unreliable data in the VETS's database. From February 8, 2005, through September 30, 2006, VETS received a total of 166 unique claims, although 202 claims were recorded

as opened in VETS's database. Duplicate, reopened, and transferred claims accounted for most of this difference. Also, in our review of a random sample of case files,[12] we found

- the dates recorded for case closure in VETS's database did not reflect the dates on the closure letters in 22 of 52 claims reviewed, so using the correct dates from the sample, we statistically estimated average processing time, and
- the closed code, which VETS uses to describe the outcomes of USERRA claims (i.e., claim granted, claim settled, no merit, withdrawn) was not sufficiently reliable for reporting specific outcomes of claims.

At OSC, we assessed the reliability of selected data elements in OSC's case tracking system in an earlier report and found that the corrective action data element, which would be used for identifying the outcomes of USERRA claims, was not sufficiently reliable.[13]

DOL Has a Lengthy Two-Phase Review Process before Claims Are Referred to OSC

We separately reviewed those claims that VETS investigated but could not resolve and for which claimants requested referral of their claims to OSC. For these claims, two sequential DOL reviews take place: a VETS regional office prepares a report of the investigation, including a recommendation on the merits and a regional Office of the Solicitor conducts a separate legal analysis and makes an independent recommendation on the merits. From February 8, 2005, through September 30, 2006, 11 claimants asked VETS to refer their claims to OSC. Of those 11 claims, 6 claims had been reviewed by both a VETS regional office and a regional Office of the Solicitor and sent to OSC.[14] For those 6 claims, from initial VETS investigation through the VETS regional office and regional Office of the Solicitor reviews, it took an average of 247 days or about 8 months before the Office of the Solicitor sent the claims to OSC.[15] Of the 6 referred claims that OSC received from DOL during the demonstration project, as of September 30, 2006, OSC declined to represent the claimant in 5 claims and was still reviewing 1 of them, taking an average of 61 days to independently review the claims and determine if the claims had merit and whether to represent the claimants.

[12]The period of the random sample covered February 8, 2005, through July 21, 2006.

[13]GAO, *Office of Special Counsel Needs to Follow Structured Life Cycle Management Practices for Its Case Tracking System*, GAO-07-318R (Washington, D.C.: Feb. 16, 2007).

[14]The remaining five claims were still at DOL as of September 30, 2006.

[15]Because of the data limitations concerning the reliability of investigations' closed dates in VETS's database, it was not possible to isolate the length of time for the two additional reviews.

Considerations Related to Extending the Demonstration Project

You asked us about factors that could be considered in deciding whether to extend the demonstration project and to conduct a follow-up review. If the demonstration project were to be extended, it would be important to have clear objectives. Legislation creating the current demonstration project was not specific in terms of the objectives to be achieved. Having clear objectives would be important for the effective implementation of the extended demonstration project and would facilitate a follow-on evaluation. In this regard, our report provides baseline data that could inform this evaluation. Given adequate time and resources, an evaluation of the extended demonstration project could be designed and tailored to provide information to inform congressional decision making.

Congress also may want to consider some potential benefits and limitations associated with options available if the demonstration is not extended. Table 2 presents two potential actions that could be taken and examples of potential benefits and limitations of each. The table does not include steps, such as enabling legislation that might be associated with implementing a particular course of action.

Table 2: Examples of Potential Actions and Potential Benefits and Limitations with Respect to Processing Federal USERRA Claims

Potential action	Potential benefit	Potential limitation
Return to pre-demonstration status (i.e., DOL receives and investigates all claims)	DOL has an infrastructure in place. All USERRA claims, federal and nonfederal, would be processed by the same agency.	DOL is taking a number of actions to correct deficiencies in notifying servicemembers of their rights and to implement controls to help improve the quality of the data on the number of cases, outcomes, and the time to investigate claims. The effectiveness of these actions has not been determined.
Give OSC authority to receive and investigate all federal claims	OSC has institutional experience from enforcement of statutes to protect federal employees from prohibited personnel practices, which according to OSC, are similar to USERRA claims. This eliminates two extra reviews at DOL under current system for referrals of federal claims.	OSC would need to "stand up" a more robust infrastructure to handle all USERRA cases, which may include hiring and training additional staff as well as additional operating expenses. A significant increase in the number of claims to be processed may also necessitate a change to the oversight structure that OSC used during our review of the demonstration project, which relied heavily on the actions of one individual.

Source: GAO analysis.

At a time when the nation's attention is focused on those who serve our country, it is important that employment and reemployment rights are protected for federal servicemembers who leave their employment to perform military or other uniformed service. Addressing the deficiencies that we identified during our review, including correcting inaccurate and unreliable data, is a key step to ensuring that servicemembers' rights under USERRA are protected. While DOL is taking positive actions in this regard, it is important that these efforts are carried through to completion.

Chairman Akaka, Senator Burr, and Members of the Committee, this concludes my prepared statement. I would be pleased to respond to any questions that you may have.

For further information regarding this statement, please contact George Stalcup, Director, Strategic Issues, at (202) 512-9490 or stalcupg@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this testimony. Individuals making key contributions to this statement included Belva Martin, Assistant Director; Karin Fangman; Tamara F. Stenzel; Kiki Theodoropoulos; and Greg Wilmoth.

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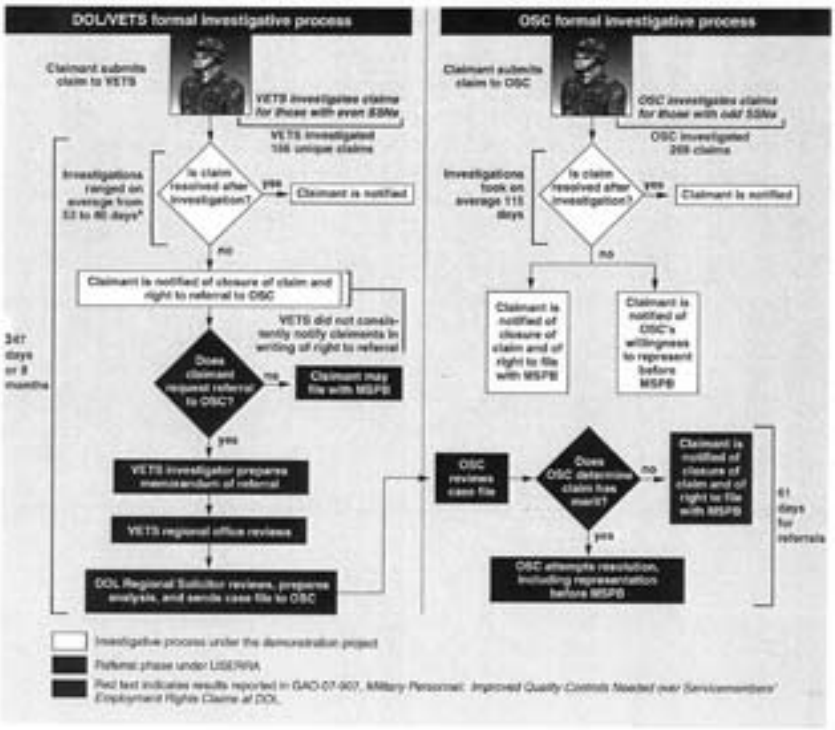
Federal Employees' USERRA Claims' Processing Under Demonstration Project



Note: Data are for claims received and processed by DOL/VETS and OSC from February 8, 2005, the start of the demonstration project, through September 30, 2006, unless otherwise noted.

*In our review of a random sample of VETS case files, we found the closed dates in VETS's database did not match the date contained in the closure letter to the claimant in 22 of 52 claims reviewed, so using the correct closed dates from our random sample, we statistically estimated the average processing time for VETS's investigations from the start of the demonstration project through July 21, 2006—the period of our sample.

Source: GAO analysis, Art Explosion (images).

RESPONSES TO POST-HEARING QUESTIONS FROM THE COMMITTEE TO GEORGE H. STALCUP, DIRECTOR, STRATEGIC ISSUES, GOVERNMENT ACCOUNTABILITY OFFICE

Dear Mr. Chairman:

On October 31, 2007, I testified before your committee at its hearing on a Federal sector demonstration project on servicemembers' employment rights claims under the Uniformed Services Employment and Reemployment Act of 1994 (USERRA).[1] The demonstration project established by the Veterans Benefits Improvement Act of 2004 was set to conclude on September 30, 2007, but through a series of extensions continued through December 31, 2007.[2] Following the hearing, we met with key members of your staff to provide our perspectives on pending legislation to amend USERRA.[3] As discussed with your staff, the following responses to post-hearing questions, which GAO received on May 8, 2008, reflect the current situation. Because the demonstration project ended on December 31, 2007, two questions are no longer relevant.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DANIEL K. AKAKA TO GEORGE H. STALCUP, GOVERNMENT ACCOUNTABILITY OFFICE

Question 1. You note in your testimony that DOL and OSC use two different models to investigate Federal USERRA claims. Were you able to determine whether these two different models produce different results in terms of the accuracy of the findings?

Response. No. The objectives of our July report on the Federal sector demonstration project were to (1) describe DOL's and OSC's policies and procedures for processing Federal employees' USERRA claims under the demonstration project; (2) identify the number of Federal employees' USERRA claims that DOL and OSC received during the demonstration project and the outcomes of these claims, including average processing times; and (3) identify changes to Federal employees' USERRA claims' processing since the demonstration project began.[4] An independent assessment of the accuracy of agency findings on such cases is not typically our role.

Question 2. I understand that you found the reliability of data at both DOL and OSC was in question and that this could affect Congress' ability to assess how well Federal USERRA claims are processed and what changes are needed. I understand that at DOL you found an overstatement in the number of claims and problems with case closure. Please expand briefly on the problems with the data at OSC.

Response. At OSC, we found that the corrective action data element, which OSC uses to describe the outcomes of USERRA claims, was not sufficiently reliable for reporting specific outcomes of claims. In an earlier report,[5] we assessed the reliability of selected data elements in OSC's case tracking system for USERRA claims by comparing them to the source case files. Specifically, we compared electronic data for 11 selected data elements (out of 90 unique data elements) in OSC's database, OSC 2000, to the source case files for 158 randomly selected closed cases received from October 1, 2004 through March 31, 2006. In that report, we assessed reliability by the amount of agreement between the data in OSC 2000 and the source case files. For the corrective action data element, we are 95 percent confident that as many as 24 percent of the outcomes would not match between the case tracking system and the source case files.

Question 3. I thank you for articulating so well the potential benefits and limitations of extending the pilot project. Do you believe that an additional review could evaluate the effectiveness of the actions DOL is taking to correct the deficiencies you identified in the July report?

Response. As part of our on-going work, we follow up with audited entities to determine the extent to which our recommendations have been implemented. In my written statement, I reported on the status of DOL's efforts to correct the defi-

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[1] GAO, *Military Personnel: Considerations Related to Extending Demonstration Project on Servicemembers' Employment Rights Claims*, GAO–08–229T (Washington, D.C.: Oct. 31, 2007).

[2] See, section 204 of Pub. L. No. 108–454, 118 Stat. 3598, 3606–3608, 38 U.S.C. §4301 note, Pub. L. No. 110–92, sections 106(3) and 130 (Sept. 29, 2007); Pub. L. No. 110–116, Division B, section 101 (Nov. 13, 2007); Pub. L. No. 110–137 (Dec. 14, 2007), and Pub. L. No. 110–149, section 1 (Dec. 21, 2007).

[3] On December 13, 2007, S. 2471, "USERRA Enforcement Improvement Act of 2007" was introduced in the Senate.

[4] GAO, *Military Personnel: Improved Quality Controls Needed over Servicemembers' Employment Rights Claims at DOL*, GAO–07–907 (Washington, D.C.: July 20, 2007).

[5] GAO, *Office of Special Counsel Needs to Follow Structured Life Cycle Management Practices for Its Case Tracking System*, GAO–07–318R (Washington, D.C.: Feb. 16, 2007).

ciencies we identified in our July report. We will continue to follow-up on these efforts. In addition, as we discussed with your staff after the hearing, we could be asked to review DOL's efforts after DOL has been afforded sufficient time to address the deficiencies we identified and a sufficient quantity of data has accrued upon which to base an analysis. We are happy to work with your staff in determining the appropriate amount of time for DOL to address deficiencies and accrue data.

Question 4. You state in your testimony that "given adequate time and resources, an evaluation of the extended demonstration project could be designed and tailored to provide information to inform Congressional decisionmaking." Would you be willing to work with the Committee to design this evaluation?

Response. As stated in the introduction above, this question is no longer relevant.

Question 5. In your opinion, do you believe there is anything to be gained from extending the demonstration project or do you think we have learned all that there is or at least all that can be learned about the investigation and resolution process in order to make a decision on jurisdiction?

Response. As stated in the introduction above, this question is no longer relevant.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. JON TESTER TO GEORGE H. STALCUP, GOVERNMENT ACCOUNTABILITY OFFICE

Question. You indicated in your statement that the data GAO received was "poor." Can you elaborate on that statement? Why was it poor? What could be done to ensure that future data is of a higher quality?

Response. Describing the quality of the data "poor" refers to our findings that data for reporting outcomes were not sufficiently reliable at both DOL and OSC and that data on the number of claims and the time to investigate claims was not sufficiently reliable at DOL.

As we state in our testimony, at OSC, we found that the corrective action data element, which OSC uses to describe the outcomes of USERRA claims, was not sufficiently reliable for reporting specific outcomes of claims. At DOL, we found that the closed code, which DOL's Veterans' Employment Training Service (VETS) uses to describe the outcomes of USERRA claims, was not sufficiently reliable for reporting specific outcomes of claims. At DOL, concerning the number of Federal employees' USERRA claims received for investigation, we found that for February 8, 2005, through September 30, 2006, VETS received a total of 166 unique claims, although 202 claims were recorded opened in VETS's database. Duplicate, reopened, and transferred claims accounted for most of this difference. Additionally, during our review of a random sample of VETS's case files to assess the reliability of VETS's data, we found the dates recorded for case closure in VETS's database were not reliable; that is, VETS's database did not reflect the dates on the closure letters, which VETS uses to indicate completion of the investigation, in over 40 percent of sampled claims. VETS uses the date recorded for case closure in its database to report to Congress on the number and percentage of claims it closes within 90, 120, and 365 days.

To ensure that accurate information on USERRA claims' processing is available to DOL and to Congress, we recommended that VETS establish a plan of intended actions with target dates for implementing internal controls to ensure that VETS's database accurately reflects: the number of unique USERRA claims filed annually against Federal executive branch agencies; the dates those claims were closed; and the outcomes of those claims. We also recommended that VETS incorporate into its USERRA Operations Manual previously issued guidance on the appropriate date to use for case closure in VETS's USERRA database.

As discussed at the hearing, at a time when the Nation's attention is focused on those who serve our country, it is important that employment and reemployment rights are protected for Federal servicemembers who leave their employment to perform military or other uniformed service. We remain available to discuss the above questions and related issues with your staff. For additional information, please contact me.

Chairman AKAKA. Thank you very much, and I want to thank you for articulating so well the potential benefits and limitations. Do you believe that additional GAO review could evaluate the effectiveness of the actions DOL is taking to correct the deficiencies?

Mr. STALCUP. Yes, I do.

Chairman AKAKA. You stated in your testimony given adequate time and resources, an evaluation of the expanded demonstration

project could be designed and tailored to provide information to respond to Congressional decisionmaking. Would you be willing to work with the Committee to design this evaluation?

Mr. STALCUP. Absolutely, Mr. Chairman. We believe there are some proxies out there that could be used to provide some measurement of what is being done and we would be more than happy to work with your staff, your counterparts in the House, and figure out what a meaningful set of those proxies would be in making those assessments.

Chairman AKAKA. You note in your testimony that DOL and OSC use two different models to investigate Federal USERRA claims. Were you able to determine whether these two different models produced different results in terms of the accuracy of the findings?

Mr. STALCUP. Well, the fact is, Mr. Chairman, we did not look at or try to assess the determinations made on these cases. It is not GAO's role to come in and actually second-guess what agencies have decided in terms of legal determinations. What we have done obviously is to look at the quality of the data and there are other things out there that we could take an additional look at, and I think with those things collectively be helpful to those that are making the decision in Congress as to which way to go.

Chairman AKAKA. I understand that you found the reliability of data at both DOL and OSC was in question and that this could affect Congress's ability to assess how well Federal USERRA claims are processed and what changes are needed. I understand that at DOL, you found an old statement in the number of claims and problems with case closure. Please expand briefly on the problems with the data at OSC.

Mr. STALCUP. Sure. At OSC, the problems with data manifested themselves in a couple of areas. First of all, in the database the DOL uses to report information to the Congress, the number of cases in there reflected 202 cases. In looking at those cases, we determined that there were duplications, there were closed cases that had been reopened, and there were cases that had been transferred that should not have been included in that total. In fact, the total was 166.

We also found problems in closed dates in the system where we tried to match the date on the letter that actually went to the claimant and the dates in the systems. In 40 percent of the cases they did not agree, and for those that did not agree, the difference was typically about 60 days.

Chairman AKAKA. Thank you very much, Mr. Stalcup.

Now I would like to turn it over to the Ranking Member, Senator Burr, for his questions.

Senator BURR. Thank you, Mr. Chairman.

You noted in your testimony if the demonstration project were extended, Congress should seek clear objectives. What are those clear objectives?

Mr. STALCUP. Well, we have talked about that and we have a set of eight or ten factors that we think could all lend themselves collectively to being framed in terms of objectives and that would provide a basis for us or someone to come in at a later time and look at those and make an assessment, including whether or not the

data problems, which are very problematic, I think cleaning up of those data objectives would greatly facilitate such an assessment. But we would be glad to work with your staff, your counterparts in the House to come up with a meaningful set of those objectives that could be used and relied on.

Senator BURR. Mr. Stalcup, you said the current demonstration project is not specific in terms of the objectives to be achieved. Share with me, if you will, how does GAO go in and assess a demonstration program that didn't have clear objectives.

Mr. STALCUP. Well, that is the point I think we tried to make in our statement, that without those clear objectives, it was difficult. If there is nothing to measure against, then it puts us in a tough situation.

Senator BURR. But I am trying to get you a little further to share with us, what is it you were looking for? What is it that you used without having some end point that the demonstration project was trying to prove?

Mr. STALCUP. Well, we met with Members of this Committee's staff, and Members on the House staff from the get-go. Some of the things we found early on, together with those staff Members, is that the processes of the two places were, in fact, different. I think there was some thinking when the demonstration project was laid out that we would end up at a point where we would have two comparable sets of data—two comparable sets of operations that we could compare. Unfortunately, it became evident early on that because of the differences in those operations, in addition to the data problems, that we really had an "apples and oranges" kind of thing and so it became difficult to make those comparisons.

So what we did was we focused on the data quality issues. We focused on the notification of claimants issues in agreement with Members of your staff, and that is what we have reported on.

Senator BURR. How does one assess where we go to from here? I mean, clearly, I have looked at your report, heard your testimony. The volume of cases taken matched with the number of people working on it and the average length of days, if I had no involvement in it, I would look at it and say, this is ludicrous. I am not sure I would be specific in any one area. It doesn't work. It is not working. What do we need to do?

Mr. STALCUP. Well, we need to clean up the data problems and that is first and foremost. And we believe, based on what we have been told by DOL, that they are well on their way to doing that. But, without good data not only can it become difficult for us to perform that assessment, it makes it difficult for the agency to manage their case files, and to know where they stand, and to report to Congress.

Senator BURR. Do you think it would help at all if veterans were given options earlier—requesting referral to Office of Special Counsel at the beginning or sooner in the process?

Mr. STALCUP. That probably is a question that may be better answered by those two organizations: OSC and the Department of Labor. I think there are some factors you need to think about. If you start offering options to veterans as to where they are going to go at what point in time, that could create a scenario of some unintended consequences, such as them shopping for the right re-

sult for them, maybe even the agencies being prone to going out and advertising what they can do for the veterans. So I think it is something to consider. I think we need to be cautious.

Senator BURR. Well, I hear what you are saying. I sit here frustrated a little bit, because we will hear from them and we will hear from private attorneys, as well, that are an option today for individuals to seek. I sit here with a firm belief they shouldn't have to use that option, that we should have a system that works. So it is somewhat frustrating to this Member, because I think what you have designed for me is a cultural problem.

I want to be fair to the Department of Labor, and I will be. They are making progress, and I am hopeful that they are because I think this can be done a lot more efficiently and a lot more effectively than clearly what I have seen, but more importantly, it displays to me just how bad it is from the standpoint of GAO is usually very specific in what they have gone in and assessed. And though I think what you did was an excellent review, I am used to reading through a GAO report and having a clear indication as to what we should be looking for. Clearly you couldn't come to that conclusion. And the data is so confusing that until you sort out the data, it is hard to figure out what the next step is. Am I accurate in that?

Mr. STALCUP. You are, Senator Burr, and I understand where you are coming from on that. It was an issue that we dealt with throughout, not only amongst ourselves, but with the staff of the Committee in sorting through those things. Yes.

Senator BURR. I thank you very much. I thank you, Mr. Chairman.

Chairman AKAKA. Thank you very much, Senator Burr.

Before I call on Senator Tester, in hearing Senator Burr's questions, you made a statement here that for GAO in January, all claims will be reviewed. You also mentioned that there were 202 claims and that OSC had 269 claims. My brief question is, in January, you are going to review all claims. What will happen for you to do that?

Mr. STALCUP. Thank you, Mr. Chairman. The point that we make in the statement is that beginning in January, according to the Department of Labor officials, they will institute an internal review process that will look at all investigation outcomes before those outcomes are sent to the claimant in a letter. This is one area where we were able to look at both agencies and kind-of do a comparison. The Office of Special Counsel had a very rigorous review of all claim outcomes before the letters were sent. The Department of Labor agreed with us in terms of that finding and have moved to create an internal review process that they tell us will begin in January.

Chairman AKAKA. Senator Tester?

Senator TESTER. Thank you, Mr. Chairman.

Were you able to tell to what extent the managers in the Federal Government were trained to comply with USERRA?

Mr. STALCUP. Managers in both organizations receive some training. I do believe the Department of Labor clearly, after some of the points we made, became aware of some of those points. Additional

training has been designed and was initiated in August—two months ago.

Senator TESTER. What about the agencies that were having the problem that the DOL and the OSC were—in other words, what I am talking about is an agency like the Department of Agriculture, Department of Commerce, those kind of agencies. Were you able to tell if there were folks within the agencies that were trained?

Mr. STALCUP. That was not part of our review, Senator.

