ABUSE OF OVERTIME AT DHS: PADDING PAYCHECKS AND PENSIONS AT TAXPAYER EXPENSE

HEARING

BEFORE THE

SUBCOMMITTEE ON NATIONAL SECURITY

OF THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

NOVEMBER 20, 2013

Serial No. 113–106

Printed for the use of the Committee on Oversight and Government Reform

Available via the World Wide Web: http://www.fdsys.gov
http://www.house.gov/reform

U.S. GOVERNMENT PRINTING OFFICE

87–893 PDF WASHINGTON : 2014

For sale by the Superintendent of Documents, U.S. Government Printing Office
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ABUSE OF OVERTIME AT DHS: PADDING PAYCHECKS AND PENSIONS AT TAXPAYER EXPENSE

Wednesday, November 20, 2013

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON NATIONAL SECURITY,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:05 a.m., in Room 2154, Rayburn House Office Building, Hon. Jason Chaffetz [chairman of the subcommittee] presiding.

Present: Representatives Chaffetz, Lummis, Mica, Amash, Gowdy, Woodall, Bentivolio, Tierney, Maloney, Speier, Kelly, Welch, and Lujan Grisham.

Staff Present: Ali Ahmad, Senior Communications Advisor; Will L. Boyington, Press Assistant; Molly Boyl, Deputy General Counsel and Parliamentarian; David Brewer, Senior Counsel; John Cuaderes, Deputy Staff Director; Linda Good, Chief Clerk; Jennifer Hemingway, Deputy Policy Director; Mark D. Marin, Deputy Staff Director for Oversight; James Robertson, Senior Professional Staff Member; Laura L. Rush, Deputy Chief Clerk; Sarah Vance, Assistant Clerk; Jeff Wease, Chief Information Officer; Sang H. Yi, Professional Staff Member; Jaron Bourke, Minority Director of Administration; Lena Chang, Minority Counsel; Devon Hill, Minority Research Assistant; Peter Kenny, Minority Counsel; Julia Krieger, Minority New Media Press Secretary; and Mark Stephenson, Minority Director of Legislation.

Mr. CHAFFETZ. The committee will come to order. I would like to begin this hearing by stating the Oversight and Government Reform mission statement. We exist to secure two fundament principles. First, Americans have a right to know that the money Washington takes from them is well spent. And second, Americans deserve an efficient, effective government that works for them. Our duty on the Oversight and Government Reform Committee is to protect these rights.

Our solemn responsibility is to hold government accountable to taxpayers because taxpayers have a right to know what they get from their government. We will work tirelessly in partnership with citizen watchdogs to deliver the facts to the American people and bring genuine reform to the Federal bureaucracy. This is the mission of the Oversight and Government Reform Committee.

I appreciate everybody being here to today's hearing. We have four people who are here in person that are going to testify. I ap-

preciate you being here. We do have one gentleman, Mr. John Florence, who is in southern Georgia, and by mutual agreement between the majority and the minority he will be giving his opening statement and testifying via video.

We will do the questioning of Mr. Florence before we get to the questioning of the panel that's here in person in Washington, D.C. At the conclusion of his testimony we will question him, we will dismiss him, we will thank him for his participation, and then we will focus on the four people that are here today.

There is a few seconds delay, and so some patience and understanding that he won't be able to hear us and we won't be able to hear his response for a few seconds given the technology, but I think this is the appropriate way to go and I appreciate the indulgence.

First, I would like to give my statement and then we will allow the minority to give their statement.

It has been brought to light that there are some serious challenges and problems with the use of overtime, often called Administratively Uncontrollable Overtime, or AUO. We are going to look today at the desk jockeys who milk the system and the public trust and steal from Americans by abusing the system. We are also going to try to give more consistency and look at those that are working hard on the border and doing the job that Americans deserve and need, and the good work that they do, and how we compensate them as well.

Our hearing examines the recent Office of Special Council letter to the President which described the pervasive misuse of Administratively Uncontrollable Overtime, AUO, by employees at the Department of Homeland Security. Special Counsel Carolyn Lerner found abuse of this form of overtime paid to be, "profound and entrenched," problem at the Department of Homeland Security, characterizing the practice as, "a gross waste of scares government funds." She will testify that this is not an isolated occurrence, but a persistent pattern of costing Americans what could be tens of millions of dollars every year, and this is just the Department of Homeland Security.

By definition, Administratively Uncontrollable Overtime is a form of overtime pay used to compensate employees who occupy positions requiring substantial amounts of irregular unscheduled work. AUO ranges from sometimes 10 to 25 percent of a worker's base pay, and this compensation goes towards their pension. So not only if they were abusing it would they be stealing from the American people at the time that it occurred, but they will be compensated for years, if not decades into the future by continuing to reap the benefits of that as a calculation for their pension.

Despite a 2008 investigation by the Office of Special Counsel and the subsequent promise of the Department of Homeland Security to stop the abuse, CBP failed to implement an agency-wide directive to better manage the overtime policy. Instead, employees were shown a video explaining the rules of the AUO. What is intolerable is the fact that this was highlighted as a problem in 2008. It was pointed out, almost the exact same thing, and yet it still continues today. In fact, it seems to have grown and spread.

Allegations of abuse have come from across the Department, including at CBP's headquarters in Washington, D.C. The Office of Special Counsel's ongoing review of information disclosed by whistleblowers at just six of the Department of Homeland Security offices found nearly $9 million wasted annually. Again, this is just a snapshot of six offices. The Office of Special Counsel substantiated disclosures made by DHS employees that Special Counsel Lerner will elaborate on here today.

Also, equally disturbing are the five additional whistleblower allegations described in the OSC's letter to the President, including the disclosure by one of today's witnesses, Mr. John Florence. We appreciate his participation and willingness to step up and do the brave thing.

It is inexplicable that the Department of Homeland Security would allow its employees to regularly abuse the AUO. Despite claiming in its budget that CBP is, "constantly reviewing the use of all overtime hours and conducting the operations and activities by all employees performed in the field and at the headquarters level." That is not true. That is not true. And we are going to explore why Homeland Security thinks that they can put out such a grandiose statement.

The Department of Homeland Security's abuse of the public trust by routinely claiming AUO up to 2 hours a day every day, including the Department of Homeland Security headquarters and while on training assignments where no qualifying circumstances appear to exist. We are not talking in this instance necessarily about the people that are actually on the border, driving out from Yuma a couple hours to go to their station. That is not what we are talking about. We are talking about desk jockeys who are sitting at headquarters and at training facilities where it is fairly predictable what is going to happen. There is a difference. There is a difference and we are going to explore that.

Was the Department of Homeland Security unable or unwilling to bring an end to the longstanding practice that pads the pockets and pensions of Homeland Security employees who watch sports and entertainment channels on a daily basis at taxpayer expense? Part of the answer to this question may stem from the fact that this behavior was endorsed by management in many cases, also practiced by management themselves.

According to CBP's own data, in 2013 agents at Border Patrol headquarters claimed an average of 20 hours of overtime pay per period, one of the highest Administratively Uncontrollable Overtime of any CBP duty station. According to the Office of Special Counsel, "The attached report confirms that Situation Room employees in Washington, D.C., claimed to have worked 2 hours of AUO following their assigned shifts 89 percent of the time." Eighty-nine percent of the time people working there claimed overtime. Again, these were not the Border Patrol agents on the front line who are doing the tough, difficult thing.

I want to read something here from the Office of Special Counsel in her report. This is page three, a letter from the Office of Special Counsel to the President of the United States. "A whistleblower at the U.S. Citizenship and Immigration Service's headquarter facility in Washington, D.C., alleged abuses of AUO in 2010 while the

whistleblower worked in the Office of Security and Integrity. The whistleblower alleged that everyone in OSI claimed 10 hours of AUO every week, even though no employee performed work that qualified. Not one. This whistleblower requested that her position be made ineligible for AUO and also advised supervisors that AUO was being routinely misused. The whistleblower was initially told she could not be decertified from AUO because it would draw unwanted attention to the office. While the whistleblower was eventually decertified, the AUO abuse by others has not stopped. DHS is required to submit a report in response to these allegations by November 13th."

I don't know who this whistleblower is, but she is the one that should probably should be running that Department and that agency and that group. God bless her for stepping up and drawing out and highlighting a problem. That is exactly the kind of person that should be running that. Again, we are talking about the Commissioner's Situation Room, which I am going to take is a fairly important position and an important place.

Now, last week I introduced some bipartisan legislation, H.R. 3463, to address the abuse raised by the Office of Special Counsel. The bill will create a consistent, reliable pay system, enhance border security, and is anticipated to save the taxpayers more than $1 billion over 10 years according to the initial estimate. The new pay scale, along with a long-term solution, will iron out the kinks of the system through old-fashioned planning and time management. These changes will both reduce the opportunities to abuse the system and provide compensation for unanticipated emergencies, such as actually capturing people who are illegally coming across our borders. I believe it is a logical solution. And I look forward to working with my colleagues, including the chairman of the Federal Workforce Subcommittee and original cosponsor, Blake Farenthold, to advance the bill. Again, we have done it in a bipartisan way. When we introduced it we had three Republicans and three Democrats.

I want to thank the six whistleblowers for disclosing this gross waste to the Office of Special Counsel. I appreciate Mr. Florence for his willingness to share his story with the committee. Mr. Florence has faced a number of challenges facing his disclosure. And I will take the opportunity to remind Homeland Security that this committee in a very bipartisan way will not tolerate any sort of retaliation or retribution against Mr. Florence or any other whistleblower who is simply trying to make this government more effective and more responsible to the American people.

And finally, and my conclusion here, I need to say we continue to be deeply disappointed for those of you working at Homeland Security who have failed to offer this committee your testimony prior to your being here today. I am sure you are both very nice people. We verbally called and said that we were going to have this hearing. We sent letters to your supervisors saying that we were going to have this hearing here today. We asked that that testimony be provided by 10 a.m. yesterday. We never received your testimony prior to your being here today.

Now, I know you work through a process with the Office of Management and Budget. They know the drill. They also know there

is no excuse—no excuse—for not providing testimony prior to coming before Congress. It allows us on both sides of the aisle to review that testimony and be properly prepared so we have a worthwhile hearing. This is a consistent drumbeat and pattern from Homeland Security, to jerk around the United States Congress. Please carry back the message with your legislative liaison this is not tolerable, and yet it continues and it persists.

We will now recognize, if there is another member, we will recognize the gentlewoman for a very generous 5 minutes.

Ms. LUJAN GRISHAM. Mr. Chairman, thank you very much. I want to thank the panelists for being here. Of course, this is a committee whose job it is to improve the effectiveness of government and be clear about accountability in all facets.

I am reading the opening statement of Representative John Tierney, who is the ranking member on the subcommittee.

Thank you, Chairman Chaffetz, for holding this hearing to discuss concerns raised by a recent Office of Special Counsel report regarding the misuse of overtime payments, called Administratively Uncontrollable Overtime, by employees at the Department of Homeland Security.

Regulation restricts the use of this type of overtime to a very limited set of circumstances, such as when a Border Patrol agent is investigating criminal activity. According to the report, however, over the last year seven whistleblowers have alleged routine misuse of AUO in separate DHS offices amounting to nearly $9 million per year. Now, I understand that two of these cases have now been substantiated by an agency investigation after referral from the Special Counsel, one other case was resolved through mediation, and the remaining four cases are pending agency investigation.

In one of the substantiated cases the Department confirmed that numerous employees and managers in a Customs and Border Protection, a CBP headquarters unit called the Commissioner's Situation Room, regularly misused AUO by claiming 2 hours of AUO following their assigned shift nearly every day, and in the absence of a compelling law enforcement need. The Department also confirmed that the director and assistant director authorized and embedded this improper practice.

Mr. Chairman, I could yield the rest of the opening statement time to the ranking member—all right, I will proceed.

The whistleblower told investigators that instead of working, these employees routinely spent their AUO hours relaxing, surfing the Internet, watching television shows, or taking care of personal matters. Other whistleblowers, like Mr. John Florence, who will be testifying today via video conference, have alleged that AUO is routinely being used to improperly complete administrative tasks or to cover shift changes. It has also been alleged that some employers were not even present at their duty station during the claimed AUO period. I welcome Mr. Florence's testimony on this topic and appreciate his willingness to share his story with us.

Special Counsel Lerner, who is here with us today, has expressed serious concerns that these cases and a prior disclosure in 2007 reveal longstanding abuse of overtime payments by the Department and strongly indicate that the Department of Homeland Security has a profound and entrenched problem. In her report, Special

Counsel Lerner also questions the ability and willingness of DHS and CBP to address the AUO problem. And after revelations of routine abuses in 2008, CBP promised to issue and implement an agency-wide directive on AUO, and 5 years later such a directive has not yet been issued.

These disclosures and the Department's slow progress in addressing the issue appear to point to a larger and more fundamental problem: that the misuse of this administrative overtime has become ingrained. The Special Counsel has noted that collecting AUO has become a culturally acceptable practice, and the National Border Patrol Council has stated that AUO long been promised, advertised, and used by every single agent who is a nonsupervisor.

While misuse of the administrative overtime cannot be tolerated, I fully appreciate the importance of AUO for frontline agents and officers who are protecting our borders, and I want to make sure that this will be available for those DHS employees who really need it to carry out the agency's mission. I hope that DHS, CBP, and the National Border Patrol Council will be able to provide this subcommittee with insight into how AUO is being used, any challenges the Department and its components face under the current system, and how the problem is being addressed. I also look forward to hearing our witnesses' thoughts on whether AUO, which was created 40 years ago, can be fixed or whether it should be replaced by an alternative overtime pay system.

Before I conclude my statement, I would like to ask my colleagues to not let their outrage over these whistleblower disclosures taint our view of Federal workers, the vast majority of whom are hard-working and dedicated civil servants who devote their lives to honorably serving and protecting the American people.

Thank you, Mr. Chairman. And with that, I would yield the remainder of the time to the ranking member.

Mr. TIERNEY. I yield back.

Ms. LUJAN GRISHAM. And Mr. Chairman.

Mr. CHAFFETZ. Well, thank you.

Mr. CHAFFETZ. And particularly that last comment, which I wholeheartedly agree on. I think this is an abuse that is being ferreted out. But you are right, the overwhelming majority of people at Homeland Security and other agencies, they do it right and they work hard and they are patriotic and they don't abuse the system. But there is widespread abuse here and we do need to ferret it out.

So we are now going to recognize our panel. Mr. John Florence, who is joining us via video, serves as the Branch Chief at the Field Operations Academy for the U.S. Customs and Border Protection; Ms. Catherine Emerson is the Chief Human Capital Officer for the Department of Homeland Security; Mr. Ronald Vitiello is the Deputy Chief of the Office of Border Patrol within the Customs and Border Protection; Mr. Brandon Judd is the president of the National Border Patrol Council; and Ms. Lerner is the Special Counsel, Office of Special Counsel, and issued one of the reports to the President that we are here talking about today.

We appreciate you, Ms. Lerner, being here as well.

Pursuant to committee rules, all witnesses will be sworn in before they testify. If you would please rise and raise your right hand.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?

Let the record reflect that the witnesses answered in the affirmative.

And you may be seated. I am going to go ahead and assume that Mr. Florence did the same, even though he is there remotely.

In order to allow time for discussion, we would appreciate if you would limit your testimony to 5 minutes. We are going to start actually with Mr. Florence. And like I said, we will do his opening statement. We will then go to Ms. Lerner, we'll go down the line. And then we will question Mr. Florence. At the conclusion of our questioning him, then we will focus our questions to the remaining panel.

Let's try with the technology here to start with Mr. Florence. You are now recognized for 5 minutes.

WITNESS STATEMENTS

STATEMENT OF JOHN FLORENCE

[The following testimony was delivered via teleconference.]

Mr. FLORENCE. Chairman Chaffetz, Ranking Member Tierney, and members of the subcommittee, my name is John Florence. It is my honor to testify in front of this panel on the subject of Authorized Uncontrollable Overtime violations within Customs and Border Protection. I sincerely apologize I could not be there in person. However, because of my serious medical challenges, my physicians have advised me not to do so.

While on my assignment as Acting Assistant Director at the Field Operations Academy, on August 20, 2012, I received a detailed email message, which was also sent to the Field Operations Academy Director, Kevin Strong, Deputy Director Michael Brown, and Assistant Director Select Kevin Levan. This email identified serious concerns about AUO violations by employees and senior level managers at the FOA. The allegations were AUO was being scheduled on a regular and reoccurring basis for work that was not uncontrollable and was primarily administrative and managerial in nature.

AUO employee shifts were being manipulated from normal academy business hours of 0730–1630 to 7 o'clock to 3 o'clock and then claiming AUO nearly every day from 3 o'clock to 5 o'clock. Lunch breaks were not being taken, to maximize AUO earnings during normal business hours. AUO was being claimed for work that should have been completed during normal business hours. And also of note but not identified in this email was AUO earners would receive approximately 20 hours of AUO per pay period or 25 percent of their base annual salaries.

I scheduled several meetings on this matter with Deputy Director Brown and sent several comprehensive email messages voicing my concerns. Unfortunately, it became apparent that the AUO violations were not receiving due diligence and would continue to be

authorized by former Director Strong because he was also significantly benefiting from the AUO pay. This was even after former Director Strong and Director Brown received comprehensive AUO guidance on August 14, 2012, from other senior level Border Patrol managers.

On September 4, 2012, I filed a Joint Intake Center investigation for a comprehensive review by Customs and Border Protection headquarters investigative components because of my concerns about mismanagement by senior level managers locally. Additionally, on September 11, 2012, I sent Deputy Director Brown an email message regarding my concerns about continuing authorization of AUO pay when it was clearly in violation of the policy, and based on these facts I no longer felt comfortable approving it.

After I advised Deputy Director Brown that I filed a Joint Intake Center investigation on the AUO violations, former Director Strong ordered that all AUO concerns and approvals would go through him directly until Assistant Director Kevin Levan reported for duty. Assistant Director Levan was also an AUO earner.

After almost 1 year had passed and I had not received a response or any indication that anything was being done to stop the AUO violations that were being observed at the Field Operations Academy and was prevalent throughout the rest of the Office of Training and Development and headquarters assignments, with the exception of the headquarters sending out an AUO training mandate on August 27, 2012, for all supervisors and managers to complete. However, this effort was ineffective because after this requirement was satisfied, the AUO violations continued. This reminded me of the action that was taken by the agency in 2007 on the Lynden, Washington, Office of Special Counsel case DI–08–0663 on AUO violations.

After applying due diligence to stop the AUO violations within my chain of command and through the agency's investigative branches with no success, it became apparent that I needed to file outside the agency as a whistleblower with the Office of Special Counsel.

Also of concern was the disparaging pay practices which was causing low morale because many employees were working in the same work areas and in identical positions, however the Border Patrol 1896 employees were receiving up to an additional 25 percent of their base pay, which to my understanding was also being utilized to calculate their retirement annuities. Many of the 1895 employees and managers that were not receiving any additional pay had serious concerns about equal pay for equal work. This was because they were also working 10 to 12 hour days and were being required to be on call but were not receiving any additional compensation.

I would like to close by saying that this experience has been the hardest decision in my 27-year Federal law enforcement career concerning reporting the AUO violations and including the former director and Deputy Director Brown in my testimony because they have been friends, colleagues, and mentors of mine for the last 15 years.

It goes without saying to do the right thing sometimes comes with a tremendous price is an understatement. Reporting the AUO

violations has taken its toll on my career, personal life, and health. Because of my mental anguish, stress, and retaliatory treatment I have received since reporting the AUO violations to my superiors, and due to the medications I was taking after a serious back surgery on February 10, 2013, I almost lost my life.

I had a serious—excuse me—I had a serious medical incident which caused me to be in an intensive care unit for 4 days. I'm sorry for losing my bearings. My chances for survival were very low and I was in a fight for my life. Today I stand before you with my life irrevocably damaged, being permanently disabled and unsure of my future with the agency.

Committee members, I have asked myself this question a number of times: Would I do it again? Would I report these blatant AUO violations if I knew what I know now? The answer is yes, because it was my duty to do so, it was the right thing to do, it was a violation of one of CBP's core values, which is integrity, and it was a serious fraud, waste and abuse of taxpayer's dollars. Thank you very much.

Mr. CHAFFETZ. Mr. Florence, we thank you. We thank you very much. I appreciate that. It is very heartfelt and we appreciate it. It is very helpful.

[Prepared statement of Mr. Florence follows:]

U.S. Department of Homeland Security

U.S. Customs and Border Protection

Congressional Testimony on Authorized Uncontrollable Overtime violations

Distinguished members of the Oversight and Government Reform Committee's Subcommittee on National Security, esteemed guest, ladies and gentleman my name is John Florence, it is my honor to testify in front of this panel on the subject of Authorized Uncontrollable Overtime (AUO) abuse.

