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EXAMINING THE USE AND ABUSE OF ADMINISTRATIVELY UNCONTROLLABLE OVERTIME AT THE DEPARTMENT OF HOMELAND SECURITY

HEARING

BEFORE THE

SUBCOMMITTEE ON THE EFFICIENCY AND EFFECTIVENESS OF FEDERAL PROGRAMS AND THE FEDERAL WORKFORCE

OF THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

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CONTENTS

WITNESSES

TUESDAY, JANUARY 28, 2014

ALPHABETICAL LIST OF WITNESSES

APPENDIX

EXAMINING THE USE AND ABUSE OF ADMINISTRATIVELY UNCONTROLLABLE OVERTIME AT THE DEPARTMENT OF HOMELAND SECURITY

TUESDAY, JANUARY 28, 2014

U.S. SENATE,
SUBCOMMITTEE ON THE EFFICIENCY AND EFFECTIVENESS OF
FEDERAL PROGRAMS AND THE FEDERAL WORKFORCE,
OF THE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:32 p.m., in room SD–342, Dirksen Senate Office Building, Hon. Jon Tester, Chairman of the Subcommittee, presiding.

Present: Senators Tester and Portman.

OPENING STATEMENT OF SENATOR TESTER

Senator TESTER. I will call to order this hearing of the Subcommittee on Efficiency and Effectiveness of Federal Programs and the Federal Workforce.

Senator Portman will be here momentarily, but we will get going for the sake of time, your time and ours, too. I want to thank the witnesses for being here today.

This afternoon's hearing is titled, "Examining the Use and Abuse of Administratively Uncontrollable Overtime at the Department of Homeland Security." Once again, I want to thank Senator Portman for his bipartisan nature and ability to work with.

On October 31, 2013, the U.S. Office of Special Counsel (OSC) issued a report to the President on longstanding abuse of overtime payments by the Department of Homeland Security (DHS). At DHS, administratively uncontrollable overtime (AUO), is intended to allow for compensation of certain employees for unscheduled overtime that requires their presence on the job. For example, the use of AUO would be appropriate for a Border Patrol agent working beyond originally scheduled hours to apprehend a suspect while trying to illegally cross the border.

However, the OSC's report showed that employees from multiple DHS agencies regularly misuse AUO. For example, employees working in purely administrative functions in the commissioner situation room or an office within the Customs and Border Protection (CBP) claim to have worked 2 hours of AUO following their assigned shift approximately 90 percent of the time. Investigators found that these hours were not a result of unpredictable or com-

pelling law enforcement activities. Instead, they were spent performing administrative functions, and in some cases, watching TV or surfing the Internet.

What is most disturbing is that this is not the first time we have heard about AUO abuses at DHS. The OSC released a very similar report regarding Border Patrol officers in Washington State in 2008. When this last report came out 5 years ago, DHS and CBP promised reforms, but we have not gotten very far.

We all greatly appreciate the work being done by the men and women at DHS. However, I am sure that they would agree that the employees' action and misuse of public funds outlined in the OSC report are unacceptable. It is estimated that the practice is costing taxpayers millions of dollars each year.

Today, we hope to examine the instances of AUO abuse raised in the Special Counsel's report. We also seek to learn more about how DHS and CBP are responding to the recent investigative report, what disciplinary actions are being taken, and what additional cases of payroll fraud may have been discovered.

I want to thank our witnesses once again for joining us today and for their ongoing work to restrict AUO abuses at the Department of Homeland Security. I look forward to our discussion. I look forward to your testimony.

With that, I will turn it over to Ranking Member Portman for his opening statement. Senator Portman.

OPENING STATEMENT OF SENATOR PORTMAN

Senator PORTMAN. Great. Thank you, Mr. Chairman.

I appreciate the witnesses being here and I join the Chairman in saying we appreciate your hard work to try to get at this abuse. More importantly, I appreciate the service that Department of Homeland Security employees perform every day, including dangerous activities on our border and around the world. We are here today to talk about an instance where the taxpayer is not being served, and this is abuse of AUO.

For about 5 years, we believe the Department has been aware of this problem, and as the Chairman has said, we do not believe that enough is being done to focus on it. The Office of Special Counsel brought this to the attention of DHS leadership back in 2008. Most recently, in an October 31, 2013 report to President Obama, the U.S. Office of Special Counsel describes a series of situations involving Customs and Border Protection headquarters in D.C., offices in Texas, California, a Texas-based Immigration and Customs Enforcement (ICE) office, D.C. headquarters of the Immigration Service, and a Georgia-based training facilities, all of which, according to the U.S. Office of Special Counsel, there were situations of abuse.

Despite the administrative nature of the work that is done in those kinds of offices, in one office, employees reportedly claimed 2 hours of AUO following their assigned shift 89 percent of the time. So, almost 90 percent of the time, they would claim 2 hours following their assigned shift.

Improper claims of AUO have reportedly cost taxpayers up to $9 million annually at 68 DHS offices identified by whistleblowers. While the total amount and cost of annual AUO abuse throughout

the Department is unknown, maybe we will get more of those numbers today from you.

It is obvious the kind of work being done in the six cases referenced in the OSC notification do not fit the criteria to be eligible for AUO. They are not activities like responding to a criminal activity and they are not being used in only an occasional basis. Unfortunately, it is also evident that throughout many parts of DHS, there seems to be a culture in the workplace that condones this, either tacitly or maybe more explicitly, so it is something that we need to get to the bottom of and that is why this hearing is important.

I understand you are announcing today at DHS certain categories of employees, such as those in headquarters positions, will be barred from utilizing administrative overtime. That seems like a good step to me. I would like to learn more about it, but I also look forward to hearing from witnesses today about a more comprehensive way forward to deal with this issue and deal with this underlying issue of the culture, being sure that it is not encouraging the abuse.

Today, we will try to get to the bottom of this. I thank, again, the folks here today with us and others that are on a path to correct this issue and fix the condoning of this practice, and Mr. Chairman, I look forward to hearing from our witnesses today.

Senator TESTER. Well, thank you, Senator Portman.

Once again, welcome to the witnesses. I think we are very fortunate to have a panel that has the expertise that it has in front of us today and I want to thank you and your folks in your different agencies for allowing you to be here today.

For introductions, first, we have Carolyn Lerner, who is the head of the Office of Special Counsel, an independent investigative and prosecutorial Federal agency. Her office released the report on AUO abuses at DHS and has been investigating additional instances of abuse since October. It is great to see you again, Carolyn. Thanks for being here.

Ron Vitiello is the Deputy Chief of U.S. Border Patrol. In this role, he serves as Chief Operating Officer (COO) for the Border Patrol and is responsible for daily operations. It is good to see you again, Chief.

Catherine Emerson is the Chief Human Capital Officer (CHCO) at DHS. She is responsible for recruiting, diversity, and inclusion, learning and development, workforce planning, policies, and technologies in support of the DHS mission. You have a full plate. Thank you for being here today, Catherine.

And, finally, Brandon Judd is the President of the National Border Patrol Counsel. A 15-year Border Patrol agent, Brandon has patrolled the borders in California, Arizona, Maine. He represents more than 17,000 Border Patrol agents and staff. You have a great resume. If you have not been in Montana, you are welcome anytime, Brandon.

And I want to thank you all for being here. As we customarily do, we swear in all witnesses who appear before this Subcommittee, so if you do not mind, please stand and raise your right hand.

Do you swear that the testimony you will give before this Subcommittee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Ms. LERNER. I do.

Mr. VITIELLO. I do.

Ms. EMERSON. I do.

Mr. JUDD. I do.

Senator TESTER. Let the record show that the witnesses all answered in the affirmative.

It goes without saying, your written testimony will be entered in its totality in the record. I would ask you to keep your oral statements to around 5 minutes, the closer the better, and the record will be open for 15 days following this hearing.

So, Ms. Lerner, I will let you kick off the testimony. Go ahead, Carolyn.

TESTIMONY OF CAROLYN LERNER,[1] SPECIAL COUNSEL, U.S. OFFICE OF SPECIAL COUNSEL

Ms. LERNER. Thank you very much, Chairman Tester, Ranking Member Portman, Members of the Committee. Thank you for inviting me to testify today about overtime abuse at the Department of Homeland Security.

I want just to briefly acknowledge the folks who are here with me from the Office of Special Counsel today, the Chief of our Disclosure Unit, Catherine McMullen; Lynn Alexander, Johanna Oliver, and Nadia Pluta, who are the attorneys in the unit that had primary responsibility for these matters and have done a great job.