Senator TESTER. You talked about the data a lot with Senator Burr and that it was inadequate or just flat bad. Why? What is the reason for that? Who is the culprit here? Was it inadequate knowledge of what should be gathered or was it bad bookkeeping? Why is the data so bad?

Mr. STALCUP. A couple things come into play. Probably first and foremost is the fact that the guidance in the USERRA manual in terms of how to process, when to notify, et cetera, was not very clear. They have made changes. There are updates to that policy manual in process and that revised policy manual is due out also in January.

Senator TESTER. Who is responsible for the USERRA manual?

Mr. STALCUP. This manual that I am referring to now is the one at Department of Labor.

Senator TESTER. OK. Have you done or did you know of any—investigation is a poor word, but has anybody taken a look at whether the private sector has as many problems as the public sector as far as granting the rights of returning veterans?

Mr. STALCUP. Haven't done that work, sir.

Senator TESTER. And are you aware of any work that has been done in that realm?

Mr. STALCUP. No. But I can probe a little bit when I go back and if there is, I will let you know.

Senator TESTER. It would be interesting to know, just to see if it is very similar to what you found out——

Mr. STALCUP. Absolutely.

Senator TESTER [continuing]. As far as what was going on there.

Thank you for being here. I appreciate your testimony. I look forward to the second and third panel. Thank you.

Chairman AKAKA. Thank you very much, Senator Tester.

I want to thank you very much, Mr. Stalcup. This hearing, of course, is very focused and I want to thank you for helping us as much as you have in trying to address this. Again, I want to say thank you for your testimony, your presence, and all your help.

Mr. STALCUP. I appreciate the opportunity. Thank you very much, Mr. Chairman and Members.

Chairman AKAKA. Thank you.

And now I would like to introduce our second panel. First, we will hear Charles Ciccolella, the Assistant Secretary for Veterans' Employment and Training, U.S. Department of Labor. Second, we will have the Honorable Jim Byrne, Deputy Special Counsel, U.S. Office of Special Counsel. Mr. Byrne is accompanied by Patrick Boulay, Chief of the USERRA Unit.

They are here today to share their thoughts and recommendations with the Committee as well as to make their cases as to why

they are the appropriate agency to have jurisdiction of the Federal sector claims.

Now we will hear first from Hon. Charles Ciccolella.

STATEMENT OF CHARLES C. CICCOLELLA, ASSISTANT SECRETARY FOR VETERANS' EMPLOYMENT AND TRAINING, U.S. DEPARTMENT OF LABOR

Mr. CICCOLELLA. Thank you, Mr. Chairman. Good morning, Senator Burr, Senator Tester. Thank you very much for the opportunity to testify on behalf of the Department of Labor concerning USERRA, the Uniformed Services Employment and Reemployment Rights Act.

As the Committee knows, the USERRA law protects the job rights of veterans and Members of the Armed Forces, including the National Guard and Reserve. The law also prohibits discrimination due to military obligations and it provides reemployment rights to our servicemembers when they return from their military duty.

The Department of Labor administers this law. The Department of Labor's Veterans' Employment and Training Service conducts outreach and education for employers and servicemembers—the employers include the Federal Government—and investigates complaints by servicemembers and veterans.

To accomplish this mission, we work very closely with the Department of Defense's Employer Support of the Guard and Reserve. We also work very closely with the Department of Justice and the Office of Special Counsel when we are unable to resolve complaints and they are referred for representation and enforcement.

Since 2001, we have done many things to make USERRA more effective. New regulations spell out in common language the employers' obligations and the employees' rights. The new rules make it easier to understand the law and actually help the employer understand how to deal with typical issues that may arise when the employees are called to military duty. We have introduced online complaint filing through our USERRA Electronic Advisor and that helps our users better understand not only the law, but also if they have a USERRA violation, how to make the complaint, because it walks them right through it. Forty-three percent of the complaints that we get where we do an investigation actually come from online, and that is up from 31 percent last year.

Employers are now required to post a USERRA notice to their employees, thanks to the wisdom of the Congress which dictated that, and VETS has also stepped up our training for USERRA investigators. We have also designated senior investigators. I think Mr. Stalcup alluded to some of the duties of those individuals because they now review all of our cases that are done by our line investigators.

Our investigators take their work very seriously and we vigorously investigate complaints and we make every effort to bring employers into compliance. We do this through a network of over 100 trained investigators who are located in every State and territory. These same individuals investigate complaints of veterans' preference and they conduct extensive, continuous USERRA education and outreach to employers.

When we are unable to bring employers into compliance and resolve complaints, we work with the servicemembers to assist in having their case referred to Justice if it is the case of a private employer or a State or local government, or the Office of Special Counsel in the case of Federal employees. We have excellent working relationships with both of these enforcement agencies.

This hearing is about the OSC–VETS demonstration project. It is a multi-year demonstration where roughly half of the Federal sector USERRA cases are investigated by OSC and the other half are investigated by VETS. I think the demonstration has had some very positive results. The agencies have cross-trained, and in particular, OSC has been very helpful in teaching us about prohibited personnel practices. In addition, our two agencies meet by phone or in person monthly to discuss USERRA issues in the Federal Government. So the working relationships are very, very good.

The Government Accountability Office, as Mr. Stalcup just talked about, recently concluded their review of the VETS demonstration and recommended that VETS improve procedures to ensure that the claimants are advised of their right to have their case referred to OSC or to DOJ. The GAO recommended that VETS develop some internal mechanisms for unresolved claims before VETS notifies the claimant that their case will be closed. GAO also recommended that VETS put into place internal controls to ensure that our database and our reporting are more accurate with regard to case closure dates and the outcomes of these claims.

As mentioned before, we are addressing each of these recommendations. Our staff has received new instructions on notifying claimants of their referral rights. We have incorporated these instructions into our operations manual that comes out in January and we conduct pretty regular training on this now. We also conduct investigator conference calls to discuss proper investigative procedures and reinforce them.

We are developing some distance learning programs for our investigators and we have corrected the problem of duplicate cases. I would be happy to talk about that in the question and answer period.

As I mentioned, I do believe the demonstration has had positive results. I also believe the demonstration has served its purpose and should be terminated. As a result of our USERRA training, the OSC–VETS demonstration project and the GAO review, I believe VETS is better positioned than ever to handle the Federal sector USERRA cases. We already handle 95 percent of all USERRA cases. The GAO found that VETS investigates or resolves these cases faster than OSC. Mr. Stalcup talked about that earlier. We resolve 95 percent of the Federal sector cases without having those cases go to OSC for referral.

I believe we have the knowledge, skill, and experience. Our staff has years of experience. They are all veterans and they know USERRA and they know how to resolve the cases. With our presence in every State, we are more likely to go face-to-face with an employer, which is really the best way to find out and collect your evidence.

Our approach is always to protect the veterans' employment rights and to get their jobs back while making sure that there is

a good relationship between the employer and the employee, so the employee has a place to come back to. We not only protect servicemembers' USERRA rights, we also protect their veterans' preference, we provide transition employment assistance to all servicemembers before they leave the military, and we have veterans' employment representatives in the workforce who do job counseling and job referral and job placement. So, we are there to ensure not only their employment and reemployment rights, but we are also there to make sure that, in any event, their employment needs are taken care of.

Finally, I would just say that I believe that the second-level review of USERRA cases is very important. If VETS investigates a complaint and we are unable to resolve the complaint, then that complaint can be referred to OSC and the veteran will receive a second review of the complaint. I think this is very important. But, it is not happening in the cases that OSC is now investigating.

I want to thank you for the opportunity to appear before you today and I would be pleased to respond to your questions.

[The prepared statement of Mr. Ciccolella follows:]

PREPARED STATEMENT OF HON. CHARLES S. CICCOLELLA, ASSISTANT SECRETARY FOR VETERANS' EMPLOYMENT AND TRAINING, U.S. DEPARTMENT OF LABOR

Chairman Akaka and Ranking Member Burr, and distinguished Members of the Committee:

I am pleased to appear before you today to discuss issues relating to the Uniformed Services Employment and Reemployment Right Act (USERRA) program.

The principal programs and services of the Department of Labor's (DOL) Veterans' Employment and Training Service (VETS) focus on three areas:

- Providing employment services for veterans in America's publicly funded Workforce Investment System (One-Stop Career Services)
- Providing transition assistance for separating military members
- Protecting servicemembers' employment rights

I will focus today on protecting servicemembers' employment rights under USERRA.

THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

USERRA protects the public and private sector civilian job rights and benefits of veterans and members of the armed forces, including National Guard and Reserve members. USERRA also prohibits employer discrimination due to military obligations and provides reemployment rights to returning servicemembers. VETS not only investigates complaints by servicemembers and veterans, it also administers a comprehensive outreach, education, and technical assistance program here in the United States and around the world.

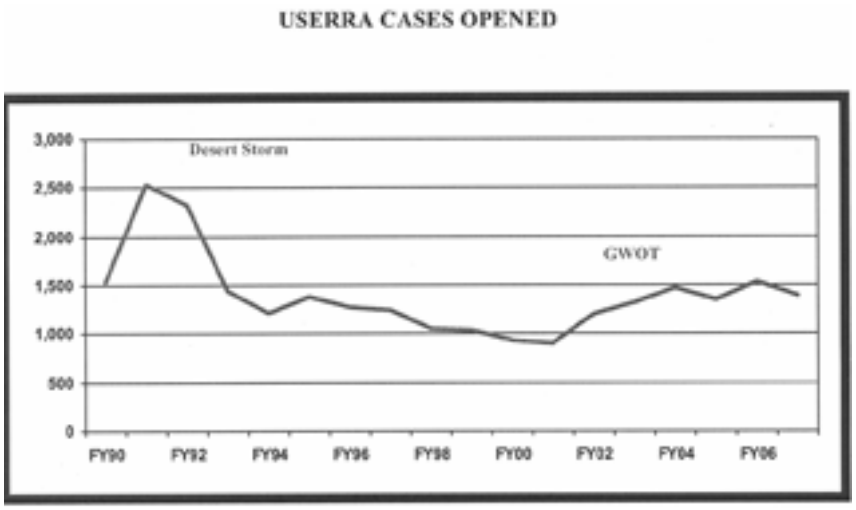
VETS works closely with the Department of Defense's (DOD) Office of the Assistant Secretary for Reserve Affairs and Employer Support of the Guard and Reserve (ESGR) to ensure that servicemembers are briefed on their USERRA rights before and after they are mobilized. We conduct continuous USERRA outreach and education to inform servicemembers and employers on their rights and responsibilities under the law. Since most complaints result from a misunderstanding of the USERRA obligations and rights, we took an important step in 2005 to make it easier to understand the law by promulgating clear, easy-to-understand regulations in question and answer format. VETS has provided USERRA assistance to over 480,000 servicemembers, employers and others.

We have also made it easier for a servicemember to determine if he or she has a valid complaint and if so, to file a USERRA complaint online through our interactive USERRA elaws Advisor, which provides the user with information on eligibility and rights and responsibilities under the law. The Advisor is available 24 hours a day, 7 days a week, at *www.dol.gov/elaws/userra.htm.*

We vigorously investigate complaints, and when employers do not comply with the law, we make every effort to bring them into compliance. We do this through a network of over 100 highly trained investigators located throughout the Nation who investigate claims of violations of USERRA and Veterans' Preference. These same individuals also conduct extensive compliance assistance outreach to employers and servicemembers in their states.

VETS coordinates with ESGR, the Office of Special Counsel (OSC), and the Department of Justice (DOJ) to ensure the employment rights and benefits for returning servicemembers are protected. As explained in their statement provided for this hearing, ESGR engages in a number of efforts to ensure employer support for the Guard and Reserve is sustained. ESGR also reinforces the relationship between employers and employees through informal USERRA mediation. DOJ and the OSC help enforce USERRA by representing USERRA complainants when the Department of Labor is unable to resolve the complaint and/or when the servicemember or veteran requests their case be referred.

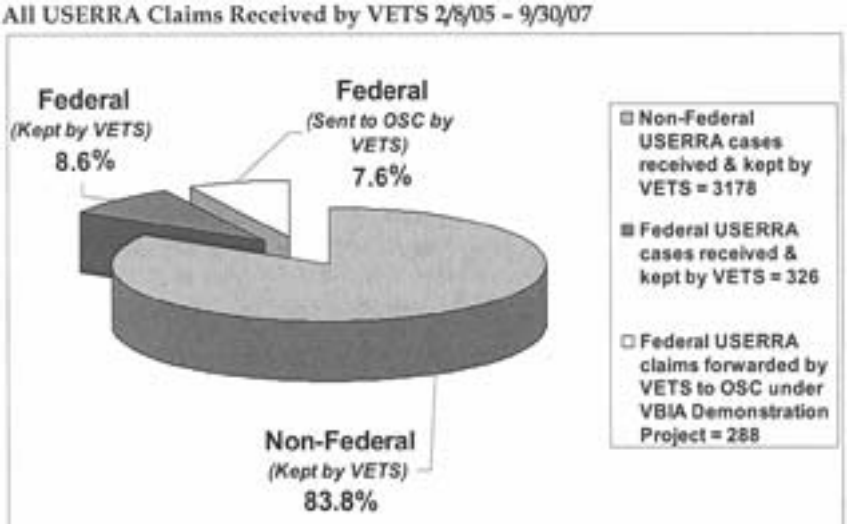
VETS has a decades-long history of protecting the rights and interests of American service men and women employed in both the public and private sectors by investigating complaints under USERRA and its predecessor laws. Complaints under USERRA peaked in 1991 following mobilizations for Operation Desert Storm, when claims topped 2,500. After 9/11, USERRA complaints rose again, from approximately 900 per year to approximately 1,500 in fiscal year 2004 and fiscal year 2006. Complaints in fiscal year 2007 decreased to 1,400. As the chart below shows, complaints during the Global War on Terror have never approached their Desert Storm high. We attribute much of this result to VETS' comprehensive outreach to servicemembers and employers and to the agency's user-friendly 2005 regulations.



DEMONSTRATION PROJECT WITH THE OFFICE OF SPECIAL COUNSEL (OSC)

In 2004, Congress passed the Veterans Benefits Improvement Act (VBIA). Section 214 of that Act required the Secretary of Labor and the OSC to carry out a multi-year demonstration project under which USERRA claims made by Federal Government employees whose social security number ends in an odd-numbered digit are referred to OSC for investigation, resolution and enforcement. The Government Accountability Office (GAO) evaluated the demonstration project and published the report of its evaluation in July of this year. The demonstration project was to conclude at the end of September 2007, but the current Continuing Resolution extended the demonstration project through November 16, 2007.

Since inception of the pilot on February 8, 2005 through the end of fiscal year 2007, VETS received 3,792 USERRA complaints. Of those, 614 (16.2 percent) were Federal cases that were subject to the demonstration. VETS transferred 288 of those Federal cases to OSC under the demonstration.



The demonstration project has produced several positive effects. VETS worked closely with OSC throughout the project to improve our investigators' ability to iden-

tify potential "mixed cases," which are USERRA cases that may also include related prohibited personnel practices under the Federal civil service laws. VETS also spurred closer ties by convening monthly meetings in which DOL and OSC officials discuss and resolve USERRA issues. In addition, VETS is addressing several data collection practices that GAO identified in its study of the demonstration project.

Recently, there has been discussion about whether to continue the demonstration project. We believe that the Department of Labor is better positioned than ever before to serve the needs of all veterans, including those who work in the Federal sector. We also believe that splitting USERRA claims between the two agencies is not in the best interests of veterans.

First, VETS should continue to investigate all USERRA claims, Federal or non-Federal, because we are a veterans-focused agency whose sole mission is to serve the workplace needs of separating servicemembers and veterans. We accomplish our mission through a nation-wide network of highly skilled Federal employees who are employment specialists. Almost all are veterans themselves. They are trained to meet the many workplace employment needs of today's servicemembers.

VETS' Federal employment specialists are located where veterans need them most—in all 50 states, the District of Columbia, and Puerto Rico. These specialists conduct outreach and provide technical assistance to employers, servicemembers, veterans, and veterans' organizations on employment and reemployment issues at the national, state and local levels, including at locations where servicemembers are demobilized. One frequently overlooked fact is that the vast majority of reemployment rights problems are resolved by VETS before a USERRA claim is ever filed. This is done at the local level through direct informal technical assistance that helps returning servicemembers secure their employment and reemployment rights in accordance with the law.

Finally, the objectives of the demonstration project were to determine whether transferring USERRA cases involving Federal employers to OSC would result in "improved services to servicemembers and veterans" or "reduced or eliminated duplication of effort and unintended delays in resolving meritorious claims." To our knowledge, neither result has been realized.

VETS is proud of its record in enforcing this statute since its enactment, including its continuous efforts to improve services. For example, over the past 10½ years:

- 91 percent of Federal USERRA cases were resolved by VETS without need for referral to the Office of Special Counsel;
- 83 percent of "meritorious" Federal USERRA cases resolved by VETS (claims granted or settled) reached resolution within 90 days.

I believe that the USERRA protections of servicemembers and veterans are best served by VETS retaining the primary investigative authority for all USERRA cases, regardless of employer.

RECOMMENDATIONS OF GAO'S REPORT ON DOL/OSC DEMONSTRATION PROJECT

GAO's Report (GAO–07–907, July 2007) that evaluated the demonstration project recommended that VETS institute improved procedures to ensure claimants are notified of their right to have their case referred to OSC, if a Federal case, or to the Department of Justice, if a nonFederal case, and that our investigators undergo mandatory training on those procedures. The report also recommended that VETS develop and implement an internal review mechanism for all unresolved claims before claimants are notified of determinations and cases are closed, to help ensure adherence to procedures and standards. Finally, GAO recommended that VETS implement internal controls to ensure that our investigations database accurately reflects the number of unique claims, the dates that these claims were closed and the outcomes of the claims.

VETS is actively addressing the issues raised in GAO's Report. VETS has taken positive steps to address each of these recommendations. For example:

- VETS investigative staff received new instructions on notifying claimants of their right to referral and on recording the appropriate closure date for a claim.
- These instructions have been incorporated into the revised USERRA Operations Manual, which will be field-tested in November and fully implemented in January 2008. The new manual will also clarify procedures for documenting case outcomes and recording them correctly in the VETS investigative database.
- VETS investigators have all participated in mandatory conference calls reinforcing procedures for notifying claimants of their right to referral. In addition, regional investigator training is being conducted in each of the VETS regions and this training will also focus on these notification procedures.
- VETS is developing an on-line distance learning module for investigators that will include this instruction.

• VETS has already identified ways to correct previous reporting practices that resulted in duplicate cases being reported. We are working with GAO to ensure that issues identified by GAO surrounding duplicate cases are addressed.

In sum, the demonstration project has proved valuable to VETS. We have institutionalized a close working relationship with OSC that will continue to pay 6 dividends long after the project comes to an end. In addition, GAO's audit identified several areas in which our investigations and reporting could be improved and, as mentioned, we are now addressing those areas.

VETS is committed to continuous improvement of our USERRA investigative processes and our reporting to Congress on investigations. As a result of that commitment, we have made a number of investments to our USERRA program, and more are planned. An investment in VETS' USERRA program is an investment in protecting the employment rights of all servicemembers and veterans covered under USERRA, regardless of whether their employer is the Federal Government, a state or local government, or a private entity.

For these reasons and others I have already highlighted, we believe all USERRA investigations should be conducted by VETS.

PROTECTING JOBS FOR CARETAKERS OF WOUNDED WARRIORS

The Committee also asked me to address the issue of providing employment protections to family members of injured servicemembers.

On March 6, 2007, President Bush issued an executive order establishing the President's Commission on Care for America's Returning Wounded Warriors "to provide a comprehensive review of the care provided to America's returning Global War on Terror service men and women from the time they leave the battlefield through their return to civilian life." Former Senator Bob Dole and former Secretary of Health and Human Services Donna Shalala co-chaired the Commission. On July 30, 2007, the Commission transmitted its report to the President, entitled Serve, Support, Simplify: Report of the President's Commission on Care for America's Returning Wounded Warriors (the Report).

The Report recommended amending the Family and Medical Leave Act (the FMLA) to allow up to 6 months of leave for a family member of a servicemember who has a combat-related injury. The Administration strongly supports the Commission's recommendation to provide leave and believes that it should be implemented promptly. However, some modification is necessary to address the mobile nature of military families.

First, in this situation, we believe that it is more helpful to utilize the FMLA as a starting point rather than amend the law because of practical difficulties that would make it difficult to achieve the necessary protections for military families. The statutory provisions on the duration of leave, the serious health conditions that entitle an employee to leave, and the procedures for certification of health conditions that are central to the FMLA may not provide the most appropriate structure for effectuating the Commission's recommendation.

We believe that it is more appropriate to create a new statute with a new leave concept based at least in part on the FMLA, but with several important adjustments. Second, although the Commission indicated that the leave should be available to employees who meet the FMLA's "other eligibility requirements," it does not appear that the Commission considered the unique hardship that the FMLA eligibility requirements would impose on families of servicemembers.

For example, the FMLA limits eligibility for job-protected leave to employees who have been employed by their employer for at least 12 months and who have worked at least 1,250 hours for their employer in the preceding 12-month period. Congress gave careful consideration to establishing those eligibility requirements when it enacted the FMLA. But because military families, and more specifically the spouses and children of servicemembers, often move from one city to another every few years as the servicemember receives new assignments, a significant number of family members of combat-wounded servicemembers would not be eligible for leave under the FMLA under the statute's prior service requirements.

The Department does not believe that the Commission intended to exclude those individuals from the job-protected leave addressed in its recommendation.

With those concerns in mind, we believe that legislation implementing the Commission's recommendation should be guided by the following principles:

1. Spouses, parents, and children of a recovering servicemember should be able to take up to 26 weeks of unpaid, job-protected leave to care for the servicemember within the 2 years following injury.

2. Employees should be able to take the leave all at once or spread it out over time.

3. Employers should continue to maintain any health coverage for the employee during the period of leave.

4. Employees and employers should be able to substitute available paid leave for unpaid military caregiver leave.

5. At the end of the leave, the employee should be entitled to be reinstated to the same position or an equivalent position.

6. Caregivers should not have to be employed by an employer for 12 months or work 1,250 hours in the preceding year to be eligible for job-protected leave.

7. Taking military caregiver leave should not diminish an employee's right to take leave under the FMLA for other reasons, such as to care for a newborn baby or for an employee's own serious health condition, subject to reasonable limits on the extent to which military caregiver leave and FMLA leave may be combined to care for a recovering servicemember.