On August 20, 2012 I received a detailed email message (Exhibit # 1) which was also sent to the Field Operations Academy (FOA) Former Director Kevin Strong, Deputy Director Michael Brown, and Assistant Director Kevin Levan; this email identified serious concerns about AUO abuse by employees and senior managers at the FOA. The allegations were:

- AUO was being scheduled on a regular and reoccurring basis for work that was not uncontrollable and was primarily administrative and managerial in nature.
- AUO Employees shifts were being manipulated from the normal Academy business hours of 0730-1630 to 0700-1500 and then claiming AUO nearly every day from 1500-1700.
- AUO earners would receive 20 hours of AUO pay every two weeks or approximately 25 percent of their annual base salaries.
- Lunch breaks were not being taken to maximize AUO earnings during normal business hours.
- AUO was being claimed for work that should have been completed during their normal work schedule.
- AUO was being earned in violation of policy and was being used to calculate retirement annuities.

I discussed these concerns with Deputy Director Brown and stated I had equal concerns because it appeared these allegations were legitimate. I scheduled several official meetings on this matter with Deputy Director Brown and sent several comprehensive email messages (Exhibit # 2) including my message on September 11, 2012 concerning the blatant AUO violations being practiced at the FOA and continuing authorization of this pay; unfortunately it became apparent that the AUO violations were not receiving due diligence and would continue to be authorized by former Director Strong because he was also significantly benefiting from the AUO pay.

I filed a Joint Intake Center (JIC) investigation (Exhibit # 3) on September 04, 2012 for a comprehensive review by CBP Headquarters investigative components because of my concerns about mismanagement by senior level managers locally. This was even after they received comprehensive AUO guidance on August 14, 2012 from other senior level Border Patrol managers (Exhibit # 4). After I advised Deputy Director Brown that I filed a JIC investigation on the AUO abuses former Director Strong ordered that all AUO concerns and approvals would go through him directly until Assistant Director Kevin Levan reported for duty, Assistant Director Levan was also an AUO earner.

After almost one year and not receiving a response or any indication that anything was being done to stop the AUO violations that was being observed at the FOA and throughout the rest of the OTD training facilities and headquarters assignments, with the exception of headquarters sending out a training mandate on August 27, 2012 for all supervisors/managers to complete on AUO. (Exhibit # 5) However, this effort was ineffective because after this requirement was satisfied the AUO abuses continued as before, this reminded of the failed actions the agency took in response to the 2008 Lynden, WA Office of Special Counsel case DI-08-0663 on AUO abuse. This was causing low morale because many employees were working in the same work areas and in identical positions however the Border Patrol Agents were receiving an additional 25 % of their base pay. Many of the employees and managers that were not receiving any additional pay had serious concerns about equal pay for equal work; this was because they were also working 10-12 hour days but were not receiving additional compensation.
After attempting to stop this abuse through my chain of command and through the agencies investigative branches with no success it became apparent that I needed to file outside the agency as a Whistleblower with Office of Special Counsel.

I would like to close by saying that this experience has been the hardest decision in my life concerning reporting the AUO violations and former Director Strong and Deputy Director Brown because they have been friends, colleagues, and mentors of mine for the last 15 years. It goes without saying "to do the right thing sometimes comes with a tremendous price is an understatement". Reporting the AUO violations has taken its toll on my career, personal life, and health. Because of the mental anguish, stress, and retaliatory treatment I have received since reporting the AUO violations to my superiors and due to the medications I was taking after a serious back surgery on February 10, 2013 I had a serious medical incident which caused me to be in an Intensive Care Unit for four days. My chances for survival were very low and I was in a fight for my life. Today I stand before you with my life irrevocably damaged, being permanently disabled, and unsure of my future with the agency.

Committee members I have asked myself this question a number times, would I do it again? Would I report these blatant AUO violations knowing what I do now? The answer is yes and the reason why is that it is my duty to do so, it was the right thing to do, it was completely in violation of CBP's Integrity Policy, and it was serious fraud, waste, and abuse of tax payers' dollars.

I sincerely thank you for your time and allowing me to testify.

John A. Florence

U.S. Department of Homeland Security

U.S. Customs and Border Protection

Testimony of Branch Chief John Florence
Customs and Border Protection Field Operations Academy
U.S. House of Representatives Committee on Oversight and Government Reform
Subcommittee on National Security
"Abuse of Overtime at DHS/CBP
November 20, 2013, 10:00 A.M.

Chairman Chaffetz and Ranking Member Tierney,

I would like to start out by saying thank you for allowing me to testify at yesterday's hearing on AUO abuse, and again I sincerely apologize for the momentary loss of bearing. I was unable to respond to the witness's testimonies but I'd be remiss if I did not make this statement. I believe Mr. Judd's statement about Border Patrol Agent's not wanting to work at the Training Academy's or Headquarters because of losing their AUO pay is completely inaccurate and I believe he was speaking as the voice for his union members out of his own greed and desires. Please allow me to explain:

After 9/11 I volunteered to leave my family and San Diego, CA to train new Officers for the front line duties to keep America safe from terrorists and people that wanted to do us harm. I loved my job in San Ysidro, CA fighting drug smugglers, seizing large quantities of narcotics, it was exciting and rewarding. However, I had a passion to train and share my knowledge and experience with the new recruits; therefore I transferred to the Field Operations Academy in Glynco, GA in 2002.

In doing this I realized I would take a substantial pay cut losing most of my location pay and 95 percent of my (COPR) overtime pay of up to $35000 annually, I did so willingly like many other Customs and Border Protection Officers (1895) have. I believe it is important to understand there are many benefits that come with an assignment at the Training Academies and/or Headquarters: a normal 8-5 job, nights/weekends and holidays off, predictable work schedules and assignments, an LEO could not ask for anything more.

In my 27 years of Federal Law Enforcement I have seen many budget expenditures that I questioned such as:

- Why do Agents have government vehicles assigned to them in the Training Academy and Headquarters environments? They do not conduct any investigative work so essentially it is a free ride to work and back. This cost the government millions in fuel, maintenance, Insurance etc. annually.
- Why do Agents get AUO, LEAP and other premium pay packages at the Training Academy's and HQ assignments? They complete little to no work that qualifies for this pay.

- When I was the Chief in Nassau, Bahamas in 2010 I questioned the Director of Preclearance Kathleen Conway about ordering me to send a GS-12 Supervisor to Washington, DC on a four month TDY to work on administrative tasks? I questioned this decision because of our low staffing levels, reduced overtime budget, and the fact that the house he was living in was funded by the government which cost $5000 dollars a month, it sat empty, we had to back fill his position with overtime assignments, and CBP paid approximately $30,000 in TDY related costs for his hotel, meals, etc. in DC? The Director told me she was in-charge and would support the OFO mission?

I have many other responsible ideas for significant cost savings to the government and I have voiced them to my superiors but have been told they would not discuss these issues with me, it cannot be done etc.

Congressmen I would be honored to participate in working groups to discuss responsible cost savings ideas for DHS and other government agencies. I truly believe with the appropriate support we can save millions of dollars that are being spent on questionable practices, policies and procedures.

VR

John A. Florence

Mr. CHAFFETZ. Let us go through the testimony of the other four and then we will come back to you for questions.

I now recognize Ms. Lerner for 5 minutes.

STATEMENT OF CAROLYN N. LERNER

Ms. LERNER. Chairman Chaffetz, Ranking Member Tierney and members of the committee, thank you for inviting me to testify today about overtime abuse disclosed by whistleblowers at the Department of Homeland Security. I would like to introduce the two attorneys from our agency who had primary responsibility for the report, Lynn Alexander and Johanna Oliver, and they did a terrific job. They are attorneys in our Disclosure Unit.

My statement to today will focus on three areas: the role of the Office of Special Counsel in whistleblower matters generally; the procedures followed in this matter; and finally, our findings and areas of concern.

I want to start by briefly explaining our role in disclosure matters. As an independent agency within the executive branch, the OSE provides a safe channel for Federal employees to disclose government wrongdoing. We evaluate disclosures using a "substantial likelihood" standard. If the standard is met, I send the matter to the head of the agency, who in turn is required to conduct an investigation and submit a written report of investigative findings to my office.

After reviewing the agency's report, I make two determinations: first, whether the report contains the information required by statute; and, second, whether the findings of the agency appear reasonable. In addition, the whistleblower may review and comment on the agency report. My office then transmits the report with findings and recommendations to the President and congressional committees with oversight responsibility. In this case, my findings and recommendations are attached to my submitted testimony.

It was within this statutory framework that we received disclosures from seven whistleblowers from six separate offices of the Department of Homeland Security over the past 2 years. In September 2012, Jose Ducos-Bello contacted OSE about overtime in the U.S. Customs and Border Protection Commissioners' Situation Room in Washington, D.C. Mr. Ducos-Bello alleged that employees there regularly abused Administratively Uncontrollable Overtime, AUO. The director and assistant director were authorizing this improper use and it was the norm for employees to extend their shifts by two hours every day, increasing pay 25 percent.

By regulation, this type of overtime may only be used when an employee's hours cannot be scheduled in advance due to a substantial amount of irregular and unpredictable work or a compelling law enforcement reason. For example, AUO is appropriate when an employee is apprehending a suspected criminal and it would constitute negligence for the employee to leave the job unfinished. However, the employees in Mr. Ducos-Bello's disclosure were not using AUO as the result of any unpredictable or compelling law enforcement need. According to Mr. Ducos-Bello, many employees spent the extra time relaxing or surfing the Internet.

The abuse was not an isolated occurrence. Over the past year we received disclosures from six more whistleblowers at five other

DHS offices. These allegations are outlined in more detail in my October 31, 2013, letter to the President.

The estimated cost of abuse at these six facilities alone is almost $9 million each year. The whistleblowers estimate that the cost nationwide is likely to reach tens of millions of dollars annually. This estimate excludes overtime claims by agents in the field, those whose need for AUO would seem to be most justified.

In April 2013 we received DHS' report on Mr. Ducos-Bello's allegations and the report substantiated his claims. As to the other five investigations, DHS' reports to my agency are due within the next several weeks and months. We will keep the subcommittee informed.

I credit the Customs and Border Patrol for conducting a thorough investigation into the whistleblowers' allegations. However, while CBP has pledged to take corrective action, I remain concerned about whether the agency is ultimately willing or able to do so.

In 2007 identical concerns about overtime abuse were raised. DHS confirmed the allegations and the agency made similar promises about correcting them. At that time CBP outlined a corrective plan, much of which is mirrored in its response to the current round of allegations. In addition, in its current report DHS describes obstacles to correcting these problems, including collective bargaining agreements and the need for updated regulations from the Office of Personnel Management.

While I am very hopeful that the Department will overcome these obstacles and take definitive action to correct this overtime abuse, I am also realistic. Based both on the magnitude of the problem and the prior history of ineffective measures taken, it will require a serious commitment the to make necessary change. I am pleased that Congress and this committee have shown an interest in helping the Department find ways to solve this problem.

In conclusion, I want to applaud Mr. Florence, Mr. Ducos-Bello, and the other courageous whistleblowers who spoke out about this important issue, often against their own financial self-interest. Had they not stepped forward, these problems would not have come to light and the taxpayers would continue to foot the bill for these improper payments.

Thank you very much. I will be pleased to answer any questions that the committee may have.

Mr. CHAFFETZ. Thank you.

[Prepared statement of Ms. Lerner follows:]

Testimony of the Honorable Carolyn N. Lerner, Special Counsel
U.S. Office of Special Counsel

U.S. House of Representatives Committee on Oversight and Government Reform
Subcommittee on National Security

"Abuse of Overtime at DHS: Padding Paychecks and Pensions at Taxpayer Expense"

November 20, 2013, 10:00 A.M.

Chairman Chaffetz, Ranking Member Tierney, and members of the Subcommittee:

Thank you for inviting me to testify today on behalf of the U.S. Office of Special Counsel (OSC). I am pleased to have the opportunity to discuss the long-standing abuse of overtime payments brought to light by whistleblowers at the Department of Homeland Security (DHS). I appreciate the Committee's interest in taking a closer look at this problem. I'd like to introduce Lynn Alexander and Johanna Oliver, attorneys in our Disclosure Unit, who had primary responsibility for these matters.

My statement today will focus on three areas: 1) the role of the Office of Special Counsel in whistleblower disclosures, 2) the specific procedures followed in this matter, and 3) our findings and areas of concern.

OSC's Role and Process

As an independent agency within the Executive Branch, the Office of Special Counsel provides a safe channel for federal employees to disclose allegations of waste, fraud, abuse; violations of law, rule, or regulation; and health or safety concerns. We evaluate disclosures to determine if there is a "substantial likelihood" that wrongdoing has been disclosed. If this substantial likelihood standard is met, I am required to send the information to the head of the appropriate agency. After a referral, the agency is required to conduct an investigation and to submit a written report to my office. OSC received approximately 1,150 disclosures from federal employees in Fiscal Year 2012, and just over three percent of the disclosures were referred for investigation.

After reviewing the agency's report of investigation, I make two determinations. First, I determine whether the report contains the information required by the statute, and second, whether the findings of the agency appear reasonable. In addition, the whistleblower is given an opportunity to comment on the agency report. My office then transmits the report along with findings and recommendations to the President and congressional committees with oversight responsibility for the agency involved.

It was within this statutory framework that we received disclosures from seven whistleblowers at six separate offices at the Department of Homeland Security over the past two years.

Now I'll turn to the procedures that were followed in those cases.

Procedural Case Chronology

In September 2012, the Office of Special Counsel received a disclosure from Jose Ducos-Bello. Mr. Ducos-Bello alleged that DHS employees working in the U.S. Customs and Border Protection (CBP) Commissioner's Situation Room, in Washington, D.C., regularly abuse Administratively Uncontrollable Overtime (AUO), and that the Director and Assistant Director authorize and abet this improper use. These routine overtime payments to Situation Room employees functionally extend their daily shift by two hours every day, increasing pay by 25%. This practice is a violation of the regulations governing AUO.

According to regulations, this type of overtime may only be used when an employee's hours cannot be scheduled in advance due to a substantial amount of irregular work. For example, AUO is appropriate when an employee's work requires responding to the behavior of suspected criminals and it would "constitute negligence" for the employee to leave the job unfinished. AUO should only be used for irregular and unpredictable work beyond an employee's normal shift. 5 C.F.R. Sec. 150.151-154.

The Situation Room employees in Mr. Ducos-Bello's disclosure were not using AUO as the result of any unpredictable or compelling law enforcement need. Rather, most claimed the overtime for administrative tasks that do not qualify. And, according to Mr. Ducos-Bello, many of these employees spent the extra two hours per day not working at all; they were relaxing, surfing the internet, watching sports and entertainment channels, or taking care of personal matters.

The abuse of this type of overtime at the Commissioner's Situation Room was not an isolated occurrence. Over the past year, we received disclosures from six more whistleblowers at five other offices throughout DHS. These allegations are outlined in my October 31, 2013, letter to the President, which is attached to this testimony. Much of the AUO at these locations involved desk jobs or training assignments, where compelling law enforcement reasons for staying on duty are highly unlikely to arise. You will hear more from John Florence about his specific concerns at the DHS training office in Glynco, GA.

At these six facilities alone, a conservative estimate of the overtime abuse is nearly $9 million each year. The whistleblowers estimate that the cost nationwide is likely to reach tens of millions of dollars annually. This estimate excludes any overtime claims by agents in the field – those whose need for AUO would seem to be most justified.

In the Situation Room case, after we determined that there was a substantial likelihood of a violation of law, rule, or regulation and gross waste of government funds, we referred these allegations to then DHS Secretary Janet Napolitano for investigation. In April 2013, we received the agency's report, which substantiated the allegations. The report concluded that there was no way to verify whether employees in the Commissioner's Situation Room were entitled to the AUO they were receiving; previous warnings regarding proper use of AUO were disregarded; and it was "evident that the regular and consistent addition of two hours of AUO to the regularly scheduled eight-hour day implies hours of duty are controllable by management."

As to the other five investigations of overtime abuse, DHS's reports to my agency are expected back within the next several weeks and months, and we will keep the Subcommittee informed of further developments.

OSC Comments and Areas of Concern Regarding Custom and Border Protection's Findings

I credit the Customs and Border Protection (CBP) Office of Internal Affairs for conducting a thorough investigation into the whistleblower's allegations. And, as noted, the CBP investigation confirmed most of the whistleblower's factual allegations. However, while the agency has pledged to take corrective action, I remain concerned about whether the agency is ultimately willing or able to do so.

As I noted in my communication to Congress and the President, in 2007 the identical concerns about overtime abuse were raised and the agency made similar promises about correcting them. Specifically, at that time, our agency received a disclosure that Customs and Border Protection employees in Blaine, Washington were improperly using AUO. In response, the agency confirmed the allegations, finding that employees were given blanket authorization to work overtime and managers improperly provided excess overtime. Much of that overtime was controllable, and therefore it should not have been classified as AUO. The report also found that employees were paid when they were not actually working.

At that time, CBP outlined a corrective plan, requiring training in AUO and annual certification. Much of the agency's response to the 2007 complaint mirrored its response to the current round of allegations.

In its current report, CBP cites a number of obstacles that will make it difficult to implement a directive to correct this problem, including collective bargaining obligations and the need for updated regulations from the Office of Personnel Management.

While I am hopeful that the Department will overcome these obstacles and take definitive action to correct this overtime abuse, I am also realistic. Based both on the magnitude of the problem and the history of ineffective solutions, it will require a serious commitment to make necessary changes. I am pleased that Congress and this Committee have shown an interest in helping the Department find ways to solve this problem, including through legislative reform.

In conclusion, I want to applaud Mr. Florence, Mr. Ducos-Bello, and the other courageous DHS whistleblowers who spoke out about this important issue, often against their own financial self-interest. Had they not stepped forward, these problems would not have come to light, and the taxpayers would continue to foot the bill for these improper payments.

I would be pleased to answer any questions that the Committee may have.

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

The Special Counsel

October 31, 2013

The President
The White House
Washington, D.C. 20500

Re: OSC File No. DI-13-0002

Dear Mr. President:

I write to express deep concerns about long-standing abuse of overtime payments by the Department of Homeland Security (DHS). The enclosed report details one of six whistleblower cases currently before the Office of Special Counsel (OSC). Each of the six cases discloses misuse of a specific pay authority known as Administratively Uncontrollable Overtime (AUO). According to information provided by the whistleblowers, abuse of AUO at these six DHS offices alone costs the taxpayers approximately $8.7 million annually, a gross waste of government funds.

The enclosed report substantiates disclosures made by DHS employee Jose R. Ducos-Bello. The report confirms that employees in the Commissioner's Situation Room (Situation Room), an office within Customs and Border Protection (CBP) in Washington, D.C., violate the federal AUO regulation by claiming two hours of AUO pay nearly every day. The report also confirms that the Situation Room Director and Assistant Director "authorize and abet" the improper use of AUO. OSC recently referred to the Secretary of Homeland Security five additional AUO cases – a strong indication that DHS has a profound and entrenched problem.

AUO is intended to be used only when an employee's hours cannot be scheduled in advance due to a substantial amount of irregular work. For example, under the governing regulation, AUO is appropriate if an employee's work hours depend on responding to the behavior of suspected criminals and it would "constitute negligence" for the employee to leave the job unfinished. CBP and other DHS components have the authority to use AUO to effectively secure the borders, which may require irregular and unpredictable work beyond an employee's normal shift. See 5 C.F.R. § 150.151–154. Despite this definition, thousands of DHS employees routinely file for AUO, claiming up to two hours a day, nearly every day, even in headquarters and training assignments where no qualifying circumstances are likely to exist.

The attached report confirms that Situation Room employees in Washington, D.C., claim to have worked two hours of AUO following their assigned shift 89 percent of the time. These routine AUO payments to Situation Room employees "functionally [extend] their daily shift by two hours each day," but are not the result of any unpredictable or compelling law enforcement need. Most of the claimed overtime work is "administrative in nature, often consisting of Headquarters or local taskings" that do not qualify for AUO. Mr. Ducos-Bello alleged that the

employees who "work" overtime frequently watch sports and entertainment channels during their claimed AUO periods, or spend the two additional hours at their duty station relaxing, joking, surfing the internet, and taking care of personal matters.

This case is not an isolated occurrence. Rather, it is part of a persistent pattern of AUO allegations raised by DHS employees. Some of these whistleblowers are authorized to receive AUO. They are disclosing information against their own financial self-interest due to concerns about the ethics of the practice and the resulting impact on the federal budget. While DHS officials have acknowledged AUO abuse when confronted with specific allegations, they have taken insufficient steps to correct the problem.

For example, on February 20, 2008, OSC referred a whistleblower's allegations of AUO abuse at the Office of Border Patrol in Lynden, WA (OSC File No. DI-08-0663). The DHS report in response to those disclosures confirmed that employees in Lynden routinely abused AUO and that senior managers also benefited from improperly approved AUO. At the time, CBP promised to implement "an Agency-wide AUO policy directive [to] bring conformity to the policies and practices" – a step that would cease the practices in Lynden and prevent misuse throughout the agency.[1]

That commitment was made more than five years ago. In the current report on AUO abuse in the Situation Room, CBP repeats its desire "to work towards a unified and simplified agency-wide directive on AUO." The report adds an additional, minor commitment by CBP to show a video to all employees to reinforce rules on proper AUO use and administration.

Much of the language regarding the Situation Room AUO abuse and proposals for corrective action is taken directly from the 2008 Lynden report. Roughly one-quarter of the 2013 report is identical to the concerns cited in the 2008 report. The lack of progress in implementing plans first outlined five years ago raises questions about the agency's willingness or ability to confront this important problem.