I want to just start by very briefly explaining the Office of Special Counsel's role in disclosure matters. OSC 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 refer the allegations to the head of the appropriate agency, who, in turn, is required to conduct an investigation and submit a report 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. My office then transmits the report with an analysis and recommendation to the President and the appropriate oversight Committees.

It was within this statutory framework that we received disclosures from 12 whistleblowers from the Department of Homeland Security. They reported overtime pay abuse at 12 separate DHS locations, nine of which involve offices within Customs and Border Protection. The whistleblowers allege that employees systematically abuse a type of overtime pay called administratively uncontrollable overtime. For years, it was the norm for employees, especially within CBP, to extend their shifts by 2 hours a day, every day, increasing their pay 25 percent. Management officials were aware of the overtime misuse and often abused it themselves.

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

[1] The prepared statement of Ms. Lerner appears in the Appendix on page 28.

law enforcement purpose. For example, AUO is appropriate when an employee is apprehending a suspected criminal along the border and it would constitute negligence for the employee to leave the job unfinished.

Each of the employees in the DHS cases here are not using AUO as the result of an unpredictable or a compelling law enforcement need. Instead, AUO is used routinely, nearly every day, and is an entrenched part of the culture at CBP and other parts of DHS. In some cases, the allegations extend to extreme misconduct. According to the whistleblowers, many employees spend the extra overtime not working at all. They relax, surf the Internet, and sometimes they are not even present at the workplace.

In my October 31 letter to the President, which was attached to my written testimony, I outlined allegations from whistleblowers at six different DHS offices. Since then, more whistleblowers have stepped forward. To date, we have referred six additional AUO abuse cases for investigation.

It is important to note that much of the AUO being claimed involves desk duty, training assignments, or even exercise classes, where there is no need for AUO.

The estimated cost of abuse at these 12 locations, which include CBP headquarters, likely exceeds $37 million annually.

To date, we have received four completed reports from DHS, and in all four, the whistleblowers' allegations were substantiated.

Overtime abuse at DHS is a longstanding problem. As you noted, Senator Tester, in 2007, identical allegations about overtime abuse were substantiated by DHS. At that time, CBP outlined a corrective action plan, but 6 years later, that plan has not been implemented.

This morning, for the first time, DHS lawyers told my office that the Department of Homeland Security had decided to suspend AUO for certain positions. I will leave it to the DHS witnesses to explain the details of that. This is a long overdue but very welcome development. As additional reports come in from DHS to my agency, we will continue to monitor whether this suspension leads to permanent reform.

In conclusion, I want to applaud the whistleblowers who are speaking out, often against their own financial self-interest. Had they not stepped forward, these problems would never have come to light.

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

Senator TESTER. Well, thank you for your testimony, Carolyn, and I can tell you there will be questions. Thank you very much for your work.

Ron, we look forward to your testimony.

TESTIMONY OF RONALD D. VITIELLO,[1] DEPUTY CHIEF, U.S. BORDER PATROL, U.S. CUSTOMS AND BORDER PROTECTION

Mr. VITIELLO. Chairman Tester, Ranking Member Portman, the Subcommittee, thank you for the opportunity to appear before you today to address the recent allegations against U.S. Customs and Border Protection, specifically, the U.S. Border Patrol.

When CBP was established in 2003 in the wake of terrorist attacks on September 11, 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 front-line law enforcement activities, such as gathering intelligence and surveillance and detection, to be accomplished remotely. The responsibilities of a Border Patrol agent are arguably the most unpredictable of all the CBP 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 highways leading away from the border, conduct city patrols, transportation checks, and support anti-smuggling investigations. Regularly working in isolated harsh terrain, agents of the Border Patrol patrol on foot, in vehicles, in boats, and in some areas on horses, all-terrain vehicles, bikes, and snowmobiles.

The frontline border security efforts are increasingly augmented by advancements in technology, including enhanced sensor, video, and radar technology. The technology is sometimes affixed to unmanned aircraft systems and 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 a 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, processing intelligence at remote locations, following leads, and to go where the illegal activity takes them, even if it takes them beyond their standard duty hour.

When it comes to paying Border Patrol agents for work beyond their regularly scheduled hours, the Department and CBP are committed to working with Congress to modernize and streamline the compensation structure to reflect the expanded responsibilities of

[1] The prepared statement of Mr. Vitiello appears in the Appendix on page 37.

our workforce. AUO, 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 security activities are conducted remotely. The work of securing the border is no longer limited to physical presence and our compensation system should reflect the current operational environment.

The Border Patrol takes its responsibility to be a good steward of taxpayer dollars very seriously. Misuse of government funds is not tolerated. The Border Patrol has and will cooperate fully with all internal DHS and external reviews of the compensation system and procedures.

Prior to the issuance of the Special Counsel's report, CBP did initiate internal working groups on AUO 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 AUO to Chief Patrol Agents and Division Chiefs, most recently in December 2012.

The guidance regulated policies governing the Administration and management of AUO criteria that Border Patrol agents and their supervisors must use to deem eligible for AUO payments in legitimately claiming AUO and the responsibility required of employees. While the Department and CBP have taken steps to educate supervisors and employees about the proper application of AUO, we intend to continue to work to educate and train our staff in the proper use and align pay structures with current agency functions.

The Border Patrol's mission requires compensation structures that maintain flexibility, ensure continuous agent coverage, provide equal pay for equal work, and enable better budget forecasting. We welcome a legislative solution that meets the agency's critical mission, promotes efficiency, and has the least impact on Border Patrol personnel.

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

Senator TESTER. Well, thank you, Mr. Vitiello, for your testimony, and there will be questions.

Catherine Emerson, you are up.

TESTIMONY OF CATHERINE EMERSON,[1] CHIEF HUMAN CAPITAL OFFICER, U.S. DEPARTMENT OF HOMELAND SECURITY

Ms. EMERSON. Chairman Tester, Ranking Member Portman, Members of the Subcommittee, thank you for the opportunity to appear before you today to address the Department of Homeland Security's use of administratively uncontrollable overtime.

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. I assumed the CHCO position in August 2011. Additionally, I advise the Under Secretary for Management and the Secretary and the Dep-

[1] The prepared statement of Ms. Emerson appears in the Appendix on page 37.

uty Secretary on workforce issues, and I greatly appreciate their the leadership of our employees in the issues that affect them.

Properly paying our border and homeland security personnel and properly managing that pay system are essential to the Department's missions. The employees of DHS are the Department's most important asset. They show an exceedingly high level of commitment to protecting our homeland and I am proud to serve them. They often work long hours under difficult conditions, and they deserve to be appropriately compensated for their work.

Our employees are compensated through a variety of pay systems and authorities that remind us that DHS was created by, in part, combining 22 different offices and agencies into one Department focused on the mission of homeland security.

One of the pay authorities that DHS utilizes to compensate our employees is called administratively uncontrollable overtime. AUO recognizes that law enforcement officers and their operationally focused employees will need to recognize circumstances that require the employee to continue working past the end of their shift. As you can imagine, those circumstances arise quite frequently with our Border Patrol agents and other mission critical operations in the field, and the vast majority of AUO and other overtime is appropriately claimed and compensated.

Given the importance of the DHS mission and the limited funds we have to accomplish it, the abuse of overtime of any kind is extremely troubling. Additionally, the inappropriate use of one type of overtime in the place of the proper one should be curtailed.

I appreciate the work of the OSC in the investigations that took place in our components as a result of those referrals. Those investigations uncovered both abuse and inappropriate application, and DHS has taken several actions as a result.

Yesterday, Secretary Johnson signed a memo that directed the heads of DHS components to suspend the use of AUO for certain categories of employees. As you are likely aware, at the request of the Office of Special Counsel, DHS has been conducting a comprehensive review of the use of AUO across the Department. That review is being led by the DHS Office of General Counsel (OGC). While that review is ongoing, it has become apparent that some AUO practices needed immediate attention. Additional measures may be taken as the review progresses, but in the interim, AUO will be suspended for the following categories of employees: Employees who work in component headquarters offices and whose duties do not meet the regulatory requirements for the use of AUO; employees engaged as full-time training instructors; and employees to whom internal investigators have determined that the Department is inappropriately providing AUO pay.