The Administration has submitted "America's Wounded Warrior Act" to the Congress in order to implement the recommendations of the Dole/Shalala Commission. Title III of this bill incorporates all of these principles and provides a new form of leave for family members to care for their wounded or injured servicemember with a combat-related serious injury, disability, or physical disability. I would urge the Congress to pass this legislation.

Our Nation owes an enormous debt of gratitude to our servicemembers who are returning from their service in the Global War on Terror. The Department of Labor is committed to maximizing employment opportunities and protecting servicemembers' jobs as they answer the Nation's call to duty. We have a special obligation to those who are seriously wounded, ill, or injured, and to their families.

Thank you for the opportunity to be with you today. I am prepared to respond to your questions.

POST-HEARING QUESTIONS SUBMITTED BY HON. DANIEL K. AKAKA TO CHARLES S. CICCOLELLA, DEPARTMENT OF LABOR

Question 1. This first question is for both DOL and OSC Our final witness this morning, Mr. Mathew Tully, an attorney specializing in U-Sarah law, will testify that he believes that the federal government could save hundreds of millions of dollars by abolishing DOL involvement in U-Sarah enforcement and mandating the award of attorney's fees and litigation costs when a claimant successfully proves a case of discrimination or retaliation. Please comment on that view.

Question 2. GAO found that there were problems with the consistent notification to claimants of their rights to pursue their claims through OSC or through the Merit Systems Protection Board. It is my understanding that you have begun to take steps to correct this situation. Please update the Committee on where you are in terms of mandatory training of VETS personnel on this issue?

Question 3. What is the status of your plans to complete revision of your U-Sarah Operations Manual?

Question 4. It is particularly troubling to me that the "closed code" used by VETS to describe the outcome of claims was found to be not sufficiently reliable by GAO What steps have you taken to improve the reliability of this data?

Question 5. What are the merits of having all claims—both federal and non-federal—reviewed and processed by one entity versus the merits of having an agency with institutional experience with federal sector enforcement handle those claims?

Question 6. What funding and staffing implications, if any, would there be if the federal sector claims were transferred to OSC?

Question 7. I'm pleased to see some positive results flowing from the demonstration project—especially the closer collaboration and cooperation between OSC and DOL If the demonstration project is discontinued, will there still be interactions, such as monthly meetings, to drive this collaboration?

Question 8. You cite that over the past 10 years, 83 percent of "meritorious" federal U-Sarah claims were resolved by VETS within 90 days. What percentage of claims filed does this represent? In other words, what percentage of claims were deemed to be without merit?

Is there any record kept of those deemed to be without merit in order to track whether the claimant subsequently sought and received favorable judgment in a legal proceeding?

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DANIEL K. AKAKA TO CHARLES S. CICCOLELLA, DEPARTMENT OF LABOR

Dear Mr. Chairman: I write to respond to your letter requesting feedback on testimony provided by Mr. Mathew B. Tully at the October 31, 2007 hearing on the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). In his testimony, Mr. Tully raised a number of issues and made several recommendations. Mr. Tully's fundamental concern is that the Department's Veterans' Employment and Training Service's (VETS) enforcement of USERRA is a serious problem, which he proposes to fix largely by shifting enforcement from the Federal Government to private attorneys like himself.

As an initial matter, a comparison of Mr. Tully's firm's USERRA caseload and success rates with that of the Federal Government is misleading. As Special Counsel Scott Bloch noted at the hearing, Mr. Tully and his firm specialize in a narrow class of cases in which servicemembers were denied military leave by their Federal employers before 2001.

The Department of Labor has long believed that most military leave cases can be resolved quickly and efficiently at an administrative level because they do not, for the most part, involve complex employment issues. For this reason, VETS, the Office of the Special Counsel, the Office of Personnel Management, and the Department of Defense, have ensured that servicemembers are able to resolve their military leave cases through a streamlined administrative process, that in most cases, eliminates the need for a USERRA case to be opened at all. While individuals remain free to bypass this process and retain private attorneys, it is not clear that attorneys in these cases necessarily add value. See, e.g., *Jacobsen* v. *Department of Justice*, 103 MSPR 439, 442 note (MSPB Sept. 22, 2006) ($8700 in attorneys fees denied where attorney obtained 16 hours of restored leave through litigation after the employing agency had determined that 20 hours of leave may have been charged incorrectly), *aff'd* 500 F.3d 1376 (Fed. Cir. 2007).

I would also note that in contrast with the practice of most private law firms, VETS accepts all USERRA cases that it receives. This is true regardless of the complexity of the issue involved, the complaint's relative merits, or the chances of success. Private law firms, on the other hand, can screen cases on many different levels, often avoiding the most difficult cases. A direct comparison between private law practices and public sector practices is not a valid comparison. Not only does Mr. Tully ignore this fact, he cites a particularly inapt proxy for VETS' success rate: the percentage of cases VETS refers for prosecution. A more accurate figure, of course, would have been the percentage of claims that VETS receive that are resolved in the claimant's favor. In fiscal year 2006, this figure was 30 percent, which was similar to the 27 percent rate claimed by OSC.

Mr. Tully also offered statistics that present an incomplete picture of VETS' USERRA caseload. He claims, for example, that his firm processed 1,802 claims between February 8, 2005 and September 30, 2006, and that VETS only handled 166 cases during this time. However, the 166 VETS cases he cited were the Federal-sector cases VETS investigated during that period, not the total number of cases that VETS handled. A more complete picture would have noted that in addition to those Federal cases, VETS opened over 2,000 non-Federal cases during that period. Those cases were professionally investigated at no cost to the claimant, included all claims filed with VETS, not just those considered "winnable," and involved multiple and complex employment issues, not simple cases of reinstating military leave to Federal employees. Furthermore, the claimants were informed of their right to pursue their case with a private attorney, if they so chose.

The Department, of course, acknowledges the important role that the private bar plays in securing the reemployment and nondiscrimination rights of servicemembers. We have serious concerns, however, about any proposal that would eliminate the right of servicemembers to secure the type of valuable help that VETS has been providing for many decades at no cost to claimants. In addition to preparing cases for litigation, the Department of Labor has consistently sought to resolve USERRA issues and disputes quickly and efficiently at the lowest level possible, thereby preserving working relationships between employers and their employees. Claimants should retain the option of pursuing such resolutions rather than be forced to pursue relief through costly, adversarial and frequently hostile litigation.

Thank you for your continued support of our Nation's servicemen and women and for your interest in USERRA. I would be happy to meet with you or your staff to discuss any of Mr. Tully's proposals in more detail.

Chairman AKAKA. Thank you very much, Mr. Ciccolella. Now we will hear from Hon. Jim Byrne.

STATEMENT OF JIM BYRNE, DEPUTY SPECIAL COUNSEL, U.S. OFFICE OF SPECIAL COUNSEL; ACCOMPANIED BY PATRICK BOULAY, CHIEF, USERRA UNIT, U.S. OFFICE OF SPECIAL COUNSEL

Mr. BYRNE. Thank you, Mr. Chairman. Chairman Akaka, Ranking Member Burr, Senator Tester, good morning. Thank you for the opportunity to testify on matters important to our servicemembers, their families, and our national security. My name is Jim Byrne and I am the Deputy Special Counsel for the U.S. Office of Special Counsel, OSC. I am joined here this morning by Patrick Boulay, Chief of the Office of Special Counsel unit that investigates and prosecutes violations of the Uniformed Services Employment and Reemployment Rights Act.

It is our privilege to enforce USERRA. Both as Deputy Special Counsel and as a member of the United States Marine Corps Reserve, I am proud of our work to protect the employment rights of those who give of themselves for our country.

USERRA expanded OSC's role as the protector of the Federal Merit System and Federal workplace rights. The Department of Labor's Veterans' Employment and Training Services receives USERRA claims to investigate and attempt to resolve with employers. Cases that DOL–VETS cannot resolve may be referred to OSC at the servicemember's request. We may then represent the claimant before the Merit Systems Protection Board and the U.S. Court of Appeals for the Federal Circuit.

Three years ago, the USERRA demonstration project gave OSC exclusive investigative jurisdiction over certain Federal sector USERRA cases to determine if we could provide better service to Federal employees. Under the demonstration project, OSC investigates over half of the Federal employee cases as well as those in which the USERRA claim is related to a prohibited personnel practice under OSC's jurisdiction.

Our work has important achieved results. Servicemembers returning from active duty service have benefited from corrective actions we have obtained—back pay, promotions, restored benefits and seniority, time off, and case settlements. We have obtained corrective action in more than one-in-four USERRA claims. Our centralized process ensures USERRA claims are resolved efficiently, thoroughly, and correctly. In addition to obtaining corrective action for the claimant, OSC also seeks systemic corrective action to prevent future agency violations. We may help an agency modify its leave policy or provide USERRA training.

OSC participated in the GAO demonstration project evaluations and their report came late, leaving Congress with little time to act before the project would end on September 30. We appreciate that Congress has extended the demonstration project in the fiscal year 2008 Continuing Resolution.

GAO's report did not address the central question of the demonstration project: Are Federal sector USERRA claimants better served when they can make complaints directly to OSC for both investigation and litigation? We believe the answer is, "clearly yes."

Our specialized USERRA Unit is second to none and is uniquely suited to assist servicemembers with USERRA claims against Federal employers. OSC protects the Federal Merit System. Thus, our USERRA Unit attorneys and investigators are experts in Federal personnel law. They have years of experience investigating, analyzing, and resolving allegations of violations of Federal employment rights. Recently, Sam Wright, Reserve Retired Navy Captain, a nationally known USERRA expert, joined our office. He helped draft USERRA and has written and spoken extensively about the law.

We are proud of our achievements. Since Scott Bloch became Special Counsel, we filed the first prosecutions by OSC in the law's history, obtaining corrective action in cases that had been delayed for years. Cases that before took several years with no positive conclusion now routinely take OSC under a year to investigate and resolve favorably.

Giving OSC exclusive jurisdiction over USERRA Federal sector claims would be doubly positive. DOL–VETS could focus on providing their best service to non-Federal USERRA claimants and Federal servicemembers would benefit from OSC's specialized experience.

More than 92,000 members of the National Guard and Reserve are currently mobilized. When they start demobilizing at a faster rate, will we see a spike in the number of USERRA claims? It is vital that government be fully ready to provide prompt and effective action on these claims.

We believe there is adequate information today to support a decision by Congress to assign OSC the task of investigating and enforcing USERRA claims by Federal employees. OSC is ready.

I look forward to your questions.

[The prepared statement of Mr. Byrne follows:]

PREPARED STATEMENT OF JAMES BYRNE, DEPUTY SPECIAL COUNSEL, U.S. OFFICE OF SPECIAL COUNSEL

Chairman Akaka, Ranking Member Burr, and Members of the Committee, good morning. Thank you for the opportunity to testify today on important matters of concern to our servicemembers, their families, and ultimately our national security.

My name is Jim Byrne and I am Deputy Special Counsel of the U.S. Office of Special Counsel (OSC). I am joined today by Patrick Boulay, Chief of the Office of Special Counsel unit that investigates and prosecutes violations of the Uniformed Services Employment and Reemployment Rights Act.

Thirteen years ago this month, Congress enacted and President Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act of 1994, or USERRA, a rewrite of the Veterans' Reemployment Rights (VRR) law of 1940. The VRR law served our Nation reasonably well for more than half a century, but over the years numerous piecemeal amendments and sometimes conflicting judicial constructions had made the law somewhat confusing and cumbersome. There were also some loopholes in the VRR law's enforcement mechanism, especially as it applied to the Federal Government as a civilian employer.

USERRA strengthened the enforcement mechanism for Federal employees by giving the Merit Systems Protection Board (MSPB) explicit jurisdiction to adjudicate allegations of USERRA violations by Federal executive agencies as employers. USERRA also provided, for the first time, for persons asserting reemployment rights against Federal agencies to have the assistance of OSC and the Department of Labor's Veterans' Employment and Training Service (DOL–VETS).

Under section 4322 of USERRA, a person claiming a violation by any employer (Federal, state, local, or private sector) is permitted to make a written complaint to DOL–VETS, and that agency is required to investigate and to attempt to resolve the matter. If the DOL–VETS efforts do not result in resolution of the complaint,

and the employer is a private employer or a state or political subdivision of a state, the matter may be referred to the Attorney General. If the employer is a Federal executive agency, it may be referred to OSC.

The passage of USERRA expanded OSC's role as protector of the Federal merit system and Federal workplace rights. However, it established a two-step process in which the DOL–VETS would receive all Federal and non-Federal sector USERRA claims, to investigate and attempt to resolve with employers. If DOL–VETS is unable to resolve a claim against a Federal employer, it is then referred to OSC at the servicemembers' request, as DOL–VETS has no prosecutorial authority.

When OSC is satisfied that the claimant is entitled to relief, we may exercise our prosecutorial authority to represent the claimant before the Merit Systems Protection Board (MSPB) and the U.S. Court of Appeals for the Federal Circuit, if necessary. In addition to obtaining corrective action for the claimant, in our role as protector of the merit system, OSC seeks "systemic" corrective action to prevent future violations by an agency. For example, we would assist an agency to modify its leave policy so it does not violate USERRA, or provide USERRA training to agency managers and H.R. specialists.

Three years ago, with enactment of the Veterans Benefits Improvement Act of 2004, a USERRA demonstration project was established as Congress sought to determine if OSC could provide better service to Federal employees filing USERRA claims. This gave OSC an opportunity to apply our extensive experience investigating and prosecuting Federal personnel laws to USERRA. It also eliminated (for some claims) the cumbersome, time-consuming "bifurcated" process whereby Federal USERRA claims often bounce around different Federal agencies before being resolved.

Under the demonstration project, OSC has exclusive investigative jurisdiction over certain Federal-sector USERRA cases. While civilian employees of the Federal Government represent about 10 percent of the National Guard and Reserve, they file a disproportionately greater percentage of claims under USERRA. Considering that the law specifies that the Federal Government is supposed to be a "model" employer, this is a disturbing trend.[1]

Under this demonstration project, OSC investigates over half of the Federal employee cases (those cases in which the claimant has an odd Social Security Number plus the cases in which the claimant's USERRA claim is related to a Prohibited Personnel Practice claim that is otherwise under OSC's cognizance). The results speak for themselves: OSC has obtained corrective action for servicemembers in more than one in four USERRA claims filed with us. This is very high when you consider that the rate of positive findings and corrective action for governmental investigative agencies is usually well under 10 percent. Our centralized and straight-line process has ensured that the USERRA claims we receive are resolved efficiently, thoroughly, and, most important, correctly under the law.

Servicemembers returning from Iraq or from other active duty service have benefited from numerous corrective actions we have obtained for them, including back pay, promotions, restored benefits and seniority, time off and case settlements that result in systemic change to make sure future violations of USERRA do not occur where they work.

Congress directed the Comptroller General to evaluate the demonstration project and to provide a report to Congress not later than April 1, 2007. OSC participated in the evaluations conducted by the Government Accountability Office, but we were disappointed that their draft report was not available for review until mid-June, and the final report was published only a week before the congressional August recess. This left Congress with almost no opportunity to act on USERRA before the demonstration projected concluded on September 30th. We appreciate that Congress enacted an extension of the USERRA demonstration project in the FY2008 Continuing Resolution.

Moreover, the GAO report did not address the central question that the demonstration project was intended to answer: are Federal sector USERRA claimants better served when they are permitted to make their complaints directly to OSC, for both investigation and litigation? We respectfully submit that the answer to that question is "clearly yes."

We of the U.S. Office of Special Counsel are privileged to be engaged in the enforcement of USERRA. Both as Deputy Special Counsel, and as a member of the U.S. Marine Corps Reserve, I am proud of the work we are doing to protect the employment rights of those who give of themselves for our national security. Our specialized USERRA unit is second to none. We employ members of the National Guard and reserve at OSC; four of our last six hires served in the military and are still

[1] 38 U.S.C. 4301(b)

in the reserve. We also just recruited a nationally known USERRA expert, Sam Wright, a captain in the Navy Reserve, who helped draft the law and has written and spoken extensively about USERRA throughout his career. He can assist us not only in the prosecution of complex cases but also in outreach and public affairs aspects of our work for veterans and active members of the National Guard and Reserve.

OSC is uniquely suited to assist members of the National Guard and Reserve who, upon their return from active duty, even from combat and with combat-related injuries, are turned away by their Federal employers, or not afforded the full protections or benefits to which they are entitled. Because the mission of OSC is to protect the Federal merit system, our USERRA unit is staffed with attorneys and investigators who are experts in Federal personnel law and have years of experience investigating, analyzing, and resolving allegations of violations of Federal employment rights.[2] For this reason, Federal sector USERRA investigation and enforcement is a natural "fit" for OSC.

We are proud of the achievements of the office. Since the advent of Scott Bloch's administration of OSC, we have filed the first ever prosecutions by OSC in the law's history, obtaining corrective action in many cases that had been delayed for years and had been essentially given up for lost. Take the case of an Army Corps of Engineers employee who was not reemployed after his active duty with the Air Force. After his case went unresolved elsewhere, OSC prosecuted the case before the MSPB and obtained full corrective action, including $85,000 in back pay, reemployment in his former position, and full restoration of benefits. Or, the case of the injured Iraq war veteran who returned from duty only to be sent home by his Federal employer because he could no long perform his former job. After OSC became involved, we convinced the agency to find him a suitable job consistent with his physical limitations and back pay for the time he was at home trying to figure out where to turn.

Cases that before took several years to come to no positive conclusion now routinely take well under a year for OSC to investigate and resolve favorably. We are committed to getting as much relief as the law allows for our brave servicemembers, and doing so as quickly as possible. These patriots have given their all in the service of this great Nation. They should never be hung out to dry by a long, drawn-out, confusing process. OSC is passionate about obtaining relief for all who come to us, and no less for the soldiers of our country who also serve in the Federal civil service.

Moreover, giving OSC exclusive jurisdiction over USERRA Federal sector claims would remove the burden from the Department of Labor Veterans Employment and Training Service to navigate Federal personnel law, freeing them to focus on providing their best service to USERRA claimants from the private sector and those in state and local governments. Thus, the benefit to servicemembers would be doubly positive—for Federal servicemembers who would benefit from OSC's specialized experience, and for those private sector servicemembers who would benefit from greater attention to their claims at DOL–VETS.

Today, America is in the middle of the largest sustained military deployment in thirty years. That deployment but is not limited to the approximately 200,000 servicemembers in Iraq and Afghanistan at this moment. In recent years, the number of members of the National Guard and Reserve mobilized at one time peaked at more than 212,000. Last week, the Department of Defense reported that 92,971 members of the National Guard and Reserve had been mobilized and were on active duty. It is when these servicemembers end their active duty that they may find they are no longer welcome to return to their civilian jobs and are eligible to file a claim under USERRA.

Right now, with returning war vets a comparative trickle, USERRA claims are in the hundreds. What will happen if and when that trickle turns into a flood? Will we see a "spike" in the number of claims filed by returning servicemembers who have been turned away from their employers? Will the government demonstrate its support for our troops by being fully ready to provide prompt and effective action on these claims?

We don't know when they will start returning home in greater numbers, boosting demand for USERRA enforcement. We believe that adequate information has been developed to support a decision by Congress to assign the task of investigating and enforcing USERRA claims by Federal employees to OSC. We are poised to assume

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[2] It should be noted that 5 U.S.C. 2302(b)(11) makes it a prohibited personnel practice for any Federal supervisor or manager to take a personnel action forbidden by a veterans' preference statute or to refuse to take an action required by a veterans' preference statute. We believe that this includes USERRA.

this responsibility and to do our part in making their transition back to civilian life as smooth as possible.

Thank you for your attention and I look forward to your questions.

RESPONSES TO POST-HEARING QUESTIONS SUBMITTED BY HON. DANIEL K. AKAKA TO JIM BYRNE, DEPUTY SPECIAL COUNSEL, U.S. OFFICE OF SPECIAL COUNSEL

Question 1. The GAO found that DOL's average processing time for a Federal U-Sarah claim ranged from 53 to 86 days. OSC's processing time WAS an average of 115 days. To what do you attribute the considerably longer process at OSC?

Response. There are several important factors to consider when comparing case processing times at OSC versus DOL:[1]

(a) "Administrative Closures:" This refers to cases over which OSC or DOL lacks jurisdiction, there is no bona fide USERRA allegation (i.e., the claimant mistakenly characterizes an allegation as falling under USERRA), there is no meaningful corrective action, the claimant mistakenly filed a complaint form or filed it multiple times (e.g., with electronic filing), etc.

OSC, as a rule, does not open such cases, and instead endeavors to provide information to the claimant regarding other possible options for redress. OSC generally only opens cases for which it will conduct a thorough investigation and legal analysis, including collecting and reviewing documents, interviewing witnesses, etc.

By contrast, DOL opens such cases, and then quickly, sometimes within minutes, hours, or days, "administratively" closed them. OSC received from DOL information indicating that, during roughly the same time period covered by the GAO report, DOL closed 13 percent of its Federal USERRA cases within 1 day, 22 percent in one-to-two days, and 34 percent within one week. This practice artificially, and significantly, lowers DOL's case processing times.

In a letter to GAO in December 2006, OSC outlined three examples of cases that appear to have been opened by servicemembers only to be closed administratively by VETS. This information was discovered by OSC on the USERRA Information Management System (UIMS) managed by VETS:

> Example #1: Carlos XXXX opened USERRA claim #AL–2007–00009–30–V on November 14, 2006, at 2:52 p.m. and USERRA claim #AL–2007–00010–30–V on November 30, 2006, at 3 p.m. According to UIMS, however, on November 30, 2006, at 3:12 p.m., VETS "resolved" and closed USERRA claim #AL–2007–00010–30–V.
>
> Example #2: Charles XXXX opened USERRA claim #VA–2007–00009–30–V on November 14, 2006, at 2:30 p.m. Charles XXXX then opened USERRA Claim #VA–2007–00010–30–V on UIMS on November 14, 2006, at 2:34 p.m. According to UIMS, these claims were "resolved" and closed by VETS on November 14, 2006, at 2:46 p.m. and 2:47 p.m., respectively. Notwithstanding VETS closing of cases on UIMS, OSC received Charles XXXX's USERRA claim from VETS on November 14, 2006, and opened OSC file Number DP–07–0370.
>
> Example #3: Else XXXX opened USERRA claim #NC–2007–00001–30–G on October 31, 2006, at 1:55 p.m. According to UIMS, VETS resolved and closed the case on November 2, 2006 at 1:51 p.m.[2]

DOL continues to "administratively" close cases. In one recent example, DOL opened a case, discovered that OSC had jurisdiction over it, and "administratively" closed the case 3 days later and referred it to OSC. The GAO report briefly discussed related discrepancies between claims shown in the UIMS database, compared to the number processed, which included closed claims reopened as separate matters, duplicate filings and claims transferred to OSC after being opened in UIMS.[3]

(b) "Mixed" Claims: Under the Demonstration Project (DP), OSC receives *all* Federal USERRA claims where a Prohibited Personnel Practice (PPP) is also alleged (regardless of claimant's Social Security Number). Approximately 20–25 percent of claims OSC received under the DP are these "mixed" claims. Because such claims involve more allegations and are generally more complex than USERRA-only claims,

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[1] As a preliminary matter, GAO found that DOL's case closure dates were not reliable and, as a result, GAO could not accurately determine an average case processing time, and had to estimate a range using only a limited "sample" of files (in contrast to OSC, where all files were included). Specifically, GAO found that the closure dates entered into DOL's database did not match the dates on the closure notification letters to claimants in over 40 percent of the cases sampled (GAO Report 07–907, p. 4).