CBP cites an array of obstacles to full implementation of an agency-wide AUO directive, including collective bargaining obligations and the need for updated regulations from the Office of Personnel Management. DHS and CBP must overcome these challenges and move quickly to reform AUO practices. OSC is currently processing five additional AUO cases, each of which met the high "substantial likelihood" standard for investigative referral by OSC to DHS. These cases include:

- A whistleblower at the CBP Office of Training and Development in Glynco, GA, alleged that agents routinely abuse AUO by claiming two hours of AUO daily while failing to perform any qualifying duties. The fact that AUO is claimed at a training facility – where compelling law enforcement reasons for staying on duty are unlikely to arise – raises concerns about the propriety of its use by these employees. According to the

[1] In 2012, OSC resolved a whistleblower case brought by another employee in Washington, who alleged retaliation for disclosing evidence of AUO abuse to his superiors.

whistleblower, CBP pays out nearly $5 million annually to employees in the Office of Training and Development, including to 50 managers at Headquarters. DHS is required to submit a report to OSC in response to these allegations by January 2, 2014.

- A whistleblower at the U.S. Citizenship and Immigration Services headquarters facility in Washington, D.C., alleged abuses of AUO in 2010 while the whistleblower worked in the Office of Security and Integrity (OSI). The whistleblower alleged that everyone in OSI claimed 10 hours of AUO every week, even though no employee performed work that qualified. This whistleblower requested that her position be made ineligible for AUO and also advised supervisors that AUO was being routinely misused. The whistleblower was initially told she could not be decertified from AUO because it would draw unwanted attention to the office. While the whistleblower was eventually decertified, the AUO abuse by others has not stopped. DHS is required to submit a report in response to these allegations by November 13, 2013.

- A whistleblower at the Immigration and Customs Enforcement (ICE) facility in Houston, TX, alleged that ICE supervisors authorize and abet the improper use of AUO. The whistleblower disclosed that employees are directed to stay beyond their normal duty hours to complete routine administrative tasks that are not time-sensitive or investigative in nature. These employees are instructed to certify the time as AUO. OSC received an inadequate report from ICE on September 11, 2013, and will seek a supplemental report.

- Two whistleblowers at the CBP facility in San Ysidro, CA, allege that Border Patrol Agents at the Asset Forfeiture Office routinely claim two hours of AUO each day, but fail to perform duties that qualify for AUO payments. The whistleblowers further alleged that employees work on routine administrative matters during the claimed AUO periods or are not even present for the AUO time they claim. DHS is required to submit a report to OSC in response to these allegations by November 6, 2013.

- Finally, a report issued by CBP in response to a whistleblower's disclosures at the CPB facility in Laredo, TX, confirms that AUO is being used for routine shift change activities in violation of rules and regulations. OSC requested additional information from CBP on the Laredo activities.

These additional cases indicate that AUO problems are ongoing and pervasive throughout DHS. Indeed, according to CBP's own data, during one three-month period in 2013 agents at Border Patrol Headquarters in Washington, D.C., averaged 1.99 AUO hours per day, or 20 hours per pay period. This is one of the highest AUO rates of any CBP duty station, including many duty stations in border areas. One whistleblower noted to OSC that if all AUO claims by agents in the field were excluded, and only AUO claims by agents in office jobs were examined, "the dollar amount of AUO abuse would be in the tens of millions per year."

Such abuse of overtime pay is a violation of the public trust and a gross waste of scarce government funds. It is incumbent upon DHS to take effective steps to curb the abuse. It is up to the administration and Congress to develop a revised pay system, if warranted, that ensures fair compensation for employees who are legitimately working overtime.

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The allegations regarding AUO abuse at the CSR were referred to former DHS Secretary Janet Napolitano on January 2, 2013, for an investigation and report.[2] On April 17, 2013, James F. Tomshek, Assistant Commissioner, Office of Internal Affairs (IA), submitted a report based on the results of an investigation conducted by CBP's IA. On May 3, 2013, a copy of the report was forwarded to Mr. Ducos-Bello, who provided comments in response to the report on May 5, 2013.

The report contains all of the information required by statute. However, there remain serious questions about the agency's ability or willingness to adequately address the AUO abuse issue. Therefore, I find the report unreasonable.

As required by 5 U.S.C. § 1213(e)(3), I have sent copies of the agency report and Mr. Ducos-Bello's comments to the Chairman and Ranking Member of the Senate Committee on Homeland Security and Governmental Affairs and the Chairman and Ranking Member of the House Committee on Homeland Security. I have also filed a copy of the report and the whistleblower's comments in our public file, which is now available online at www.osc.gov, and closed the matter.

Respectfully,

Carolyn Lerner

Carolyn N. Lerner

Enclosures

[2] The Office of Special Counsel (OSC) is authorized by law to receive disclosures of information from federal employees alleging violations of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. 5 U.S.C. § 1213(a) and (b). If the Special Counsel determines that there is a substantial likelihood that the disclosures are accurate, she is required to advise the appropriate agency head and the agency head is required to conduct an investigation of the allegations and submit a written report. 5 U.S.C. § 1213(c). Upon receipt, the Special Counsel solicits comments from the whistleblower and reviews the agency's report to determine whether it contains all of the information required by statute and that the findings of the head of the agency appear to be reasonable. 5 U.S.C. § 1213(e)(2).

Mr. CHAFFETZ. Ms. Emerson, you are now recognized.

STATEMENT OF CATHERINE V. EMERSON

Ms. EMERSON. Chairman Chaffetz, Ranking Member Tierney, distinguished members of the subcommittee, thank you for the opportunity to appear before you today to address the Department's use of Administratively Uncontrollable Overtime, AUO.

I serve as the first career Chief Human Capital Officer of the Department of Homeland Security and am responsible for the Department's Human Capital Program, which includes workforce planning, policies, and technology in support of the DHS mission.

Today I am here to discuss AUO, a matter that has been of concern to the Department for some time. Properly paying our border and Homeland Security personnel and properly managing that pay system are essential to the Department's mission. AUO was established by Congress in 1966 and is a payment mechanism that allows the compensation of certain employees for irregular, unscheduled, but necessary overtime. AUO is determined as a percentage, not less than 10 percent nor more than 25 percent of an employee's rate of basic pay fixed by law or administrative action for the position held by the employee.

Mr. Chairman, we appreciate your taking the initiative to introduce new legislation to attempt to address the challenges posed by AUO and welcome the opportunity to work with you on finding solutions at an affordable cost. As you know, the Department has sought legislative changes for several years that would enable CBP to reform and rationalize its compensation structure. The Department has been working to institute pay reform, including AUO, since 2009.

The President's fiscal year 2011 budget request submitted in April of 2010 would have fully funded that increase. That plan also required statutory changes in a comprehensive pay reform legislative proposal submitted as part of the President's fiscal year 2012 budget request and formally submitted to Congress in September 2011.

Unfortunately, Congress did not take action on the proposal. The Department again restated the proposal in the President's fiscal year 2013 budget request to provide fair payment for all of CBP's overtime-eligible law enforcement officers and agents.

The Department takes its responsibility to be good stewards of taxpayer dollars very seriously. Any misuse of government funds will not be tolerated. At the request of the Special Counsel, on October 31, 2013, Acting Secretary Beers ordered an expeditious and comprehensive Department-wide review of our compliance with rules governing the use of AUO. The Office of General Counsel is conducting the compliance review and examining both current practices relating to designating positions as eligible for AUO pay and the compliance with all applicable rules and laws in recording and paying for AUO. The Office of the Chief Human Capital Officer, CBP, and all other relevant components of DHS are working closely with OGC on the compliance review and will be integral in implementing any decisions that result from OGC's findings and recommendations to the Secretary.

In conclusion, the Department and CBP are committed to finding solutions to modernize and streamline compensation structures, to align them with evolving missions, and to reflect the expanded responsibilities of our workforce, and we look forward to working with Congress to achieve these goals.

Thank you for allowing me the opportunity to testify before you today, and I look forward to answering any of your questions.

[Prepared statement of Ms. Emerson follows:]

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Joint Statement for the Record

of

Ms. Catherine Emerson

Chief Human Capital Officer

U.S. Department of Homeland Security

AND

Mr. Ronald Vitiello

Deputy Chief of the Border Patrol

Customs and Border Protection

U.S. Department of Homeland Security

U.S. House of Representatives

Oversight & Government Reform Subcommittee on National Security

November 20, 2013

Chairman Chaffetz, Ranking Member Tierney, Members of the Subcommittee, thank you for the opportunity to appear before you today to address the Department of Homeland Security's (DHS's) use of Administratively Uncontrollable Overtime (AUO). This is a matter of concern to DHS and we welcome the opportunity to work with you on finding solutions at an affordable cost. Properly paying our border and homeland security personnel, and properly managing that pay system are essential to the Department's missions. DHS takes its responsibility to ensure proper use of taxpayer funds seriously. While many frontline officers and agents across the Department require work hour flexibility, misuse of over-time funds will not be tolerated.

Mr. Chairman, the Department welcomes your interest in addressing the challenges posed by AUO. As you know, the Department has sought legislative changes for several years that would enable U.S. Customs and Border Protection (CBP) to reform and rationalize its compensation structure. AUO no longer meets the needs of a 21st century law enforcement environment where increasing amounts of surveillance and border security are conducted remotely. The work of securing the border is more than simply physical presence on the border and the pay system should not be one built only for those needs.

The Department has been working to institute pay reform, including AUO, since at least 2009. CBP developed a plan to replace AUO with Law Enforcement Availability Pay (LEAP), as part of its effort to upgrade the journeyman Border Patrol Agent position from GS-11 to GS-12. That transition began in 2010, and the President's fiscal year 2011 Budget request submitted in April 2010 would have significantly offset the long-term costs associated with that grade increase. The replacement of AUO with LEAP required statutory changes, and a legislative pay reform proposal was submitted as part of the President's fiscal year 2012 Budget Request, and formally submitted to Congress in September 2011.

Unfortunately, Congress did not take any action on this proposal. The Department again restated the proposal in the President's Fiscal Year 2013 Budget Request submitted to Congress in February 2012. The Department's proposal would have provided fair payment for all of CBP's overtime-eligible law enforcement agents and officers.

In many areas of human capital policy at DHS, we strive to create more uniform policies. However, premium pay, or overtime, poses challenges to achieving uniformity, as a result of the patchwork of authorities and systems that cover DHS employees. Some components do not even share the same mechanisms for employee compensation across their various organizations. These differences can be attributed to several factors, including the disparate missions of our workforce; the number of unions that represent our employees and the range of concerns of those they represent; the budgetary impacts of various types of pay reform that have been considered; the difficulty in managing various types of pay systems and their impact on current mission operations; and the need for legislation to implement most pay reforms.

Administratively Uncontrollable Overtime

AUO was established by Congress in 1966 (Public Law 89-554), and is a payment mechanism that allows the compensation of certain employees for irregular, unscheduled, but necessary overtime. Currently, approximately 77% of AUO paid at DHS goes to employees of CBP. AUO

pay is a form of payment for irregular overtime pay and is determined as a percentage - not less than 10 percent nor more than 25 percent - of an employee's rate of basic pay fixed by law or administrative action for the position held by the employee.[1] Under Office of Personnel Management (OPM) regulations, the rate of AUO pay that is authorized for a position is based on the average number of hours of irregular or occasional overtime work performed per week. For example, a 25 percent rate is authorized for a position that requires an average of over 9 hours per week of irregular or occasional overtime work.[2]

Current Activities

The Department takes its responsibility to be good stewards of taxpayer dollars very seriously. Any misuse of government funds will not be tolerated. Following a request by the Special Counsel, on October 31, 2013, Acting Secretary of Homeland Security Rand Beers ordered an expeditious and "comprehensive, Department-wide review of our compliance with rules governing the use of AUO." The Office of the General Counsel (OGC) is conducting the compliance review, and will include a review of both "current practices related to designating positions as eligible for AUO pay and the compliance with all applicable laws and rules in recording and paying for AUO."

The Office of the Chief Human Capital Officer, CBP and all other relevant components of DHS are working closely with OGC on this review, and will be integral in implementing any decisions that result from OGC's findings and recommendations to the Secretary. The Department will also work to implement new structures that will be more effective in securing the country and serving the taxpayer, while continuing to fairly compensate our dedicated employees.

Prior to the issuance of the Special Counsel's Report, CBP initiated an internal working group on AUO to review current practices as well as update AUO internal policies, where applicable, in an effort to modernize this form of pay with the roles and responsibilities of the positions earning AUO. For example, the Border Patrol issues official guidance on AUO to all Chief Patrol Agents and Division chiefs, most recently via a December 2012 memorandum. This guidance contains a list of all regulations and policy governing the administration and management of AUO for eligible Border Patrol agents, including 5 U.S.C. § 5545(c)(2), CFR § 550.151-164, and Section 1.3.103 of the Administrative Manual. The guidance also includes criteria that a position must meet to be authorized and deemed eligible for payment of AUO; steps for legitimately claiming AUO; and the responsibilities required of employees, supervisors and management in order to legitimately earn and oversee the AUO structure.

In particular, CBP's mission requires that compensation structures maintain flexibility to ensure continuous agent coverage, provide equal pay for equal work, and enable better budget forecasting. The Department would welcome a legislative solution that promotes efficiency and meets the agency's critical mission.

[1] *See* P.L. 101-509, Section 404; 5 U.S.G. 5304; 5 CFR part 531, subpart G; CFR 550.151
[2] *See* 5 CFR 550.154

H.R.3463: The Border Patrol Pay Reform Act of 2013

The Department and CBP are committed to working with Congress to modernize and streamline compensation structures, to align them with evolving missions, and to reflect the expanded responsibilities of our workforce.

Although the Department has not yet had an opportunity to sufficiently analyze H.R. 3463 or the immediate or long term costs that may be associated with it, the fact that your bipartisan legislation has a companion bill with bipartisan sponsorship in the Senate, reassures us that Congress is willing to help us with a legislative fix. We note, however, that the proposed legislation would only address the pay of the Border Patrol, and we would like the opportunity to work with you on pay reform elsewhere in CBP and in other Components of the Department.

Thank you for allowing us the opportunity to testify before you today. I look forward to answering your questions.

Mr. CHAFFETZ. Mr. Vitiello, you are now recognized for 5 minutes.

STATEMENT OF RONALD VITIELLO

Mr. VITIELLO. Chairman Chaffetz, Ranking Member Tierney, members of the subcommittee, thank you for the opportunity to appear before you today to address the recent allegations against U.S. Customs and Border Protection and specifically the U.S. Border Patrol.

When CBP was established in 2003 in the wake of the terrorist attacks on September 11, 2001, it was tasked with merging personnel, equipment, policies, procedures, and systems from four agencies within three departments, Treasury, Agriculture, and Justice. Today, the uniformed men and women of CBP make up the largest law enforcement organization in the Nation and take a solemn vow to secure the homeland from terrorists and other threats.

While much of CBP's critical efforts are performed at official ports of entry and at the land and maritime borders in between, advancements in technology are increasingly enabling aspects of frontline law enforcement activities.

The responsibilities of a Border Patrol agent are arguably the most unpredictable of all CBP's law enforcement positions. While the function of the Border Patrol has changed and expanded dramatically since its inception 89 years ago, its primary mission remains unchanged. The Border Patrol protects our Nation by reducing the likelihood that dangerous people and capabilities enter the United States between the ports of entry.

This effort is accomplished by maintaining surveillance, following up leads, responding to electronic sensor alarms and aircraft sightings and interpreting and following tracks. We also maintain traffic checkpoints along the highways leading from border areas, conduct city patrols and transportation checks, and support the antismuggling investigations. Agents regularly work in isolated and harsh terrain. Agents patrol the border on foot, in vehicles, boats, and in some areas patrol on horses, all-terrain vehicles, bikes, and snowmobiles.

The Border Patrol's frontline border security efforts are increasingly augmented by advancements in technology, including enhanced sensor, video, and radar technology. This technology, affixed to assets such as unmanned aircraft systems, increases the Border Patrol's capabilities in the land, air, and maritime domains between the ports of entry. The vast amounts of information gathered from this technology requires review and analysis and rapid interpretation into actionable information for use by agents on the ground.

The work of the Border Patrol agent is by its very nature dynamic and unpredictable. In the course of any given day, agents are continually presented with new conditions and new situations. This type of work requires agents both patrolling on the ground and processing intelligence at remote locations to follow leads and go where the activity takes them, even if it takes them beyond their standard duty hours.

When it comes to paying Border Patrol agents for work beyond regularly scheduled hours, the Department and CBP are committed

to working with Congress to modernize and streamline our compensation structure to reflect the expanded responsibilities of the workforce.

Administratively Uncontrollable Overtime, a system established almost 50 years ago, no longer meets the needs of a 21st century law enforcement environment where increasing amounts of surveillance, intelligence, and Border Patrol activities are often conducted in remote areas. The work of securing the border is no longer limited to physical presence on the border and our compensation system should reflect the current operational environment.

The U.S. Border Patrol takes its responsibility to be a good steward of taxpayer dollars. Any misuse of government funds is not tolerated. The U.S. Border Patrol will cooperate fully with all internal DHS and external reviews of our compensation and procedures.

Prior to the issuance of the Special Counsel's report, CBP initiated an internal working group on Administratively Uncontrollable Overtime to review current practices and update internal policies, where applicable, to reflect the roles and responsibilities of the positions earning AUO.

The Border Patrol also regularly issues official guidance on all AUO to chief patrol agents in the field, most recently in December of last year. This guidance contains the regulations and policies governing the administration of AUO, criteria that agents must meet and be authorized to be deemed eligible for payments for legitimately claiming AUO, and the responsibilities required of employees, supervisors, and managers.

While the Department and CBP have taken steps to educate supervisors and employees about the proper application of AUO, we continue working to educate and train our staff on the proper use and align pay structures with current agency functions.

The Border Patrol's mission requires compensation structures, maintain flexibility and ensure continuous coverage. We would welcome a legislative solution that meets the agency's critical mission, promotes efficiency, and has the least impact to our Border Patrol agent personnel.

Thank you for allowing me the opportunity to testify today, and I look forward to your questions.

Mr. CHAFFETZ. Thank you.

Mr. Judd, you are now recognized for 5 minutes.

STATEMENT OF BRANDON JUDD

Mr. JUDD. Chairman Chaffetz and Ranking Member Tierney, on behalf of the 16,500 Border Patrol agents who are members of the National Border Patrol Council, I would like to thank you for having this hearing to explore reforming the Administratively Uncontrollable Overtime system.

I am the president of the Border Patrol Council and I have been a Border Patrol agent for 16 years. I am currently assigned in Maine, but I have worked the majority of my career in some of the busiest Border Patrol sectors, including El Centro, California, and Tucson, Arizona.

The Special Counsel's latest report simply confirms what line agents have been saying for years: AUO is outdated and a broken system that needs wholesale reform.

When AUO was first instituted in the 1970s there were fewer than 4,000 Border Patrol agents. There was no border fence, remote sensing technology, or even an interoperable communications system. Most agents worked alone or in small groups with little or no supervision.

AUO made sense 40 years ago because if an agent was tracking smugglers or illegal aliens, after the shift was over the agent could simply keep working. Those extra hours worked were covered under AUO. When I entered on duty with the United States Border Patrol in 1997, there were still mom-and-pop smuggling organizations who peddled their product across our borders.

Fast forward to where we are today in 2013. Gone are the mom-and-pop smuggling organizations, replaced by multinational cartels that smuggle both drugs and illegal aliens into our country. These cartels are well organized, well funded, heavily armed, extremely violent, and have an extensive intelligence and surveillance network. With each tunnel coming into the United States that is discovered by law enforcement, the American public is made aware of just how well funded and organized these cartels are.

In response to cartel threats and the increase in both human and drug smuggling, Congress set a Border Patrol staffing floor at approximately 21,300 agents, seven times its initial size. This level of staffing not only ensured more agents in the field, but also ensured that Border Patrol would be a 24-hour-a-day operation on all of our borders.

In order to maximize manpower in the field, the Border Patrol utilizes a three-shift rotation with each shift lasting 8 hours. The challenge is how to handle shift changes because it is common for an agent's patrol area to be over an hour away from the Border Patrol station. Therefore, an agent's shift may be done, but the oncoming relief is still an hour away. After a handover is made with an oncoming agent, the off-going agent still has to drive an hour back to the Border Patrol station to turn in all equipment. So while a shift may be 8 hours, the agent has to work an extra 2 hours per day to ensure border integrity. These hours are and have always been covered under AUO, which we know through the Office of Special Counsel is illegal.

For the most part, when discussions on border security arise, the conversation tends to focus on the southwest border. In no way do I want to detract from the importance of securing the southwest border, but I would be remiss if I didn't mention the ongoing threat of the nearly unguarded northern border to the safety of the American public. As far as I am aware, all recent threat assessments have pointed to the northern border as the most likely point of entry into our country for terrorists.

I also need to remind the committee of our recent history. In the early to mid-1990s, San Diego and El Paso were ground zero for both illegal immigration and drug smuggling. In response, the Border Patrol threw all of its resources at those two areas without also strengthening other areas of the border. The thought process was that no one would attempt to cross through the inhospitable deserts of Arizona.