I appreciate the leadership that Secretary Johnson and Deputy Secretary Mayorkas have shown on this issue in their first few weeks since being confirmed. I look forward to continue working with them on human capital policy issues at DHS.

I have taken several additional actions as a result of the OSC disclosures. Based on my concerns, all future OSC complaints related to workforce issues will be provided to my staff, which should improve coordination and better enable us to identify trends that may be emerging.

On December 6, 2013, I issued a memorandum to components reminding them of their responsibilities to comply with all AUO laws and regulations. Components were directed to provide greater scrutiny to the eligibility determinations of employees who receive AUO and to continue to address instances of inappropriate use or abuse.

I instructed my staff to include the review of AUO policies in their required Office of Personnel Management (OPM) audits of component human capital policies and programs. Review of AUO policies is not otherwise required by OPM.

I tasked the components with providing my office information regarding disciplinary actions taken as a result of AUO abuse. I look forward to reviewing that information when it is provided.

I would like to close by thanking the Chairman for introducing legislation that proposes a new pay system for the Border Patrol that may better suit the needs of the 21st Century law enforcement environment. The Department is actively reviewing that legislation and will continue to work with you and your staff throughout the legislative process.

I appreciate the chance to address this issue today and to answer any questions that you may have. Thank you.

Senator TESTER. Thank you, Catherine. We appreciate you being here today.

Brandon Judd, your testimony.

TESTIMONY OF BRANDON JUDD,[1] PRESIDENT, NATIONAL BORDER PATROL COUNCIL

Mr. JUDD. Chairman Tester and Ranking Member Portman, first off, Chairman Tester, I appreciate the invite to your State. I have a brother who is a Border Patrol agent out of the Malta, Montana, Border Patrol station, so I have been there many times. It is a beautiful State.

Senator TESTER. Truly God's country. Go ahead.

Mr. JUDD. On behalf of the 16,500 rank-and-file Border Patrol agents whom I represent, I would like to thank you for having this hearing to explore reforming the administratively uncontrollable overtime system.

The Special Counsel's report confirmed what the line agents have known for a long time. When AUO was first introduced in the 1970s, there were fewer than 4,000 Border Patrol agents. 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 their shift was over, the agent could simply keep working. Because those hours were unscheduled, the extra hours were covered under AUO.

Today, the Border Patrol has over 21,000 agents. It is a 24-hour a day operation, and 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.

For example, an agent's shift may be done, but the oncoming relief is still an hour away. After a handover with an oncoming

[1] The prepared statement of Mr. Judd appears in the Appendix on page 40.

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. Those 2 hours have been traditionally covered under AUO, even though they are routine and foreseeable.

From my perspective, a reform of the Border Patrol pay system to address the problem is long overdue. What worked 40 years ago does not work for today's operational needs and threats. Today, 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, and are often extremely violent. They also have extensive intelligence and surveillance networks. 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.

The real question is where do we go from here. How do we reform the AUO system while ensuring manpower on the border? Last month, Chairman Tester and Senator McCain introduced legislation, S. 1691, to reform AUO, and there is companion legislation is the House introduced by Congressman Chaffetz. On this point, I want to be clear. Border Patrol agents support this legislation. It is long overdue.

The primary reason agents support this legislation is that it guarantees manpower we need in the field to accomplish our mission. This bill provides the equivalent of 20 percent more manpower, or 5,000 trained agents at the border. The legislation gives us the capacity we need to do our job.

I would also like to address the cost savings that would be achieved by this legislation. This legislation will save the taxpayers over $1 billion in 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, long-term stability, and safety is worth a pay reduction.

We heard last month from Deputy Chief Vitiello of the Office of Border Patrol that the proposed legislation gives the agency the flexibility to schedule agents where and when needed. We also heard from the Special Counsel last month about how the current AUO system has been abused for financial gain at taxpayers expense since at least 2008. We heard from DHS's Chief Human Resource Officer that no immediate solution is possible, absent legislation. And, finally, just earlier this month in the joint explanatory statement of the fiscal year (FY) 2014 omnibus appropriations bill, congressional leadership has directed Customs and Border Protection to work with the National Border Patrol Council to develop a sensible pay reform.

Let me be clear. We see no sound reason why any agency or department would not support a bill that will curb abuse, allow for scheduling flexibility, increase border security, and saves taxpayers money. I testified a month ago that this bill gives the agency and our country more security and safety at our Nation's border while saving over $1 billion in the next 10 years. That remains true today. We welcome any support and collaboration from the Department of Homeland Security and the Office of Customs and Border

Protection. The time to take action is now. We owe it to the American public and taxpayers and to the agents at the borders.

In conclusion, I want to thank this Committee for the opportunity to testify. I want to leave you with the firm notion that Border Patrol agents support S. 1691 and its House companion. The Border Patrol is overdue a system that fits current threats and operational needs, that is also cost effective and ensures manpower and agent safety.

I look forward to any questions that you might have for me.

Senator TESTER. Thank you for your testimony. I want to thank all the witnesses for their testimony, and so we will go to the questions. I think we will put 7 minutes on the clock and do as many rounds as we want.

I will start with you, Mr. Vitiello. Not everyone is familiar with administratively uncontrollable overtime. Could you further flesh out and explain in as plain of English as you can the current role it plays in the Border Patrol pay system.

Mr. VITIELLO. So, as stated previously, the legislation that controls, and the regulations that control AUO were developed in the late 1960s, and so what it allows for under that rubric is that after the end of an 8-hour schedule, an agent—an individual can self-deploy the additional time it would take to complete a compelling mission.

Now, in these reviews, it has obviously been seen that this is specifically outside of the administrative process or the administrative work and it is more of a field-based kind of construct. But it does allow for agents to finish the work that starts within that first 8 hours.

Senator TESTER. OK. Catherine, very quickly, you talked about three areas—and correct me if I did not get it down right—three areas where AUO would not be allowed. Component headquarter offices, what I have written down, training instructors, and employees that the internal investigations say are not relevant. Fairly accurate, in that you are nodding your head. What percentage of the overall employees that were eligible for AUO are going to be eliminated from its use, and do you expect this list to expand with time? What is the short-term and long-term goals here?

Ms. EMERSON. This is an interim measure, and you did get those three categories correct, for the most part. It approximately affects 900 employees——

Senator TESTER. OK.

Ms. EMERSON [continuing]. Take a rough guess of how many employees in the Department are using AUO is probably anywhere from 25,000 to 28,000.

Senator TESTER. OK.

Ms. EMERSON. And they are primarily in CBP.

Senator TESTER. OK. Well, maybe I will stick to the script here, but I guess the question I have is that as we look down the road, I mean, how—look, Mr. Vitiello said that the Border Patrol has changed. Brandon Judd said that the Border Patrol has changed. The question becomes, as we look forward—assuming that my bill does not pass, because I hope it does and we are going to work to get it passed, but I do not know that it is or it is not—how is the Department going to take care of this? How are they going to—this

is somewhat of a measure put forward now that is going to probably be expanded upon later, I would think, potentially. What kind of metrics are you going to be using to determine whether it should be used or not, and what kind of metrics were used in this?

Ms. EMERSON. Well, we have new leadership. We have a new Secretary, a new Deputy Secretary who inherited this situation and were briefed on it when they came in, and they have taken it very seriously, as we see from the memo that was put out yesterday. This is an interim measure, and as there are a number of reviews that are going on, one with the Government Accountability Office (GAO). We have the OSC that has brought some cases to our attention. We have our Office of General Counsel that is doing a review, as well as the components are doing reviews, as well. So, there are a number of reviews underway and this number could expand as we go forward. We are looking at the AUO practices and procedures that are in place and making sure that AUO is properly being accounted for.

Senator TESTER. OK. Ms. Lerner the whistleblowers, did they have the ability to—did they come to anybody within DHS before they went to OSC?

Ms. EMERSON. I am not aware that they did. Perhaps Mr. Vitiello can speak to that regarding the CBP ones.

Senator TESTER. Yes. Right.

Ms. EMERSON. But we appreciate the whistleblowers——

Senator TESTER. Oh, no. I am not being critical of anybody. I just want to know if there is a mechanism for them to go to the Department first, or is their first avenue OSC, and that is going to be the question I ask you in a second, Carolyn. But, did anybody come to the leadership at the Border Patrol?

Mr. VITIELLO. I would have to refer that. I am not specifically aware of that, although we encourage employees to go to their supervisors for all manner of——

Senator TESTER. Gotcha. Carolyn.