[2] U.S. Special Counsel letter to GAO (George Stalcup) of December 19, 2006; Re: USERRA Demonstration Project (GAO Engagement Number 450458).

[3] GAO Report 07–907 (pages 17 & 35).

and because of the statutory requirement for PPP claims that OSC notify the claimant of its preliminary determination and provide an opportunity to respond, "mixed" claims take longer to investigate and resolve than USERRA-only claims. As a result, OSC's average case processing time is adversely affected when compared to DOL's.

(c) Time Counted Toward Case Closure: OSC's understanding is that DOL counts only the days a case remains at VETS, not DOL as a whole, in determining the number of days it took to close a USERRA case. This practice ignores the significant amount of time a case might spend in DOL's Regional Solicitor offices for legal review, which often can be several months.[4] From the claimant's perspective, the total amount of time it takes to resolve or refer his or her case, regardless of which DOL office has it, is the important factor. By contrast, OSC's processing time is measured from the date OSC received the case until the date OSC notified the claimant in writing of the outcome.

(d) Differing Responsibilities: If DOL-VETS cannot resolve a Federal sector USERRA claim, it may simply close the claim and ask the claimant whether he or she wants it referred to OSC for possible prosecution before the MSPB. OSC, however, must also decide whether to file such litigation before the MSPB, an additional responsibility that increases its overall case processing times.

For these reasons, the case processing times reported by GAO are not an accurate, or reliable, basis on which to compare how quickly OSC and DOL process Federal sector USERRA cases. Accordingly, OSC respectfully disagrees that its process is "considerably longer" than DOL's. Moreover, OSC believes that its investigations are more thorough, its conclusions more legally sound, and the outcomes that it achieves more favorable for servicemembers, all important factors that GAO did not address in its report, which did not assess the quality of claims investigations. As was emphasized to GAO in our response to the report, over *one-in-four* claims investigated and closed by OSC have resulted in full corrective action for the servicemember.

Question 2. During the demonstration project, OSC received six claims from DOL from claimants who requested referral of their claims. It is my understanding that in five of these cases OSC declined to represent the claimant. Of the claims that OSC processed during the demonstration project, how many claims did you agree to represent the claimant?

Response. This presumably refers to the non-Demonstration Project cases discussed on page 23 of the GAO report (i.e., cases investigated, but not resolved, by DOL and referred to OSC, at the claimant's request, for possible prosecution before the MSPB). It is important to note that such cases are referred by DOL to OSC at the claimant's request, regardless of merit. Thus, many such cases are referred with a recommendation by DOL that OSC *not* represent the claimant before the MSPB. Nevertheless, of the four cases filed by OSC at the MSPB since 2004 in which OSC obtained full relief for the claimant, DOL recommended that OSC *not* represent the claimant in two of those cases.

If OSC determines that a USERRA case is meritorious (i.e., there is sufficient evidence of a violation and the claimant is entitled to relief), OSC first requests that the Federal agency voluntarily take appropriate corrective action. OSC has had tremendous success in convincing agencies to do so, as evidenced by OSC's greater than 25 percent corrective action rate during the Demonstration Project (i.e., OSC obtaining corrective action for claimants in more than one-in-four of the USERRA cases it has received under the DP). OSC attributes this success to its thorough investigations and legal analysis, ability to educate Federal agencies about their obligations under USERRA, and the credible threat of litigation illustrated by the four MSPB cases cited above.

If an agency does not agree to OSC's request in a timely manner, OSC will file litigation with the MSPB, not simply close the case and take no further action. Remarkably, OSC has yet to have to do so with any Demonstration Project cases, although there are several pending matters that OSC may file if agencies do not take the requested action. Thus, OSC has not formally represented any claimants before the MSPB in DP cases, but has represented claimants' interests to Federal agencies in the approximately 25 percent of meritorious cases it has received under the DP. In this sense, OSC has "agreed to represent" the claimant in roughly one-in-four DP cases (i.e., where OSC would have represented the claimant before the MSPB, but

[4] GAO found that it took an average of 247 days, or over 8 months, for DOL to process such cases from beginning to end (GAO Report 07–907, p. 23). Only one such case was included in the 54 cases that GAO sampled to estimate a processing time "range" for DOL (GAO Report 07–907, p. 37).

did not have to do so because the agency voluntarily agreed to OSC's request for corrective action).

Question 3. If the Congress were to give jurisdiction of Federal U-Sarah claims to OSC, what funding and staffing issues would you need to address and what would be an optimum time line needed for a smooth transition?

Response. While OSC would need additional staff and resources over the long term to handle roughly double its current USERRA caseload, we have sufficient staffing flexibility and expertise in the short term to handle these cases immediately. In addition to the full-time USERRA Unit, which currently has nine attorneys and investigators, each of OSC's four field offices has received USERRA training and is currently handling a limited number of cases. In the short term, these field offices could handle additional USERRA cases while additional staff members were recruited for the USERRA Unit. An estimate of specific budgetary needs for OSC to exercise jurisdiction over Federal USERRA claims in FY2008 is at Appendix A.

Question 4. This question is for both DOL and OSC: I am deeply concerned that individuals who are being sent to battle by the Federal Government are put in the position of having to do battle with that same government in order to regain their jobs when they return home. In your experience, can you think of any reason that the Federal Government (as an employer) would have any problems with complying with the law in this regard? Is it a matter of complexity, a matter of budget, or something else?

Response. In OSC's experience, while Federal agency managers and Human Resource (HR) specialist often have a general awareness of USERRA, they often do not understand the full extent of their responsibilities to Federal employees who serve in the military. For example, while it seems rare for a Federal agency to flatly refuse to reemploy a returning servicemember, it may not do so properly (e.g., by failing to place the person in the "escalator" position). Or, the agency may not fully carry out its obligations to injured servicemembers (e.g., by failing to seek placement assistance from OPM). OSC is striving to correct these deficiencies by providing USERRA training, written guidance to agencies on common issues (e.g., advance notice requirements, reemploying injured servicemembers), and speaking at national conferences and events attended by agency managers, attorneys, and HR specialists. Moreover, OSC provides live technical assistance to agencies through its telephonic and e-mail USERRA Hotlines, staffed by its team of USERRA experts. OSC also intends to extend its highly successful 5 U.S.C. Sec. 2302(c) certification program to include USERRA. Through these efforts, OSC is helping to educate Federal agencies about USERRA and prevent future violations.

Other factors that possibly contribute to USERRA violations by Federal agencies:

- The large proportion of Federal civilian employees who also serve in the military—according to DoD, about 25 percent of National Guard and Reserve members are civilian employees of the Federal Government. Federal employees generally have greater employment rights than private employees, and are possibly more aware of their rights.
- The decentralized nature of large agencies accounting for a higher proportion of USERRA violations (e.g., U.S. Postal Service, Veterans Affairs).
- USERRA can be demanding, as it should be, and is sometimes counter-intuitive or inconvenient for employers; thus, agencies may sometimes mistakenly believe their actions are not violating USERRA (e.g., refusing to hire a servicemember because he or she is about to be called up for military duty and cannot start work when the agency needs them).
- There is a tendency in some members of management to disparage those who serve because it makes their jobs more difficult, they are possibly perceived as "getting special treatment" and not having to work some shifts when they are on military training duty when others have to work those weekend shifts, for example. This is anecdotal, but it appears to be the case in some situations OSC has encountered.

Question 5. In their testimony, GAO stated that, if OSC were given the authority to receive and investigate all Federal claims, a significant increase in the number of claims might necessitate a change to the oversight structure that you used during the demonstration project which relied heavily on the actions of one individual. Could you please comment on that concern?

Response. OSC has superior persons with expertise and experience that will make such a restructuring unnecessary. The acting chief of the unit is highly experienced in OSC litigation and in USERRA and trained for a period of 2 years under the former chief. OSC hired a nationally known expert, Sam Wright, one of the "fathers of USERRA," to work cases, perform outreach and serve as an adviser to the unit

on complex matters. Few can claim to have his credibility on and knowledge of USERRA. OSC believes that its centralized approach has ensured timely, consistent, and most important, correct results in USERRA cases. If OSC were to receive all Federal USERRA claims, we would increase the number of investigators, attorneys and administrative support. Modifications to our organizational structure, adding deputy and team leader positions, would maintain centralization without dependency on the USERRA Unit Chief position.

APPENDIX A

U.S. Office of Special Counsel.—Funding needed for OSC to handle all Federal USERRA cases

Object Class	Amount	Percent of Supplementary Request
Salaries. The amount necessary to provide funding for approximately 16 FTE in fiscal year 2008	$1,602,000	62%
Benefits. The benefits required for the approximately 16 FTE	417,000	16.1%
Travel. This includes approximately $60,000 in travel for investigations and approximately $24,000 in travel related to litigation	84,000	3.2%
Transportation. Courier services, contract mail service, and freight, required for general expenses and also for delivery between headquarters and field offices	3,000	0.1%
GSA Rent. Since OSC's current space is fully occupied by its headquarters and Washington DC field office, a small but secure additional suite of offices should be used to house the unit	285,000	11.0%
Utilities and Communications. Communication costs related to local and long distance telephone services and Internet access make up the largest portion of this category	27,000	1.0%
Printing. Printing for USERRA related publications	2,000	0.0%
Other Services. Includes $21,000 in annual litigation related non-travel expenses. Also includes $20,000 in training. Also includes WestLaw, travel services, and miscellaneous services. Accounting and payroll services would be handled through OSC existing systems and incur no additional cost. Also included here are $30,000 in miscellaneous non-recurring expenses connected to starting the full USERRA office in its first year	101,000	3.9%
Supplies and Materials. General supplies can include copier toner, printer toner, copy paper, bond paper, folders, files, binders, zip drives, whiteboards, business cards, subscriptions related to legal research, reference books, training materials, electronic subscriptions for access to data, water coolers, digital recorders, batteries, cassettes, disks, investigative supplies, and other supplies of all types	10,000	0.4%
Equipment. Laptops and printers, telecom equipment, and network equipment. Includes cost of updating hardware and software by replacing a portion of obsolete equipment annually. Annual equipment replacement cost would be around $20,000. But in the first year of setting up a full USERRA office, there will be additional non-recurring equipment expenditures of $32,000	52,000	2.0%
TOTAL	$2,583,000	100.00%

Chairman AKAKA. Thank you very much, Mr. Byrne.

I have a question for both Mr. Ciccolella and Mr. Byrne, and it is for DOL and OSC. I am deeply concerned that individuals who are being sent to battle by the Federal Government are put in the position of having to do battle with the same government in order to regain their jobs when they return home. In your experience, can you think of any reason that the Federal Government as an employer would have any problems with complying with the law in this regard? Is it a matter of complexity, a matter of budget, a matter of personnel, or is there another reason? Mr. Ciccolella?

Mr. CICCOLELLA. Senator, there should be no reason ever where a servicemember goes off to duty and comes back to their Federal agency and doesn't get their job back. That is not what usually happens.

The cases today, USERRA cases, are very complex. It is not like there may be one issue in a USERRA case. In many situations, there are multiple issues. A lot of times, what you find with the Federal manager is that they don't understand all the things that properly restore an individual to his or her duty position. They don't understand the escalator principle, that when you leave, you are on an escalator, and if you are on Step 5 at the escalator when you leave and you would have been at Step 7, then when you come back, you have to be put into Step 7. If that requires training or anything else, the Federal manager, they have got to figure that out, how to do it.

The cases are very complex. About half the cases that we do in the Federal Government are where the Federal hiring manager just doesn't understand the law or the OPM regulations that spell out how to implement the law. So that is really what we are seeing more often than a servicemember who is just terminated, because that really doesn't happen very often and there is a safety catch in this, and that is if that Federal agency is unable to place that individual back in his or her job, then it becomes the responsibility of the Office of Personnel Management to place that individual.

So the Federal Government has been pretty good as a model employer. They do a lot of things for our servicemembers that the private sector doesn't do. For example, when a servicemember leaves on active duty, goes on active duty, most Federal agencies continue that Federal health benefit. That is pretty expensive. Private employers don't do that. And they not only pay the employer's share of the health benefit, they pay the employee's share. So servicemembers in most cases that get the TRICARE military benefit also get the health care that they had so there is no loss of coverage. Also, you can serve your probation period on active duty. That never happens in the private sector.

So the Federal Government has done a reasonably decent job of being a model employer, but as I said, there are issues, there are problems. I believe a lot of the problems are because of the complexity of the issues and the multiple issues.

And here is the other thing. It is not like these servicemembers are going to active duty for a year once. In many cases, these are multiple deployments and the frequency of those deployments, maybe in a 5-year period, some of our Federal employees have been gone for 2½ or 3 years on active duty and that is hard. That is hard for Federal managers to manage. But that is also the law and that is why you have us and that is why you have Special Counsel, to make sure that they obey the law.

I think I had better stop there. I could go on for a long time, but I think I had better just stop there.

Chairman AKAKA. Mr. Byrne?

Mr. BYRNE. Thank you, Senator, for that question. I agree with most everything that Mr. Ciccolella said. I would like to emphasize the whole awareness piece, which I think was sort of the core of your question, is that most of the cases that have come forward to us are a lack of awareness on the managers and sort of the H.R. departments within Federal agencies. And so I can speak on behalf of OSC that even during the demonstration project—and I am sure DOL has an outreach program, too, I am just not versed on it—

but even though it has just been a demonstration project for us, we have gone out and done extensive outreach, presentations to various agencies, the FDR Conference on Federal Employment Law just a couple months ago out in San Francisco where we put on a presentation to hundreds and hundreds of Federal managers and H.R. personnel.

And what we plan on doing if we receive full jurisdiction of USERRA is to incorporate a certification process, which we do with other aspects of our office, the Hatch Act and the prohibited personnel practices, where we train up an agency to a certain level and they become certified, which is a requirement that they should do. And I submit probably Labor has something very similar. But we have postured to do all that, and I think awareness is key.

I think this would be a good time to maybe put in the fact that hasn't been brought out is that the awareness is the appearance that employers in the government have been innocent, just not being aware. I don't believe that we have run into any cases yet where an employer has willfully discriminated against a veteran and fired them, or intentionally said, "I am tired of them being deployed. I am going to hold them back in the promotion cycle." But, I pass on to this Committee that we don't have any disciplinary action that we can take against an employer at this time and I would ask the Committee to consider that as they look at this legislation.

Chairman AKAKA. Thank you. We will have a second round. May I call now on our Ranking Member for his questions.

Senator BURR. Thank you, Mr. Chairman. I want to ask unanimous consent for additional questions to be in writing to the witnesses because I can assure you I am not going to have ample time with one or two rounds, I think, to sort this out in my own mind. I actually spent several hours going through the testimony and my thoughts last night and thought I understood this. I have learned in a short period this morning that I am more confused than I ever dreamed that I would be, and I am going to warn you, Chick, that I am going to come back to you because you said it is more difficult to do these investigations and I am going to ask you to walk me through a typical one.

This demonstration project is focused on Federal agencies, and I sit here almost amazed that we have got these Federal guidelines and Federal agencies—I think one of you used "unaware," that an H.R. person doesn't fully understand exactly what the law says as it relates to this population of people. One, it makes me wonder who in the hell hired them. What qualifications did they have to serve in the capacity that they are in? If anybody ought to get this right, it ought to be the Federal Government, and if I were a private sector employer today and looked at the results within the Federal Government, I would say, why the hell are you coming after me? Why don't you clean up your own house first?

Now, we have gone through a Government Accountability Office study where, for the first time, and I am perplexed at it to some degree, that the Government Accountability Office couldn't come in and distinguish black and white. There was a report that had a tremendous amount of gray and the reason was the inability to sort data or the inability to find the data that is needed to make the determination.

I would love for both of you to share candidly with the Members of this Committee, how can Federal agencies butcher this so bad and force you to go through a lengthy process, and Chick specifically I will throw the first question to you. After a claimant requests referral to Office of Special Counsel, there are two additional layers of process that the Department of Labor goes through before the referral is made. Why and what purpose do those two layers serve?

Mr. CICCOLELLA. I understand, Senator. It is a good question because the issue is why we go through that bureaucracy.

First, I would just like to say I probably shouldn't comment on who we hire in the Federal Government and what the qualifications are for those people in the Federal Government. I know there is some disappointment in the way some people behave in the Federal Government. I won't comment, sir, on that.

Senator BURR. We have that problem, too.

Mr. CICCOLELLA. Yes. Well, everybody does, I guess.

Can I just say, this is not—I understand where you are coming from, Senator. I really do. USERRA is a tough law. We enforce about 189 laws in the Department of Labor. This is the most employee-friendly law there is on the books. It leans toward the veteran, as well it should, because servicemembers should never be penalized for their military service. And that is why, since the 1940's, there has always been a law in place to make sure that servicemembers do get back their jobs.

I agree with you. Investigations take long enough, because you have got to gather the evidence and you have got to confront the Federal hiring manager. But then if we find that the case has merit and we decide we are going to buck it over to the Counsel's Office so that they can also investigate. Well, it has to go through a Regional Administrator. He looks at it from the point of view, "is it correct," and that is a pretty good check. It only takes a couple of days, maybe, at most.

But then it goes through our Solicitor. Labor has a lot of people up there in the Solicitor's Office. Is that important? It is important. It is important to the Counsel's Office and it is important to us because we want to make sure that the law has been properly interpreted. And so when we send a case over to the Special Counsel's Office, that process takes place.

I am not an attorney, so I don't know all the things about what they look at, but I know the law pretty well. When we do send it over to Special Counsel, they are going to take a look at it. They do a very good job of reviewing it and they will also do an investigation.

Now, there is a down side to that and I couldn't agree more, because that is bureaucracy at work, and it takes a little bit of time. But there is sometimes an unintended advantage when that process takes place, because once it goes to a lawyer in our office, or if it goes over to Special Counsel, I can guarantee you that there is more attention paid to that complaint by the Federal hiring manager. So a lot of times, just having it up at our Solicitor's Office or having it over with Jim's folks over there at OSC, that case may be resolved en route to referral.

So that is a long-winded answer, but——

Senator BURR. Well, let me——

Mr. CICCOLELLA [continuing]. It is sort of bureaucratic. But, if this doesn't happen, you know, "wham, bam." There is a process. I hate to say it, but you know, it has to work that way.

Senator BURR. I want to commend you because I think you are trying extremely hard to sort this out, and I agree with you, it is extremely difficult. As is evidenced, it is becoming more difficult by the minute for me.

Mr. CICCOLELLA. Yes, sir.

Senator BURR. I want to give Jim an opportunity to respond to my point, but I also want to ask you, if the Federal hiring managers understood this, how much of what you are doing would go away?

Mr. CICCOLELLA. Probably a lot more of it. I think you are always going to have some situations. Let us face it, if an individual is gone 3 years out of 5 years in a Federal agency, it is tough. I mean, my Chief of Staff went over to Iraq for a year. That is tough. You just gut it out. You put somebody else in the job temporarily.

The outreach and education that Jim talked about is extremely important. One of the things we did 2 years ago is we have this Veterans Hiring Initiative which focuses on trying to hire disabled veterans, and there are streamlined authorities for doing that, direct appointments. Most of the Federal agencies don't use them. So we talked to about 40 Federal agencies in person and then we talked to a bunch of others through various messaging. Now we are doing that in the Federal regions. And in those Veteran Hiring Initiatives Briefings, what we do is we make sure that we talk about USERRA.

The other thing that is really good today is that we brief, or the Defense Department and the Staff Judge Advocates in the military brief, every servicemember when they are mobilized and when they are demobilized, which is more important, they are briefed on USERRA. So most servicemembers know how to make a complaint.

Thanks to the good work that the Labor Department has done in the private sector and in the Federal Government, thanks to what OSC has done under Scott Bloch, because they have got a real interest in enforcing USERRA, and that is something to be absolutely admired and respected, they do a very good job, the employers do understand the law a lot better. But as I said, some of these cases are complex and it may not be just about the reinstatement. It may be how do we restore that servicemember's pension benefits, or how do we restore the health care coverage? You know, there are gaps in restoring health care coverage after a servicemember comes back. We are trying to fix that now with a legislative fix, because they can continue their TRICARE when they come back and they may not reinstate their health care coverage right away. There is a hole there.

So, you know, these are kind of complex situations and I do agree with you. I wish we could do it faster, and we should do it faster. We should eliminate as much bureaucracy if we can, and I believe in that. I believe in busting bureaucracy that doesn't work really well. But there is a process and I think for legal purposes, especially if we have to send a case over to the Counsel, we have got to follow those procedures, sir.

Senator BURR. Jim?

Mr. BYRNE. Thank you, Senator. I think Labor would agree with us that we would all like to outreach or educate ourselves out of a job where we don't have to face these. I think back to our outreach programs that we have with the Hatch Act, extensive programs, prohibited personnel practices, extensive outreach programs. But we are still in business. There are still plenty of violations and allegations that come forward.

But I think we can all do a better job in educating the managers in HR, because I am frustrated that they don't understand this basic principle, not only not understanding the law, but looking at it from just doing the right thing, which I think should be part of a test in an H.R. department or an executive or a manager. So I guess that is a little bit of my opinion on the side, not related to the law.

But you had talked about some of the processings of the cases as they come in. If you are interested in some details, Mr. Boulay does this for a living day in and day out. He has his hands on every single case that comes into OSC. I guess that sort of leads into the fact that we are a small agency, 110 personnel, four field offices around the country. USERRA has nine personnel, seven attorneys, two investigators, and so we are lean, very lean and very efficient at what we do. And so we have that luxury of not having a big bureaucracy and so I think that really plays to our advantage in that regard.