We now have a similar thought process in that we don't believe illegal smuggling, whether it be drugs or aliens, will ever move to

our northern border because it is cost prohibitive. Like Arizona, the northern border is ripe for the exploitation of not only alien and drug trafficking, but also for facilitating the illegal entrance of terrorists and those that would do this country harm. If we selectively limit manpower to current locations with high volumes of illegal crossings, all we really achieve is shifting the point of illegal entry to a different location.

The real question is where do we go from here. Last week, Chairman, you introduced legislation, H.R. 3463. In addition, Senators Tester and McCain introduced a companion bill in the Senate. The legislation would reform Border Patrol agent pay for the first time in almost 40 years.

On this point I want to be clear: Border Patrol agents completely support this legislation. The primary reason agents support this legislation is that it guarantees manpower we need in the field to accomplish our mission.

I learned early in my career that manpower and agent safety are linked. It was true when I started 16 years ago. It is even more true today. With the domination and spread of sophisticated drug cartels on the border, having this legislation in place is the equivalent of hiring 5,000 new Border Patrol agents, which increases border security as well as agent safety.

Finally, I would like to address the cost savings that would be achieved by the legislation. This legislation will save taxpayers over $1 billion over the next 10 years. Moving to this new system will be a pay cut from what Border Patrol agents have traditionally earned. However, we believe ensuring proper manpower stability and safety is worth a pay reduction.

Chairman, I look forward to any and all questions that you might have.

Mr. CHAFFETZ. Thank you.

[Prepared statement of Brandon Judd follows:]

Testimony of Brandon Judd

On Behalf of the

National Border Patrol Council

Chairman Chaffetz and Ranking Member Tierney, on behalf of the 16,500 Border Patrol Agents who are members of the National Border Patrol Council, I would like to thank you for having this hearing to explore reforming the Administrative Uncontrollable Overtime (AUO) system.

My name is Brandon Judd and I am the President of the National Border Patrol Council and I have been a Border Patrol Agent for 16 years. I am currently assigned in Maine but I have worked the majority of my career in some of the busiest Border Patrol sectors, including the El Centro, California sector, and the Tucson, Arizona sectors.

The Special Counsel's latest report simply confirms what line Agents have been saying for years – AUO is an outdated and broken system that needs wholesale reform.

When AUO was first instituted in the 1970s, there were fewer than 4,000 Border Patrol Agents. There was no border fence, remote sensing technology or even an interoperable communications system. Most Agents worked alone or in small groups with little or no supervision. AUO made sense 40 years ago because if an Agent was tracking smugglers or illegal aliens after the shift was over, the Agent could simply keep working. Those extra hours worked were covered under AUO.

When I entered on duty with the U.S. Border Patrol in 1997, there were still mom and pop smuggling organizations, who peddled their product across our borders. Fast forward to where we are today in 2013. Gone are the mom and pop smuggling organizations, replaced by

multi-national cartels that smuggle both drugs and illegal aliens into our country. These cartels are well-organized, well-funded, heavily armed, extremely violent, and have an extensive intelligence and surveillance network. With each tunnel coming into the United States that is discovered by law enforcement, the American public is made aware of just how well-funded and organized these cartels are.

In response to cartel threats and the increase in both human and drug smuggling, Congress set a Border Patrol staffing floor at approximately 21,300 Agents, seven times its initial size. This level of staffing not only ensured more Agents in the field, but also ensured that Border Patrol would be a 24-hour a day operation on all of our borders. In order to maximize manpower in the field, the Border Patrol utilizes a three shift rotation, with each shift lasting eight hours. The challenge is how to handle shift changes because it is common for an Agent's patrol area to be over an hour away from the Border Patrol station.

Therefore, an Agent's shift may be done but the oncoming relief is still an hour away. After a handover is made with an oncoming agent, the off-going agent still has to drive an hour back to the Border Patrol station to turn in all equipment. So while a shift may be 8 hours, the agent has to work an extra two hours per day to ensure border integrity. These hours are and have always been covered under AUO, which we know through the Office of Special Counsel is illegal. I'm also aware that the Special Counsel in 2008 informed the government that the "U" in AUO stands for "uncontrollable"—and regular and recurring shift change relief is anything but that. These long-standing problems point out to the need for change. From my perspective, a reform of the Border Patrol pay system is long overdue.

For the most part, when discussions on border security arise, the conversation tends to focus on the Southwest border. In no way do I want to detract from the importance of securing the Southwest Border, but I would be remiss if I didn't mention the ongoing threat of the nearly unguarded Northern border to the safety of the American public. As far as I am aware, all recent threat assessments have pointed to the Northern Border as the most likely point of entry into our country for terrorists. I also need to remind the committee of our recent history. In the early to mid-1990s, San Diego and El Paso were ground zero for both illegal immigration and drug smuggling. In response, the Border Patrol threw all of its resources at those two areas without also strengthening the other areas of the border. The thought process was that no one would attempt to cross through the inhospitable deserts of Arizona. We know from that experience that while San Diego and El Paso experienced a temporary drop in illegal crossing, towns like Nogales and Douglas in Arizona saw their illegal crossings rise to the level of chaos, ultimately requiring a 30 percent increase in border patrol Agents to staff those crossing points.

We now have a similar thought process in that we don't believe illegal smuggling, whether it be drugs or aliens, will ever move to our Northern border because it is cost prohibitive. Like Arizona, the Northern Border is ripe for the exploitation of not only alien and drug trafficking, but also for facilitating the illegal entrances of terrorists and those that would do this country harm. If we selectively limit manpower to current locations with high volumes of illegal crossings, all we have really achieved is shifting the point of illegal entry to a different location.

The real question is where do we go from here? Last week, Chairman Chaffetz introduced legislation, HR 3463. In addition, Senators Tester and McCain introduced a companion bill in the Senate. The legislation would reform Border Patrol Agent pay for the first

time in almost 40 years. On this point I want to be clear – Border Patrol Agents completely support this legislation.

The primary reason the Agents support the legislation is that it guarantees the manpower we need in the field to accomplish our mission. I learned early in my career that manpower and agent safety are linked. It was true when I started 16 years ago. It's even more true today, with the domination and spread of sophisticated drug cartels on the border. Having the legislation in place is the equivalent of hiring 5,000 new border patrol Agents, which increases border security as well as Agents' safety.

Finally, I would like to address the cost savings that would be achieved by the legislation. This legislation will save the taxpayers over $1 billion over the next ten years. Moving to this new system will be a pay cut from what Border Patrol Agents have traditionally earned. However, we believe ensuring proper manpower, stability, and safety is worth a pay reduction.

Mr. CHAFFETZ.

We are going to now direct our questions to Mr. Florence. I would ask members here on the panel to direct their questions just to Mr. Florence. We will go through those questions. At the conclusion, then we will focus on the four here in Washington, D.C. I will now recognize myself for 5 minutes.

And, Mr. Florence, I hope you can hear me. And I appreciate your testimony. Could you please tell me what you saw? What were these people doing day in and day out? You mentioned generally that they were surfing the Internet, doing those types of things, but what specifically did you see them doing?

Mr. FLORENCE. Well, I didn't see them doing specific things. I did not mention anything about them surfing the Internet. That was Mr. Ducos out of the Situation Room.

The individuals that were under my supervision worked in the Marine Branch, and according to their 203s, which were their AUO forms, they were preparing for lessons for the next day, working on lesson plans, other things like that, that were primarily controllable and administrative in nature.

Normally here at the academy the instructors will work anywhere from 4 to 6 hours a day and they will have at least 2 hours of a break to do the things that they were putting down that they were doing on their AUO. Sometimes they would even have 4 hours a day to prepare for their lessons the next day and to prepare for their classes and lesson plans, et cetera. So it didn't make any sense to me as far as prudent management why these employees were filing the AUO they were when they had plenty of time during their shifts to accomplish their work.

Mr. CHAFFETZ. I now yield to the gentlewoman from Wyoming, Mrs. Lummis.

Mrs. LUMMIS. Thank you, Mr. Chairman.

Mr. Florence, thank you for your testimony. I understand that you began your law enforcement career as a law enforcement specialist at F.E. Warren Air Force Base in Cheyenne, which is where I am from. So I am very pleased that you were willing to testify today.

I want to focus on the kind of response that you received when you notified your colleagues about the allegations of overtime abuse. Mr. Florence, could you comment on that?

Mr. FLORENCE. When I sent Deputy Director Brown my email, which I mentioned, which was on the 11th of September, he actually wanted to speak with me in person. He responded back by saying they were very serious allegations, et cetera, which I appreciate that and I can understand that. But he asked me to come into his office the next day. And then he sat me down and he said that my allegations were very serious, that I was questioning the director's integrity, and did I think that he would jeopardize his career for AUO? And then he told me you can go ahead and file your Joint Intake Center report but I feel it is a real waste of government money and a waste of government time.

Mrs. LUMMIS. Now, based on your experience working at CBP, what do you think contributes to this problem, an atmosphere or a culture where overtime is abused? Is it a lack of training or is it just a sort of a herd mentality to think that this is somehow fair?

Or the fact that, gee, we feel like we are underpaid and until Congress addresses that we will find a way to make sure that we are adequately paid, whether it is legal or not. What is it about this culture that makes this so hard to eradicate?

Mr. FLORENCE. Well, I think some of the Border Patrol agents feel that it is an entitlement, it is part of their pay package. When I received the three employees that were Border Patrol agents under my chain of command, I quickly started to study what AUO was all about because I was unfamiliar with it. I don't claim myself as a subject matter expert on AUO in any way, shape or form, but I know when someone should be working overtime and when they shouldn't, and in a training environment obviously most of it, 99 percent of it is controlled, so in any opinion it wasn't necessary.

So I think it is basically the mentality. It is an entitlement, it is an AUO-certified position, so therefore we can have AUO. That is what I was told by the director on numerous occasions. But in doing some research on my own on the Lynden, Washington, case, and then doing the mandatory training that was sent out and then doing my own research, I quickly found it was easy to understand that this was in violation of the policy. And I explained that to them numerous times to try to get this taken care of within my chain of command.

Mrs. LUMMIS. Mr. Florence, one more question. We had testimony from Mr. Judd that it can be a 2-hour commute, 1 hour each way, for a shift that is far away from the area where you must turn in your weapons and stuff before the end of a shift. Is that the typical situation where you would allege that overtime is abused or is that an appropriate use of overtime?

Mr. FLORENCE. Well, at the academy, as I said before, everything is controlled. They don't have to commute anywhere near that time. They are normally in their work area so they are able to report on time and there is normally no commutes.

Now, in the marine environment where these three employees worked, I understood that there could be situations where they got stuck out at sea because of weather or they had a mechanical issue with their vessels, et cetera, and I accepted that. I told them in those kind of situations, AUO should be authorized. It is uncontrollable. But in most situations in the academy environment everything is controllable and scheduled in advance.

Mrs. LUMMIS. Thank you for your testimony, Mr. Florence.

Mr. Chairman, I yield back.

Mr. CHAFFETZ. Thank you.

We'll now recognize the ranking member, Mr. Tierney of Massachusetts, for 5 minutes.

Mr. TIERNEY. Thank you.

Thank you, Mr. Florence, for making yourself available to testify here today, and accept at least my regrets for what you have gone through physically and emotionally as a result of trying to do your job the proper way and know that we respect it and appreciate it and feel very badly for the situation that you are in today healthwise.

I want to make this as short as I can, my questions. I was curious to know what kind of retaliation and confronted your subordinate, and you heard about that and you testified about that. So let

me just quickly ask you, who specifically did you directly report to when you first made the determination that this was being done improperly?

Mr. FLORENCE. I directly reported to the deputy director, Michael Brown, which in turn he reported to the director, Kevin Strong, who was also an AUO earner. Michael Brown was not an AUO earner.

Mr. TIERNEY. And did the deputy director have a direct response to you, directing you to either change the situation that you found or advising you to just leave it alone?

Mr. FLORENCE. He advised me that it was an AUO-certified position, that I didn't know what I was talking about, I didn't know the AUO system, and that, like I said before, the director was not going to jeopardize his career over AUO and it is a very serious concern of his that I am even bringing this up.

Mr. TIERNEY. Did you have any indication of how it was he thought he was going to be jeopardizing his career by dealing with this issue?

Mr. FLORENCE. I am not really sure about that. I think what he was alluding to is that the director wouldn't collect the AUO unless it was authorized and it was within policy.

Mr. TIERNEY. Okay. All right.

I have no further questions. If my colleague has any questions I'll yield.

Mrs. KELLY. No, I have no questions.

Mr. TIERNEY. We yield back, Mr. Chairman.

Thank you, Mr. Florence.

Mr. CHAFFETZ. Mr. Florence, we thank you for your time, your commitment, your dedication to your country, your service. It is my understanding there are no other questions from this panel of members. We thank you again for your bravery, for your willingness to step forward and do what is right, and I hope you sleep better because of it. And I am heartened that people like you are in those positions, and I appreciate the responsible nature. I appreciate you preparing for this testimony. Testifying before Congress is not an easy thing. And God bless you. I wish you nothing but the best. We thank you for your time. You are welcome to listen.

This committee will now direct its questions to the four panel members that are here in Washington, D.C., and I will start by recognizing myself for 5 minutes.

Ms. Lerner, on January 2 of this year you sent a letter to Secretary Napolitano. On page 3 you said, "I have concluded that there is a substantial likelihood that the information provided by the whistleblower to OSC discloses a violation of law, rule, or regulation, gross mismanagement, an abuse of authority, and gross waste of funds."

You stand by that statement, correct?

Ms. LERNER. I do.

Mr. CHAFFETZ. Your microphone, please.

Ms. LERNER. I do.

Mr. CHAFFETZ. Ms. Emerson, is she right or is she wrong?

Ms. EMERSON. We are currently in the process——

Mr. CHAFFETZ. Wait. Currently in the process? This is a letter that was sent on January 2nd. It is now November 20. Is she right or wrong?

Ms. EMERSON. That is currently under review by the Office of General Counsel.

Mr. CHAFFETZ. How long does it take you to review this?

Ms. EMERSON. From what I understand, it is going to take several months.

Mr. CHAFFETZ. Well, it has been—we are in month 11. How many more months do you think it is going to take?

Ms. EMERSON. I will have to get back to you with that. But from my understanding it will take several months. I know——

Mr. CHAFFETZ. What is your role?

Ms. EMERSON. I am the Chief Human Capital Officer.

Mr. CHAFFETZ. The Chief Human Capital. You are in charge. Who do you report to?

Ms. EMERSON. I report to the Under Secretary for Management.

Mr. CHAFFETZ. What is his name or her name?

Ms. EMERSON. Presently there is an acting. That would be Chris Cummiskey.

Mr. CHAFFETZ. How long have you been in this role?

Ms. EMERSON. I have been the DHS CHCO since August of 2011.

Mr. CHAFFETZ. When did you first become aware of this problem?

Ms. EMERSON. My office first became aware of it somewhere in 2009, the former CHCO.

Mr. CHAFFETZ. So you knew it was a problem in 2009.

Ms. EMERSON. The office worked on——

Mr. CHAFFETZ. When did you personally, Ms. Emerson, when did you become aware of it?

Ms. EMERSON. I personally became aware of it, it came to my attention in late April and——

Mr. CHAFFETZ. Of this year.

Ms. EMERSON. Yes.

Mr. CHAFFETZ. Do you think anybody has been dishonest?

Ms. EMERSON. That is under review right now, but OGC——

Mr. CHAFFETZ. What is the question here? We have the Office of Special Counsel who has reviewed this and come up with a definitive report on this. What do you need to do that Ms. Lerner hasn't done?

Ms. EMERSON. What I understand is that Ms. Lerner had some very serious concerns regarding the administration of AUO at DHS. That report or letter was sent to the Office of General Counsel, and they are working with the component. They are also working with my office, the Office of the CHCO, in reaching out to the component experts to look into the matter.

Mr. CHAFFETZ. Has anybody been fired?

Ms. EMERSON. Regarding this? I am not knowledgeable on that at this point.

Mr. CHAFFETZ. You are the chief human capital person. You can't point to a single person who has been fired, let go. What are you going to do to claw back the dollars?

Ms. EMERSON. That is under review with the Office of General Counsel.

Mr. CHAFFETZ. What are you here to talk about then? Everything is under review. Who is reviewing it? Who should have been here to represent the Department? Are you the chief or are you the——

Ms. EMERSON. I am the Chief Human Capital Officer and I have oversight throughout DHS for human capital programs. I am involved presently with the review being done by OGC to look at AUO administration——

Mr. CHAFFETZ. What about the specific allegations?

Ms. EMERSON. Those are all being reviewed currently.

Mr. CHAFFETZ. When are you going to come to a conclusion?

Ms. EMERSON. In the next several months.

Mr. CHAFFETZ. No, no, no, give me a date. What is the date?

Ms. EMERSON. I will have to get back to you on the date. I have been informed that it will be——

Mr. CHAFFETZ. Do you think anything that has been done has been dishonest?

Ms. EMERSON. As I said, I have to look into the facts. I know that they are being reviewed right now.

Mr. CHAFFETZ. This started in 2008. It was brought up again in 2009. A letter went to the Secretary on January 2nd of this year. And you are still reviewing it?

Ms. EMERSON. As I said, it is under review by the Office of General Counsel, and it is a case-by-case, component-by-component review of AUO usage throughout——

Mr. CHAFFETZ. You can't point to any case where we are clawing these dollars back?

Ms. EMERSON. I know that there has been work in that area.

Mr. CHAFFETZ. You said in your testimony, the testimony that you never gave us in advance—we have trouble getting it right now. You said, "At the request of special counsel, on October 31, Acting Secretary Beers ordered an expeditious and comprehensive department-wide review of our compliance and rules for the governing use of AUO." October 31st? You started a few days ago? She sent a letter to the Secretary on January 22nd, saying there is a substantial likelihood that the information provided by the whistleblower discloses a violation of law, rule, regulation, gross mismanagement, abuse of authority, and a gross waste of funds, and you didn't start a review until October 31st?

Ms. EMERSON. That review is the component-by-component department-wide review. That information was handled by OGC and forwarded to the Customs and Border Patrol, and they were working on that—those specific instances were specific to CBP.

Mr. CHAFFETZ. I can tell exactly why this continues to be a problem. There are tens of millions of dollars, taxpayer dollars, that are being abused. They are being stolen from the American people. And you are doing nothing about it. You have known about this since 2008. It was highlighted in January. And yet, nothing has been done. Don't tell me that there are months that we have got to continue to review this. There are people that need to be fired. There are dollars that need to be clawed back. There are people that may be headed to a violation of law that should be going to jail. So I hope we get the right person from Homeland Security to come here.

This committee will hold another hearing with the right person, who is actually going to testify to Congress. But don't tell me that

you need more dollars, more resources. You heard Nancy Pelosi saying, we are at bone bare—you know, the cupboard is bare. There is nothing to give. There are too many thousands of people who are working hard, doing the right thing, and guess what? They are getting screwed by the Department of Homeland Security, because those people are stealing from the American people.

You take that back to Homeland Security and let them know, they are going to deal with Congress. They are going to be candid about this. They are going to hold people responsible, and they are going to be candid in making sure that they are responsible with the American taxpayer dollars. Your answers, quite frankly—you are a very nice person—but your answers, quite frankly, they are not acceptable. For you to be the chief human capital person and you have no answers to any questions, saying everything is under review because, well, it is not in my department; it is with the General Counsel. It is inexcusable.

I now recognize the gentleman from Massachusetts, Mr. Tierney for 5 minutes.

Mr. TIERNEY. Thank you.

I am going to cede to Ms. Kelly, who was here in my delay in being here, so please. Thank you.

Mr. CHAFFETZ. Ms. Kelly.

Ms. KELLY. Thank you, Mr. Chair and Ranking Member Tierney.

Mr. Judd, your colleague, Shawn Moran, the vice president of the National Border Patrol Council, was quoted in a recent Washington Post article as stating that AUO has long been promised, advertised and used by every single agent who is a nonsupervisor.

Panel members, do you agree with that statement, that collecting AUO has become a promise that employees and new hires have come to expect?

Mr. JUDD. Thank you for your question. Actually, when you apply for a job—and they have since removed this in the application—but when I applied for the job, it was actually a part of the compensation package that you were told that you would earn. It said that you would earn a substantial amount of irregular overtime in the form of administrative uncontrolled overtime. So, yes, all Border Patrol agents, prior to—I believe that it was removed from the job announcement about a year ago, but prior to a year ago, yes, all Border Patrol agents were told that this was part of your compensation package.

Ms. KELLY. Is it true that it has been used as an actual recruitment incentive?

Mr. JUDD. It has. It absolutely has.

Ms. KELLY. And I think it was said that a person could earn up to 25 percent of their salary for AUO?

Mr. JUDD. That is correct.

Ms. KELLY. That is a very strong recruitment incentive.

Mr. JUDD. It is.

Ms. KELLY. Panel members, do you agree that it would be a challenge to implement any fix to the AUO system that would reduce or eliminate the AUO premium that employees have been earning?