Ms. LERNER. I can answer that.

Senator TESTER. Sure.

Ms. LERNER. At least for the first six, the group of six that we referred and talked about in our October letter——

Senator TESTER. Right.

Ms. LERNER [continuing]. All six of them tried internally to complain and bring this problem to their supervisors and the Inspectors General (IGs) attention. They did not get a result, which is why they came to us.

Senator TESTER. I got you.

Ms. LERNER. They are not required to come to us first.

Senator TESTER. I got you.

Ms. LERNER. They can, but——

Senator TESTER. OK. So, moving forward, do you not think that is important, to open up the ability for people to come and actually encourage them so that you guys can deal with it up front?

Ms. EMERSON. Yes, I agree with you. In fact, they can go to our Office of Inspector General (OIG). They can go to the components' Internal Affairs. But encourage the whistleblowers to come forward, yes, sir.

Senator TESTER. OK. But, the point is, and I know you guys have been without leadership for some time, the point is, they did not, and when they did, according to Ms. Lerner's testimony, nothing happened. Is the leadership team there at DHS going to look at ways to facilitate better interaction with leadership within DHS?

Ms. EMERSON. Yes. And, in fact, the reviews that are ongoing are looking at the whistleblower situation, as well.

Senator TESTER. OK.

Ms. EMERSON. In fact, I put out an information request to the components in looking at any disciplinary actions that have occurred for abuse of AUO, and also the whistleblowers, any retaliation——

Senator TESTER. Yes. I mean, I am going to get into this later, but one of the things that personally drives me crazy as a policymaker is we are under tight financial restrictions here. Both Senator Portman and myself understand the importance of border security. And when we are allocating money and it is being misused and we are looking at potentially pulling people off the Northern border, which may be warranted, may be not—I am not saying that—but we are looking at doing some things that reduce manpower in the process and this is going on, it drives me crazy. So, hopefully, you do have new leadership in Homeland and I think that is going to help a lot.

Ms. Lerner, you had something you wanted to say, and then I will kick it over to Senator Portman.

Ms. LERNER. Yes. Just, we talk about one example where a whistleblower went to her supervisor and said, "I want to be decertified. I do not want to be certified to take AUO anymore." And the supervisor said, "No, you have to keep doing it, because if you stop, it is going to affect all of us." It is against their own financial self-interest for them to hold people accountable as supervisors because they are getting it, as well.

I wanted to mention one other thing, which is that these are terrific interim steps. We are really pleased at some progress.

Senator TESTER. Yes.

Ms. LERNER. But, the problem is, there still has not been a directive issued to stop it. This is not a difficult issue. The law is really easy. You do not qualify for AUO unless your job specifically requires it, if you have substantial unpredictable work, if it is irregular, or if there is a substantial law enforcement need. This is not rocket science. It should not be that difficult to issue a directive saying that folks who do not meet that criteria should not be taking AUO.

Senator TESTER. I agree with you, and I will tell you that the only excuse here that I can see is the fact that we have not been able, until just recently, to confirm their leadership. I think that you can be assured that we are going to be watching this issue very closely and holding the leadership within DHS very much accountable.

With that, Senator Portman.

Senator PORTMAN. Thanks, Chairman. I appreciate it.

And thanks for the testimony today and for your willingness to not just come here today and testify, but help us get to the bottom

of this and provide the information to deal with the issue administratively in your Department.

It sounds like there are a couple of instances where it has been abused. One is based on what Mr. Judd and Chief Vitiello said. You have a shift change and there is no better tool right now to cover that shift change because this goes back to the 1960s. It is antiquated. It is being used when you should have a better tool.

The other seems to be an even more egregious case, where employees are just falsifying time cards, and this is often in a position that really does not need AUO because some of these positions, as the interim measures are saying, really are not appropriate for it.

Is that more or less accurate? Chief, do you think you can kind of put that into those two categories?

Mr. VITIELLO. That is a fair description.

Senator PORTMAN. One of the things that troubles me as I look at this is that we have these allegations that have come forward related to DHS as a group and that it seems like CBP was kind of put in a position to deal with it, and specifically Office of Internal Affairs. And, Ms. Emerson and Chief Vitiello, in Ms. Lerner's testimony, she says that within Customs and Border Protection's Office of Internal Affairs, a whistleblower alleges that approximately 275 CBP employees improperly claim AUO, up to 2 hours a day, every day, with the full knowledge and approval of the Office of Internal Affairs leadership. I just want to confirm with both of you that this is the same office that is being charged with investigating the claims of AUO abuse in other CBP offices. Is that accurate?

Mr. VITIELLO. So, it is true that a couple of parts of the Internal Affairs Office at CBP are compensated in overtime using AUO. That is correct.

Ms. EMERSON. Can I just add that the Office of Inspector General is now involved in investigating those AUO complaints.

Senator PORTMAN. Yes. But, I guess my question is, why would it have gone to the Office of Internal Affairs if there was indication that this was an office that was using AUO itself inappropriately? Anyway, it just does not seem to make sense to have delegated it to that office.

Finally, Ms. Lerner's office, from its communication date, has indicated that AUO abuse has the possibility of being a Department-wide problem, so my question is, why was it just focused on CBP, not DHS as a group? And maybe, Ms. Lerner, you could tell us, do you know if it is common for the Inspector General to refer cases down to a particular component that seem to have an impact across DHS, and if so, why?

Ms. LERNER. I am not exactly sure of the correct answer to that, and probably Ms. Emerson would know better than I would. I will say that there is a lot of emphasis on CBP, but this is a problem throughout DHS.

Senator PORTMAN. Yes.

Ms. LERNER. And it is not just, actually, Customs and Border Patrol officers, or Border Protection officers, that are affected, as you note. I mean, these are office workers. These are trainers. These are canine workers. These are CrossFit instructors. It is a problem that extends throughout the Department.

Senator PORTMAN. Ms. Emerson.

Ms. EMERSON. Until recently, the majority of the cases were CBP. So, it was not until recently where we had ICE and the United States Citizenship and Immigration Services (USCIS) added to that. So, the practice within DHS is when the OSC referral letters came in, that was handled as a legal matter. So, it was referred to OIG. They had the right to refuse it. And then it went over to the components, and that is where it went to the Internal Affairs Office for investigation. It did not come to my office. I did not find out about the OSC referral letters until November, early November 2013. So, now there is a process in place where those letters come to me right when they come into the Office of General Counsel.

Senator PORTMAN. OK. Yes, that seems to make a lot more sense, and particularly when it is an agency-wide allegation and specifically not to send it to one of the specific offices that was at least alleged by whistleblowers to have been abusing itself.

So, the October 31 report from the Office of Special Counsel stated that these abuses were taking place in assignments where it is really inconceivable that the employees would be conducting work that makes them eligible, based on the criteria. And so, I guess, again, Ms. Emerson and Chief, what is the process for selecting which employees are eligible for AUO? I know the interim measures may change this, but what is the process for selecting employees?

Mr. VITIELLO. So, the bulk of the individuals involved are in the Border Patrol, and so when they come to a headquarters assignment, they are coming from the field. All of my staff that is in uniform were people who previously served in the field in all manner of what the Border Patrol does in the field, and so you spoke briefly about the culture and how this is kind of a systemic problem. Now, looking at it going backward, we incorrectly interpreted the eligibility. There was a scenario in which we used AUO not as it is in the reg as a discrete resource, but, in fact, used it to get whatever the work in front of particular agents were. And so, again, the actions that the Department is taking today will right that problem interimly and then we will learn more about it as we have over the last year.

Senator PORTMAN. So, if you have a largely administrative job, you think that after these interim measures are expired, there will be something in place that will make that clear, that that person would not be qualified——

Mr. VITIELLO. Agree. The ongoing review at the Department with the other agencies, what we have learned from the OSC complaints, our own review at CBP, will help discriminate the work in a way that is most beneficial. I think, again, I have 29 years of doing this and I have learned more about AUO in the last year than I did in my previous 28. And so I think the actions that are taken are the appropriate ones. We have to figure out what the impacts of them are and then move out and learn in a way that puts us in a place where supervisors, managers, and leaders have the right information to put the right kind of compensation against the right kind of work.

Senator PORTMAN. And employees are going to change jobs. They are going to rotate through. So, it should not be as to the employee. It should be as to the job function, right?

Mr. VITIELLO. Correct.