Mr. Ciccolella also talked about the complexity of some of the cases, and I think Mr. Boulay might be able to speak to that, also. A lot of times, the cases have prohibited personnel practices incorporated into them. So from our perspective at OSC, when a case comes in, it is not necessarily just a USERRA case. There could be a retaliation case mixed in or some other type of discrimination mixed in which is more difficult to investigate than a straightforward USERRA claim. So I want to just throw that in there, that it is complicated. To even confuse everybody even more, there are more matters.

We are just really fortunate in our office, and I am hoping Mr. Boulay gets the chance to speak here, we have experts in this area, in Federal employment law. They do this for a living, prohibited personnel practices, Hatch Act, whistleblower disclosures. And so for us to do USERRA claims is a natural.

Senator BURR. If the Chairman would indulge and my colleague, Senator Tester, could we hear from Mr. Boulay?

Chairman AKAKA. [Nodding affirmatively.]

Mr. BOULAY. Thank you. Just to pick up on what Mr. Ciccolella and Mr. Byrne said, I would agree. Generally speaking, I think what we see is that Federal agencies, Federal managers have a general understanding of USERRA but don't know the full extent of what is required, and that is where these cases become more challenging and that is why a big part of our approach is even if a case may not have merit for the individual, that we work very hard to educate the Federal managers and the H.R. specialists in the full extent of their responsibilities both under the USERRA statute and under the OPM regulations that have some additional requirements, such as making sure there is a mechanism to con-

sider servicemembers for promotions while they are absent due to military service.

Because our approach is centralized at OSC, we have the ability to spot where cases come in and go out through me, through the USERRA Unit Chief, we are able to spot trends and issues that come up. In fact, two have come up in particular, and I think Mr. Ciccolella referenced this, in agencies' obligations with regard to injured servicemembers, the steps they need to take up to and including getting OPM to provide placement assistance if they can't find a job for the servicemember, and also advance notice requirements for military leave. We have standard letters that we provide to agencies and to H.R. specialists that detail these issues.

As Mr. Byrne alluded to, under the prohibited personnel practices, there is a requirement that heads of agencies educate their employees about civil service laws, rules, and regulations and that they comply with that, and we have a certification program that they can become certified that they are complying with that provision and we would like to extend that to USERRA if we get the work, so that we would have an agency certify to us that they have provided training, posted information and things of that nature for USERRA to ensure that they comply.

Now, as far as just to make it clear, cases under the referral process, which is nondemonstration project cases, there is this process whereby VETS investigates and then has several stages of review where they send it from their local office to their regional office and then to the regional solicitor and then finally to OSC if the claimant requests that. Now, under the demonstration project, those steps are eliminated because OSC gets the case from the beginning, we investigate it, we decide whether to prosecute. We have that authority. When we approach agencies in a meritorious case, they know that there is a credible threat of litigation.

And as far as the need or the benefit added at VETS and Department of Labor to do these additional reviews, that is built into our process under the demonstration project. We have supervisory and legal review throughout the process, from the beginning of the end of the case. So there is no need, because we are centralized, to transfer it between offices. So I just want to point out that difference.

And as far as cases that do get referred, while we do appreciate getting a summary or a memorandum of referral from the Department of Labor, we do a de novo review. We do not rely on those summaries to make our decision. It gives us a brief overview of the case, gets us up to speed, but we are evaluating the case ourselves fully, and we have had some instances where we have had disagreements, but we think as experts in the Federal sector that we should be making the final decision and doing, as I said, a de novo full review of every case.

I just hope that is helpful to your questions. Thank you.

Chairman AKAKA. Thank you very much, Senator Burr.

Senator Tester?

Senator TESTER. Mr. Chairman, thank you very much. I feel the same way Senator Burr does at this point in time. I have got so many questions, I don't know if we have time to answer them all today, so we will start at the beginning.

The process that I heard was a claim goes to DOL, then it goes to the Solicitor, and then it goes to OSC, is that fairly correct?

Mr. CICCOLELLA. The investigative process—that would be the chain, yes.

Senator TESTER. Does it occur anytime where it goes right straight to OSC, where the first two are eliminated? That does occur? It just depends on what the claimant wants?

Mr. CICCOLELLA. Yes. Under the demonstration, half the cases go directly, and if the case involves, or we suspect it involves, a prohibited personnel practice, one of the 12 PPPs, then we send it to Special Counsel immediately.

Senator TESTER. So, it still goes through your office, though?

Mr. CICCOLELLA. Yes, sir.

Senator TESTER. So they all go through your office initially?

Mr. CICCOLELLA. Some come direct to OSC through their outreach, but most cases, I believe it is fair to say, come through the Veterans' Employment and Training Service.

Senator TESTER. That is cool. Mr. Boulay said that you, if I heard you right, you don't use the previous reviews done by the DOL. You use your own?

Mr. BOULAY. That is in non-demonstration project cases—cases that are referred from DOL to us—they provide a memorandum of referral after it goes through their multi-stage process. We do review those and use those as sort of a quick overview of the case, but we make our own decision and do our own review.

Senator TESTER. Right. So you kind of read through them and set them to the side and do your own thing on that? I am not being critical. I just want to know the process.

Mr. BOULAY. Yes. I mean, we do a full review of the case and the case file, and under the demonstration project, though, that process is not necessary because we get the cases directly.

Senator TESTER. OK. Training—Mr. Boulay, you talked a little bit about the certification process. Does the OSC have a training regimen that they are doing at this point in time? I think that Mr. Byrne also talked about training, some training stuff. Do you guys have a training regimen that you are offering to agencies, or is it up to the agency to get a hold of you? How is it done? Either one can answer.

Mr. BOULAY. If I could just go ahead, please. We have a formal outreach program, a training program, PowerPoint presentation——

Senator TESTER. Who initiates it?

Mr. BOULAY. It is initiated by—in individual cases we often actually request it. We offer it in most cases based on, you know, if the agency seems to have a good handle on USERRA and there are no violations, we would not necessarily offer it. But even in a case where there was no individual liability, we offer that program to agencies.

Senator TESTER. So the program offering happens most commonly when there is a problem with——

Mr. BOULAY. When there is a complaint, yes.

Senator TESTER. When there is a complaint. DOL, is it the same? Do you guys have a training regimen that you offer in the Department for Federal agencies?

Mr. CICCOLELLA. As I mentioned, 2 years ago we had our Disabled Veteran Hiring Initiative to go out physically and talk to 40 agencies. We are now in the ten Federal regions talking to the Regional Executive Councils, so we will probably start that again on a cycle with the Federal agencies.

Senator TESTER. OK. Mr. Byrne, you talked about having nine people dedicated to USERRA in the OSC, is that correct?

Mr. BYRNE. Yes, sir, that is correct.

Senator TESTER. And where is your office located?

Mr. BYRNE. At 17th and M Street here in the District.

Senator TESTER. So it is in D.C.?

Mr. BYRNE. That is the headquarters, and we have three field offices that we actually have trained and utilize for some of our cases.

Senator TESTER. OK.

Mr. BYRNE. But they all go through centralized headquarters.

Senator TESTER. In those field offices, are there additional personnel, or is that part of the nine?

Mr. BYRNE. No, that is not part of the nine. That is additional personnel, correct.

Senator TESTER. OK. So how many total personnel do you have in the OSC dedicated to USERRA?

Mr. BYRNE. Dedicated is nine——

Senator TESTER. FTE.

Mr. BYRNE. FTE would be nine, but depending on the surge and the number of cases, we push them out to the field offices under the supervision of Mr. Boulay. And we have four field offices with an average of about eight personnel. So that is our set core—nine—but, we can surge way beyond that. So if you ask for an FTE, I could guess and say we are 13 or 14.

Senator TESTER. How about the DOL? How many people do you have dedicated to USERRA? You said you had, what, a hundred investigators, is that correct, in every State and Territory?

Mr. CICCOLELLA. Correct. That organization has 250 employees. About 115 are State Directors of Veterans' Employment and Training or their assistant directors. 115 are trained USERRA investigators located in the 52 States and Territories.

Senator TESTER. That is their job?

Mr. CICCOLELLA. That is part of their job. That is not the only job they have.

Senator TESTER. OK. How many claims do you receive per year at DOL?

Mr. CICCOLELLA. Put it in perspective for you?

Senator TESTER. Sure.

Mr. CICCOLELLA. Before——

Senator TESTER. Let me back up my question. How many Federal claims do you receive per year, not the private claims, but the Federal claims?

Mr. CICCOLELLA. There are approximately 200, and it differs each year, about 200 complaints with the Federal Government each year.

Senator TESTER. And that is probably going to go up, as somebody said, with the potential for bringing the troops home.

OSC, how many do you get that are not referred through the DOL first?

Mr. BYRNE. Approximately 140 to 160, of which some of those also have the prohibited personnel practices mixed in with them.

Senator TESTER. OK. But the initiation is USERRA claims?

Mr. BYRNE. Correct.

Senator TESTER. OK. Mr. Ciccolella, the previous witness said that the main problem that the GAO had was bad data, and I hope I don't put words in his mouth, and the bad data was a direct response to an inadequate manual. And I said, whose responsibility was the USERRA manual and he said the DOL. Are you doing anything to fix that? That might be the second question. The first question is, do you have the same opinion as far as what makes databad? Is it the USERRA manual, and are you doing anything to fix it?

Mr. CICCOLELLA. I have the same opinion that GAO does.

I thought their review was very useful.

Senator TESTER. OK.

Mr. CICCOLELLA. The thing that has to be done is that more attention by our investigators has to be paid to recording the closure date of the case and making certain that the administration and procedural aspects of the case are properly attended to. I would just like to say for the record, that doesn't necessarily speak to the quality of the case of those investigations.

Senator TESTER. OK. Just a couple of side comments that—I have one more question for DOL. How many private cases, USERRA claims, do you guys deal with a year?

Mr. CICCOLELLA. Sir, we are doing about 1,400 total cases a year. Of those, last year, 12 percent were Federal cases.

Senator TESTER. OK. So you are doing 1,400 a year total, 12 percent—OK. I have got you.

Mr. CICCOLELLA. Now, could I just clarify, sir——

Senator TESTER. Yes, go ahead.

Mr. CICCOLELLA [continuing]. Because Jim is doing the same thing. You know, we get many more inquiries and provide many more assistance, technical assistance things to people, and you have to remember also that the Department of Defense has an agency that does informal mediation.

Senator TESTER. Yes.

Mr. CICCOLELLA. They do a lot of claims. So there are a lot more claims than just the 1,400.

Senator TESTER. I have got you. So let us revert back a little bit. You said you have got somewhere between 160 and 200 Federal claims, if it is 12 percent of 1,400.

Mr. CICCOLELLA. That would be about right.

Senator TESTER. And what percentage of those do you pass on to OSC?

Mr. CICCOLELLA. Well, under the demonstration, everyone with an odd Social Security number goes to OSC, so roughly 50 percent of those. So last year, it was 96, and this year so far it has been seven, and the total in the demonstration, I think somebody said 269, but I think it is 289.

Senator TESTER. OK. All right. Thank you very much. I appreciate your patience with the questions. I appreciate your testimony. Thank you.

Chairman AKAKA. Thank you very much, Senator Tester.

As you know, Senator Tester has many more questions to ask. What had intrigued me is a possible solution is the statement that was made by Mr. Boulay, who said that there was no need to transfer cases to another agency. It appears that there is a process, there are investigations, there are interpretations and decisions made and all of this takes time. And for it to go through three agencies takes all the time. So we really need to look at this. You have been helpful in trying to clarify this.

Instead of asking a second round of questions, I ask Senator Tester whether he would agree that we would submit further questions in writing to you to answer. I have many questions to ask. Senator Tester?

Senator TESTER. I would. I would just like to make a quick comment, if I may, Mr. Chairman——

Chairman AKAKA. Yes.

Senator TESTER [continuing]. And that is that it appears to me preventive medicine here would be much better than what we are doing. We can have our own personal opinion, so I will just tell you mine. I think the Department of Labor ought to figure out a regimen for training the Federal agencies and make sure those agencies know what the heck is going on. And I think that you have the wherewithal to do that and I think you do the best job at it, quite frankly. I think it ought to be a requirement. Mr. Boulay talked about certifying the agencies to be able to comply with USERRA. I think you could do that.

You know and I know it is complicated, and you guys are on the ground dealing with it on a daily basis and I am not, but it doesn't appear to me that it has to be this complicated. It is pretty cut and dried as far as I am concerned. I think if you know the rules going in, your human resource director ought to be able to deal with it in a way that makes sense for the agency.

I can't help to think that a lot of the problems here are with people who, quite honestly, they would just as soon see go out the door than move up the ladder like what is supposed to happen in USERRA. But I think training is critically important and we will do that.

Thank you, Mr. Chairman.

Chairman AKAKA. Thank you very much, Senator Tester.

I want to thank this panel for your testimonies and your responses, as well. I look forward to continuing to work with you. We will send you our submitted questions for the record and look forward to your responses.

Mr. CICCOLELLA. Mr. Chairman, could I say one thing before we end here? I know you all appreciate this—that we do have two agencies doing these investigations, so you have two standards in place. So I want to say for the record that it is not about turf with me. My focus is on the best service for veterans. I think if GAO is going to do a review they look at, hopefully, the quality of the cases, so we are better informed in terms of making our decision. Congress and this Committee, in particular, intended that the pro-

cedures for investigating USERRA cases would be the same procedures that are used in investigating veterans' preference. They said that when the Veterans' Employment Opportunity Act was passed, and it is in your report language.

So I would ask that as the GAO takes a look at who should do these Federal sector USERRA cases, that whoever does them should probably also do the veterans' preference cases. Because then your procedures are consistent, which is what Congress intended in their report language.

Chairman AKAKA. Thank you. Mr. Byrne, do you have any closing remarks?

Mr. BYRNE. Yes, sir. I would actually agree with what he just said.

Chairman AKAKA. Mr. Boulay, do you have any closing remarks?

Mr. BOULAY. Thank you again for the opportunity. I would just add, on veterans' preference cases, that OSC currently enforces disciplinary action for veterans' preference violations. So, we do have that expertise, as well, and we would be ready, willing, and able to take that on in addition to USERRA. Thank you.

Chairman AKAKA. Thank you very much, panel two. Thank you.

Mr. BYRNE. Thank you, Mr. Chairman.

Chairman AKAKA. Now I would like to call forward our third and final witness. Matt Tully comes to us from Albany, New York on his way to his second deployment in the Middle East. He is currently a Major in the New York National Guard. In 2005, Mr. Tully was deployed to Iraq with the 42nd Infantry Division based in Tikrit and at Camp Victory in Baghdad. Mr. Tully has been awarded the Vice Chief of Staff of the Army Award for Excellence, Iraqi Campaign Medal, Global War on Terrorism Service Medal, Armed Forces Reserve Medal with mobilization device, and the National Defense Service Medal. Mr. Tully has firsthand knowledge of USERRA issues, both as a returning veteran and also as an attorney.

Mr. Tully, I welcome you and your wife, Kelly, and your 9-month-old son, Kevin, to this hearing. I thank you for traveling all this way to be here today and for sharing your story and thoughts with us this morning. I also want to thank both you and your family for the sacrifices you are making for our Country. I know it must be difficult for all of you at this time. So will you begin with your testimony.

STATEMENT OF MATTHEW B. TULLY,
TULLY, RINCKEY AND ASSOCIATES, PLLC

Mr. TULLY. Thank you, Mr. Chairman, and thank you, Senator, for allowing me to be here today to discuss USERRA. I gave a detailed written report to this Committee that outlines my experiences as a victim of USERRA discrimination at the hands of the Bureau of Prisons several times from 1999 to the present. As this Committee is aware, I have received a substantial judgment in my favor because of the discrimination that I was subjected to.

The Office of Special Counsel had noted that they haven't received any complaints pertaining to a willful violation of USERRA. My case is crystal clear. My supervisors testified under oath that they knew about USERRA and they decided to violate it because

of budgetary issues. They were concerned that my departure was going to force the jail to require overtime and that they didn't like that.

In addition, I represent a U.S. Postal Service employee by the name of Richard Erickson. He is a Special Forces Sergeant Major in the Florida National Guard. He deployed to Afghanistan with the Florida National Guard and received a letter from the Postal Service stating that for the efficiency of the Service, the Postal Service was firing him from his position because the amount of time that he had taken was in excess of 5 years. Unfortunately for the Postal Service, there are a whole bunch of exceptions to the 5-year rule in USERRA and call-ups to Afghanistan and Iraq are excluded. That matter is currently in litigation.

There are numerous other cases that I can cite you of intentional violations by Federal employees of USERRA, and as the statistics that were in my written report show, my law firm handles many more USERRA violations than DOL–VETS and the Office of Special Counsel combined. During the GAO reported time period, we handled 1,802 complaints. The Office of Special Counsel handled approximately 269. The Department of Labor handled approximately 166.

What I would point out, of that 1,802, we had a 73 corrective percentage rate. So what that means is out of that 1,802, 73 percent of those veterans got what they were asking for, versus the OSC had approximately a 25 percent rate. The DOL report said that only 7 percent was sent to prosecution, so it is unclear how many actually got what they were deserving.

I believe that private attorneys offer the wham-bam fix here. I believe attorneys can turn these cases around in a matter of weeks. My law firm, from the time that we get a complaint from a servicemember, files court proceedings, whether it is in State court, Federal District Court, or before the Merit Systems Protection Board for Federal employees, within 3 weeks, versus the other agencies, as the GAO report talks about, just the investigative stage takes months. We actually are in court within 3 weeks.

We take the overwhelming majority of our USERRA cases for free because USERRA allows for attorney's fees to be awarded on top of any damages awarded to the servicemember. So if I am able to get Mr. Erickson his job back, he gets the back pay and benefits he is entitled to and then attorney's fees are added on top of that. So the servicemember is not harmed in any way, shape, or form by having a private attorney.

As a matter of fact, the servicemember is helped when they have severe cases, such as they are suspended, they are demoted, they are fired, and they need immediate action and they can't wait for a year for DOL to investigate the case, only then to turn it over to OSC for prosecution of the case. They will come to us, we will file the case within 3 weeks. With the Merit Systems Protection Board, the cases are adjudicated within 120 days. So we could get the servicemember back into his job generally within 120 days, and that is the big selling point for our firm. That is one of the reasons why we have 1,802 clients during this time period and the other agencies combined have under 400.

We have built a reputation around helping servicemembers. We have built this reputation around not charging servicemembers. In some cases, we do charge servicemembers who have farflung USERRA cases that we don't think are winnable and we tell them, go to DOL, go to OSC. If they are insistent to keep our firm, we do charge a little bit of an up-front retainer because we only get our attorney's fees paid by a Federal agency if we are successful. So the overwhelming majority of our cases, 99 percent, we don't charge our clients a penny, and it is only that 1 percent where the case is borderline that we ask for some type of up-front money, goodwill money.

So I think the right answer here, Mr. Chairman, is to change the attorney's fee provision from discretionary, which is what it is right now, to mandatory, so that if a servicemember proves their claims, they are guaranteed attorney's fees on top, because the private sector can do the job faster, better, and in a higher quality than the current Federal agencies have done.

With that said, I believe the Office of Special Counsel during the short time period in which they had the availability to do USERRA cases did an outstanding job. I believe that their addition of Sam Wright, who is known as the Godfather of USERRA, the person that wrote USERRA, his addition to the Office of Special Counsel really shows the Office of Special Counsel's commitment to doing the right thing.

The Department of Labor VETS, I haven't seen any changes. As a matter of fact, I would point out to you, Mr. Chairman, that we have represented several DOL–VETS employees who have alleged USERRA discrimination by DOL–VETS and those cases have been resolved under settlement agreements with confidentiality clauses, but the names and that type of information is available through the Merit Systems Protection Board. But I just find it astonishing when there were discussions here about training requirements that there would be allegations of USERRA violations with DOL–VETS.

That concludes my statement and I am available for any questions that any Member on the Committee has.

[The prepared statement of Mr. Tully follows:]

PREPARED STATEMENT OF MATHEW B. TULLY, TULLY, RINCKEY & ASSOCIATES, PLLC

Mr. Chairman and distinguished Members of the Committee: I am honored to appear before you today to speak about my experiences with the Department of Labor, the Office of Special Counsel and the United States Department of Justice in regards to enforcing rights under the Uniform Services Employment and Reemployment Act (USERRA). I am pleased to be accompanied at today's hearing by my wife, Kimberly Tully, and my 9-month-old son, Kevin Tully.

To provide you with some background on me: From 1991 to 1995 I was enrolled in the Reserve Officer Training Corp (ROTC) at Hofstra University with my current law partner, Greg Rinckey. In May 1995, I was commissioned as a Second Lieutenant in the United States Army and I found myself unemployed while awaiting the Officer Basic Course. I applied for several law enforcement positions with the Federal Bureau of Prisons and I was hired by them on August 20, 1995. Shortly thereafter in early October 1995, I was activated to attend military schooling and remained on active duty until approximately April 1998.

During the entire time that I was on active duty, I was placed on leave without pay status under USERRA by the Bureau of Prisons. Almost immediately upon my return from active duty I was subjected to intentional violations of USERRA by my superiors because of my military service. The discrimination varied from receiving poor performance evaluations during the time period that I was actually serving in the military, a period of time that I should not have even been rated or evaluated

by the Bureau of Prisons, to being publicly ridiculed for making the Bureau of Prisons fill my position using overtime employees.

In late 1999 and early 2000, I filed numerous complaints with the Merit Systems Protection Board against the Bureau of Prisons alleging violations of USERRA. I believe that it is important to point out that I consulted with Labor Law attorneys and other members of my military unit that also had employer issues and I was universally told not to waste my time dealing with the Department of Labor and to exercise my rights under USERRA and file my allegations of USERRA violations directly with the Merit Systems Protection Board (MSPB). Very shortly after I had filed my claims, the Bureau of Prisons conducted an internal investigation and I assume that they found merit to my allegations as they offered me a substantial cash settlement and paid leave to withdraw my allegations and resign from employment with the agency.

At that time I had just enrolled in law school and the large sum of money that the Bureau of Prisons was offering me and the extended paid time off was too enticing to turn down so I entered into a settlement agreement with the agency, which contains a confidentiality clause that prevents me from discussing in further detail the specifics of the case.