Mr. VITIELLO. I think the findings in the investigation and the work that we have done has shown that this has been a very difficult challenge. That is why we look forward to working with the

committee and others to get us into a space where we can put these kind of things behind us.

Ms. KELLY. Anyone else? Okay, panel members, if we eliminate AUO for all employees not working on the front lines protecting the border, would it be difficult to retain and recruit employees to work at headquarters or at the department's training facility? And how would we recruit and retain these folks if you think it would be a hard time?

Mr. JUDD. Congresswoman Kelly, if you remove the overtime system that we currently have, you wouldn't be able to retain employees. That is one of the biggest incentives that we have to do the job we do. We live in environments, if you go out to Sanderson, Presidio, Texas, Ajo, Arizona, we live in environments that just aren't where the normal United States citizens would choose to live. This—what we have noticed is that, yes, AUO by law, Ms. Lerner has pointed it out, by law, AUO is not being used correctly. However, we do have a fix for that which would actually save the taxpayer dollars and would increase border security.

Ms. KELLY. Do you feel the starting salary or however your salary progresses is so low that it is hard to recruit people, just——

Mr. JUDD. No, our salary—when I began 16 years ago our salary was extremely low compared to other police departments, major police departments. However, our salary is now on par with those police departments, but every police department in the United States has an overtime system which they use. And just like those overtime systems, we also need an overtime system. But we need an overtime system that would be cost-effective to taxpayers, increase border security, and include incentives to retain our employees.

Ms. KELLY. Okay. Any other comments?

I yield back the remainder of any time.

Mr. CHAFFETZ. Thank you.

I will now recognize the gentlewoman from Wyoming, Ms. Lummis, for 5 minutes.

Mrs. LUMMIS. Thank you, Mr. Chairman.

Ms. Emerson, you have some—a marvelous mastery of bureaucratese, but let me tell you what I heard when you were giving your testimony. I want to paraphrase what I thought I heard you say. You said, Unless Congress does what DHS wants with regard to giving us money, that we are going to keep cheating the taxpayers to get it unless Congress will give us more money. That is what I heard you say. Am I correct?

Ms. EMERSON. AUO has been a challenge for the department over the last years, as we have seen and is pointed out in testimony here today and with the Office of Special Counsel. And over the years, there have been——

Mrs. LUMMIS. No, no, no. Okay, and this is something that somebody has taught you how to do when you are testifying in front of Congress, which is stray, obfuscate, use bureaucratese, so let me—let me just ask you a question again. When you testified, were you saying that unless Congress gives us more money, we are going to cheat the system? That is what I thought I heard you say. But did I hear wrong? Yes or no? Did I hear wrong?

Yes or no. Did I hear it wrong?

Ms. EMERSON. There is—yes.

Mrs. LUMMIS. Okay, what did you mean to say? What did you mean to say?

Ms. EMERSON. That AUO has been a challenge over the years.

Mrs. LUMMIS. Oh, now, come on. What did you mean to say when you said Congress isn't giving us the amount of money the President requested, and so the AUO challenge will continue until Congress gives us more money. That is what I heard you say.

Ms. EMERSON. It is not in regards to the money. It is in regards to the legislation that has been proposed over the years, and I appreciate the current draft legislation that has been introduced. It is certainly an attempt to look at our AUO situation, and to——

Mrs. LUMMIS. Okay, so the—so until Congress passes legislation that will reform the AUO, you will continue to cheat the system? Is that what I am hearing?

Ms. EMERSON. No.

Mrs. LUMMIS. Okay.

Ms. EMERSON. And also——

Mrs. LUMMIS. Okay, what am I hearing?

Ms. EMERSON. The allegations, the report from the OSC is currently under review by OGC.

Mrs. LUMMIS. Okay, thanks.

Ms. Lerner, obviously, the—I am going to have to go and ask you these questions because I can't get a non-bureaucratese answer out of the department. So is that what you're hearing from the department, that there will be no reforms until Congress changes the law?

Ms. LERNER. No, I can't say that's a message that we have gotten.

Mrs. LUMMIS. What is the message you are getting?

Ms. LERNER. For the most part, I mean, the only report we have gotten back now is on the Ducos-Bello matter, and that report from Internal Affairs confirmed the allegations and said that they would take steps to solve the problem. Now, my concern with that report is, it was in many ways cut and pasted from the same report that they gave us 5 years ago.

Mrs. LUMMIS. Uh-huh.

Ms. LERNER. And the obstacles that they cite to being able to implement reform, you know, I can't really speak to those. They say that they have collective bargaining agreements, and OPM——

Mrs. LUMMIS. Let's explore that one. Yeah, let's explore the collective bargaining agreement.

Ms. LERNER. I'm not really sure that I can add much to that because I'm not—I'm not familiar with those obstacles that they have cited.

Mrs. LUMMIS. If we wanted to explore whether somehow the taxpayers are being cheated because of a collective bargaining agreement that is negotiated between the government and the union on behalf of its members, then we have got a problem.

Ms. LERNER. Well, I mean, let me—let me add something to this conversation, which is that there are probably a very wide variety of overtime uses here that we are talking about. Some of them may, in fact, be fraudulent. Right. There may be people who are claiming overtime when they are actually not working.

Mrs. LUMMIS. Right.

Ms. LERNER. Or not even on the job or surfing the Internet. There may be folks who are actually working over time in a legitimate way.

Mrs. LUMMIS. Right.

Ms. LERNER. And it's really, really hard to know the extent of the over time. What I can tell you is that at least in three of the cases that we have, they are at, you know, headquarter's positions, where there shouldn't be a need to be taking this particular type of overtime, where people are doing training, where they are primarily desk jobs. Doesn't mean that folks aren't using AUO in an appropriate way in other places. But it is a systemic problem, and it needs to be looked at department wide. And so I take, you know, some solace in the fact that they are doing this review, that they do seem serious. I think that Congress' interest is going to help spur, you know, a remedy.

Mrs. LUMMIS. Thank you. Thank you.

Ms. LERNER. And that may make a difference this time.

Mrs. LUMMIS. And thank you all. I know that this is hard. I appreciate it.

Thanks, Mr. Chairman. I yield back.

Mr. CHAFFETZ. I thank the gentlewoman.

I will now recognize the gentleman from Massachusetts, the ranking member, Mr. Tierney, for 5 minutes.

Mr. TIERNEY. Look, some of this just needs plain English and direct talk on that. But Ms. Emerson and Mr. Vitiello, I notice that we didn't get your testimony before this hearing, which is totally unhelpful. So I won't make you name your legislative liaison with Congress now and embarrass them unduly because I know it is not all your fault, but I think you might take this back to the department or whatever. Next time, there will be a joint effort to make sure that there are some repercussions for people not cooperating. It is just indicative of how late it has been to respond to these issues since January, all the way through. But you should know that if we ask for something, we are going to have a hearing, it is a courtesy to you to give you advanced notice. You owe us the courtesy back to give us the advanced testimony so that we can properly prepare.

Mr. Judd when did you first go to work for the agency?

Mr. JUDD. September of 1997.

Mr. TIERNEY. So, in 1997, you were basically induced into your situation by knowing that you are going to get your base pay, plus up to 25 percent on that, because that was part of the package that they told you about when you were employed. Is that correct?

Mr. JUDD. That is correct.

Mr. TIERNEY. All right, so we have had this problem now through three administrations, so it is not political. This is a systemic problem, and this has been ongoing.

And if the agents are perceived to not being paid enough for a salary or whatever, why has it never been a case somebody comes to Congress in the appropriations process and just says, in order to recruit people, we have got to pay them X amount of dollars more than we are paying now or we will have a serious recruitment problem? Anybody want to tackle that one?

Mr. VITIELLO. I would like to be a little precise, as it relates to recruitment and job announcements, the idea that the work is unpredictable and that it will exceed regular shift hours has to be advertised so that we are truthful and we are attracting people who recognize this.

Mr. TIERNEY. I am going to just have a colloquy with you. I hope you don't take it as interrupting. But yes, I understand that, but this is representation that people are saying was made, not that you are going to have irregular hours, but basically, you can count on 25 percent extra pay. And you know, that is just not the best way to do business. I think you can agree on that.

Mr. VITIELLO. I agree. I think we need to be more precise, but the object of those words in the recruitment announcements is to put folks on notice that the work is irregular.

Mr. TIERNEY. And the result has been that everybody has been led to believe that it is automatic and that there is their pay, plus 25 percent more.

Mr. VITIELLO. Well, the fine——

Mr. TIERNEY. If I am going to work for that agency, because I am really not going to get paid the base that they are talking about; I am going to get paid 25 percent more than that. That is what we have to attack.

I appreciate Mr. Chaffetz' legislation. We are going to review it thoroughly, but I am hoping we are not legalizing an already bad situation and that if there is an adjustment that has to be made in compensation in order to make sure that we get the recruitment we need, that is how we ought to address it. Is that statute at 3463 the best way, or is there some other way that we ought to be doing it? But we are going to have to have some directness and honesty in advertising here in bringing people on board so that we have an expectation when budgets are being done as to what we are going to meet in that obligation.

Ms. Emerson, you—I appreciate that they send you out here as a sacrificial lamb and put you in a difficult position. We really would like to get somebody who is responsible for that department, if there is anybody that is willing to accept responsibility. But the real problem seems to be, when given specific instances of abuse, the agency sets off on a broad-scope investigation of the process, which is fine. Ms. Lerner says it is well overdue. But who is dealing with the specific investigations into those incidents that were reported and the retaliation that occurred? Is there a bifurcation of those investigations?

Ms. EMERSON. It is my understanding that those allegations are being—well, I know they are being looked at through the Office of General Counsel in the department-wide review, but they are also being handled because they are component specific by CBP.

Mr. TIERNEY. Okay, would you have the department provide to this committee the exact status on each aspect of those investigations, the component ones and the individuals involved and the broad—we want it right where it is. We are not going to wait months if we can help it. We would like to know, to this day, where is that investigation? What have you found so far? What is left to be done on that investigation, by whom? All right, and who is the

ultimate responsible person to bringing this home to a final date, and that would be very helpful. Will you do that, please?

Ms. EMERSON. Okay.

Mr. TIERNEY. Okay, is there anybody, Mr. Vitiello, Ms. Emerson, is there anybody in the department responsible for reviewing the general way that we pay people, you know, other than this wide review of AUO, to come to Congress with a recommendation that perhaps we ought to have an entirely new payment system for people so that, you know, we get away from things that are ambiguous, like the AUO, all of those things, and get to a payment system where people can expect how it is they are going to get paid and know how that is going to go? Is anybody doing that kind of review?

Mr. VITIELLO. So, I think the work that we did post the 2008 findings led us to try to structure, train, and do better with the layers of management that review this time and how it is claimed, but we have also recognized that CBP, that a legislative fix was in order, that we wanted to structurally reform the system to give us the flexibility to change the compensation system to meet the mission in a better way.

Mr. TIERNEY. Well, I think we have to look at, A, one alternative is how you might restructure AUO; two, whether you have to replace it with something else; and three, how is it being used in the recruitment of people? What is specifically being said by inference or directly?

And if I can ask one further question, Mr. Chairman, have your indulgence on that.

Mr. Judd, these individuals against whom the complaints were originally alleged, the people that were at the academy, for instance, that really aren't out in the field and don't have that problem of, you know, traveling back and forth whatever, what is your organization doing with respect to those individuals?

Mr. JUDD. Those individuals are management officials. Therefore, I have no contact with them.

Mr. TIERNEY. They are not part of your group?

Mr. JUDD. No, they are not.

Mr. TIERNEY. Okay. Thank you very much.

I yield back.

Mr. CHAFFETZ. Thank you.

I now recognize the gentleman from Florida, Mr. Mica, 5 minutes.

Mr. MICA. I hate to say it, it is kind of like ObamaCare, but sort of the same with DHS: I told you so.

I gave a speech in this committee when we created the Department of Homeland Security, and I said, whoever thinks that bringing 22 agencies together and over 200,000 people would be more efficiently operated is dreaming. Most of you—Ms. Emerson, do we still have over 200,000 in DHS?

Ms. EMERSON. Yes, from what I understand, we have approximately 230,000 employees at DHS. And as you said, it is the third largest Federal agency.

Mr. MICA. And they have got 66,000 in TSA; probably close to 60,000 Coast Guard. How many in Customs and Border Patrol now?

Mr. VITIELLO. Approximately 65,000.

Mr. MICA. 65,000, okay. For the most part, you guys do a pretty good job. I commend you. Some tough assignments.

But it is tough to manage that many people. Do you do a pretty thorough job, you think, of reviewing the qualifications of folks before you hire them, Ms. Emerson?

Ms. EMERSON. At DHS as a whole?

Mr. MICA. Yeah, well——

Ms. EMERSON. I would say each——

Mr. MICA. H–O-L–E, but W–H-O–L-E, go ahead.

Ms. EMERSON. As a whole, yes, I would say so. Each component has their own HR operation, organization.

Mr. MICA. Okay. So Customs and Border Patrol, the 65,000, they would review those folks. I ask that because I am not sure, some of these people are properly vetted. But you would make a decision, for example, if people are put on administrative leave for some violation, whether they continued to get paid. Would you make that decision?

Ms. EMERSON. That would be handled by the component.

Mr. MICA. Okay. Well, what troubles me is—and the subject of this hearing is, again, some abuses in overtime and some other payments—I am concerned that DHS still hasn't fired—I have got a headline here—a black supremacist who called for mass murder of whites. There is an employee who was a Customs—let's see, his title was immigration and customs enforcement officer. Are you familiar with this case at all? It is a gentleman by the name of Kimathi?

Mr. Vitiello or Ms. Emerson?

Mr. VITIELLO. Not specifically. I have seen the media accounts of it as well.

Mr. MICA. Well, I am wondering if you had the authority—I mean, this guy—when you get a report of some misconduct or a question, how long does it take to move forward and investigating it?

Mr. VITIELLO. So we take all of the allegations of misconduct seriously.

Mr. MICA. Especially in enforcement, right?

Mr. VITIELLO. Correct. Correct.

Mr. MICA. I am told that there were complaints as of 2011, since 2011. In fact, one of his supervisors says everybody in the office is afraid of him, and he wasn't suspended until August of this year. You are not aware of that case?

Mr. VITIELLO. I have no direct knowledge of that.

Mr. MICA. Would you let us know about that? Is that customary to take 2 years before someone is suspended? Some of the things that he did here. On his Web site, he said, "In order for black people to survive in the 21st century, we are going to have to kill a lot of whites." He said that "whites and their enablers"—this is from his Web site—"like President Obama are trying homosexualize black men in order to make them weaker."

He went on with other hate things against Zionists and others. This is an enforcement officer of, again, your agency.

Mr. VITIELLO. No, it is not—that is not a CBP employee.

Mr. MICA. It isn't?

Mr. VITIELLO. It is not.

Mr. MICA. Homeland Security then?

Ms. EMERSON. That employee works for ICE.

Mr. MICA. Under DHS. Are you aware of it?

Ms. EMERSON. Yes, sir, I am aware.

Mr. MICA. Now, do you have the tools— now this guy—what is frosting people is this guy is still getting paid. He is still—he is getting a salary. His salary is $115,731. Do you have the authority to suspend pay? Does it take 2 years when employees report misconduct or this kind of activity to put someone on administrative leave?

Can you answer, Ms. Emerson?

Ms. EMERSON. From my understanding, and I have also seen some reference of it in the media, that case is being handled by ICE, their HR shop, and also their Office of General Counsel.

Mr. MICA. But that is under you. Can you report—my time is about up. Can you report back to the committee? Again, I don't have to get—I know you don't want to get specific with the personnel issue with an individual, but I want to know if you have the—why it took so long, again, from August, 2 years ago in 2011, to September, I guess it was, or August, 2 years, and then when they are put on administrative leave and you have got this kind of record, and that particular position, why someone cannot be terminated, their pay. And if you don't have the authority, what it would take that we could do to hold these people responsible. That is an important position, and DHS is an important role.

Again, I get these complaints from my constituents in the media report, and the public is outraged, so I would appreciate your responding to us.

I yield back.

Mr. CHAFFETZ. I thank the gentleman.

I now recognize the gentlewoman from California, Ms. Speier, for 5 minutes.

Ms. SPEIER. Mr. Chairman, thank you.

You know, this is very reminiscent of a hearing that I chaired when I was in the State Senate in California, when the correctional guards were playing a similar game, which was one in which they would call in sick one day, and a friend would work overtime. And then the following week, the friend would call in sick, and the colleague would work overtime. This is outrageous.

And Ms. Lerner, you pointed in your comments that this is not just an isolated incident, that, in fact, there are—there have been seven whistleblowers at six facilities within the department that have complained specifically about AUO, is that correct?

Ms. LERNER. That's right. We don't know how big a problem this is, but——

Ms. SPEIER. Well, I can tell you right now, it is big. If you have already heard from six offices, I can guarantee you that it is a wink and a nod, and it is something that is going on throughout the department. And it has got to stop. Now, you mentioned in your comments that you are unclear about whether or not the agency is ultimately willing or able to make the corrective actions. Can you explain that to us, why you think they are unwilling?

Ms. LERNER. Well, the track record, you know, the 5-year long notice that they have had. This is not a new issue that has come to their attention for the first time. I think the difference this time, though, may be having congressional interest.

Ms. SPEIER. Right, sometimes that always——

Ms. LERNER. And so I really want to thank this committee for its interest in this important issue.

Ms. SPEIER. So my concern are the whistleblowers who come forward, who then go through physical, health deterioration, because they had the guts to come forward and, as Mr. Florence exhibited today, had a very difficult time even reading his comments. So I think it is imperative, and I say this to all of you representing the department, this has got to be fixed. Human beings who come forward and make points like this that show that there is abuse need to be heard and the issue needs to be resolved.

And if. in fact, it is not going to be resolved internally, then Congress will take steps. So my first question to those of you within the department is, we all recognize the AUO has got to be fixed. The question is, whether or not you can do it internally, or do we need congressional action to do it?

So I guess to Ms. Emerson, and Mr. Vitiello, do you have any thoughts on the legislation that has been introduced by Chairman Chaffetz, and whether or not it is workable, or whether or not you could support it?

Mr. VITIELLO. We look forward to working with yourself and others on the committee and the chairman to give a full analysis that would be—that would look at all of the aspects of it and can comment more fully in support.

Ms. SPEIER. Well, have you looked at the bill?

Mr. VITIELLO. I have seen it.

Ms. SPEIER. And what do you think of it?

Mr. VITIELLO. I think it allows for the—an ability to meet the mission much like we can now, the flexibility to assign and then availability to flex beyond the scheduled shift, yes.

Ms. SPEIER. Mr. Vitiello, were you aware of the abuse of AUO before it was brought to the attention of the department by the whistleblower?

Mr. VITIELLO. This has actually been a challenge for CBP and the Border Patrol for quite some time.

Ms. SPEIER. Okay, so you knew about it but didn't fix it.

Mr. VITIELLO. Well, I would like to separate what is termed as "abuse." Misconduct by employees, people who are claiming hours that they don't work or doing things at work that are inconsistent with the mission, is recognized as misconduct and is referred to authorities for investigation and a follow up. We do that on a regular basis.

Ms. SPEIER. Yeah, but that is different because this is a ruse that is created, correct?

Mr. VITIELLO. We have looked at AUO structurally, and we have tried to improve training. We have tried to improve awareness. We have issued guidance to the field and to our offices to better manage it and monitor it. We have taken steps in fact this year to reduce the amount of the costs in it. But yet we still are challenged and the findings suggest that we still have a lot more work to do.

Ms. SPEIER. Ms. Emerson, let's presume that the bill passes and gets signed into law. What do you think the effect will be within the department?

Ms. EMERSON. Well, currently within the department, we are reviewing that to look at it to make sure that it is physically sound so that, you know, it is not costing additional sums. We wouldn't have to increase——

Ms. SPEIER. How can it cost additional sums if you are going to restrict the amount of AUO?

Ms. EMERSON. Well, there are experts in the department who are looking at that. I have read it, but I am not an expert in that area in terms of the monetary issue, but——

Ms. SPEIER. All right, enough said. You are shaking your head. Would you like to comment?

Mr. JUDD. Yes, I would. What we are offering, what this bill is offering right now, you are getting an hour and a half of work out of agents on the border to secure the border that is broken. The border is broken. What we are giving you is, we are giving you 2 hours for the same pay that you are getting for an hour and a half. That is fiscally responsible and for anybody to say that it is not and that it needs to be reviewed is outrageous. It is an outrageous claim. Okay, this is fiscally responsible. It saves $1 billion over what we have previously done in the past. And frankly, I am asking you for a pay cut. I am coming to you and I am telling you, agents are willing to take a pay cut to secure—to better secure the border.

We are not talking about AUO abuses amongst frontline agents. We are talking about AUO abuses amongst management. And even though we are talking about AUO abuses amongst management, we are coming to you and saying, Look, we will fix the problem that management created; we will give you the fix, and the fix is there, and it saves the taxpayers money, and it secures the border.

It is—I don't understand how the administration can possibly say that we have to review this when they have proposed similar—in appropriations, similar measures, and now all of a sudden we have to review it. I don't understand.

Ms. SPEIER. Well, I think there are others here that disagree with you, Mr. Judd.