Senator PORTMAN. OK. Well, listen, again, we appreciate the fact that there is work being done. The interim steps are starting to be taken. I think we need to learn, though, from what happened. It is, as the Chairman said, critical to get more people on the border, and we are all looking at tight budgets. Certainly, the appropriations process going on right now is difficult with regard to your Department, particularly, but generally for DHS, and we have to be sure that the money is being spent in the most efficient way possible.

So, we appreciate your being on top of it. We are going to stay on top of it and we appreciate your getting back to us as you begin to work through this. And the interim measures are just that, just interim, so I understand you have an ongoing process, Ms. Emerson, through your Special Counsel Office within the Department. The DHS Office of General Counsel is conducting an internal review, is that accurate?

Ms. EMERSON. That is correct.

Senator PORTMAN. And when is that likely to be completed and when do you expect a report?

Ms. EMERSON. I have asked that question myself and have not gotten an answer. I know it is a lot of work. There is also a couple other reviews going on that I mentioned, GAO and the OIG. But this was an interim measure that the Secretary felt needed to be taken right away, and as it goes on, we may be looking at more measures coming forward.

Senator PORTMAN. Does the internal review so far corroborate what the OSC found?

Ms. EMERSON. Yes.

Senator PORTMAN. OK. Thank you, Mr. Chairman.

Senator TESTER. Thank you, Senator Portman.

I was just sitting here listening while you were responding to Senator Portman's questions, and I have to tell you, with a different two people sitting up here, they could be beating you guys to death and making themselves look pretty good because this looks pretty bad, and here is why.

In 2008, the Department was made aware of this, and we are finding out things now like the AUO eligibility was not determined, was not defined the right way, and I heard the AUO eligibility coming from Ms. Lerner's mouth and it does not look like it is that complicated, that it is pretty tough to define it any other way than what it is, and I can have her list them again. I did not write them down.

And then your position, Catherine—and I said when I introduced you, your plate is very full—by your own admission, you were not aware of this stuff until November 2013?

Ms. EMERSON. I had an offsite with my H.R. Directors the end of April, and that is when a couple of them were talking about some inconsistencies in the way AUO was applied.

Senator TESTER. Gotcha.

Ms. EMERSON. But, I never did know, and neither did my staff know——

Senator TESTER. Right. So——

Ms. EMERSON [continuing]. About this OSC complaint.

Senator TESTER. So, the question becomes for me, and I think for Senator Portman and anybody else who would be here off this Committee, what happened? Where is the breakdown? I mean, a red flag was raised back in 2008 and, basically, folks ignored it, or there were not the communication channels to bring it up the ladder, or tell me what happened, and then tell me if it is different today and why.

Ms. EMERSON. It was seen as a legal matter. So, the complaints went from OSC to the Office of General Counsel and the Office of General Counsel sent it to OIG to see if they wanted to take it, and they sent it to the component Internal Affairs to investigate, and that is how it went. It never came to the Office of the CHCO. So, it was seen as a component matter. So, CBP received the majority of those referral letters from OSC.

Senator TESTER. OK. So, what is different today? I mean, what is different today that this same thing is not going to happen again after Senator Portman and I start thinking about doing other things?

Ms. EMERSON. Well, as you mentioned, we have new leadership and they are extremely concerned about this. They inherited it. They are very concerned. They have only been in there for, what, approximately 30 days, and they have already taken action.

The other thing is I have found out about the OSC complaints in early November and I have reached out to the Office of General Counsel and told them that I need to have those OSC complaints when they deal with personnel matters, specifically AUO, so that I can watch for trends like this.

So, we have also got the additional reviews going on, GAO, IG, component investigations going on. So, there are a lot of reviews right now that are bringing us some information regarding AUO practices and procedures throughout the Department. Additionally, when my office goes and does audits of the human capital policies and procedures, I put this on the list. It is not something that OPM requires, but I am requiring it throughout the Department, that we will review the policies and the procedures of each component on AUO.

Senator TESTER. OK. Ms. Lerner, did you put forth recommendations to the Department when you did your research? Did you put forth recommendations to the Department about what has transpired and potentially—and maybe this is not in your purview, I am just asking—any suggestions on how you fix the problem?

Ms. LERNER. That is actually not——

Senator TESTER. Put your mic on, please.

Ms. LERNER. Our statutory authority is pretty much to make a substantial likelihood determination, refer it to the agency for their investigation, and then review their report——

Senator TESTER. And who did you refer it to? Who did you refer your investigative report to?

Ms. LERNER. Well, I sent it to the head of the Department, so I would send it to——

Senator TESTER. OK.

Ms. LERNER [continuing]. The first set went to then-Secretary Napolitano.

Senator TESTER. Gotcha.

Ms. LERNER. And then we get their report back. We review it for reasonableness. The whistleblower reviews it. We often ask, as we did in one of these cases, for the Department to look at it again, because we were not satisfied with how they reported back to us.

Senator TESTER. OK.

Ms. LERNER. They then came back, actually, I think, yesterday on one of these and said, yes, in fact, this was substantiated. All four of the reports that we have gotten back so far, and there are 12 altogether, the four that we have gotten back have all substantiated the allegations.

Senator TESTER. OK.

Ms. LERNER. Once we get those reports back, our authority is pretty much just to then report to you all as the oversight Committee——

Senator TESTER. Right. Yes.

Ms. LERNER [continuing]. And to the President. We can ask for the Department to get back to us——

Senator TESTER. Yes.

Ms. LERNER [continuing]. On remedial efforts that they say that they are going to take, and we are going to do that now. We are going to ask that they report back to us in probably 3 to 6 months——

Senator TESTER. Sure.

Ms. LERNER [continuing]. About what actions they have taken.

Senator TESTER. OK. Good. So, it is up to them to fix the problem. You point out the problem, verify it, and say fix it. OK.

Ms. LERNER. Yes.

Senator TESTER. Thanks.

Ms. LERNER. One of the legislative fixes we have been talking about with your staff is to make it an affirmative obligation——

Senator TESTER. Yes.

Ms. LERNER [continuing]. For the agency to report back on remedial actions that they have taken.

Senator TESTER. I got you.

Mr. Vitiello, are there mechanisms currently in place, because it is the Border Patrol Department where most of this is coming from—are there mechanisms currently in place to monitor AUO within the agency today?

Mr. VITIELLO. Yes. So, to go back a little bit on your question, since the 2008, the agency, either through CBP corporate or from the Office of Border Patrol, the Chief's office, we did issue additional guidance. We pointed people to the existing regulations. We tried to tighten up the office. The Human Resources Office put together a training package that we deployed to the field. Unfortunately, we still continue to suffer from a lack of being able to execute on those things in the most appropriate way.

Senator TESTER. My guess is, because it is not being checked on. So, are there mechanisms today——

Mr. VITIELLO. Yes, so——

Senator TESTER [continuing]. In which you can check and make sure that the orders that you put down are followed?

Mr. VITIELLO. Yes. So, there has been, we are using it differently now—the actions that went into place today, we will be able to look real-time how the hours are being claimed. In fact, each pay period when employees submit their time is an opportunity for a supervisor to review, and I think——

Senator TESTER. What if it is the supervisor that is doing it?

Mr. VITIELLO. Yes, so that is part of the problem. Systemically, we have used this—again, we have not used AUO—we did not treat it in the Border Patrol for a very long time, until very recently, as a discrete resource, did not look at it as overtime, sort of looked at it as part of how we got the job done, regardless of what the work was. And so that is a foul in the process and the reg as it relates to administrative duties and things that happen at the training academy. And so those were where our biggest challenges are.

But, also, the job has changed. There are several things that agents do these days that were not contemplated in the 1960s when this reg was issued, and so—intelligence reports, analyzing things and getting the next shift more prepared for their deployment.

We are going to use the tools that we have. We obviously have leadership and instruction from the Department and at CBP to fix immediately, based on the interim findings, and then the review of the ongoing cases, and then the complete review at the Department will help us do this in a much more structured way with the verification that you are talking about.

Senator TESTER. Are you reasonably confident today that the verification methods that are in place within your office are adequate and appropriate at this point in time?

Mr. VITIELLO. I think the tools are there. I would prefer that we had AUO in and of its nature is self-deployable, so I think we are still going to have an ongoing challenge with how it is looked at and how it is discussed. But, obviously, given these actions that we are going to take and how we are learning from these reviews, we are going to get much better at it.