While out on extended paid leave pursuant to the settlement agreement, I began looking for other employment opportunities. Unfortunately, with not many employment prospects on the horizon, I sought a vacant position at another Bureau of Prisons institution in August of 2000. Shortly thereafter, I was hired by Morgan Stanley to work as a paralegal. In late 2000, I learned that the Bureau of Prisons employees at the institution at which I applied had learned of my prior protected USERRA activities and subsequently refused to process my application for employment with the Bureau of Prisons.

While I did have a position with Morgan Stanley that complimented my attending night school at Brooklyn Law School, I was deeply disturbed that I was being subjected to further retaliation by the Bureau of Prisons only months after they had entered into a settlement agreement with me, which in my opinion reflected their implicit acknowledgement of supervisory employees violating USERRA. As a result, I filed another USERRA complaint against the Department of Justice alleging that my application for employment was not processed in retaliation for my prior protected USERRA activities. That case continued for many years.

In the meantime, on September 11, 2001, my office on the 65th floor of the World Trade Centers came under attack. After September 11th, I served with the New York Army National Guard at Ground Zero for many weeks. In May 2002, I graduated from law school and subsequently passed the Bar Exam and was admitted to practice before the New York State Courts.

In January 2003, I sold my cooperative apartment overlooking New York Harbor in New York City and moved with my wife Kimberly to our ski condo in upstate New York. It was at that point that I opened up a law firm out of the back bedroom of my house. Some of my earliest clients were colleagues from the Bureau of Prisons who asked me to represent them in employment matters to include: allegations of EEO violations, whistle blowing violations and disciplinary actions.

In February 2004, my current law partner and long time friend, Greg Rinckey, returned from active duty and we entered into a law partnership together. Throughout 2004, the number of cases that we received from Federal employees dramatically increased to the point where we had to hire an associate and then several more associates to accommodate this increase in clients. In June of 2005, I received orders to report to Iraq with the 42nd Infantry Division.

On July 30, 2007, I reported to Fort Drum, New York for deployment training and I was subsequently deployed to Iraq and served as the Division Chief of Operations. This deployment, as determined by the United States Small Business Administration, resulted in my law firm suffering financial losses in the amount of $173,000.00. The Small Business Administration offered to provide my firm with a Disaster Assistance Loan for that amount to help my firm recover from my deployment. In addition to the financial suffering that my firm and my family experienced because of my deployment, I was also injured and have subsequently been rated by the United States Department of Veterans Affairs to be 60 percent disabled.

On March 21, 2007, nearly 7 years after I originally filed my complaint with the MSPB alleging that the Bureau of Prisons retaliated against me by failing to process my application for the position of Correctional Officer at the Metropolitan Detention Center in Brooklyn New York, the New York Regional Office of the MSPB awarded me nearly $300,000.00 in back pay. The Board also ordered the Bureau of Prisons to appoint me, effective August 22, 2002, to the position of Correctional Officer. The initial decision of the Board became final on April 5th, 2007, when neither I nor the Agency appealed. As of this date, The Bureau of Prisons has not reinstated

me to the position of Correctional Officer, nor has it timely paid me the back pay, interest, and accrued leave that I am owed. In fact, tomorrow on November 1, 2007, I have been asked by the Bureau of Prisons to undergo a medical examination at their institution in Otisville, New York to determine if I am medically fit to perform the duties of Correctional Officer or another position within the Bureau of Prisons. I believe as evidenced by the MSPB's decision in my favor awarding me substantial back pay as well as the original settlement agreement with the Bureau of Prisons in 2000 that all of my allegations of misconduct by Department of Justice officials have been vindicated.

I would point out that Senator Specter, at my request, asked the Bureau of Prisons if any employee was ever disciplined for violating my rights under USERRA and Senator Specter's office was informed by the Bureau of Prisons that despite the sworn admissions by Bureau of Prisons employees nobody was disciplined for any of the discrimination or retaliation that I was subjected to. Due to my personal experiences as a victim of USERRA discrimination as well as being a member of the New York Army National Guard and an Iraqi War Veteran, I have over the past several years built a considerable law practice, primarily representing others who have been victimized by their employers in violation of USERRA.

FROM FEBRUARY 8TH, 2005 THRU DECEMBER 30TH, 2006

According to the U.S. Government Accountability Office, report number GAO–07–907, during the time period February 8th, 2005 to September 30th, 2006 the Department of Labor investigated 166 allegations of USERRA discrimination by Federal employees. During that same time period, the Office of Special Counsel investigated 269 allegations for USERRA discrimination. I would point out that during that time period my law firm not only investigated but prosecuted before the MSPB, a total of 1,802 cases. That represents more than 4 times the combined number of cases that the Department of Labor and the Office of Special Counsel handled during the same time period.

I would point out that on page 9 of the GAO report it listed 189 employees with the Department of Labor who are responsible for investigating USERRA complaints, on page 16 of the GAO report the Department of Labor said only about 7 percent of those 166 cases were referred for prosecution, that means only approximately 12 cases during the time period relevant to the GAO report was a DOL case actually prosecuted before the MSPB. By contrast, in a July 6th, 2007 response to the GAO report the Office of Special Counsel was proud of its 25 percent corrective rate, which translates into 67 times during the relevant time period that a Federal employee received corrective action from the Office of Special Counsel.

I find these numbers to be astonishing, given my law firms experience with helping Federal employees win their USERRA claims before the MSPB. I would point out that of the 1,802 cases, that my firm investigated during the relevant time period our clients received the remedy that they were seeking in approximately 73 percent of the cases. That translates into a success rate nearly 3 times that of the Office of Special Counsel and at the very least 10 times better than the Department of Labor.

I would respectively point out that the GAO report referenced above does not provide any of the Committees that it reported to with the proper context of how a claim is investigated. Specifically, I would note that on page 38 of the report it admits that it did not contact any private law firm or attorneys that specialize in USERRA litigation. Had it contacted myself or the handful of others who concentrate their practice in USERRA enforcement they would have learned that very few servicemembers who believe that they are the victims of USERRA discrimination go to the Department of Labor. In my opinion, the Department of Labor has built a reputation over the last 13 years of poor investigative work, poor use of investigative tools such as, issuing of subpoenas and demanding sworn testimony by employers and non responsive investigators in addition to outrageously long processing times.

I would further point out that the GAO report incorrectly shows figures describing how USERRA claims are processed. I note on page 8 of the report that it fails to list the retention of a private attorney for the investigation and prosecution of claims. I believe that it is important to point out to the Committee that private attorneys like myself and others within my firm handle many more cases per year than the Department of Labor, the Department of Justice, and the Office of Special Counsel combined.

MY OPINION OF THE THREE WAYS TO PROCESS A USERRA COMPLAINT

A. Department of Labor

In my opinion the Department of Labor has proven time after time that they do not aggressively investigate allegations of USERRA discrimination or retaliation. This is evidenced by the low number of Reservists and National Guardsman who go to the Department of Labor for help. I find it obscene that the Department of Labor has 189 personnel assigned in various capacities to investigate USERRA violations and yet my firm consistently investigates more allegations of USERRA violations with an astronomically higher corrective rate.

I think at this point the Members of this Committee and others on Capital Hill should consider abolishing this responsibility and shifting the resources going to DOL vets to the Department of Defense Employers Support of the Guard and Reserve (ESGR) who could handle all of the educational briefings that DOL Vets claims it does and to the Office of Special Counsel. In fact, as you will soon see in my solutions to this problem, I believe that the Federal Government over the next decade could save hundreds of millions of dollars by simply abolishing the Department of Labor's involvement in USERRA enforcement and mandating the award of attorney's fees and litigation costs when a victim successfully proves his or her case of discrimination or retaliation.

B. Office of Special Counsel

It is my opinion that the Office of Special Counsel has done a much better job at investigating and prosecuting violations of USERRA than the Department of Labor. Furthermore, it is my understanding in talking with several people who had their matters investigated by the Office of Special Counsel that they were treated in a professional and courteous manner. I would further point out that the Office of Special Counsel has taken great strides to improve its reputation, as recently as this month it retained Sam Wright as one of its attorneys. I consider Sam Wright, the Godfather of USERRA, my mentor, and my friend. I don't believe that there is an attorney or for that matter any person on this planet who knows USERRA better than Sam Wright. I have no doubts that if the Office of Special Counsel is allowed to continue to investigate and prosecute USERRA claims that their reputation will grow, and that their processing time will be reduced and that their success rate will dramatically increase.

As you will see in my solution to the problem, I believe it is critical for the Office of Special Counsel to have "Hatch Act" like powers to enforce USERRA.

C. Private Law Firms

Currently, my law firm is the largest law firm in the country that handles large numbers of USERRA cases. We handle USERRA cases not only against the Federal Government but against states and private employers. Our track record of success is well documented and has resulted in my law firm receiving on average 45 new USERRA allegations per week. My firm has also signed an agreement with the American Federation of Government Employees (AFGE) that will make us co-counsel over the next 4 years on approximately 10,000 new cases of USERRA discrimination pursuant to the United States Court of Appeals for the Federal Circuit's new holding in *Butterbaugh* v. *Department of Justice*.

So that you can compare the Department of Labor, the Office of Special Counsel and private law firms like mine, I would reiterate that despite the dramatically higher number of cases that we investigated during the relevant time during the GAO report we had a dramatically higher success rate. I believe that this should clearly indicate to this Committee that the way to end discrimination against members of the National Guard and the Reserves is to look to private attorneys and not to Government entities. If this Committee wants to properly protect today's National Guard and Reservist and ensure that USERRA is properly prosecuted and investigated it must not limit its research to just the Department of Labor and the Office of Special Counsel. It must consider the overwhelming success of persons who privately retain attorneys.

THE SOLUTION

Not only am I going to provide this Committee with my opinions, my observations and my thoughts but I will also provide you with common sense solutions that I think will achieve Congress' intent of making the Federal Government the model employer while also dramatically reducing the number of people discriminated against because of their military service. My solution is three fold:

1. Make attorney's fees mandatory when a victim proves his/her allegations.
2. Give USERRA teeth by allowing judges to award liquidated, compensatory and punitive damages.

3. Give the Office of Special Counsel disciplinary authority like it has under the Hatch Act so that Federal supervisors are held personally accountable for their violations of USERRA.

I believe that if this Committee does not make these three changes to USERRA I will be back in 5 or 10 years and the situation will remain the same whether it is the Department of Labor or the Office of Special Counsel handling the investigation of the complaints, no significant corrective measures will have been taken by Federal agencies, state employers and private employers to protect members of the military service, and I would especially point out that as the Global War on Terrorism continues the number of National Guardsman and Reservists who are being called to second, third and fourth tours of duty will force an increase in the number of persons discriminated against.

I would ask you to place yourself in the shoes of a Reservist or National Guardsman who since September 11th, 2001 has served in Afghanistan for 12 months and in Iraq for 15 months and because of those deployments is passed over for a position within the Federal Government. Who would you call for help? The Department of Labor where only 7 percent of the cases are referred for prosecution? The Office of Special Counsel which has a 25 percent correction rate? Or, a highly skilled privately retained attorney with a 70 percent correction rate? Clearly, the answer is for the Federal Government to rely on private attorney's to protect our fighting men and women. For private attorneys to properly bare that burden Congress must pass and the President must sign a Law that mandates attorney's fees so that more firms like mine would be willing to provide no cost legal services to our citizen soldiers.

USERRA should be amended to mandate the payment of reasonable attorney fees, expert witness fees and other litigation expenses where the claimant has procured an Order directing the employer to comply with the provisions of the statute after a hearing or adjudication.

In a recent decision, the Court of Appeals for the Federal Circuit determined that while the MSPB *may* award attorney fees and litigation costs to successful USERRA claimants, such awards are *not* mandatory under 38 U.S.C. § 4324(c)(4). *See, Jacobsen* v. *Department of Justice*, 2007 US App LEXIS 22412. The statute should be amended to specifically overrule this interpretation.

The award of reasonable attorney fees and litigation costs is par-for-the-course in virtually all other forms of employment discrimination and veterans benefits litigation. For example, 33 U.S.C. § 918 entitles Longshoremen and harbor workers to attorney fees in successful employment discrimination and workers' compensation claims. Similarly, whistleblowers and veterans discriminated against in violation of the Veterans Employment Opportunities Act are also entitled to an award of attorney fees and litigation costs; just to name a few.[1] Congress clearly intended to ensure that veterans who have meritorious employment discrimination complaints will not be deterred from bringing such claims due to costs associated with the effective assistance of counsel.

This intent must be stated in an amendment to USERRA so that no deserving claimant will be forced to bear the burden of his or her own legal representation, or worse, deterred from bringing the claim due to economic hardship. Congress enacted USERRA to protect Veterans from unlawful discrimination in their employment because of their military service. An essential aspect of that protection is ensuring that aggrieved Veterans have access to affordable, skilled, and experienced legal counsel to successfully enforce their rights under USERRA.

Furthermore, over the past two (2) years, the Government Accountability Office (GAO) has conducted multiple investigations into the efficiency of USSERA enforcement.[2] The reports unanimously conclude that the Department of Labor (DOL) and the Department of Justice (DOJ) are failing our service men and women in their administration of USERRA. The GAO found deficiencies in the manner in which both departments advised claimants, processed claims, and enforced claimants' rights.[3]

The current enforcement scheme fails to provide adequately for victims of USERRA violations. Such a systematic failure to properly administer the provisions and protections of the Act cannot be justified. Under the circumstances, the only efficient and effective method of redress for victims of USERRA violations is representation by private counsel who will effectively pursue their claim. Given this fact, a mandatory award of attorney fees is imperative in the interest of justice; no victim

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[1] *See*, 5 U.S.C. § 1221(g)(2); 5 U.S.C. § 3330c(b); 29 U.S.C. § 626; 29 U.S.C. § 216(b); 10 U.S.C. § 2409; 12 U.S.C. § 1975; 14 U.S.C. § 425; and 16 U.S.C. § 3117.

[2] *See*, GAO–06–60, October 2005; GAO–07–259; and, GAO–07–907, July 2007. All of these reports elucidate the ineptitude with which the DOL and DOJ administer USERRA.

[3] *Id.*

of a USERRA violation should have to endure two harms as a result of an unlawful employment practice, namely, the denial of a benefit of employment and the financial burden of enforcing his or her rights in the face of such a violation.

With this in mind, I propose that 38 U.S.C. § 4324(c)(4) be deleted and replaced with the following language:

(c)(4) If the Merit Systems Protection Board determines as a result of a hearing or adjudication that the claimant is entitled to an order referred to in paragraph (2), the Board shall order the agency to comply with such provisions and award compensation for any loss of wages or benefits suffered by the individual by reason of the violation involved. A successful claimant **SHALL** be awarded reasonable attorney fees, expert witness fees, and other litigation expenses. (emphasis added).

Similarly, I propose that 38 U.S.C. § 4323(h)(2), which governs the remedies available to State and private employees, be amended to read as follows:

(h)(2) In any action or proceeding to enforce a provision of this chapter [*38 USCS §§ 4301* et seq.] by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, the court **SHALL** award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses. (Emphasis added.)

These amendments are a cost-neutral and minimally restrictive method for achieving our goals. By mandating the payment of reasonable attorney fees and litigation costs, the amendment will effectively overrule the prejudicial holding in *Jacobsen* and eliminate the barrier between aggrieved veterans and the legal counsel they need to adequately pursue their rights. It would also finally place USERRA on equal ground with other employment discrimination and Veterans benefits statutes, thereby effectuating the intent of Congress. This minor revision will provide veterans the best option for enforcing their rights, enabling them to retain private counsel and bypass the failed DOL and DOJ administration system.

Moreover, the change will prevent malicious and detrimental agency action. By making attorney fees a statutory benefit under the Act, we can prevent the malicious and injurious agency conduct which occurred in *Seitz* v. *Department of Veterans' Affairs*.[4] In *Seitz*, the agency intentionally protracted the litigation, thereby increasing the amount of the claimant's litigation costs and attorney fees. On the eve of the hearing, however, the agency paid the claimant the disputed amount of damages and sought to moot the claim. As a result of the agency's litigation tactics, an award only in the amount of the claimant's disputed damages, was grossly insufficient to return the claimant to the *Status Quo Ante* payment for the claimant's legal representation, the Board ultimately concluded that the inappropriate conduct of the agency entitled the claimant to litigate the issue of attorney fees.

Nonetheless, codification of this principle is essential. Only by expressly incorporating the claimant's statutory entitlement to attorney fees can we prevent the aforementioned disingenuous conduct. An agency must not be allowed to take actions that facilitate unnecessary legal expenses and then, at the last minute, pay the claimant damages in order to render the claim moot. This conduct places the burden of legal representation on the claimant, in violation of Congressional intent and the prevailing equitable considerations favoring retention of private counsel by USERRA claimants.

USEERA MUST BE AMENDED TO PERMIT THE OFFICE OF SPECIAL COUNSEL TO INVESTIGATE AND DISCIPLINE FEDERAL EMPLOYEES WHO VIOLATE THE ACT.

5 U.S.C. § 1215 provides the Office of Special Counsel (OSC) broad powers to investigate and discipline Federal employees who violate any "law, rule or regulation" falling within its vast jurisdiction. Unfortunately, USERRA violators have not yet been subject to the oversight and disciplinary authority of the OSC. USERRA should be amended to empower OSC to investigate and punish violators personally for their unlawful discriminatory acts. Personal liability is the ultimate deterrent and its implementation would have a profound effect on those unsavory individuals who might otherwise commit a USERRA violation.

Thus, I propose that 38 U.S.C. § 4324 be amended to provide for three (3) new subparagraphs (f), (g), and (h) which read as follows:

(f)(1) Except as provided in subsection (g), if the Special Counsel determines that disciplinary action should be taken against any employee for having—

(A) committed a prohibited personnel practice, adverse or unlawful employment practice, or violated any provisions of this chapter;

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[4] *See,* Final Order dated March 7, 2007.

(B) violated the provisions of any law, rule, or regulation, or engaged in any other conduct within the scope of this chapter [37 U.S.C. §§ 4301 et seq.];

(C) knowing fully and willfully refused or failed to comply with an order of the Merit Systems Protection Board, the Special Counsel shall prepare a written complaint against the employee containing the Special Counsel's determination, together with a statement of supporting facts, and present the complaint and statement to the employee and the Board, in accordance with this subsection.

(2) Any employee against whom a complaint has been presented to the Merit Systems Protection Board under paragraph (1) is entitled to—

(A) a reasonable time to answer orally and in writing, and to furnish affidavits and other documentary evidence in support of the answer;

(B) be represented by an attorney or other representative;

(C) a hearing before the Board or an administrative law judge as prescribed by 38 U.S.C. § 4324(c)(1)(A);

(D) have a transcript kept of any hearing under subparagraph(C); and

(E) a written decision and reasons therefore at the earliest practicable date, including a copy of any final order imposing disciplinary action.

(3) A final order of the Board may impose disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed $1,000.

(4) There may be no administrative appeal from an order of the Board. An employee subject to a final order imposing disciplinary action under this subsection may obtain judicial review of the order by filing a petition therefore with such court, and within such time, as provided for under section 7703(b) [5 USCS § 7703(b)].

(g) In the case of an employee in a confidential, policymaking, policy-determining, or policy-advocating position appointed by the President, by and with the advice and consent of the Senate (other than an individual in the Foreign Service of the United States), the complaint and statement referred to in subsection (f)(1), together with any response of the employee, shall be presented to the President for appropriate action in lieu of being presented under subsection (f).

(h)(1) In the case of members of the uniformed services and individuals employed by any person under contract with an agency to provide goods or services, the Special Counsel may transmit recommendations for disciplinary or other appropriate action (including the evidence on which such recommendations are based) to the head of the agency concerned.

(2) In any case in which the Special Counsel transmits recommendations to an agency head under paragraph (1), the agency head shall, within 60 days after receiving such recommendations, transmit a report to the Special Counsel on recommendation and the action taken, or proposed to be taken, with respect to each such recommendation.

USERRA MUST BE AMENDED TO MANDATE THE PAYMENT OF COMPLETE COMPENSATORY DAMAGES FOR SUCCESSFUL CLAIMANTS.

Currently, USERRA does not provide a statutory entitlement to compensatory damages for successful claimants. This is an anomaly in employment discrimination and Veteran's benefits legislation.[5] Pursuant to 38 U.S.C. §§ 4301 and 4331, USERRA must be amended to provide comparable relief to Federal employees for violations of the Act. Law and equity demand that USERRA eligible employees receive the same quality anti-discrimination protection as all other employees.

Title VII was amended to provide for compensatory damages because Congress recognized that a financial award, typically consisting of back pay, is often insufficient, by itself, to fully compensate the victim for his or her injuries. Discrimination cases commonly involve complex, non-pecuniary injuries. Successful claimants should be entitled to compensation for these injuries in addition to their financial damages. For example, Section 102 of the Civil Rights Act of 1991 has been held to allow recovery for the following non-pecuniary injuries under its compensatory damages remedy: "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses."[6] The same remedies available to victims of unlawful employment practices under the

[5] *See*, 42 U.S.C. §§ 2000–1 et seq.; and, 5 U.S.C. §§ 3330 et seq.

[6] Gilbert, Gary. "Compensatory Damages and Other Remedies in Federal Sector Employment Discrimination Case." 2nd ed. Dewey Publications, Inc: Arlington, 2003. Page 97.

Civil Rights Act of 1991 should be available to victims of discrimination under USERRA.

Therefore, I propose that 38 U.S.C. § 4324(c) be amended to add a new subsection (9) to read as follows:

> (9) In any claim brought pursuant to the laws of this chapter [38 U.S.C. §§ 4301 et seq.], where the Merit Systems Protection Board or Administrative Judge determines that an employer failed to comply with the provisions of this chapter, the Board or Judge shall award the claimant compensatory damages in addition to, but not including, any other relief granted pursuant to this chapter.

Additionally, I propose that 38 U.S.C. § 4323(d)(1) be amended to add a new subsection (E), which reads as follows:

> (E) In any action brought pursuant to the laws of this chapter [38 U.S.C. §§ 4301 et seq.], where the court determines that an employer failed to comply with the provision of this chapter, the court shall award the claimant compensatory damages in addition to, but not including, any other relief granted pursuant to this chapter.

USERRA MUST BE AMENDED TO REQUIRE THE PAYMENT OF PRE-JUDGMENT INTEREST ON ALL BACK PAY AWARDS.