My time is expired.

Mr. CHAFFETZ. Thank you.

I now recognize the gentleman from South Carolina, Mr. Gowdy for 5 minutes.

Mr. GOWDY. Thank you, Mr. Chairman.

Ms. Emerson you are an attorney, correct?

Ms. EMERSON. Yes, sir.

Mr. GOWDY. I am a simple-minded person who tries to assign commonly understood definitions to words. What does the word "uncontrollable" mean to you?

Ms. EMERSON. That would mean that it would be unscheduled.

Mr. GOWDY. So "uncontrollable" means unscheduled? So I could not schedule to write a report after hours, and that would count as uncontrollable? Is that your testimony?

Ms. EMERSON. It would depend on the situation.

Mr. GOWDY. How about a report that has no deadline whatsoever?

Ms. EMERSON. Again, it would depend on the situation.

Mr. GOWDY. Well, how in the world does that depend on the situation? If there is no deadline, how is it uncontrollable? Why can't you do it the next day during your normal working hours?

Ms. EMERSON. That is possible.

Mr. GOWDY. Possible? Possible? How about watching movies, is that controllable?

Ms. EMERSON. As was referenced earlier, that would be seen most likely as misconduct and would be handled separately.

Mr. GOWDY. Most likely. How about watching television, is that controllable?

Ms. EMERSON. It would depend on the situation.

Mr. GOWDY. Depend on the show or depend on the situation?

Ms. EMERSON. It would depend on the situation.

Mr. GOWDY. Well, Ms. Emerson, most folks don't go into law enforcement for the money. It is an incredibly difficult job that takes its toll on every single aspect of life. So they don't go into it for the money, and they don't go into it for the easy hours or the prestige. And it is for that reason and many others that I have a tremendous amount of respect for the women and men in law enforcement. It is an incredibly hard job.

But people who live under the laws fully expect those who execute and enforce the laws to abide by them. And your definition of "uncontrollable" would make a law school professor blush. Watching television is not uncontrollable. Watching movies is not uncontrollable. Writing reports with no deadline is not uncontrollable. Do your agents ever testify in court hearings, Ms. Emerson?

Ms. EMERSON. If you—yes. Yes.

Mr. GOWDY. Would you rather me ask the agent? Do you ever testify in court hearings?

Mr. VITIELLO. I have.

Mr. GOWDY. Do you ever swear out search warrants or arrest warrants?

Mr. VITIELLO. I have provided affidavits for that purpose.

Mr. GOWDY. Right, and an affidavit is under oath, right?

Mr. VITIELLO. Correct.

Mr. GOWDY. You ever testify before a grand jury?

Mr. VITIELLO. I have.

Mr. GOWDY. You ever testify in sentencing hearings?

Mr. VITIELLO. I don't believe so.

Mr. GOWDY. But your agents could.

Mr. VITIELLO. Yes.

Mr. GOWDY. All right. And the common theme in all of that is the credibility of the agent, right?

Mr. VITIELLO. Correct.

Mr. GOWDY. Do you agree that acts of deceit or dishonesty or fraud could be used to impeach the credibility of a law enforcement agent?

Mr. VITIELLO. I do.

Mr. GOWDY. In fact, it often is, right?

Mr. VITIELLO. Correct.

Mr. GOWDY. And so when you are in front of a jury and you are testifying that you witnessed X, Y or Z happen and your credibility is being attacked because you committed what some might conclude to be an act of dishonesty, that hurts the entire cause of law enforcement, doesn't it?

Mr. VITIELLO. It does.

Mr. GOWDY. Do you agree with Ms. Emerson's definition of "uncontrollable"?

Mr. VITIELLO. I think that there are situations within the work that require agents to flex beyond their shift. What is—what was pointed out in the findings and what CBP agreed needed to be worked on were these allegations of misuse of time, whether within AUO or without it. And so we have taken that to heart. Those matters will be referred to the Internal Affairs investigative process and then dealt with appropriately after.

Mr. GOWDY. Well, I say this with all due respect as somebody who is crazy about law enforcement and respects the women and men who go into it, once you lose your credibility, it is almost impossible to get it back. There was a German philosopher that I think the chairman is a fan of, Friedrich Nietzsche, who said, I'm not mad that you lied to me; I'm mad that I can't believe anything else you ever tell me. So deceit and dishonesty matters, and it impacts your ability to do your job and the women and men who also wear uniforms, whether it is a municipal police officer or a DEA agent. So I hope this gets fixed, and I hope it gets fixed real soon, and I hope the definition of "uncontrollable" becomes something that the jury, the American people, can understand, because watching TV and watching movies and writing reports with no deadline doesn't fit that definition.

I yield back, Mr. Chairman.

Mr. CHAFFETZ. I thank the gentleman.

I will now recognize the gentlewoman, Ms. Maloney for 5 minutes.

Mrs. MALONEY. Well, first of all, thank you, Mr. Chairman, and ranking member for calling this meeting. And I read a recent Washington Post article about the misuse of administratively uncontrollable overtime at the Department of Homeland Security. And I would like unanimous consent to place it in the record.

Mr. CHAFFETZ. Without objection, so ordered.

Mrs. MALONEY. I would like to follow up with a little bipartisan support for Mr. Gowdy's statements and ask Special Counsel Lerner, in your report, you questioned, as he did, the ability and willingness of the Department to address the AUO problem. And can you explain for us the reasoning underlying your concern? Roughly 89 percent of those workers in the Situation Room were claiming overtime, yet they were watching movies. Could you elaborate, Ms. Lerner, on your concerns?

Ms. LERNER. Sure, I mean, the extent of the problem certainly goes to my concern about solving the problem, because it is so widespread. We know that there are 22,000 Border Patrol agents in CBP alone who are AUO eligible. We know that there is $500 million in overtime at CBP alone. If even a fraction of that amount is improper, we are talking about a huge amount of money in the budget.

So it's a widespread problem, but I also want to emphasize that it's a problem along a continuum, I think. Based on the information that we have now, there may in fact be some fraudulent use of overtime where folks are claiming it who are not, in fact, working at all. There may be people who are working but not doing AUO-certified activities.

And just so the record is clear, the regulations are very, very clear about the definition of what irregular, what type of work is qualified for AUO. It has to be irregular and occasional circumstances, where, for example, the failure to stay on duty would equal negligence. So, you know, we don't have to guess at what the regulations are intending for this type of overtime. It is very clear.

And I think it is terrific that this committee is focused on this, and I think that the statements from DHS have been positive in terms of recognizing the problem. Lots of times we get reports back from agencies that don't even admit that there is a problem. So, I'm hopeful that that will lead to change, but I think that it is an entrenched problem, it is a widespread problem, and it is part of the culture, and it is probably going to take some sort of change in the law to solve it.

Did I answer your question?

Mrs. MALONEY. Yeah, but basically you are saying that they could take steps right now to address it. They could right now crack down on those areas that are clearly not eligible, as he mentioned, you know, putting off the time for your reports, movies, sitting there. Given the problems that we have in our budget with sequestration and others, it's something that we could address already in the agencies. And we have run through it.

I just would like to ask all the panelists to put in writing, Ms. Emerson and Vitiello and Judd, what you are already doing right now to address it, and get it back to the committee to review as we proceed to go forward.

But I want to focus on one of the whistleblowers who was aware of these abuses for years, but then he really began to be concerned after sequestration kicked in and was implemented this year, and this particular person was worried that employees were losing work and important programs were being cut while other employees were watching television and continuing to get this $500 million that you are talking about and to receive improper AUO payments, which is outrageous.

So, I would like to ask Ms. Emerson and Mr. Vitiello, as you know, sequestration was implemented this year and current budget talks are literally underway right now for the coming years, 2014 and 2015, and we are also looking at alternatives to replace sequestration. But if Congress does not replace sequestration cuts, further cuts will be imposed on agencies, including the Department of Homeland Security, for fiscal year 2013. And CBP was able to avoid furloughs. But are you concerned that the Department may have to furlough employees and cut important programs while AUO continues to be routinely used and authorized for administrative tasks as the whistleblower pointed out? And why aren't you cracking down on these abusive practices of AUO? Ms. Emerson and Mr. Vitiello?

Mr. VITIELLO. So, the allegations of misconduct or the misuse of the funding is being investigated by Internal Affairs. There is a process for that and that will be dealt with appropriately.

As it relates to the budget, most of the AUO that's used by the Border Patrol in that account is used in the field. Very little of it is used at headquarters. And we are in the middle of reviewing CBP-wide and then the Secretary has ordered review for the Office of General Counsel across the Department. Once those reviews are complete, we at CBP can rewrite the directives and change the instructions to make them more applicable.

Mrs. MALONEY. Yeah, okay. As I understand it, during sequestration CBP originally considered eliminating all AUO and ended up cutting back on the amount of AUO. Can you tell us why and how that decision was made?

Mr. VITIELLO. So, when we did the planning for the budget, one of the planning scenarios was to decertify AUO, and AUO-earning employees did in fact get a potential decertification letter. We were able to make significant cuts in other areas, including overtime, to avoid both furloughs and decertification.

Mrs. MALONEY. My time has expired.

Mr. CHAFFETZ. Thank you.

I will now recognize myself for 5 minutes as we start another round, and then we will turn the chair over to Mr. Bentivolio.

Ms. Emerson, how many people within your Department? The one that you are responsible for, Human Capital, how many people are in your Department?

Ms. EMERSON. In the Department?

Mr. CHAFFETZ. Yes.

Ms. EMERSON. Approximately 230,000 employees.

Mr. CHAFFETZ. But how many within your——

Ms. EMERSON. In OCHCO, in the Office of the Chief Human Capital Officer? Approximately 210.

Mr. CHAFFETZ. Two hundred ten. And how many attorneys does Homeland Security have?

Ms. EMERSON. I'm not sure. I am an attorney, but I am not acting as an attorney for the Department of Homeland Security. So, let me just clarify with that question. I'm not acting as an attorney for DHS.

Mr. CHAFFETZ. Ms. Lerner, how many people within the Office of Special Counsel did you have working on this?

Ms. LERNER. Well, you are looking at the main one right here.

Mr. CHAFFETZ. Yes.

Ms. LERNER. And, you know, we have only about 8 people in our disclosure unit.

Mr. CHAFFETZ. Okay, so you have 8 people. You have 230,000. You have a couple hundred that you are responsible for. There are undoubtedly hundreds, if maybe not thousand-plus attorneys. These women right here were able to figure this out in pretty short order. They focused on it. Focus determines reality.

Ms. Lerner, tell me about the Situation Room. One of the highlights here is the Situation Room in Washington, D.C. What it is? How many employees are we talking about? What happens there in the Situation Room?

Ms. LERNER. I'm sorry, I don't remember offhand how many employees. It is not a huge office. I think it is under 100. But we know that about 90 percent of the time people were taking 2 hours of AUO who worked in the Situation Room.

Mr. CHAFFETZ. Every day?

Ms. LERNER. Every day, yeah, about 90 percent of the time.

Mr. CHAFFETZ. So, 90 percent of the time the people working in the Situation Room—now, Situation Room connotates it is fairly important, correct? What were they doing when they took an extra 2 hours?

Ms. LERNER. Well, Mr. Ducos-Bello, who was the whistleblower from the Situation Room, alleged that he observed people watching TV, being on the Internet, relaxing, and that was why he felt so compelled to come forward. He felt that there was a real waste.

Mr. CHAFFETZ. And you fairly quickly——

Ms. LERNER. On a continuum that would be——

Mr. CHAFFETZ. You fairly quickly were—how long did it take you to come to that conclusion, that this was indeed a valid allegation?

Ms. LERNER. What we look at again is a substantial likelihood of the allegations. And before we make a referral to the agency we do a review of the whistleblower's allegations.

Mr. CHAFFETZ. But you substantiated it?

Ms. LERNER. We don't actually substantiate them. It has to meet that threshold, and we decided that Mr. Ducos-Bello's allegations met that threshold for referral to the agency for investigation. And that probably took us a couple of months.

Mr. CHAFFETZ. And they came back and actually confirmed it?

Ms. LERNER. They did come back and confirm it, yep.

Mr. CHAFFETZ. So now that they have confirmed it, the allegation was made, it was investigation by the Office of Special Counsel, has anybody been fired? Ms. Emerson?

Ms. EMERSON. That's being handled by the component. That's not handled by my office.

Mr. CHAFFETZ. Who is the component?

Ms. EMERSON. The component is the Border Patrol.

Mr. CHAFFETZ. So what's your responsibility here? I mean, if you are the chief of human capital and you have got allegations of fraud and misuse of dollars, potentially criminal—or potential, you know, breaking of the law—you just wash your hands of it?

Ms. EMERSON. Well, actually, I'm involved in the Department-wide——

Mr. CHAFFETZ. Here we go. We are in the circle again. Let's go back to what Mr. Gowdy was talking about. There's valid use of AUO and there's then an abuse of AUO. Explain to me in your own words what an abuse of AUO is.

Ms. EMERSON. Well, some of the things that we heard about and we saw in Ms. Lerner's reports could very well include employee misconduct. And in those instances——

Mr. CHAFFETZ. Well, explain to me employee misconduct, give me some examples, give me a definition of what a misuse of AUO would be.

Ms. EMERSON. Well, from what I'm understanding, those are currently under investigation.

Mr. CHAFFETZ. No, no, no, no, no, no. You are not investigating the definition. We have given you weeks' notice, in fact years' notice, that this is an issue. You are highlighting and confirming this committee's concern, and that is that you haven't taken it seriously. What is the definition of AUO, and what is the definition of an abuse of AUO?

Ms. EMERSON. The definition is provided by in the government-wide regs and in the laws. 5 U.S.C. Speaks on it, as does the implementing regulations, 5 CFR 550, and it sets out the definition for AUO.

Mr. CHAFFETZ. And what's the consequence if you violate the AUO?

Ms. EMERSON. In terms of employee misconduct, that is handled by the component.

Mr. CHAFFETZ. So they have full discretion? They just give a wink and a nod and let it keep happening?

Ms. EMERSON. That could lead to disciplinary action.

Mr. CHAFFETZ. Which could be what?

Ms. EMERSON. Up to and including removal from Federal service.

Mr. CHAFFETZ. Has that ever happened?

Ms. EMERSON. I would defer to the Border Patrol for that.

Mr. CHAFFETZ. I mean, AUO is—we have other departments and agencies, too. Are there any sort of investigations happening from your Department, or the Department of Homeland Security in other—we are focused on CBP here—any others that you are investigating for abuse of overtime?

Ms. EMERSON. In the Department-wide review we are looking at the Department component-by-component policies and procedures for AUO. It is a Department-wide review, including——

Mr. CHAFFETZ. I'm going to ask one more time as I conclude here. What is an abuse of the AUO?

Ms. EMERSON. The abuse of the AUO in terms of employee misconduct could be a number of issues, some of which may be spelled out in the OSC reports, but those are currently being investigated and they would be handled by the component.

Mr. CHAFFETZ. You can't seem to answer that question, can you? Defining an abuse of the AUO. One more time, do you have any—don't tell me it's being reviewed. What would constitute an abuse of the AUO?

Ms. EMERSON. It would depend on the situation. It really would.

Mr. CHAFFETZ. This is unbelievable, and unbearable, and it is a total lack of leadership throughout the Department and agency.

I yield back my time and recognize the gentleman from Massachusetts, Mr. Tierney.

Mr. TIERNEY. Ms. Emerson, let me see if I can help you out a little bit. Ms. Lerner's group found that there was a reasonable belief that the allegations were accurate. I should maybe ask Ms. Lerner that. Is that your standard?

Ms. LERNER. Substantial likelihood——

Mr. TIERNEY. Substantial likelihood. Ms. Lerner found that there was a substantial likelihood. Now it is up to your people to determine whether or not it actually happened, right? She sends it to you as a finding that there is a substantial likelihood it happened. Your group then has to determine whether or not it did happen.

Ms. EMERSON. It actually goes to the Office of General Counsel. That's not my group.

Mr. TIERNEY. Okay.

Ms. EMERSON. The Office of General Counsel is actually the one that receives the Office of Special Counsel reports. And they usually share that information with the IG, and then they deal with the component regarding the issue. So those issues specifically do not come to my office.

We have been tasked, because it is a Department-wide review of AUO throughout the Department component by component, my office has been asked to assist in that matter. But the actual discipline of any employees from that goes to the component.

Mr. TIERNEY. All right. So as unusual as it may seem to us, the fact that you are the chief officer here has nothing to do with discipline or violations or anything like that. You are strictly policy. Is that the deal?

Ms. EMERSON. We have oversight, and certainly if a component came to us to ask for advice and guidance, or if we are directed to handle a situation involving a disciplinary action——

Mr. TIERNEY. All right, but you don't check to see whether or not they properly handle it? You don't ever take responsibility to make sure that each component actually does its work?

Ms. EMERSON. Only if request——

Mr. TIERNEY. Request from who?

Ms. EMERSON. From leadership. For example——

Mr. TIERNEY. All right. So, please, so it goes to somebody else, and they are responsible for it, and you have nothing to do with it after that. Even though you are the chief officer of this thing, you never, ever take a personal responsibility without being requested by somebody else to see whether or not there was a continuing investigation that came to a conclusion with actions taken as a result of that conclusion?

Ms. EMERSON. In this situation——

Mr. TIERNEY. In any situation.

Ms. EMERSON. It depends on the situation.

Mr. TIERNEY. Forget it. Forget it. I was trying to help you out, and beyond help. All right, beyond help, disturbingly so.

So now we have the Internal Affairs of CBP, Mr. Vitiello, do they have a role here? They are the ones that are responsible for investigating those specific referrals from Special Counsel, am I correct?

Mr. VITIELLO. That's correct.

Mr. TIERNEY. Okay. Fifty percent of their employees, 50 percent of their employees receive AUO.

Mr. VITIELLO. In the Internal Affairs, yeah, correct.

Mr. TIERNEY. Do you have a conflict of interest problem there?

Mr. VITIELLO. I don't believe so.

Mr. TIERNEY. Why not?

Mr. VITIELLO. Well, that's the compensation system that was available when those positions were filled and people were hired for them.

Mr. TIERNEY. Yeah, but I'm hearing from Mr. Judd that back into 1996, at least, it seems that, you know, everybody sort of was in on the game here. And so are they going to start looking at this thing saying, well, it's the game, everybody is in on it, we take ad-

vantage of it, they take advantage of it? That may color the way they proceed, no?

Mr. VITIELLO. I don't believe so.

Mr. TIERNEY. So $22,000 per employee per year on this system and you don't think that they are going to have some loss of objectivity from the fact that they are all in on the process that allows this to happen?

Mr. VITIELLO. They are responsible to claim the hours that they work, and the nature of their work sometimes exceeds the regularly——

Mr. TIERNEY. The nature of everybody's work sometimes exceeds it, but we found abuse here, and some of the abuse we found out is policy, almost. In fact, that people are encouraged do it, that they would be there. So I just have a problem with it. I think you ought to have a problem with it. I hope somebody in the Department takes that into account when they are looking at that.

Ms. Lerner, do you have a problem with that?

Ms. LERNER. I mean, I think the problem is that there are folks who are at headquarters offices who are not, you know, on the border, who are taking this leave. But we also have to be careful not to throw the baby out with the bath water. If there are folks who are actually legitimately taking or using AUO, by all means, but it seems that there needs to be a real effort on the part of DHS to figure that out, and you could put a stop to it right away just by saying anyone who is not working on an irregular or, you know——

Mr. TIERNEY. Well, they can interpret the statute. I guess that's the problem here. We have this ongoing general review about whether or not the whole system works, but then it seems to be nobody is saying like, look, from this day forward, no matter what the understanding was that Mr. Judd referred to that has been going on as a wink and blink, and this is an extra 25 percent for everybody on that, whatever that is, somebody ought to come down with an affirmative policy statement that says from this day forward we are going to interpret this law very, very strictly, as Mr. Gowdy was putting forward. We all know what uncontrollable is. From this day forward, whatever the deal was before, it is over, and now while we are doing our overall policy that's going to be the implementation.

Ms. LERNER. If I could just add——

Mr. TIERNEY. Sure.

Ms. LERNER. —there are five more reports that are due to us, and we may have more information from the agency when we get those reports about what remedial efforts they are taking.

Mr. TIERNEY. Okay.

Ms. LERNER. So maybe we will get more answers shortly.

Mr. TIERNEY. Wishful thinking.

Thank you. I yield back.

Mr. BENTIVOLIO. [Presiding] Thank you, Mr. Tierney.

I'm listening to you, Ms. Emerson, and Mr. Tierney is trying to give you all the help you need. You said you were an attorney?

Ms. EMERSON. I have a JD, member of the bar.

Mr. BENTIVOLIO. Right.

Ms. EMERSON. But in my capacity as CHCO, I'm not an attorney, and I don't have attorneys who work for me in my organization.

Mr. BENTIVOLIO. I understand. Let me ask you a question. A border patrolman arrests somebody within an hour of the end of their shift. They have to drive a distance to process the criminal or the person. And they take about an hour and a half beyond their shift to complete that. Is that fair overtime?

Ms. EMERSON. I would like to defer to the Border Patrol.