Senator TESTER. OK. Same question for you, Catherine. Within the Department itself, DHS, do you have the tools by which to monitor and do you think they are adequate?

Ms. EMERSON. Yes. I would like to point out, in the Secretary's memo that he put out yesterday——

Senator TESTER. Yes.

Ms. EMERSON [continuing]. He specifically said in the last paragraph, "Nothing in this memorandum limits a component head from otherwise restricting or controlling the use of AUO where he or she discovers other circumstances involving misuse of AUO." So, this is from our Secretary saying that it is on the component heads to be responsible for how that AUO is administered.

Senator TESTER. Good.

Ms. EMERSON. I said there are a number of reviews that are ongoing. I know that there have been in CBP, there is a position-by-position review going on——

Senator TESTER. Yes.

Ms. EMERSON [continuing]. On who should be given AUO. I know ICE has done the same thing.

Senator TESTER. Yes.

Ms. EMERSON. They are doing an audit.

Senator TESTER. Right.

Ms. EMERSON. USCIS has temporarily suspended the use of AUO in their component, as has the Management Directorate.

Senator TESTER. OK. Thank you. Senator Portman.

Senator PORTMAN. Thank you, Mr. Chairman.

I think what we learned from the OSC report is pretty clear, that there is, as I said earlier, a cultural problem here. In other words, it is embedded in the culture, and not just of Border Patrol and Protection but also at DHS. And so I guess the question would be, what are you doing specifically about that? Ms. Emerson, you are a human capital expert. What specific steps should be taken to change the culture that this abuse of this overtime is acceptable?

Ms. EMERSON. Honestly, I think the memo that was put out by our Secretary yesterday is a good effort in the very beginning. It is very serious. He is taking this matter very seriously. He is acting quickly, only been on the job for approximately 30 days and already coming out strongly regarding AUO administration.

Also, my office, as said, I put in measures that when we go and do our human capital audits in the components, we will be looking at AUO processes and procedures. There are a number of reviews that are going to be coming up, finalizing, and we will look at that to see where we still have issues.

Senator PORTMAN. I think one thing that maybe we have not touched on enough today is the way you change the culture is, in part, through accountability, right. I mean, you hold people responsible. And if folks think they are not going to be held responsible, it may be difficult to change that culture.

So, I understand from information provided to our Subcommittee that DHS reported that 84 cases of AUO abuse were reported in 2012 and 2013. As of December 2013, of those 84 cases, 43 are still being reviewed, 33 were closed with no action, no findings, one was pending with DHS Inspector General, a total of 7 of the 84 cases, investigators were able to substantiate the allegation of AUO abuse. I understand that in these seven cases, the employees were only given oral or written counseling as their disciplinary action.

One, is that true? Is that your understanding? And, I guess to Ms. Emerson or to you, Chief, can you describe the offenses in these seven cases? Were these employees inappropriately directed by their management team to use this overtime inappropriately, or were they found to be logging hours when they were not doing work, or, as we have heard in some of these allegations, maybe not even present? What do you know about the seven cases?

Mr. VITIELLO. I do not have specifics on where the counseling or the disciplinary actions were taken. I can tell you that, again, those cases were referred because they were, in fact, determined to be misconduct, and there is a strict process for that, where employees are given due process. The agency reviews the findings and then each case is looked at based on what were the supervisor's responsibilities and how did they relate to the employee, or was this

something that the employee took on by themselves. You look at the totality of those things to decide what the final outcomes are.

Senator PORTMAN. Eighty-four cases, seven substantiated, what do you know——

Ms. EMERSON. It is my understanding that those are primarily CBP cases. Those disciplinary actions, when allegations of employee misconduct, are handled by the components. However, in the General Counsel's review that is ongoing, I have recently put out a request for information regarding the discipline of employees, so I will be getting that information in the near future.

Senator PORTMAN. Any supervisors subject to any kind of punishment for condoning or knowingly approving of these——

Mr. VITIELLO. I do not have specifics, but anywhere where it is determined that employees, whether they are supervisors or not, engage in misconduct in this area, then it is addressed through the disciplinary process.

Senator PORTMAN. Well, we would like some more information on that. I mean, you guys have both been in the field. One way in which people learn about a culture shift is they see there is some responsibility and accountability that goes with it, and if we are not following up on these disciplinary actions—84 cases, 43 still being reviewed, 33 closed with no action or no findings, seven were found to have abused overtime, and what we understand is that those employees were only given oral or written counseling as disciplinary action—so, I mean, I do not know what kind of accountability there is in that kind of a system. So, if you could get back to us as to what has happened with those cases, that would be really helpful.

And specifically, I am not talking about the seven managers, as you say, Chief. If they are managers, they are subject to the same discipline. I am talking about, in those seven cases, were their managers disciplined if they were found to have condoned it——

Mr. VITIELLO. Let me just——

Senator PORTMAN [continuing]. Because I would suspect that is, from what we know, part of what has been going on.

And, also, if you could tell us what led to the 33 cases being closed without action. I mean, I assume that is because the allegations were not substantiated, but we would like to know that. And, then, what is the status of the 43 pending cases as of December. These were cases from 2012 and 2013.

Mr. VITIELLO. We will get back to you with that.

Senator PORTMAN. Thanks, Chief.

Thanks, Chairman.

Senator TESTER. Yes. Thank you, Senator Portman.

I would just kind of want to add on that, because I think it is important, I think it was testimony you gave earlier, and I can go back and check the record—it does not matter, we are not—but, you had talked about the definition of AUO that was interpreted wrong. And I would say, if that is correct, it was wrongly interpreted on how it should be used, that may be where the problem started right there.

Mr. VITIELLO. Yes. I mean, there is no excuse for, knowing what we know now, not to take the actions that have been taken or look-

ing at the findings from OSC and saying that it does not mean what it means, because it is very serious and we take it seriously.

Senator TESTER. Yes.

Mr. VITIELLO. Like I said, we have been well aware that AUO has been a problem for the last couple of years——

Senator TESTER. Yes.

Mr. VITIELLO [continuing]. But throughout my career, again, it was not treated as something separate and apart, like our other overtime systems. It was treated not as a discrete resource but as sort of a tool that is used to get all work done.

Senator TESTER. Give me the definition really quickly again, Ms. Lerner.

Ms. LERNER. Sure. By regulation, AUO 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 purpose.

Senator TESTER. This would just be my opinion, and I am a dirt farmer from Montana, OK—this would just be my opinion, but unless that administrative personnel is directly connected to that agent in the field, that he needs information, I cannot see how any administrative personnel would be eligible for this. That is my opinion. If I am wrong on that, let me know why I am wrong on that as we move forth and try to solve this problem.

Mr. VITIELLO. No, I agree with what you said.

Senator TESTER. OK.

Mr. VITIELLO. I am just saying that when we talked earlier about the culture, incorrectly used——

Senator TESTER. Yes.

Mr. VITIELLO [continuing]. The actions going forward are the right actions——

Senator TESTER. Right.

Mr. VITIELLO [continuing]. But, previously, we did not have that same interpretation.

Senator TESTER. I got you.

Mr. VITIELLO. We did not look at it the way we are looking at it now——

Senator TESTER. Gotcha.

Mr. VITIELLO [continuing]. In the more appropriate——

Senator TESTER. I guess the point I am trying to make is that the people who defined it as being incorrect are the ones at fault here, not the people who are using it——

Mr. VITIELLO. I agree with you.

Senator TESTER [continuing]. Because if I am told as an administrative person that I can utilize it, that it is OK by my boss, then I will use it.

Mr. VITIELLO. That is correct. I think that is part of the systematic challenge that we had previously and now are coming to grips with.

Senator TESTER. OK. That is good.

I want to talk a little bit to you again, Mr. Vitiello, CBP conducted a comprehensive audit last spring to get a better understanding of the full extent of the costs of AUO use throughout CBP. I would assume that is both costs that have been used by the agents in the field when necessary and some of the administrative

costs we have been talking about before. What were the findings of the audit?

Mr. VITIELLO. So, we have a review, there are 158 positions within CBP, positions and titles——

Senator TESTER. Sure.

Mr. VITIELLO [continuing]. That are being reviewed. We expect that to be completed sometime in February.

Senator TESTER. OK.

Mr. VITIELLO. And that will give us a better handle on if position descriptions are correct, and then what is the appropriate work schedule and overtime compensation.

Senator TESTER. I assume that audit will be public information?