As currently drafted, 38 U.S.C. § 4323(d)(1)(B) provides that, "[t]he court may require the employer to compensate the person [claimant] for any loss of wages or benefits suffered by reason of the employer's failure to comply with the provisions of this chapter." This section should be amended to specifically provided for the payment of pre-judgment interest on back pay awards for three (3) reasons: (i) an award of pre-judgment interest is necessary to fully compensate the victim; (ii) Congress intended for awards of back pay to include an award of pre-judgment interest; and, (iii) it is necessary in order to provide the same level of protection to victims of USERRA violations that Congress has extended to all other victims of employment discrimination.

An award of back pay lacking accrued interest fails to properly compensate the victim for his or her actual damages. For example, paying someone in 2007 for a loss that was suffered in 2002 does not take into account two (2) undeniable market forces that effect the contemporary value of money: inflation and opportunity cost or time value. If an aggrieved Veteran receives an award of back pay in 2007 for lost wages occurring in 2002, inflation will have devalued that sum to a measurable extent. Furthermore, not having had that money in his or her possession over the past five (5) years caused the victim to lose his or her opportunity to invest that sum and earn interest.

It is true that neither §§ 4323(d)(1)(B) nor 4324(c)(2) expressly guarantees a successful claimant interest on an award of back pay. Nonetheless, Congress clearly intended that Veterans discriminated against in violation of USERRA should receive interest on awards. Section 4323(d)(3) expressly provides for the payment of prejudgment interest for awards against State and private employers. Additionally, under USERRA's predecessor, the Veterans' Reemployment Rights Law of 1940 (VRR), prejudgment interest was commonly awarded, a fact that was well known to Congress at the time of USERRA's enactment.[7]

Prejudgment interest is routinely awarded in all other employment discrimination cases.

> Prejudgment interest serves to compensate for the loss of money due as damages from the time a claim accrues until judgment is entered, thereby achieving full compensation for the injury these damages are intended to redress[T]o the extent the damages awarded to the plaintiff represent compensation for lost wages, it is ordinarily an abuse of discretion not to include prejudgment interest. *Fink* v. *City of New York*, 129 F.Supp 511, 525–26 (E.D.N.Y. 2001) (Addressing interest on back pay awards under USERRA).

Until the statutory language is amended to unambiguously include interest on awards for USERRA violations, zealous agency attorneys will continue to argue that the absence of an express entitlement to an award of interest is evidence that such an award is NOT mandatory. Given the regularity with which these cases take years to resolve, prejudgment interest is an essential part of any compensatory remedy.

Therefore, I propose that 38 U.S.C. § 4323(d)(1)(B) be amended to read as follows:

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[7] *See*, Captain Samuel F. Wright, JAGC, USNR article, "Does USERRA Provide Interest on Back Pay Awards?" Law Review No. 0611, posted on *www.roa.org* in April 2006.

The court may require the employer to compensate the person [claimant] for any loss of wages or benefits, **INCLUDING INTEREST**, suffered by reason of the employer's failure to comply with the provisions of this chapter. (Emphasis added)

As noted above, sections 4301(b) and 4331(b)(1) demand that Federal employees receive at least the same degree of protection and quality of benefits as all other employees under USERRA. Consequently, I propose that § 4324(c)(2) also be amended, and that it read as follows:

(2) If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter [*38 USCS §§ 4301* et seq.] relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits, **INCLUDING INTEREST**, suffered by such person by reason of such lack of compliance. (Emphasis added).

USERRA MUST BE AMENDED TO EXPAND THE AVAILABILITY OF LIQUIDATED DAMAGES FOR SUCCESSFUL CLAIMANTS.

USERRA currently provides limited instances where a successful claimant may be awarded liquidated damages. Pursuant to section 4323(d)(1)(C), if a claimant was found be the victim of a willful violation, he or she is entitled to liquidated damages in the amount of his or her actual damages. The provision, however, applies only to servicemen and women employed by state or local governments or private employers.

RAJA, H.R. 3393, proposes to amend section 4323(d) by extending its coverage to Federal Government employees and by ensuring that liquidated damages will always be available to victims of willful USERRA violations. The bill seeks to increase the amount of liquidated damages available to a successful claimant from the amount of his/her actual damages to the greater of either $20,000.00 or the claimant's actual damages. I support these proposals and hope to see both of them implemented. Additionally, the section should be amended to remove the willful violation requirement for liquidated damages.

The payment of liquidated damages is often the only true award granted to victims of USERRA violations. For example, if the victim of a wrongful termination under USERRA promptly finds comparable work, his or her actual damages may be quite small. As a result, an award of additional liquidated damages that merely doubles his or her miniscule actual damages award is an insufficient deterrent to employers who would discriminate against military personnel in civilian employment. Liquidated damages of the greater of $20,000.00 or the claimant's actual damages should be available to USERRA claimants in every case.

It is imperative that the language in RAJA extending this provision to protect Federal employees in the same manner as state and private employees is adopted. The purpose of USERRA is to protect ALL veterans, reservists and National Guard members irrespective of their place of employment. By treating our service men and women differently by virtue of their employer we are defeating the very basis of the statute. USERRA demands parity. Justice demands parity. Equitable treatment among all USERRA eligible employees is an ethical absolute and is necessary to fulfill the intent of Congress by extending the promise of USERRA protections to all eligible employees.

Therefore, I propose that section 4323(d) be amended to read as follows:

(1) In any action under this section, the court may award relief as follows: (C) If the court determines that an employer has failed to comply with the provisions of this chapter, the court **SHALL** require the employer to pay the person as liquidated damages an amount equal to the greater of: . . . (i) the amount referred to in subparagraph (B); or (ii) $20,000.00. (Emphasis added).

Additionally, section 4324(c) must be amended, pursuant to 38 U.S.C. §§ 4301 and 4331, to provide the same protection. I propose that 38 U.S.C. 4324(c) be amended to add a new subsection (7) which reads as follows:

(7) In any action under this section, the court may award relief as follows: (i) if the court determines that an employer has failed to comply with the provisions of this chapter, the court **SHALL** require the employer to pay the person as liquidated damages an amount equal to the greater of: (A) the amount referred to in subparagraph (C)(2); or (B) $20,000.00. (Emphasis added).

USERRA MUST BE AMENDED TO PROVIDE FOR PUNITIVE DAMAGES IN THE WORST CASES OF DISCRIMINATION.

Presently, USERRA does not provide for an award of punitive damages. As mentioned above, section 4323(d) allows for liquidated damages in only the most limited of instances. Representative Davis' RAJA proposals, however, include a provision that would allow for punitive damage awards to victims of the worst kinds of discrimination.

H.R. 3393 proposes to amend USERRA section 4323(d) to provide for the availability of punitive damages, in addition to liquidated damages, where the court finds that the violation was committed with "malice or reckless indifference to the federally protected rights of the person." The proposal would apply only to state and local governments and private employers with more than fifteen (15) employees. I support these proposals. However, I believe that punitive damage awards need to be expanded even further.

Punitive damage awards should be available in all cases where the employer knowingly, willfully, maliciously or with reckless indifference violated an employees protected USERRA rights. Punitive damages are imposed as a deterrent to future egregious behavior. Any act taken by an employer of his or her own volition with the knowledge that he or she is denying a member of the military his or her protected rights offends the most sacred principles of our society. Such behavior must be discouraged in the clearest and strongest manner possible. A simple amendment to the existing law unambiguously granting employees a right to punitive damages in such cases will greatly reduce the number of employers willing to flout the law.

Moreover, limiting the availability of punitive damage awards to cases against state and local governments and private employers of 15 or more persons leaves a vast number of USERRA-eligible employees unprotected. Congress intended for veterans benefit and employment discrimination statutes to apply to all eligible parties equally, regardless of their employer. By allowing punitive damage awards only for employees of state and local governments and large private employers, the RAJA proposal discriminates against an enormous number of veterans, reservists and National Guard members who are employed either by Federal agencies or by smaller private employers. USERRA, to be effective, demands parity. How can we look a veteran in the eye and tell him or her that we value his or her service less because he or she is employed by a ten (10)-person construction crew and not by the Commonwealth of Massachusetts or Morgan Stanley?

Therefore, I propose that 38 U.S.C § 4323 be amended to read as follows:

> (d)(1)(D) If the court determines that the employer willfully, knowingly, maliciously, or with reckless indifference failed to comply with the provisions of this chapter, in violation of the employee's federally protected rights, the person shall be entitled to an award of punitive damages in addition to all other remedies outlined in this chapter.

Likewise, 38 U.S.C § 4324(c) must also be amended to provide for punitive damages awards in cases of willful or malicious discrimination. I propose section 4324(c) be amended to add a new subsection (8) to read as follows:

> (8) If the court determines that the employer willfully, knowingly, maliciously, or with reckless indifference failed to comply with the provisions of this chapter, in violation of the employee's federally protected rights, the person shall be entitled to an award of punitive damages in addition to all other remedies outlined in this chapter.

USERRA MUST BE AMENDED TO MAKE INJUNCTIVE AND INTERIM RELIEF MANDATORY WHERE APPROPRIATE.

Under the current statutory structure, section 4323(e) of USERRA permits courts to invoke their full equity powers to remedy violations at the courts' discretion. Section 4324 contains no provision regarding the courts' power to grant equitable relief. In 2005 the Seventh Circuit Court of Appeals upheld a lower court decision denying injunctive relief under section 4323(e) in *Bedrossian* v. *Northwestern Memorial Hospital*, 409 F.3d 840 (7th Cir 2005). Dr. Bedrossian, in addition to his military service in the Air Force Reserves, was employed as a physician and professor at Northwestern Memorial Hospital. The Hospital sought to fire Dr. Bedrossian because of the inconvenience caused by his military service and the Doctor responded by seeking an injunction. The trial court held, and the Seventh Circuit affirmed that, regardless of the strength of the claimant's case, an injunction was not an available remedy. This decision should be overruled.

By merely, changing the word "may" in section 4323(e) to "shall", Congress could ensure that equitable relief is available to all USERRA victims when appropriate.

The claimant would still need to demonstrate his or her entitlement to equitable relief in the form of an injunction. However, under the proposed amendment, once the claimant has established that an injunction is appropriate, the court would be required to grant it.

This proposal is one of many contained in H.R. 3393, the Reservists Access to Justice Act (RAJA), sponsored by Representative Artur Davis (D–AL). RAJA recognizes that the driving force behind the enactment of USERRA was to support and protect the members of our armed forces. The national defense interests of our country require that the segment of our military composed of civilian employees is supported by their civilian employers. We are currently fighting a global war on terror on multiple fronts. For the first time in our Nation's history we are waging war on a grand scale without conscription and in reliance on an all volunteer military; Congress recognizes this and strongly supports this Nation's commitment to voluntary military service. Nonetheless:

> Congress also recognizes that the reliance on volunteers means that we must include substantial incentives for young men and women to join and remain in our Nation's uniformed services. We also must mitigate the disincentives to service, including the realistic fear that "if I sign up, I will lose my civilian job."[8]

Thus, I, too, propose that 38 U.S.C. § 4323 be amended to add a new subsection (e) which reads as follows:

> The court **SHALL** use its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter. (Emphasis added)

Pursuant to 38 U.S.C. § 4301(b), "It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter [38 USCS §§ 4301 et seq.]" With this in mind, Congress enacted 38 U.S.C. § 4331(b)(1) which states, in relevant part:

> The Director of the Office of Personnel Management (in consultation with the Secretary and the Secretary of Defense) may prescribe regulations implementing the provisions of this chapter [*38 USCS §§ 4301* et seq.] with regard to the application of this chapter [*38 USCS §§ 4301* et seq.] to Federal executive agencies (other than the agencies referred to in paragraph (2)) as employers. *Such regulations shall be consistent with the regulations pertaining to the States as employers and private employers, except that employees of the Federal Government may be given greater or additional rights.* (Emphasis added).

Therefore, any amendment to § 4323 resulting in greater benefits to an employee must also, by law, be reflected in a comparable amendment to § 4324. As a result, I also propose that section 4324(c) be amended to provide a new subsection (5) that reads as follows:

> The Merit System Protection Board or Presiding Administrative Judge **SHALL** use its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter. (Emphasis added)

Additionally, USERRA should be amended to provide for interim relief comparable to that afforded to other employees under 5 U.S.C. § 7701(b)(2) for deserving section 4324 claimants. 5 U.S.C. § 7701(b)(2) directs the Merit Systems Protection Board (MSPB or Board) to award successful Appellants, "the relief provided in the decision effective upon making the decision, and remaining in effect pending the outcome of any petition for review under subsection (e)." In contrast, USERRA does not require a Federal Executive Agency under section 4324 to furnish any relief until a final decision has been entered. Thus, a claimant who successfully established an unlawful employment practice may be required to remain unemployed and uncompensated for a period of up to two (2) years until the MSPB enters a final decision, whereas, an otherwise identical claimant who files an action before the Equal Employment Opportunity Commission is entitled to interim relief immediately upon the entering of an initial decision. This inequity cannot be justified and must be remedied.

The MSPB's interim relief authority pursuant to 5 U.S.C. § 7701(b)(2) must be extended to USERRA claims. Therefore, I propose that 38 U.S.C. § 4324(c) be amended to provide a new subsection (6) that reads as follows:

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[8] *See*, Captain Samuel F. Wright, JAGC, USNR article, "Firmer Teeth: Legislation introduced to enhance USERRA enforcement" Law Review No. 0754, posted on *www.roa.org* in October 2007.

(e)(1) If an employee or applicant for employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review under subsection (d), unless—

(A)(i) the relief granted in the decision provides that such employee or applicant shall return or be present at the place of employment during the period pending the outcome of any petition for review under subsection (e); and

(ii) the employing agency, subject to the provisions of subparagraph (a), determines that the return or presence of such employee or applicant is unduly disruptive to the work environment.

(2) If an agency makes a determination under subparagraph (A) that prevents the return or presence of an employee at the place of employment, such employee shall receive pay, compensation, and all other benefits as terms and conditions of employment during the period pending the outcome of any petition for review under subsection (d).

The extensive deployment of Reservists and Members of the National Guard in furtherance of the War Against Terror has only compounded the inequity and made the need for congressional intervention more pronounced.

As Army Chief of Staff Gen. George W. Casey Jr. stated during a recent Association of the United States Army Convention, "Our reserve components are performing magnificently, but in an operational role for which they were neither designed nor resourced. They are no longer a strategic reserve, mobilized only in national emergencies. They are now an operational reserve deployed on a cyclical basis," enabling the Army to sustain operations. "Operationalizing" the reserve components *"will require national and state consensus, as well as the continued commitment from employers*, soldiers and families," Casey said (emphasis added). "It will require changes to the way we train, equip, resource and mobilize."

I could not agree with General Casey more. As the National Guard and Reserves change to an operational reserve, it is vital to our national security and our homeland defense to ensure members of these units are protected from losing their full-time careers while they defend our country at home and abroad. The time for a major overhaul of the laws that protect the employment rights of members of the National Guard and Reserves is upon us.

As currently drafted, the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) fails to adequately support military personnel upon their return to civilian employment. The Honorable Representative Artur Davis (D–AL) recently sponsored new legislation, H.R. 3393, to address some of the law's deficiencies. I urge you to demonstrate your strong commitment to the brave men and women who serve in the armed forces by supporting these amendments and by incorporating the additional proposals contained within this correspondence into a new more comprehensive updating of USERRA. Please fight to get this updated USERRA bill passed as quickly as possible.

Our national defense and homeland security depend on the men and women in our National Guard and Reserves, and while they are protecting us we should be protecting their civilian jobs. We never want to be in the situation where members of the reserves need to pick between helping our national defense and their civilian careers, as that will undermine our security. Unfortunately, too many have been placed in that situation, and after many deployments (both overseas and stateside guarding our bridges, tunnels, nuclear power plants, and responding to natural disasters) have chosen their civilian careers over their service to our country. This exodus of highly skilled and trained personnel could undermine our recruiting efforts and result in a hollowed out military force unless Congress takes immediate action to strengthen the weak links. Fixing USERRA is a good first step to taking away the fear of a deployment and how that deployment will have a negative impact on their civilian careers.

USERRA MUST BE AMENDED TO PROTECT NATIONAL GUARD MEMBERS WHO ARE CALLED TO ACTIVE DUTY IN STATE SERVICE.

Active duty National Guard members fulfilling State service obligations are currently excluded from USERRA protection under 38 U.S.C. § 4303(13). The definition of "service" contained in that chapter includes virtually all other types of uniformed, military duty; including "full-time National Guard" service. The statute expressly recognizes the vital importance of National Guard service to our security interests. Whether those duties are performed on full or part-time status, or in furtherance of Federal or State objectives, is of little consequence when evaluating the critical importance of the task. National Guard members called to State service are de-

ployed to defend, protect, rebuild and sustain American infrastructure and communities. These emergency responders are an integral component of our homeland security strategy, the indispensability of which was heroically demonstrated in the aftermath of September 11th and the devastation of Hurricane Katrina.

Justice demands that their contributions to our national defense and homeland security do not go unrecognized. USERRA must be amended to reflect the contributions of National Guard members serving under State obligation and to protect their civilian livelihood. The distinction between State active duty and Federal active duty for the purposes of USERRA protection is an arbitrary one; we must provide all of our uniformed servicemembers with equal protection under the law.

Thus, I propose that 38 U.S.C. § 4303(13) be amended to read as follows:

(13) The term 'service in the uniformed services' means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes: active duty; active duty for training; initial active duty for training; inactive duty training; full-time National Guard; service in the National Guard under competent state military authority while in support of a homeland security mission, in response to a natural disaster, in response to aid to civil authorities, or for any other reason that the Governor of the state declares the need for a state activation of the National Guard is necessary, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.

USERRA MUST BE EXPANDED TO PROTECT MEMBERS OF THE COMMISSIONED CORPS OF THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION.

The National Oceanic and Atmospheric Administration (NOAA) occupies a pivotal role in national defense and homeland security. As the first line of defense against natural disaster, NOAA is charged with the protection of our persons, property, national security and economic interests.

Notably, NOAA administers the Defense Meteorological Satellite Program (DMSP) in conjunction with the Department of Defense (DOD). The program involves complex aerospace and weapons development and requires the maintenance of a massive satellite network, sensory aircraft and specialized monitoring equipment. NOAAs persistent geological monitoring and intelligence gathering are fundamental to our national security operations.

Inexplicably, USERRA excludes members of the commissioned corps of the National Oceanic and Atmospheric Administration from the definition of "uniformed service."[9] This exclusion precludes NOAA employees from invoking USERRA protections in the face of unlawful employment actions. The exclusion is an anomaly and appears to be a clerical error given the inclusion of NOAA members in other statutory definitions of "uniformed service."[10] The Act must be amended to eliminate this injustice and to provide critical service men and women with the same benefits their uniformed service compatriots share.

Consequently, I propose that 38 U.S.C. § 4303(16) be amended to read as follows:

(16) The term "uniformed services" means the Armed Forces; the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty; the commissioned corps of the Public Health Service; the commissioned corps of the National Oceanic and Atmospheric Administration; and any other category of persons designated by the President in time of war or national emergency.

USERRA MUST BE AMENDED TO UNAMBIGUOUSLY PRECLUDE USERRA CLAIMS FROM BINDING ARBITRATION.

38 U.S.C. § 4302(b) expressly states that any law, agreement, or practice which, "reduces, limits, or eliminates in any manner any right or benefit" provided under USERRA is preempted by the statute. Nonetheless, the Fifth Circuit Court of Appeals recently held that this provision only preempts agreements limiting the claimants' substantive rights and not his or her procedural rights (e.g. the right to pursue a lawsuit in Federal court as opposed to being required to proceed via arbitration). *See, Garrett* v. *Circuit City Stores, Inc.*, 449 F.2d 672 (5th Cir. 2006). This is an egregious misapplication of the text and purpose and intent of USERRA and must be overturned by legislative mandate. Veterans must not be denied the procedural due process of law as a result of employment agreements contradicting Federal law.

[9] 38 U.S.C. § 4303(16).
[10] 10 U.S.C. § 101(a)(5)(B).

Accordingly, I implore you to support RAJA, H.R. 3393, and its proposed amendment to Chapter 1 of Title 9 of the United States Code, which would unambiguously exempt USERRA disputes from binding arbitration agreements and expressly overrule Garrett. In that vein, I, too, propose that 38 U.S.C. § 4322 be amended to add a new subsection that reads as follows:

(g) Chapter 1 of title 9 shall not apply with respect to employment or reemployment rights or benefits claimed under this subchapter.

USERRA MUST BE AMENDED TO ADOPT TWO ADDITIONAL EXCEPTIONS TO SECTION 4312'S 5-YEAR LIMITATION ON SECTION 4313 REEMPLOYMENT RIGHTS.

As currently drafted, USERRA's reemployment protections lapse after a 5-year period of consecutive active duty service. Section 4312(c) establishes eight specific exceptions to this 5-year limitation, thereby enabling employees to serve five or more years of continuous active duty while working for a single employer and retaining his or her reemployment rights under the Act. Additionally, the Department of Labor (DOL) regulations implementing USERRA recognize a ninth exception.

DOL USERRA regulation § 1002.103 applies to servicemembers who are forced to mitigate economic losses suffered as a result of an employer's USERRA violation. The regulation provides, in relevant part, that a servicemember who remains or returns to the armed services in an attempt to "mitigate economic losses caused by the employer's unlawful refusal to reemploy that person,"[11] shall not be required to count the time "against the 5-year limit."[12] The regulation is grounded in equitable considerations. Those same considerations demand that the exception created by the regulation be fully incorporated into the text of the statute.

I propose that 38 U.S.C. § 4312(c) be amended to add a new subsection (5) which reads as follows:

(5) which is undertaken by an individual who remains in or, returns to, uniformed service in order to mitigate economic damages suffered as a consequence of the employer's unlawful failure to comply with the provisions of this chapter.

An additional exception should also be added for National Guard members who are called to state active duty service in response to homeland emergencies. As currently drafted, time spent fulfilling active duty training commitments, time on active duty support for critical missions and time called upon for Federal active duty National Guard service are all exempt from consideration in calculating a person's 4312 time. Presumably, these missions are considered so important that they warrant preferential treatment. Under this reasoning, active duty service in furtherance of a State's emergency response is an equally compelling interest and should receive equivalent treatment.

Homeland emergency response is an integral component of our homeland security strategy. The fact that disasters and emergencies requiring the mobilization of active duty National Guard forces are generally unforeseeable adds weight to the argument that service men and women should not be penalized in their USERRA reemployment rights because they were required to answer the call to service. USERRA must be amended to take into account the sacrifices of guardsmen and their families during times of crisis. National Guard members who respond to such crises in State service should be entitled to the same protections as their Federal counterparts.