Mr. BENTIVOLIO. It's a very simple question. He is in the process of doing his job, which is to protect the border, him or her, and they have to process somebody and go into an hour and a half of overtime. In your opinion, is that legitimate overtime?

RPTS COCHRAN

DCMN CRYSTAL

[12:02 p.m.]

Ms. EMERSON. It sounds like it would be.

Mr. BENTIVOLIO. It is very simple. It is, beyond a reasonable doubt. I have never worked Border Patrol. I know what responsible and necessary overtime. If he is processing and doing his job and he needs that additional hour and a half, it is legitimate overtime. Would you agree, sir?

Mr. VITIELLO. I would.

Mr. BENTIVOLIO. Okay.

Another officer, end of his shift, he is not processing, he is not doing anything, but he wants to put in overtime. And so he goes on the Internet, does something, maybe checks his personal email or falls asleep. I think I even read that in one of these reports. Legitimate overtime or not?

Ms. EMERSON. No.

Mr. BENTIVOLIO. Okay. You are an attorney, or have attorney training. You ever heard of the term plausibly state, boldly assert?

Ms. EMERSON. I am sorry, could you repeat that?

Mr. BENTIVOLIO. Have you ever heard the term or phrase plausibly state, boldly assert?

Ms. EMERSON. No, sir.

Mr. BENTIVOLIO. Okay. It is a lawyer thing, isn't it? Are you a lawyer, Mr. Tierney?

Mr. TIERNEY. I am a lawyer.

Mr. BENTIVOLIO. You have heard that before?

Mr. TIERNEY. Yes.

Mr. BENTIVOLIO. Great.

Is it within your authority to notify when you hear somebody is abusing their overtime to send a letter to the Border Patrol or some other agency that comes under your jurisdiction outlining those problems or situations, put them on notice, plausibly state.

Ms. EMERSON. If it came to my attention, yes, sir.

Mr. BENTIVOLIO. Okay. Well, I have got the impression that quite a few of these concerns came to your attention.

Ms. EMERSON. Actually, they go, because they are coming from OSC, they go to the Office of the General Counsel, who then shares it with OIG, the Office of Inspector General, and then they usually reach out to the component where the alleged act occurred. I am involved in this situation because it involves Department-wide review of AUO component by component.

Mr. BENTIVOLIO. Okay. So individually you don't deal with individual issues?

Ms. EMERSON. Usually it depends on what the issue is. But when it is from the Office of——

Mr. BENTIVOLIO. Abuses of overtime. Blatant disregard for the ethics of overtime.

And I believe you have training in that, don't you, Mr. Vitiello? I think I read, since 2007 you train your staff on ethics and what abuses of overtime are and are not, correct?

Mr. VITIELLO. There was specific training issued after the 2008 findings.

Mr. BENTIVOLIO. But it is not working, or it is?

Mr. VITIELLO. Well, the findings indicate that we still have a lot of work to do, that the training in and of itself isn't sufficient. That is why the internal review that is being conducted at CBP specific to this issue, a new directive is in order and we are working on that, and then the Department-wide review ordered by the Secretary is also in order.

Mr. BENTIVOLIO. Okay. So just for my understanding, because I am somewhat unfamiliar with your process, but abuses come to your attention, is that correct, Ms. Lerner?

Ms. LERNER. Abuses come to us when whistleblowers come to us.

Mr. BENTIVOLIO. Okay, whistleblowers come to you, they point it out. Do you in turn send some kind of notification or letter about these abuses to——

Ms. LERNER. The head of the agency.

Mr. BENTIVOLIO. The head of the agency, but not the chief of human resources?

Ms. LERNER. No. In this case we sent it to then Secretary Napolitano.

Mr. BENTIVOLIO. Okay. Does the employee who is abusing overtime get a letter of reprimand that goes in their personnel file?

Ms. LERNER. We don't have authority for disciplinary action. They did not report back to us in this case. Sometimes they do but sometimes—well, in this case——

Mr. BENTIVOLIO. Do you have authority to follow up?

Ms. LERNER. We do have—I mean, statutorily we don't have it explicitly, but we do follow up. In cases like this we will ask the agency for supplemental reports. In two of the six cases that we have outstanding we have asked for additional information. So, yes, we can follow up.

Mr. BENTIVOLIO. You can, but not always. Who is responsible——

Ms. LERNER. If we think that the circumstances require follow-up, we do it. We have done it in many cases since I have taken over as Special Counsel in 2011. Where an agency promises to make systemic reforms, we do follow up to make sure that they are being taken. So, yes, we do.

Mr. BENTIVOLIO. I see I have run out of time. Do you have additional questions?

Mr. TIERNEY. No.

Mr. BENTIVOLIO. Okay. I have a few more questions. I would like to finish up here and then we can adjourn.

In regards to the employees that abuse overtime, do you counsel the employee? Do you give them a letter of reprimand, Mr. Vitiello? Did I pronounce that correctly.

Mr. VITIELLO. Vitiello, correct.

So when it is established that an employee is engaged in misconduct, whether for this or other matters, it is referred and they are put through a process with our own HR department for discipline, yes.

Mr. BENTIVOLIO. Okay. What is the discipline? Do they have to give back the money or what? What is the discipline?

Mr. VITIELLO. It depends on the allegation. It depends on what the findings develop.

Mr. BENTIVOLIO. Okay. Are you familiar with the case studies that I have read that was given to me in the brief?

Mr. VITIELLO. Yes. I have considered all the materials that brought us here today.

Mr. BENTIVOLIO. Okay. Employees using overtime to sleep or watch the Internet. What happens to that employee?

Mr. VITIELLO. It depends on the findings. If those allegations are proven to be true, then they are put through a discipline process. And just to give you some data, in 2012 there were 84 cases around AUO that were alleged in CBP in 2012 until today, so in the last 2 years. And the range of dispositions that I have, according to the reports, oral or written counseling; closed with no action, which they weren't substantiated; there is 43 that are still open; and then grievances filed against. There is one anomaly case which is still being considered. So that process does work and we have used it.

Mr. BENTIVOLIO. Well, apparently it is not, because this has been ongoing since 2007, to my understanding, according to this briefing.

Mr. VITIELLO. But to the extent that the agency is aware of misconduct, it is referred through those processes.

Mr. BENTIVOLIO. Okay. So on individual cases you are reprimanding, counseling employees that you found in violation or improper use of overtime.

Mr. VITIELLO. And then we are attempting to do structural changes to put this issue behind us. That is why we are excited about the prospect of legislation that gets us to a fix, to put this kind of issue behind us.

Mr. BENTIVOLIO. Great. Thank you very much. I appreciate it.

I have no further questions. Any questions?

Mr. TIERNEY. No.

Mr. BENTIVOLIO. I would like to thank our witnesses for taking time from their busy schedule to appear before us today. The committee stands adjourned. Thank you.

[Whereupon, at 12:10 p.m., the subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Opening Statement of Chairman Jason Chaffetz

Subcommittee on National Security

"Abuse of Overtime at DHS: Padding Paychecks and Pensions at Taxpayer Expense."

November 20, 2013

Good morning. Today, we look to bring more consistency to those who risk their lives everyday protecting the border.

Our hearing examines the recent Office of Special Counsel letter to the President, which described the pervasive misuse of Administratively Uncontrollable Overtime (AUO) by employees at the Department of Homeland Security (DHS). Special Counsel Carolyn Lerner found abuse of this form of overtime pay to be a "profound and entrenched" problem at DHS, characterizing the practice as "a gross waste of scarce government funds."

By definition, AUO is a form of overtime pay used to compensate employees who occupy positions requiring substantial amounts of irregular, unscheduled work. AUO ranges from 10 percent to 25 percent of the worker's base pay, and counts toward their pension.

Despite a 2008 investigation by the Office of Special Counsel and subsequent promise from DHS to stop the abuse, CBP failed to implement an agency-wide directive to better manage overtime policy. Instead, employees were shown a video explaining the rules of AUO.

Allegations of abuse have come from across the Department, including at CBP headquarters in Washington, DC. OSC's ongoing review of information disclosed by whistleblowers at just six DHS offices found nearly $9 million wasted annually.

OSC substantiated the disclosures made by DHS employee Jose Ducos-Bello that Special Counsel Lerner will elaborate on here today. Also equally disturbing are the five additional whistleblower allegations described in OSC's letter to the President, including the disclosure by one of today's witnesses, Mr. John Florence.

It is inexplicable that DHS would allow its employees to regularly abuse AUO, yet claim in its budget that CBP is "constantly reviewing the use of all overtime hours in conducting the operations and activities by all employees, performed in the field and at Headquarters level." DHS employees have abused the public trust by routinely claiming AUO up to two hours a day, every day – including in DHS headquarters and while on training assignments – where no

qualifying circumstances appear to exist. Was DHS unable or unwilling to bring an end to the longstanding practice that pads the pockets and pensions of DHS employees who watch sports and entertainment channels at taxpayer expense?

Part of the answer to this question may stem from the fact that this behavior was endorsed by management, and, in many cases, also practiced by management themselves. According to CBP's own data, in 2013 agents at Border Patrol headquarters claimed an average of 20 hours of overtime per pay period, one of highest rates of administratively uncontrollable overtime of any CBP duty station.

We have a responsibility to ensure homeland security dollars are available to cover the cost of legitimate overtime for agents enforcing our border. We need a consistent, cost-effective, and fair system for overtime pay within our federal law enforcement community.

Last week, I introduced bipartisan legislation, H.R. 3463, to address the abuse raised by the Office of Special Counsel. The bill will create a consistent and reliable pay system, enhance border security, and is anticipated to save taxpayers more than $1 billion over 10 years according to initial estimates.

This new pay scale is a long term solution that will iron out the kinks of the current system through old-fashioned planning and time management. These changes will both reduce opportunities to abuse the system and provide compensation for unanticipated emergencies such as capturing criminals.

I believe this is a logical solution, and look forward to working with my colleagues, [including the Chairman of the Federal Workforce Subcommittee and original cosponsor, Blake Farenthold,] to advance the bill.

I commend the six whistleblowers for disclosing this gross waste to OSC, and appreciate Mr. Florence for his willingness to share his story with the Committee. Mr. Florence has faced a number of challenges following his disclosure -- I'll take this opportunity to remind DHS this Committee will not tolerate retaliation or retribution against Mr. Florence or any whistleblower.

Opening Statement
Rep. John F. Tierney, Ranking Member

Subcommittee on National Security
Committee on Oversight and Government Reform
Hearing on "Abuse of Overtime at DHS: Padding Paychecks and Pensions at Taxpayer Expense"

November 20, 2013

Thank you, Chairman Chaffetz, for holding this hearing to discuss concerns raised by a recent Office of Special Counsel report regarding the misuse of overtime payments called Administratively Uncontrollable Overtime (AUO) by employees at the Department of Homeland Security (DHS).

Regulation restricts the use of this type of overtime to a limited set of circumstances, such as when a Border Patrol Agent is investigating criminal activity. According to the report, however, over the last year, seven whistleblowers have alleged routine misuse of AUO in separate DHS offices amounting to nearly $9 million per year. I understand that two of these cases have now been substantiated by agency investigation after referral from the Special Counsel, one other case was resolved through mediation, and the remaining four cases are pending agency investigation.

In one of the substantiated cases, the Department confirmed that numerous employees and managers in a Customs and Border Protection (CBP) headquarters unit called the Commissioner's Situation Room regularly misused AUO by claiming two hours of AUO following their assigned shift nearly every day and in the absence of a compelling law enforcement need. The Department also confirmed that the Director and Assistant Director authorized and abetted this improper practice. The whistleblower told investigators that instead of working, these employees routinely spent their AUO hours relaxing, surfing the internet, watching television shows, or taking care of personal matters.

Other whistleblowers, like Mr. John Florence, who will be testifying today via videoconference, have alleged that AUO is routinely being used to improperly complete administrative tasks or to cover shift changes. It also has been alleged that some employees were not even present at their duty station during the claimed AUO period. I welcome Mr. Florence's testimony on this topic, and appreciate his willingness to share his story with us.

Special Counsel Lerner, who is with us here today, has expressed serious concerns that these cases and a prior disclosure in 2007 reveal "long-standing abuse of overtime payments by the Department" and strongly indicate that "DHS has a profound and entrenched problem."

In her report, Special Counsel Lerner also questions the ability and willingness of DHS and CBP to address the AUO problem. After revelations of routine abuses in 2008, CBP promised to issue and implement an agency-wide directive on AUO. Five years later, such a directive has not yet been issued.

These disclosures and DHS' slow progress in addressing the issue appear to point to a larger and more fundamental problem – the misuse of AUO has become ingrained. The Special Counsel has noted that collecting AUO has become a "culturally acceptable practice" and the National Border Patrol Council has stated that AUO long been "promised, advertised and used by every single agent who's a non-supervisor."

While misuse of AUO cannot be tolerated, I fully appreciate the importance of AUO for frontline agents and officers who protect our borders. I want to make sure that AUO will be available for those DHS employees who really need it to carry out the agency's mission.

I hope that DHS, CBP, and the National Border Patrol Council will be able to provide this Subcommittee with insight into how AUO is being used, any challenges the Department and its components face under the current system, and how the problem is being addressed. I also look forward to hearing our witnesses' thoughts on whether AUO—which was created 40 years ago—can be fixed or whether it should be replaced by an alternative overtime pay system.

Before I conclude my statement, I would like to ask my colleagues to not let their outrage over these whistleblower disclosures taint our view of federal workers, the vast majority of whom are hardworking and dedicated civil servants who devote their lives to honorably serving and protecting the American people.

Questions for Mr. Judd
President
National Border Patrol Council
American Federation of Government Employees

Questions from Representative Maloney
Subcommittee on National Security
Committee on Oversight and Government Reform

Hearing on:
"Abuse of Overtime at DHS: Padding Paychecks and Pensions at Taxpayer Expense"

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1. Please provide a written explanation of what your Department, agency, or office is currently doing to address the alleged misuse of Administratively Uncontrollable Overtime within the Department of Homeland Security.

Answer:

As the President of the National Border Patrol Council that represents over 16,580 Agents, I encourage the Department and the Office of Customs and Border Protection to take the matter seriously and show genuine effort towards reforming the AUO system. The most recent report is the second time in the last five years we have learned about AUO misuse and abuse. It is clear to me that the problem is entrenched and pervasive. I strongly encourage the Department and the Agency to collaborate with members of Congress to ensure a speedy passage of the Border Patrol Pay Reform Act introduced by Congressman Chaffetz with bipartisan support. The bill will address concerns of misuse and abuse delineated in the Special Counsel's report, maximize manpower at the border, and save taxpayer over $125 million per year.

Question#:	1
Topic:	H.R. 3463
Hearing:	Abuse of Overtime at DHS: Padding Paychecks and Pensions at Taxpayer Expense
Primary:	The Honorable Jason Chaffetz
Committee:	OVERSIGHT & GOV RFORM (HOUSE)

Question: On November 13, 2013, Subcommittee Chairman Chaffetz introduced H.R. 3463, bipartisan legislation that would allow Border Patrol agents to annually elect assignment to one of three pay levels, with corresponding levels of overtime pay and compensatory time. Senator John Tester introduced companion legislation, S. 1691.

Absent legislative reform, what options exist for DHS to comply with the law and regulation governing administratively uncontrollable overtime?

What impact would H.R. 3463 have on DHS operations?

What, if any, savings would accrue to the Department of Homeland Security if H.R. 3463 were enacted?

The Office of Special Counsel's October 31, 2013 letter to the President includes a disclosure from a U.S. Customs and Border Protection employee in Laredo, Texas, alleging Administratively Uncontrollable Overtime (AUO) is being used for routine shift changes.

Is it legal for an employee to claim AUO for time worked as part of a shift change?

What, if any, impact did additional agents and resources have on eliminating AUO during shift changes both along the border and at headquarters and training facilities?

Is it appropriate for an employee to claim AUO for time worked as part of a shift change?

Response: DHS has the ability to use overtime under 5 U.S.C., chapter 55, subchapter V, and the *Fair Labor Standards Act of 1938*, as administered by OPM in 5 CFR part 551, for situations that do not fit the criteria of administratively uncontrollable overtime (AUO). Overtime under those authorities is compensated on an hour for hour basis rather than as a percentage of salary. Employees covered by FLSA are compensated at a time and a half rate for the overtime hours. Employees not covered by FLSA are compensated at one and one half (1½) the hourly rate of base pay up to GS-10, step 1, or their straight hourly rate, whichever is higher for approved overtime hours.

DHS strives to create uniform policies wherever practicable, but sometimes employees working side-by-side performing the same work are covered by different compensation rules. While we are still studying the potential budget implications if H.R. 3463 is

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enacted, the department will continue to operate under disparate compensation rules for work that is critical to securing the homeland. The Department welcomes the opportunity to address the challenges posed by AUO and different overtime authorities at CBP and throughout the Department.

Approval of AUO eligibility for a position is appropriate when the position requires the performance of substantial (at least 3 hours per week on average) amounts of irregular overtime work that cannot be controlled administratively, with the employee generally responsible for recognizing, without supervision, circumstances which require the employee to remain on duty (e.g., duty to decide to pursue a criminal suspect). (See 5 CFR 550.151 and 550.153.) Once AUO eligibility has been approved for a position, AUO becomes the sole compensation for all irregular overtime hours (i.e., overtime hours not scheduled in advance of the workweek), regardless of whether or not those irregular overtime hours are administratively uncontrollable. (See 5 CFR 550.154(a) and 550.163(b).) However, AUO determinations must be reviewed at appropriate intervals and AUO payments must be revised or discontinued when necessary to meet statutory and regulatory requirements. (See 5 CFR 550.161(f).)

Question#:	2
Topic:	revised pay system
Hearing:	Abuse of Overtime at DHS: Padding Paychecks and Pensions at Taxpayer Expense
Primary:	The Honorable Jason Chaffetz
Committee:	OVERSIGHT & GOV RFORM (HOUSE)

Question: In the Office of Special Counsel's October 31 letter to the President, Special Counsel Carolyn Lerner advises the President it is "up to the administration and Congress to develop a revised pay system, if warranted, that ensures fair compensation for employees who are legitimately working overtime."

Do you believe a revised pay system is warranted?

If so, what is your recommendation to Congress?

Response: DHS supports a government-wide pay system review that addresses disparities in overtime rules and practices, particularly in the ranks of law enforcement officers and law enforcement support positions.

When it comes to paying our DHS personnel for work beyond regularly scheduled hours, DHS and CBP are committed to working with Congress to modernize and streamline our compensation structure to reflect the expanded responsibilities of our workforce. We also can assure you that all additional work beyond regular hours that is required by the agency or is necessitated by the circumstances of the mission will be compensated, though it may not be through AUO.

Question#:	3
Topic:	AUO
Hearing:	Abuse of Overtime at DHS: Padding Paychecks and Pensions at Taxpayer Expense
Primary:	The Honorable Jason Chaffetz
Committee:	OVERSIGHT & GOV RFORM (HOUSE)

Question: On January 2, 2013, Special Counsel Carolyn Lerner sent a letter to then Secretary Napolitano regarding abuse of Administratively Uncontrollable Overtime (AUO) at the Department of Homeland Security (DHS). On October 31, 2013, Special Counsel Carolyn Lerner sent a letter to the President about the ongoing abuse of AUO at DHS. The Office of Special Counsel (OSC) raised similar concerns with AUO abuse with DHS in 2007/2008.

Did you receive a copy of the January 2013 letter?

Did you receive a copy of U.S. Customs and Border Protection's April 2013 internal review of the claims made by the Office of Special Counsel in its January 2013 letter?

Did you review a copy of the October 31, 2013 letter?

What steps did DHS take following Secretary Napolitano's receipt of the January 2013 letter from the Office of Special Counsel?

What, if any, disciplinary action is planned or pending against DHS employees abusing AUO?

What, if any, action has DHS taken to reduce and ultimately eliminate improper use of AUO across the Department?

Response: Yes, the DHS Chief Human Capital Officer (CHCO) received the three documents in November 2013.

Although OSC's current practice is to send disclosure letters to the Secretary by mail and send an electronic version to the Office of the General Counsel, OSC sent the January 2, 2013 disclosure letter directly to CBP. CBP's Office of Internal Affairs investigated the allegations and submitted their investigative findings to OSC on April 17, 2013. On January 23, 2014, the CBP Office of Internal Affairs submitted three additional reports to OSC (one constituting a supplemental report) detailing investigative findings related to AUO abuse allegations.

Following the October 31, 2013, letter, then Acting Secretary of Homeland Security Rand Beers ordered the Office of General Counsel (OGC) to conduct a Department-wide review of our compliance with rules governing the use of administratively uncontrollable

Question#:	3
Topic:	AUO
Hearing:	Abuse of Overtime at DHS: Padding Paychecks and Pensions at Taxpayer Expense
Primary:	The Honorable Jason Chaffetz
Committee:	OVERSIGHT & GOV RFORM (HOUSE)

overtime (AUO). USCIS and the Management Directorate have suspended their use of AUO for their organizations pending the OGC review. Additionally, on December 6, 2013, the DHS Chief Human Capital Officer (CHCO) issued a memorandum to the component HR directors reminding them of the compliance and regulatory requirements for using AUO. This includes the requirement for component heads to determine which employees receive AUO pay, consistent with law and regulation, for periodically reviewing determinations, adjusting AUO rates, and discontinuing AUO if the employee no longer meets the requirements for AUO. The DHS CHCO also instructed Components to immediately address instances of inappropriate use or abuse of AUO. The Department will use the results of the Department-wide review to determine additional actions that need to be taken.