Mr. VITIELLO. I am not sure. I would have to——

Senator TESTER. We would like to get the results of that audit, if you could, to this Committee when appropriate, OK.

Mr. VITIELLO. All right.

Senator TESTER. So that we will know what kind of recommendations came down from those folks. I think if we all work together, we get this problem solved even quicker, so——

Do you know whether USCIS or ICE is conducting similar audits? This is for you, Catherine.

Ms. EMERSON. I know ICE is conducting an audit, very similar, position by position. USCIS has suspended the use of their AUO.

Senator TESTER. Oh, OK. All right.

Ms. EMERSON. And they did that before the memo came out.

Senator TESTER. OK. Sounds good.

Mr. Judd, you have gotten off easy here today so far. In your testimony, you said that you thought that AUO was—there was a role for it 40, 50 years ago, not so much—it has kind of outlived its—I do not want to put words in your mouth, but maybe outlived its usefulness today. Could you expand on that a little bit? You talked about three shifts, basically three 8-hour shifts that rolled over. Could you talk about if there is a role for AUO today and what that role should be.

Mr. JUDD. There is a role for AUO. I think that what we have to do is we have to go back and look at how this problem started. If you go back and you look at the hiring memorandum that went out to prospective employees, one of the things that it said was that you will receive 25 percent AUO. When I came in the Border Patrol approximately 16½ years ago, I was told in the job announcement that I would receive 25 percent AUO. It was a recruitment tool that was used, because when we came in the Border Patrol, our entry salaries were not commensurate to other law enforcement, whether it be local, State, or Federal law enforcement.

And so that is where the service used AUO as a recruiting tool to get personnel into the Border Patrol, and it is still applicable today. We still use AUO correctly in the field. We will continue to use AUO correctly in the field as long as we are allowed to have the overtime system.

Rio Grande Valley, for instance, is the hotbed right now for illegal immigration and the agents out there are chasing drug smugglers, alien smugglers in the country well after their 8-hour shift. And so AUO is absolutely applicable, and it is applicable in all parts of the Border Patrol where we are chasing illegal aliens or

illegal drug smugglers. The problem is we need to look at a more modernized system.

Senator TESTER. Let me ask you this, since you bring up another issue. You entered 16½ years ago. If my math is correct, it was about 1998, maybe a little bit before.

Mr. JUDD. Nineteen-ninety-seven.

Senator TESTER. Nineteen-ninety-seven. You said wages were not commensurate then with other sectors of law enforcement. Are they commensurate now without AUO?

Mr. JUDD. At the entry level, no, they are not.

Senator TESTER. They are——

Mr. JUDD. The journeyman level is, but the entry level is not.

Senator TESTER. Is how much lower, percentage-wise?

Mr. JUDD. We recently——

Senator TESTER. Or dollar. I do not care.

Mr. JUDD. It depends on who you are comparing us against, but when we looked at other law enforcement agencies that people—that are desirable, and that is city law enforcement, city police departments, or other Federal law enforcement, generally speaking, we are about $10,000 less than what other agencies hire their employees at.

Senator TESTER. OK. Well, that is another issue for another hearing.

I think we will probably wrap this up. Look, the Department has a new Director. It has a new second-in-command. It has a new IG. I can tell you that we want our border secure and we want our people to be able to do the job that they need to do when they are in the field. I can also tell you that, quite frankly, this kind of abuse of a program needs to stop, especially—it needs to stop any time. Even if we were flush with dough, it would need to stop, OK, because it is just not right.

I want to thank you all for being here today, and I mean that. Oftentimes, these hearings are not particularly pleasant, but the truth is, I think that you offered up information that we all could use and did it in a way that shows your commitment to the Department.

We have covered some ground. I think we need to work together to get the overtime issue solved at DHS, to ensure the taxpayer dollars are spent appropriately. I think it will help your program. It will help all of government, quite frankly, if we are able to do this. I look forward to working with you folks, the witnesses here today, to monitor implementation and the impact of the Secretary's recent directive.

Senator Portman and I were the only two here today, but I can guarantee you, there is not a person on this Subcommittee and on this Committee as a whole that is not concerned about this. I can guarantee you that. And so I think that if we can work on constructive measures to fix the problem—I think we know what the problem is—I think we all can win from this.

This hearing record will remain open for 15 days for any additional comments or questions.

And with that, once again, thank you all for being here, and this hearing is adjourned.

Whereupon, at 3:45 p.m., the Subcommittee was adjourned.]

APPENDIX

Opening Statement for Dr. Coburn

"Examine the use and abuse of Administratively Uncontrollable Overtime at the Department of Homeland Security"

January 28, 2014

Thank you, Chairman Tester, for holding this hearing.

At a time when our country faces $17 trillion in budget deficits it is concerning that a culture of entitlement is entrenched at the U.S. Department of Homeland Security (DHS).

The American people continue to hear government agencies, including DHS, press for more resources and responsibilities, yet fraud in the use of Administratively Uncontrollable Overtime (AUO) continues. Even though no one knows how much fraud may exist in AUO we now know how much has been paid out.

AUO involves a large amount of taxpayer money. According to DHS, since 2010, a total of around $1.9 billion of AUO has been paid out across DHS. This is not some small problem.

As DHS Secretary Johnson gets settled in his new job, addressing potential fraud in overtime costs must be high on his list of priorities. It's encouraging to see the Department take some limited action by suspending AUO to certain categories of DHS personnel. But this action comes after years of inaction.

It appears that the U.S. Office of Special Counsel's (OSC) report has spurred DHS into some damage control. The OSC examined just six offices at DHS and found around $8.7 million in fraudulent AUO claims. AUO abuse may total in the tens of millions annually across DHS.

Some of the whistleblowers that spoke with the OSC and to my office believe a culture of entitlement has gripped DHS. This culture, as the OSC noted, seems to be aided by certain DHS managers and many others within DHS have turned a blind eye towards this issue.

The Department's response to put an end to these abuses has been slow and ineffective. DHS was aware of AUO abuse as far back as 2008, yet six years later and the problem apparently continues to grow.

As the OSC made clear, this abuse is not an isolated incident but a problem that is part of a persistent pattern. AUO allegations have come from many DHS offices and especially from the U.S. Customs and Border Protection.

Other allegations of AUO abuse have come from the Immigration and Customs Enforcement and at the U.S. Citizenship and Immigration Services.

In November 2013, I sent a letter to DHS regarding my concerns about the OSC's report. I received a letter back and want to share some of what I now know.

As mentioned earlier, since 2010, DHS has paid around $1.9 billion in AUO. In order to gain a clearer understanding of this number one must dig deeper and breakdown the amount of AUO by DHS component.

Since 2010, U.S. Customs and Border Protection was around $1.5 billion in AUO and U.S. Immigration and Custom Enforcement was around $407 million. Other DHS components include the U.S. Secret Service at around $27 million and the National Protection and Programs Directorate at around $19 million.

These DHS numbers equate to an average of $16,000 per employee. That is a large amount of money on top of a DHS employee's salary. According to DHS, around 23,000 CBP employees per year claim AUO. At ICE, the number of employees totals around 5,500.

One topic that should not be forgotten is the fact that it was DHS whistleblowers who risked their careers to expose these issues. Many of these whistleblowers went to the OSC despite it being against their own financial interests.

Retaliation remains a problem at agencies across the government and I strongly urge DHS not to take any adverse actions against any of the whistleblowers. In November 2013, I along with Chairman Carper and Senator Ayotte sent a letter to the

Acting CBP Commissioner asking him to refrain from taking any actions against CBP Officer Jose Ducos-Bello.

CBP Officer Ducos-Bello risked his career to do the right thing. It's individuals like Officer Ducos-Bello who keeps our government honest and he should not suffer any retaliation from DHS for his disclosures to the OSC.

I will continue to push DHS for answers on this topic.

I hope the oversight of this committee will push DHS as they work towards a successful effort to root out fraud in AUO.

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

U.S. Senate Committee on Homeland Security and Governmental Affairs
Subcommittee on the Efficiency and Effectiveness
of Federal Programs and the Federal Workforce

"Examining the Use and Abuse of Administratively Uncontrollable Overtime at the Department of Homeland Security"

January 28, 2014, 2:30 P.M.