Therefore, I propose that 38 U.S.C. § 4312(c) be amended to provide for a new subsection (6) that reads as follows:

(6) service in the National Guard under competent state military authority while in support of the homeland, in response to a natural disaster, in response to aid to civil authorities, or for any other reason that the Governor of the state declares the need for a state activation of the National Guard is necessary.

USERRA MUST BE AMENDED SO THAT THE TERM "ADJUDICATION" IN§ 4324(C)(1) IS DEFINED AS PROVIDING THE SAME PROCEDURES AVAILABLE TO APPELLANTS UNDER 5 U.S.C. § 7701.

In its current incarnation, USERRA does not expressly outline the formal due process to which claimants are entitled when bringing a claim for relief of an alleged violation of the Act. In *Kirkendall* v. *Department of the Army*, the Court of Appeals for the Federal Circuit concluded that every USERRA claimant has a right to a hearing and that he or she is entitled to the same procedures as an "appellant"

[11] 20 C.F.R. 1002.103.
[12] *Id.*

under 5 U.S.C. § 7701(a). *See, Kirkendall* v. *Department of the Army*, 479 F.3d 380 (Fed. Cir. 2007).

5 U.S.C § 7701(a) expressly provides for basic due process formalities in other appeals brought before the MSPB. USERRA should be amended so that both sections 4323 and 4324 unambiguously state the due process rights afforded to claimants. USERRA claimants must be granted the same procedural protections that the United States Code extends to other employees. Codification of the holding in *Kirkendall* will effectively extend the due process protections of 5 U.S.C. § 7701(a) to USERRA claimants and correct any enduring ambiguities.

Therefore, I propose that 38 U.S.C. § 4323(a) be amended to incorporate a new subsection (3) which reads as follows:

(3) Any employee, or applicant for employment, who submits any claim or action for relief pursuant to the rights outlined in this chapter [38 U.S.C. §§ 4301 et seq.] shall have the right:

(A) to a trial by Judge or Jury, for which a transcript will be kept; and

(B) to be represented by an attorney or other representative.

In addition, I propose that 38 U.S.C. § 4324(c)(1) be amended to provide for a new subparagraph (A) which reads as follows:

(A) Any employee, or applicant for employment, who submits any claim or action for relief pursuant to the rights outlined in this chapter [38 U.S.C. §§ 4301 et seq.] shall have the right:

(i) to a hearing for which a transcript will be kept; and

(ii) to be represented by an attorney or other representative.

USERRA SECTION 4324 MUST BE AMENDED TO STATE UNEQUIVOCALLY THAT THERE IS NO STATUTE OF LIMITATIONS PROVISION GOVERNING THE TIME PERIOD IN WHICH TO BRING A CLAIM UNDER THE ACT.

Section 4323(i) clearly states that "[n]o Statute of Limitations shall apply to any proceeding under this chapter [38 USCS §§ 4301 et seq.]." Sections 4301 and 4331 compel Congress to amend section 4324 to provide the same protection to Federal Government employees.

The MSPB has already held that no Statute of Limitations applies to cases brought under § 4324. *See, Hernandez* v. *Department of the Air Force*, 2007 U.S. App. LEXIS 20280, 6–7. Nonetheless, codification of this principle is the only way to ensure that future Federal Executive Agencies will not successfully overturn this ruling and reinstate the arbitrary distinction between Federal employees and all other employees for the purpose of USERRA Statute of Limitations claims.

Therefore, I propose that 38 U.S.C. § 4324 be amended to add a new subsection (e) which reads as follows:

(e) Inapplicability of statute of limitations. No statute of limitations shall apply to any proceeding under this chapter [*38 USCS §§ 4301* et seq.].

USERRA MUST BE AMENDED TO CREATE A NEW SECTION, SECTION 4327, FOR THE PURPOSE OF ADJUDICATING CLAIMS BY FEDERAL JUDICIARY BRANCH EMPLOYEES.

USERRA presently provides no enforcement mechanism for employees of the Federal judiciary branch to adjudicate claims under the Act. The inequity in such a discrepancy is apparent. USERRA was not drafted to apply only to employees of certain branches of the Federal Government. The Act must be amended to provide employees of the Federal judiciary branch the same anti-discrimination protections and enforcement mechanisms available to all other Federal employees.

A new section, section 4327, should be created to establish the adjudicative body, procedures and protections available to Federal judiciary branch employees under USERRA. The Section should otherwise be identical to section 4324, including all of my proposed revisions.

USERRA MUST BE AMENDED TO IMPROVE ENFORCEMENT AND PROCEDURAL TRANSPARENCY FOR FEDERAL EMPLOYEES OF INTELLIGENCE AGENCIES.

Pursuant to 38 U.S.C. § 4315, most employees of Federal Intelligence Agencies, including all employees of agencies governed by 5 U.S.C. § 2302(a)(2)(C)(ii), are not entitled to the same adjudicative procedures available to employees of other Federal Executive Agencies under 38 U.S.C. § 4324. This is an arbitrary distinction and one that contradicts the express purpose of the Act. As such, it should be remedied.

As a threshold matter, § 4315 should be amended to require that all adjudicative "procedures" prescribed pursuant to subsection (a) be published within 120 days of the date the new Bill is signed into law. Procedural transparency is essential to the efficient and orderly administration of the statute. Employees cannot properly pur-

sue their rights under the law if the requisite procedures are cloaked in secrecy. I appreciate the Intelligence community's unique circumstances. Nonetheless, I see no threat to our national security in requiring the agencies to publish their internal rules regarding USERRA enforcement.

Furthermore, § 4315 should be amended to provide employees of the agencies within 5 U.S.C. § 2302(a)(2)(C)(ii) with the same procedural rights and available remedies bestowed upon § 4324 employees. Again, denying certain Federal employees equal rights under USERRA based merely upon the Federal agency by which they are employed is an arbitrary delineation and one that contradicts the purpose and intent of the Act.

Therefore, I propose that 38 U.S.C. § 4315 be amended to mirror section 4324's procedural mechanisms and remedies, including all of my proposed revisions.

USERRA MUST BE AMENDED TO REQUIRE THAT ANY STATE ACCEPTING FEDERAL FUNDING MUST WAIVE ITS 11TH AMENDMENT SOVEREIGN IMMUNITY IN USERRA ACTIONS.

In his RAJA proposal, H.R. 3393, Representative Davis has included language that would amend USERRA to ensure that any state accepting Federal funding for a state program or activity is deemed to have waived its Sovereign Immunity in cases of USERRA violations. I wholeheartedly support this proposal and beseech you to do the same.

This proposal is imperative to prevent further instances in which an aggrieved veteran with a legitimate right to enforce is denied relief due to the lack of a forum in which to pursue his or her claim. In *Larkins* v. *Department of Mental Health and Mental Retardation*, 806 So.2d 358 (AL Sup Ct 2001), that exact scenario unfolded. Mr. Larkins was forbidden from suing the State of Alabama in Federal Court because of the Eleventh Amendment of the Constitution of the United State's Sovereign Immunity clause. Moreover, he was denied relief in the Alabama State Court system by reason of Alabama's own State Constitutional Sovereign Immunity protection. Thus, Mr. Larkins found himself with a substantive right to enforce but no effective method for enforcing it. An unenforceable right is of no value to an injured party.

By amending the Act to provide for a waiver of the 11th Amendment's Sovereign Immunity protection for states accepting Federal funding for state projects, RAJA ensures that no other USERRA eligible employee will suffer Mr. Larkins' fate. Removing the defense of Sovereign Immunity guarantees USERRA claimants will always be able to pursue their claims against the State-as-employer in Federal court. This provision is necessary in order to extend the congressionally envisioned protections of USERRA to all eligible employees.

Consequently, I, too, propose that 38 U.S.C. § 4323(d)(1) be amended to read as follows:

> (j)(1)(A) A State's receipt or use of Federal financial assistance for any program or activity of a State shall constitute a waiver of sovereign immunity, under the eleventh amendment to the Constitution or otherwise, to a suit brought by an employee of that program activity under this chapter for the rights or benefits authorized the employee by this chapter. (B) In this paragraph, the term "program or activity" has the meaning given the term in section 309 of the Age Discrimination Act of 1975 (42 U.S.C. § 6107).

USERRA MUST BE AMENDED TO PROVIDE VETERANS THE RIGHT TO BRING THEIR CLAIMS IN EITHER STATE OR FEDERAL COURT.

Presently, section 4323(b) of USERRA allows veterans to bring cases against private employers in Federal court and cases against the state in state court. RAJA, H.R. 3393, proposes to amend the Act by granting veterans the right to bring their claims in either state or Federal court regardless of whether they are employed by the state or a private employer. I support this proposal and urge you to do the same. The additional flexibility such an amendment provides is vital to guaranteeing USERRA-eligible employees the best opportunity to successfully pursue their claims.

As a result, I too propose that section 4323(d)(1) be amended to remove the current paragraphs denoted as (2) and (3) and replace them with a new paragraph (2) that reads as follows:

> (2) In the case of an action against a State (as an employer) or a private employer by a person, the action may be brought in a district court of the United States or state court of competent jurisdiction.

THE UNITED STATES CODE MUST BE AMENDED TO EXTEND USERRA PROTECTIONS TO EMPLOYEES OF THE TRANSPORTATION SECURITY ADMINISTRATION.

USERRA does not presently apply to employees of the Transportation Security Administration (TSA). TSA is typically exempt from employment discrimination statutes. This Congressional policy decision, however, failed to weigh the importance of USERRA protection to our national defense and security interests. USERRA is a unique statute. It requires unique administration and unique enforcement mechanisms. The Act is designed specifically to encourage enrollment in the uniformed services of this country. This has never been more vital. The military Reserves and National Guard are currently fully operational and members of these units compose a significant portion of our active duty forces deployed across the globe. Under these circumstances, it is absolutely imperative that USERRA protection is extended to each and every civilian-employed member of the uniformed services; including TSA employees.

Therefore, I propose that 38 U.S.C. section 4303(5) be amended to read as follows:

(5) The term "Federal executive agency" includes the United States Postal Service, the Postal Rate Commission [Postal Regulatory Commission], any non-appropriated fund instrumentality of the United States, the Transportation Security Administration, any Executive agency (as that term ifs defined in section 105 of title 5 [5 USCS § 105]) other than an agency referred to in section 2302 (a)(2)(C)(ii) of title 5 [5 USCS § 2302(a)(2)(C)(ii)], and any military department (as that term is defined in section 102 of title 5 [5 USCS § 102]) with respect to the civilian employees of that department.

The proposed changes outlined above are pivotal in advancing our national defense interests and achieving parity and equity in the workplace. USERRA was designed and implemented to provide comprehensive anti-discrimination protection for military personnel in civilian employment. In order to effectuate this congressional mandate, we must improve opportunities for injured veterans to pursue their rights under the Act, increase the statutory mechanisms that serve as deterrents to unlawful employer behavior, and create uniformity in the law's protections to all USERRA-eligible employees, regardless of their employer.

USERRA should no longer be a second-class anti-discrimination statute; we owe it to our service men and women to provide them with the premier anti-discrimination law in the land. We must encourage military service in our all-volunteer forces and ensure that those who have served are properly cared for upon their return home, now more than ever. The proposed changes represent the least restrictive means possible for effectuating legitimate equality in the workplace and guaranteeing that no one other than a USERRA violator will bear the costs of the improved enforcement.

Chairman AKAKA. Thank you. Thank you very much, Mr. Tully.

I want you to know that we appreciate your thoughts and various recommendations for improvements in USERRA and that we will be looking into those as we draft future legislation on the subject. It is astounding for me to hear that you had 4,802 cases to deal with along this line.

Mr. Tully, I would like your answer to the same question as I asked other witnesses this morning. I am deeply concerned that individuals who were sent to battle by the Federal Government are put in the position of having to do battle with that same government in order to regain their jobs when they return home. In your experience, can you think of any reason that the Federal Government as an employer would have any problems with complying with USERRA for its employees? In your experience, are the problems facing servicemembers when they return to claim their jobs the position itself, or benefits associated with that position?

Mr. TULLY. Mr. Chairman, just to point out, it is 1,802 clients that we had during the demonstration project. I wish we had 4,000.

Chairman AKAKA. Thank you for that correction.

Mr. TULLY. I believe the No. 1 problem is ignorance of the law. Many of the Federal supervisors are not up to date on the ins-and-outs of USERRA and the escalator principles. That is why one of

my proposals is giving the Office of Special Counsel disciplinary powers. The first time the Office of Special Counsel brings a disciplinary action against a supervisor who violated USERRA, that will dramatically decrease the number of USERRA violations you have in the Federal Government. And I think as part of the demonstration project, not only getting the monetary damages that are due to a servicemember, but bringing about justice to the supervisors who inflicted the harm on the person is critical. Right now, there is no mechanism to punish a Federal supervisor who violates USERRA.

And I believe the second problem is budgetary. Many of the Federal agencies are being crunched due to financial constraints. If they lose somebody, like, for example, the Chief of Staff for the Department of Labor VETS, somebody else has to fill that spot and some positions may not have to be filled on an overtime basis, but in the Federal law enforcement communities, they have to fill those posts. So for my position, for example, as a corrections officer, my post when I left had to be filled and that cost the Bureau of Prisons my salary plus time-and-a-half for somebody else to fill it, and that builds up a little bit of animosity.

Chairman AKAKA. Mr. Tully, your testimony presents an interesting perspective on the jurisdictional question. It could tend to lead one to conclude that there are hundreds of USERRA violations and cases out there that are not tracked or even recorded or even cared about. Do you believe that this is the situation?

Mr. TULLY. Absolutely, Mr. Chairman. This GAO report only dealt with OSC and DOL–VETS. There is a third option which was not incorporated in the GAO report at all, which is private attorneys. Under USERRA, a servicemember who believes he has a discrimination allegation does not have to go to DOL–VETS, does not have to go to the Office of Special Counsel. They can retain private counsel. And the figures from the Merit Systems Protection Board show that the overwhelming majority of prosecutions by Federal executive employees has been done either pro se or by private counsel like myself. So the snapshot that GAO is taking is of a fraction of the overall USERRA violation cases in the Federal sector.

Chairman AKAKA. Well, I want to thank you so much for traveling here and joining us and providing your testimony and your responses to our questions. I want to wish you well on your deployment and thank you so much for your service to our country.

Mr. TULLY. Thank you, Mr. Chairman.

Chairman AKAKA. Thank you so much, everyone, for being here and being a part of this hearing.

This hearing is adjourned.

[Whereupon, at 11:08 a.m., the Committee was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF PHILIP POPE, DEPUTY EXECUTIVE DIRECTOR, NATIONAL COMMITTEE FOR EMPLOYER SUPPORT OF THE GUARD AND RESERVE

Phil Pope became the Deputy Executive Director, National Committee for Employer Support of the Guard and Reserve in January 2005. Phil came to NCESGR after serving over 33 years in the United States Army. He holds undergraduate and graduate degrees from Auburn University and a master's degree from the National Defense University.

He entered the Army in 1971 as a private and served as a rifleman, 90mm recoilless rifle gunner, and squad leader. In 1977, as a sergeant, he entered Officer Candidate School from the North Carolina Army National Guard and was commissioned a Lieutenant of Infantry in 1978.

Mr. Pope's assignments include tours in the United States, Europe, and Asia. He commanded Company B, 3d Battalion, and 11th Infantry, in the 5th Infantry Division, at Fort Polk, Louisiana, from May 1981 to December 1982. From 1986 to 1989, he served as a Tactical Officer at the United States Military Academy, West Point, New York. In 1990, he was assigned to the Office of the Deputy Chief of Staff, Operations, United States Army Europe (USAREUR), where he served as an Arms Control Officer. During Operations Desert Shield and Desert Storm, he served as the Operations Officer (S3) for the 7th Battalion, 6th Infantry, 1st Armored Division. After Desert Storm, he returned to Germany and served as an Operations Officer in USAREUR Headquarters. In 1992, Mr. Pope was assigned as the Operations Officer (S3) for the 1st Battalion, 6th Infantry, 3d Infantry Division. Upon completion of his assignment in Germany, Mr. Pope assumed the duties as Chief, Regional Training Team, 1st Brigade, 78th Division (Exercise) at Fort Dix, New Jersey. From 1994 to 1996, he commanded the 1st Battalion, 9th Infantry, 2d Infantry Division at Camp Hovey, Korea. In 1998, He returned to Europe, where he served as the Deputy Chief of Staff, Operations (G3), 1st Infantry Division, and as the Assistant Deputy Chief of Staff, Operations (DG3) V Corps. From August 2000 through August 2002 he was the Garrison Commander at Fort Riley, Kansas. Mr. Pope has served two tours on the Army Staff working on the G–3 staff and serving as the Legislative Assistant to the Secretary of the Army. His last assignment was as the Senior Military Assistant to the Assistant Secretary of Defense, Reserve Affairs.

Mr. Pope is a graduate of the Infantry Officer Advanced Course, the Command and General Staff College, and the National War College. His awards and decorations include the Defense Superior Service Medal, Legion of Merit with 2 Oak Leaf Clusters, the Bronze Star with "V" Device and Oak Leaf Cluster, the Meritorious Service Medal with Silver Oak Leaf, the Combat Infantryman's Badge, Ranger Tab, and the Parachutist Badge. Mr. Pope also is a recipient of the Order of Saint Maurice and a 2002 inductee in the Army Officer Candidate School Hall of Fame.

Chairman Akaka and Members of the Committee: thank you for the invitation to offer my perspective on issues relating to the Uniformed Services Employment and Reemployment Rights Act (USERRA) program. Your invitation letter asked me to address the findings set forth in the report issued by the Government Accountability Office (GAO) on July 20, 2007, entitled "Improved Quality Controls Needed over Servicemembers' Employment Rights Claims at DOL" (GAO–07–907). This report looked at the results of a demonstration project which authorized the Office of Special Counsel, rather than the Department of Labor, to receive and investigate certain USERRA claims. You asked us to provide our view on what might be learned from an extension of the demonstration project and the merits of conducting a follow-up review. I will give you my agency's position on that report.

As you know, the Uniformed Services Employment and Reemployment Rights Act of 1994 protects the employment and reemployment rights of Federal and non-Federal employees who leave their employment to perform military service. The role of

informing servicemembers and employers about this law, and of enforcing it fall to several different government organizations.

Employer Support of the Guard and Reserve (ESGR) is a Department of Defense organization which operates a proactive program directed at U.S. employers, employees, and communities that ensures understanding and appreciation of the role of the National Guard and Reserve in the context of the DOD Total Force Policy. We do this by recognizing outstanding support, increasing awareness of the law, and resolving conflicts through informal mediation.

Gaining and maintaining employer support requires a strong network comprised of both military and civilian-employer leaders that is capable of providing communication, education and exchange of information. ESGR works with the Reserve component leadership from each service, appropriate government organizations such as the Department of Labor's Veterans' Employment and Training Service (DOL-VETS), and the Small Business Administration, and industry associations such as the Chamber of Commerce and others, to create a broad-based, nationwide support for our troops.

It is important to note that ESGR is not an enforcement agency, and we do not have statutory authority to offer formal legal counsel or to participate in any formal investigative or litigation process. Our part in the USERRA issue is to inform and educate our customers—servicemembers and their civilian employers—regarding their rights and responsibilities under the USERRA statute, and to also provide an informal mediation service. We have over 1,000 trained volunteer ombudsmen throughout the country and a national call center in Arlington, Virginia, to provide this service. Our call center received over 13,000 requests for assistance during FY07. Of those requests, 10,742 were informational in nature, that is, they were sufficiently resolved by providing information about the law. The remaining 2,374 were assigned as cases to our ombudsmen. Through a Memorandum of Agreement (MoA) between ESGR and DOL–VETS, ESGR refers to DOL–VETS any cases we are unable to successfully mediate within 14 days. During FY07, ESGR referred 416 cases to DOL–VETS. It should be further noted that the ESGR mediation process is now covered by the Administrative Dispute Resolution Act of 1996. This statute is fairly restrictive regarding the protection of privacy for all parties involved in the dispute. Thus, even for cases ESGR refers to the DOL–VETS under our MoA, ESGR is unable to pass on any case information exchanged between claimants and ESGR ombudsmen without the written consent of all parties involved in the mediation.

ESGR's mandate ends at this point in the USERRA resolution process. As I understand it, absent the mandated demonstration project between DOL–VETS and Office of Special Counsel (OSC), DOL investigates and attempts to resolve claims filed by servicemembers, and if not successful, DOL informs the Federal claimants that they may request to have their claims referred to the OSC, and informs non-Federal claimants that they may engage the Department of Justice. Of course, all parties reserve the right to engage private counsel at any time.

The report from the GAO concerned the specific investigation process for Federal claimants, that is, servicemembers who are employees of, prior employees of, and applicants to Federal executive agencies. Under the demonstration project, the DOL and OSC essentially divided Federal sector USERRA claimants. The investigative and administrative responsibilities for the Federal sector claims that stayed with DOL remained the same, while cases assigned to OSC under the project were investigated and administered by OSC.

You asked us to provide our view on what might be learned from an extension of the demonstration project.

As I stated earlier, ESGR's role is primarily to inform and educate servicemembers and their employers regarding their rights and responsibilities under USERRA, and to offer informal mediation to both. ESGR does not have any statutory authority to investigate or litigate USERRA complaints, nor do we differentiate between Federal and non-Federal claimants. As such, our primary interest in this demonstration project was to gain further understanding of the investigative process so we could inform our customers, and to see if either of the two models used for processing claims—a local process by DOL–VETS offices throughout the country or a centralized, national process by the OSC—was more effective in providing resolution.

Based on the DOL agreement with the GAO's findings, I believe the demonstration project was a success and all agencies involved in the USERRA resolution process will gain further efficiencies by incorporating the GAO recommendations.

We also continue to believe that the original USERRA process is the process that will continue to best serve the interests of servicemembers, whereby the Department of Defense, through the ESGR organization, provides informal mediation, and the Department of Labor continues to have the statutory authority to investigate

USERRA claims. The ESGR and DOL will, of course, continue to collaborate to the fullest extent possible to ensure the speediest and most effective resolution of USERRA challenges.

For our part, ESGR will continue its mission to gain and maintain employer support by recognizing outstanding support, increasing awareness of the law, and resolving conflicts through informal mediation, and by cooperating to the fullest extent allowable with the Department of Labor.

I hope that I have been able to clarify the role played by the Employer Support of the Guard and Reserve in helping to explain, and where applicable, mediate, issues involving the Uniformed Services Employment and Reemployment Rights Act.

Thank you.

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