DHS, in consultation with CBP leadership, initially suspended AUO effective pay period beginning January 26, 2014, for the following three categories of employees: 1) employees engaged as full-time training instructors (145 employees); 2) employees working in component headquarters offices (except for employees working in active operational capacities whose duties meet the regulatory requirements and restrictions for the use of AUO) (442 employees); and 3) employees to whom internal investigators have, to date, determined that the Department is inappropriately providing AUO pay. The National Border Patrol Council, and the 587 impacted employees, have received written notification of the suspension of AUO compensation.

CBP is taking steps to ensure proper use of AUO. Any overtime work required of these affected employees will be compensated under either title 5 (specifically 5 U.S.C. chapter 55, subchapter V) or the Fair Labor Standards Act (FLSA), as appropriate.

While the Office of Special Counsel's ongoing investigations have not confirmed allegations that these employees were not performing work during claimed overtime hours, they have found that the employees' work during these overtime hours was not appropriately paid as AUO. CBP has agreed to an in-depth audit process and has communicated that to the Office of Special Counsel. As we move forward with this effort, CBP leadership is communicating to its workforce that it is crucial that employees and supervisors properly document and certify AUO-qualifying work at all CBP locations, and that supervisors appropriately determine and manage what work actually needs to be performed on an overtime basis.

Additionally, CBP's Office of Human Resources Management (HRM) last September initiated a comprehensive review of the more than 150 positions currently eligible to earn AUO to confirm their AUO eligibility and identify positions that no longer meet the

Question#:	3
Topic:	AUO
Hearing:	Abuse of Overtime at DHS: Padding Paychecks and Pensions at Taxpayer Expense
Primary:	The Honorable Jason Chaffetz
Committee:	OVERSIGHT & GOV RFORM (HOUSE)

requirements for AUO compensation. CBP completed this review and is in the process of notifying impacted employees of the results.

Question#:	4
Topic:	qualifying overtime
Hearing:	Abuse of Overtime at DHS: Padding Paychecks and Pensions at Taxpayer Expense
Primary:	The Honorable Jason Chaffetz
Committee:	OVERSIGHT & GOV RFORM (HOUSE)

Question: The U.S. Customs and Border Protection's April 2013 report in response to the Office of Special Counsel's January 2013 letter indicates that agents assigned to the Commissioner's Situation Room at headquarters "did not record their qualifying overtime work prior to December 2012." The report also seems to suggest that hours are entered into the payroll system for overtime at 25 percent of base pay without evaluation. Were employees paid overtime without documentation?

Response: Employees in the Commissioner's Situation Room (CSR) utilized the electronic system known as the Customs Overtime Scheduling System (COSS) to document overtime hours, but the Office of Internal Affairs (OIA) determined that employees in CSR were not describing their overtime duties in sufficient detail to enable OIA to determine if the work met AUO criteria.

Question: Does this practice continue? Please explain.

Response: No. In accordance with DHS Secretary Johnson's memo to components dated January 27, 2014, CBP has ceased the use of AUO pay for employees assigned to the CSR.

Question#:	5
Topic:	OPM
Hearing:	Abuse of Overtime at DHS: Padding Paychecks and Pensions at Taxpayer Expense
Primary:	The Honorable Jason Chaffetz
Committee:	OVERSIGHT & GOV RFORM (HOUSE)

Question: Has the Department consulted with the Office of Personnel Management to determine if additional rules and regulations for AUO are needed? If so, what were the results of those conversations?

Response: While the Department maintains an open and collaborative dialogue with OPM, we are awaiting the conclusion of the OGC review before we formally engage OPM in this manner.

Question#:	6
Topic:	Special Counsel report
Hearing:	Abuse of Overtime at DHS: Padding Paychecks and Pensions at Taxpayer Expense
Primary:	The Honorable Jason Chaffetz
Committee:	OVERSIGHT & GOV RFORM (HOUSE)

Question: In 2008, in response to an initial Special Counsel report, U.S. Customs and Border Protection (CBP) stated that it "has been working to create and coordinate the implementation of an Agency-wide AUO policy directive that will bring conformity to the policies and practices regarding [AUO]."

Did CBP develop an agency-wide policy?

Response: In 2008, the U.S. Customs and Border Protection (CBP) developed a CBP-wide AUO directive in an effort to unify the administrative procedures of the two AUO policies the agency inherited from the former Immigration and Naturalization Service (INS) and the U.S. Customs Service. The proposed CBP directive was provided to CBP's unions, the National Border Patrol Council (NBPC) and the National Treasury Employees Union (NTEU), for negotiations. Negotiations with NTEU were completed, but NBPC proposed significant revisions requiring CBP leadership to reevaluate several key components of the Agency's initial proposal. While negotiations with NBPC were proceeding, CBP and DHS were also moving forward with efforts to transition to a new compensation structure for overtime continued.

In 2009, CBP decided to take a more holistic approach and began to develop a legislative proposal to reduce inefficiencies that resulted from the 2003 merger and to properly compensate CBP's frontline personnel. This proposal, which was supported in the President's FY 2012 Budget request, included replacing AUO with Law Enforcement Availability Pay (LEAP) for Border Patrol Agents (BPAs), CBP Air & Marine Agents, and Senior CBP Officers (CBPOs); and was coupled with CBP's administrative efforts to upgrade the journeyman of the agency's frontline positions from GS-11 to GS-12. The Journeyman upgrades began in late 2010. The comprehensive pay reform legislative proposal was submitted as part of the President's Fiscal Year 2012 Budget Request, and formally submitted to Congress in September 2011.

Ultimately, the legislative proposal was not enacted into law, and in 2012, CBP again resumed its efforts to create a unified agency policy on the administration of AUO and a new CBP-wide AUO directive was drafted. Concurrent with the development of the new directive, CBP began an agency-wide review of all positions authorized for AUO. The purpose of this review is to assess whether previous determinations that these positions are appropriate for AUO remain an accurate assessment. The directive is currently still in draft form pending the completion of the CBP-wide review of positions currently

Question#:	6
Topic:	Special Counsel report
Hearing:	Abuse of Overtime at DHS: Padding Paychecks and Pensions at Taxpayer Expense
Primary:	The Honorable Jason Chaffetz
Committee:	OVERSIGHT & GOV RFORM (HOUSE)

authorized for AUO. Once the review is completed, CBP will proceed with the efforts to finalize, negotiate, and implement the directive.

Question: Did DHS support CBP's implementation of this directive?

Response: The draft directive developed in 2008 was a component-level directive; therefore, the Department was not involved with its development. To clarify, the purpose of the CBP directive was to consolidate/unify existing procedures. DHS generally supported and did not review such unification initiatives.

Question: What is the status of the directive?

Response: The directive is currently in draft form pending the completion of the CBP-wide review of the current AUO approved positions. CBP's Office of Human Resources Management initiated a comprehensive review in September 2013 of the more than 150 positions currently eligible to earn AUO to confirm their AUO eligibility and identify positions that no longer meet the requirements for AUO compensation. The review is complete. Once impacted employees are notified of the results of the review, CBP will proceed with the effort to finalize, negotiate, and implement the directive.

Question#:	7
Topic:	Federal labor relations law
Hearing:	Abuse of Overtime at DHS: Padding Paychecks and Pensions at Taxpayer Expense
Primary:	The Honorable Jason Chaffetz
Committee:	OVERSIGHT & GOV RFORM (HOUSE)

Question: Federal labor relations law currently permits use of official time to negotiate collective bargaining agreements, participate in proceedings before the Federal Labor Relations Authority, and perform certain representational activities. The use of official time must be reasonable, necessary, and in the public interest.

Are employees on official time eligible to claim AUO?

What percentage of salary may employees on official time claim on their time and attendance reports?

How much does the Department spend on overtime for employees on official time?

Is this data included in the information provided to the Office of Personnel Management?

Response: If the employee is on official time during the regularly scheduled duty day and continues to perform representational duties after hours, this employee would not be eligible for overtime or administratively uncontrollable overtime (AUO). However, employees who are on official time during a portion of the day may be eligible for AUO if they are performing duties for the agency when an AUO qualifying activity occurs.

Official time amounts range from "as needed" to 100 percent of duty time spent on official time depending on negotiated contract language.

We are currently gathering data on use of overtime for employees on official time. The data provided to the Office of Personnel Management includes official time reported in the following categories: contract bargaining, mid-term bargaining, dispute resolution, and general labor management.

Question#:	8
Topic:	overtime abuse
Hearing:	Abuse of Overtime at DHS: Padding Paychecks and Pensions at Taxpayer Expense
Primary:	The Honorable Jason Chaffetz
Committee:	OVERSIGHT & GOV RFORM (HOUSE)

Question: Special Counsel Lerner's October 31, 2013 letter to the President mentions several additional cases related to overtime abuse.

OSC's letter to the President describes disclosure by a whistleblower within U.S Citizenship and Immigration Services headquarters facility. The whistleblower claims headquarters employees in her division claimed 10 hours of overtime every week. The whistleblower maintains her request to be deemed ineligible for overtime was initially denied.

Why would DHS initially deny an employee decertification from this type of overtime, stating such action would "draw unwanted attention to her office"?

OSC's letter to the President includes a claim from a whistleblower in U.S. Immigration and Customs Enforcement (ICE). In this case, ICE supervisors in Houston, Texas authorize and abet improper use of overtime.

Does it concern the Department that managers are directing employees to work behind their normal hours to compete tasks that are not time-sensitive?

Under what circumstances would this type of work be appropriate?

OSC's letter to the President includes a disclosure from a CBP facility in San Ysidro, California, alleging employees regularly claim two hours of overtime each day, but are often not present for the overtime they claim.

Under what circumstances would an employee claim overtime while not at their duty station?

Response: DHS takes these OSC complaints seriously and incidents are under investigation. OSC's referral letters to the Department contain allegations – not conclusive determinations – and OSC's request that the Department investigate. The Department continues to investigate and implement appropriate corrective action in each case.

Question#:	9
Topic:	CBP overtime
Hearing:	Abuse of Overtime at DHS: Padding Paychecks and Pensions at Taxpayer Expense
Primary:	The Honorable Jason Chaffetz
Committee:	OVERSIGHT & GOV RFORM (HOUSE)

Question: The Department of Homeland Security's fiscal year 2014 budget states, for U.S. Customs and Border Protection (CBP), "CBP and OBP are constantly reviewing the use of all overtime hours in conducting the operations and activities by all employees, uniformed and non-uniformed, performed in the field and at the Headquarters level."... and that "Overtime will vary based on operational requirements, staffing structures, and the risk assessments requiring agent availability due to border conditions and other operational factors. As such, overtime will not be the same across the board and will vary as required to meet operational situations."

In reviewing data provided by the Department of Homeland Security, 22,303 Office of Border Patrol employees claimed AUO in fiscal year 2013, approximately 5 percent fewer employees than the prior fiscal year.

How many Office of Border Patrol employees claiming AUO are receiving payment for such overtime at 25 percent, 20 percent, and 10 percent of their base salary? Please provide information for each category for fiscal years 2003-2013, by fiscal year.

Response: The attached PDF document provides counts of Border Patrol Agents at each of the four AUO percentages by pay period and calendar year. Calendar year was provided to present a more visually understandable view. Additionally, Border Patrol Agents salaries and expenses were not appropriated as part of U.S. Customs and Border Protection until fiscal year 2004 (Oct. 2003).

Summary AUO Count
of Agents by Percent

Question#:	10
Topic:	investigations
Hearing:	Abuse of Overtime at DHS: Padding Paychecks and Pensions at Taxpayer Expense
Primary:	The Honorable John F. Tierney
Committee:	OVERSIGHT & GOV RFORM (HOUSE)

Question: Please provide as soon as possible the status of all Department and component investigations into allegations of the misuse of Administratively Uncontrollable Overtime, including, but not limited to, individual cases referred by the Office of Special Counsel, and any potential retaliation against persons who alleged misuse.

For each investigation, list the name of the relevant component, the name of the person or office responsible for investigating the alleged misuse, a summary of the investigative efforts taken to date, any investigative tasks that remain to be performed, and when the investigation is expected to be completed.

Response: DHS is in the process of collecting this information from its Components.

Question#:	11
Topic:	written explanation
Hearing:	Abuse of Overtime at DHS: Padding Paychecks and Pensions at Taxpayer Expense
Primary:	The Honorable Carolyn B. Maloney
Committee:	OVERSIGHT & GOV RFORM (HOUSE)

Question: Please provide a written explanation of what your Department, agency, or office is currently doing to address the alleged misuse of Administratively Uncontrollable Overtime within the Department of Homeland Security.

Response: Following a request by the Special Counsel, Acting Secretary of Homeland Security Rand Beers ordered a Department-wide review of our compliance with rules governing the use of administratively uncontrollable overtime (AUO). USCIS and the Management Directorate at DHS headquarters have suspended their use of AUO for their organizations pending the OGC review. Additionally, on December 6, 2013, the DHS Chief Human Capital Officer (CHCO) issued a memorandum to the component HR directors reminding them of the compliance and regulatory requirements for using AUO. This includes the requirement for component heads to determine which employees receive AUO pay, consistent with law and regulation, for periodically reviewing determinations, adjusting AUO rates, and discontinuing AUO if the employee no longer meets the requirements for AUO. The DHS CHCO also instructed Components to immediately address instances of inappropriate use or abuse of AUO.

In addition, to improve coordination and better enable us to identify trends that may be emerging, all future complaints from the Office of the Special Counsel related to workforce issues will be provided to the CHCO. Also, the CHCO's staff will include a review of AUO in audits of Component human capital policies and programs.

Once the OGC review is complete, the Department will determine what additional steps are necessary.

FOR IMMEDIATE RELEASE:
Nov. 20, 2013
Contact: Sydney Glass
202-639-6421
glasss@afge.org

Border Patrol Union Calls Reformed Pay Structure for Agents in Congressional Testimony

(WASHINGTON) - American Federation of Government Employees (AFGE) National Border Patrol Council President Brandon Judd today testified before the House Committee on Oversight and Government Reform National Security Subcommittee in support of the Border Patrol Pay Reform Act of 2013 (H.R. 3463), a bill to reform the agents' pay system for the first time in 40 years.

According to Judd, the new pay system outlined in H.R. 3463 would save up to $1 billion for the taxpayers over a ten-year period while also improving agent morale. In his testimony, Judd also noted that more staffing is needed on our nation's borders to address the threat of increasingly well-organized, well-funded, and heavily armed drug cartels.

"The primary reason the Agents support the legislation is that it guarantees the manpower we need in the field to accomplish our mission," said Judd to committee members. "I learned early in my career that manpower and agent safety are linked. It was true when I started 16 years ago. It's even more true today, with the domination and spread of sophisticated drug cartels on the border."

If passed, the measure would be the equivalent of hiring 5,000 new Border Patrol Agents, increasing both border security and agent safety. The legislation would guarantee proper staffing and stability at each of the nation's borders without selectively limiting staffing only to locations with high volumes of illegal activity.

"The current pay system at Border Patrol is broken, and the time has come to do something about it. We believe the passing of this bill is critical to ensuring the protection of our borders and the wellbeing of the dedicated Border Patrol Agents who stand literally on the front lines of our national security," said AFGE National President J. David Cox, Sr.

AFGE is the exclusive representative of 17,000 Border Patrol Agents nationwide.

Read the testimony here: http://afgeunionblog.files.wordpress.com/2013/11/judd-testimony.pdf

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The American Federation of Government Employees (AFGE) is the largest federal employee union, representing 670,000 workers in the federal government and the government of the District of Columbia.
For the latest AFGE news and information, follow us on Facebook and Twitter.

The Washington Post

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Homeland Security workers routinely boost pay with unearned overtime, report says

By Emily Wax-Thibodeaux, Published: October 31

Federal employees at the Department of Homeland Security call it the "candy bowl," a pot of overtime money they have long dipped into to pad their pay even if they haven't earned it, whistleblowers say.

This practice, which can add up to 25 percent to a paycheck, has become so routine over the last generation that it's often held out as a perk when government managers try to recruit new employees, according to these accounts.

In a report submitted to the White House and Congress on Thursday, the federal Office of Special Counsel (OSC) details what it calls a "profound and entrenched problem" at DHS and a "gross waste of government funds." Based on the testimony of seven whistleblowers, the OSC concludes that the pervasive misuse of overtime pay in six DHS offices, including four within Customs and Border Protection (CBP), comes to $8.7 million a year.

At issue is Administratively Uncontrollable Overtime, known as AUO, which is meant only to compensate for urgent and unanticipated work like that often undertaken by law enforcement agents.

But Carolyn Lerner, special counsel at the OSC, an investigative and prosecutorial agency, said in an interview that many employees across DHS now consider the overtime pay their due. She said the whistleblowers' testimony suggests that the department's bill for these improper payments is running in the tens of millions of dollars a year.

"These are not border patrol guys chasing bad guys who can't stop what they are doing and fill out paperwork for overtime. We are not questioning that," Lerner said. "These are employees sitting at their desks, collecting overtime because it's become a culturally acceptable practice."

Over the past year, as federal cuts have torn through department budgets, the use and misuse of overtime has become a matter of increasing concern among federal managers, employees and unions.

Asked about the special counsel's report, a DHS spokesman said acting Secretary Rand Beers has ordered a department-wide review of how AUO is used and whether it complies with the law and other rules.

"DHS takes seriously its responsibility to ensure proper use of taxpayer funds," said spokesman Peter Boogaard. "While many frontline officers and agents across the department require work hour flexibility, often through the use of Administratively Uncontrollable Overtime (AUO), misuse of these funds is not tolerated."

In a written response to the special counsel's allegations, the CBP's assistant commissioner for internal affairs, James F. Tomsheck, said the agency would "work towards a unified and simplified agency-wide directive on AUO" and would show all employees a video to reinforce rules on proper AUO use.

Federal employees across a range of agencies are eligible to receive this kind of overtime pay, and each agency has some latitude to determine how to regulate it. The Office of Special Counsel said it had not received reports of abuses other than at DHS.

Some DHS employees routinely claim more than their "straight eight," with two hours of overtime every day, recounted one of the whistleblowers, Jose Rafael Ducos Bello, who works as a supervisor for Customs and Border Protection, until recently in Washington.

"It's pickpocketing Uncle Sam," Ducos Bello said in an interview. "Employees will sit at their desks for an extra two hours, catching up on Netflix, talking to friends or using it for commuting time."

He estimated that 27 employees in the Commissioner's Situation Room, which is part of CBP, improperly put in for a total of $696,000. They ranged from managers, who received up to $34,000 each, to border patrol agents, who received $24,500 each, he said.

"It was such misuse that I felt I had a legal obligation to report. I will sleep better at night," said Ducos Bello, a 24-year veteran of government employment. "It's like a father who has a son who commits a crime and has to report it for the health of their child's future."

Another whistleblower, Jimmy Elam, a supervisory paralegal specialist for Customs and Border Protection in San Diego, reported that eight administrative employees at his location received a total of $150,000 of improper AUO a year.

"It happens day after day, year after year," Elam said in an interview. "They are sometimes working, sometimes goofing off or just unaccountable completely. Whatever they are doing, they shouldn't be doing those extra two hours according to the law."

Elam, who has worked at his office since 2008, said he had noticed the problem for years but that it began bothering him more after automatic federal budget cuts, known as sequestration, kicked in this year. He said he worried about employees losing work and programs being slashed while employees continued to get overtime payments.

"It's just wrong," he said. "But everyone here condones it."

Other whistleblowers raised concerns about alleged abuses at the Immigration and Customs Enforcement (ICE) facility in Houston and CBP's Georgia-based Office of Training and Development.

But the union that represents border patrol employees warned against taking a heavy-handed approach to overtime pay. Shawn Moran, vice president of the National Border Patrol Council, which represents more than 17,000 employees, said that AUO has long been "promised, advertised and used by every single agent who's a non-supervisor."

"Suddenly now the party line from the agency is this is not part of your base salary," Moran said. "There's been a mentality shift in CBP about securing the border; now it's about securing the bottom line."

He said there will always be people who misuse pay systems in any agency, but he argued that most of the money is well spent on patrol and enforcement tasks that protect the border and on support tasks such as bringing criminal defendants to trial.

Lerner said her office isn't questioning the need for legitimate AUO payments, but instead the widespread abuse.

"We recognize that many believe border patrol employees should be better paid," she said. "But clocking

overtime that shouldn't be there to begin with isn't the vehicle that should be used to boost salaries."

Lerner said CBP offered assurances five years ago that it would end abuse of AUO. In a CBP letter issued in 2008 in response to a special council's report on allegations of AUO abuse at two CBP offices in Washington state, the agency promised to implement "an Agency-wide AUO policy directive [to] bring conformity to the policies and practices."

But, Lerner wrote in a letter to the White House on Thursday accompanying the new report, "the lack of progress in implementing plans first outlined five years ago raises questions about the agency's willingness or ability to confront this important problem."