Chairman Tester, Ranking Member Portman, 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, Johanna Oliver, and Nadia Pluta, 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 the recently-concluded overtime case involving employees at the U.S. Customs and Border Protection (CBP), Commissioner's Situation Room, in Washington, D.C., and 3) our findings and ongoing 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 and the whistleblower's comments on the report, 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. My office then transmits the report, whistleblowers's comments, and my findings and recommendations to the President and congressional committees with oversight responsibility for the agency involved.

In addition to providing a safe channel for disclosures of government misconduct, OSC plays a critical oversight role in government investigations and often prompts corrective actions to address the reported wrongdoing. It was within this statutory framework that we received disclosures from whistleblowers throughout DHS concerning widespread abuse of overtime pay.

Procedural Case Chronology

In September 2012, OSC received a disclosure from Jose Ducos-Bello. Mr. Ducos-Bello alleged that DHS employees working in the CBP 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. According to Mr. Ducos-Bello, routine overtime payments to Situation Room employees functionally extend their daily shift by two hours, nearly every day, increasing pay by 25%. This practice is a violation of the regulations governing AUO.

According to regulations, AUO 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 may only be used for irregular and unpredictable work beyond an employee's normal shift. 5 C.F.R. Sec. 550.151-154.

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

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, prepared by the CBP Office of Internal Affairs (OIA), which substantiated the allegations. The report concluded that 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."

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

OIA's investigation confirmed most of Mr. Ducos-Bello's factual allegations and substantiated the concerns about AUO misuse. However, while CBP pledged to take corrective action in response to these findings, I remain concerned about whether the agency is ultimately willing or able to do so. As the rest of my testimony illustrates, the problem of AUO misuse is entrenched, particularly within CBP, and prior commitments to address these issues remain unfulfilled.

Over the past year, OSC has received disclosures from whistleblowers throughout DHS. In my October 31, 2013, letter to the President, which is attached to this testimony, I outlined

allegations of AUO abuse from six additional whistleblowers at five DHS offices. In addition to CBP, they include disclosures from employees at U.S. Citizenship and Immigration Services (USCIS) and Immigration and Customs Enforcement (ICE).

On Thursday, January 23, 2013, OSC received three additional reports from DHS. In these reports, CBP's Office of Internal Affairs substantiated the disclosures of AUO misuse at the CBP Office of Training and Development, CBP Laredo North Station, and CBP San Ysidro Asset Forfeiture Office. We are in the process of reviewing the details provided in these reports, and will provide the Committee with additional information on these confirmed instances of misconduct.

In addition, as public and congressional scrutiny of AUO misuse grew in response to our October letter, more whistleblowers stepped forward to report concerns. Since the fall, OSC has referred six additional AUO abuse cases to DHS for further investigation, bringing the total to 12 separate offices, and raising further concerns about the broad scope of AUO misuse, especially within CBP. These six new cases include:

- A whistleblower alleges that five Border Patrol Agents detailed to work as CrossFit instructors in El Centro, California routinely claim AUO, increasing their base pay by 15 percent every pay period.

- A whistleblower alleges that approximately 275 CBP employees in the Office of Internal Affairs (OIA) improperly claim AUO, up to two hours a day, every day, with the full knowledge and approval of the OIA leadership.[1]

- A CBP employee in El Paso, Texas alleges that approximately 440 employees are improperly receiving AUO. The employee specifically alleges that Supervisory Border Patrol Agents claim AUO hours when completing administrative tasks, and Border Patrol Agents claim AUO when assigned to "light" duty due to injury and when performing routine shift change activities.

- A CBP employee alleges that approximately 95 employees at the National Targeting Centers in Herndon and Reston, Virginia, including management, improperly claim AUO, up to two hours a day, every day, increasing their base pay by 25 percent.

- A whistleblower alleges that employees working in CBP Office of Border Patrol headquarters in Washington, D.C., claim AUO on a daily basis but fail to perform duties that qualify for AUO.

[1] As noted, OIA investigated and substantiated the previous AUO abuse cases referred by OSC. Although OIA conducted thorough investigations in each of these cases, the allegations concerning misuse within OIA raise questions about its ongoing ability to review OSC referrals. Accordingly, in consultation with OSC, the DHS Office of General Counsel determined that OIA will complete the pending CBP cases previously submitted to that office. However, the DHS Office of Inspector General will receive and investigate any new OSC referrals of AUO abuse, including those listed above.

- A whistleblower alleges that employees working in the ICE Enforcement and Removal Operations Office in Chattanooga, Tennessee routinely claim AUO, up to two hours a day, every day, with the full knowledge and approval of their supervisor but fail to either work any additional hours or perform duties that qualify.

Much of the AUO claimed at the locations identified by whistleblowers involves desk duty, training assignments, or even exercise classes, where compelling law enforcement reasons for staying on duty are unlikely to arise. For example, at the November 2013 House Oversight and Government Reform Committee hearing on AUO abuse, DHS whistleblower John Florence testified about his specific concerns at the CBP training facility in Glynco, GA. According to Mr. Florence, classroom instructors and as many as 50 headquarters managers in the Office of Training and Development routinely claim AUO. The recently-submitted report on the Office of Training and Development also confirms that Border Patrol Agents routinely claim AUO for performing the same duties as Customs and Border Protection Officers (CBPOs). CBPOs are not eligible for AUO and therefore do not receive AUO for completing the same tasks as the agents.

At the six facilities first identified by whistleblowers in disclosures to OSC, a conservative estimate of the cost of overtime abuse is nearly $9 million each year. The whistleblowers project that the cost nationwide is likely to reach tens of millions of dollars annually, and the more recent disclosures provide further evidence of the substantial, ongoing cost of improper AUO claims.

As I noted in my October 2013 communication to Congress and the President, identical concerns about overtime abuse were raised by a whistleblower in 2007, and CBP made similar promises about correcting them. Specifically, at that time, our agency received a disclosure that CBP employees in Blaine, Washington were improperly claiming AUO. In response, the agency confirmed the allegations, finding that employees were given blanket authorization to work overtime and managers improperly permitted excess overtime. Much of that overtime was controllable, and therefore it was improper to claim it as AUO.

At that time, CBP outlined a corrective plan, including the implementation of an agency-wide directive on AUO. Much of the agency's response to the 2007 complaint is mirrored in its response to the current round of allegations. Yet, to date, no directive has been issued.

In both the 2007 (Blaine, WA) and 2013 (Situation Room) reports, 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 CBP and 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 an immediate, serious and sustained commitment to make necessary changes.

According to DHS officials, in response to OSC's initial findings, a department-wide review of AUO practices is ongoing. AUO has reportedly been suspended at DHS Headquarters and within USCIS. These are positive steps. But, it remains unclear whether CBP – where the problem is most pervasive – has taken similar steps to control abuse. I note that in the most recent report CBP committed "to determine which of the 158 positions within CBP should continue to be eligible for AUO and which should be decertified."

I am also pleased that Congress and this Committee in particular have shown an interest in helping CBP find ways to solve this problem, including through legislative reform.

In conclusion, I want to applaud Mr. Ducos-Bello and the courageous DHS whistleblowers who are speaking out, 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).

Senate Homeland Security and Governmental Affairs Committee
Subcommittee on Efficiency and Effectiveness of Federal Programs and the Federal Workforce
Hearing: Examining the Use and Abuse of Administratively Uncontrollable Overtime at the Department of Homeland Security

Testimony of

Catherine Emerson, Chief Human Capital Officer

Ron Vittiello, Deputy Chief, Border Patrol

January 28, 2014

Chairman Tester, Ranking Member Portman, 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. Some of our components' AUO practices stretch back many years. We are examining those practices because we are concerned by allegations that AUO has not always been employed appropriately under the law. Our leadership has directed interim measures to limit DHS's use of AUO where the available evidence suggests that its use is impermissible and where interim action can be quickly implemented. DHS is studying additional measures that may be warranted as our review continues. We will continue to keep this Subcommittee closely apprised.

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. Existing AUO authorities no longer meet the needs of a 21st century law enforcement environment.

The Department has been working to institute pay reform, including of 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.

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 pay parity 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 consistent policies. However, premium pay, or overtime, poses challenges to achieving uniformity. 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. In order to be eligible for AUO, an employee must be in a position in which the hours of duty cannot be controlled administratively and which requires substantial amounts of irregular or occasional overtime work, with the employee generally being responsible for recognizing, without supervision, the circumstances which require the employee to remain on duty. Currently, approximately 77% of AUO paid at DHS goes to employees of CBP. Once an employee is certified for AUO, AUO pay is the exclusive mechanism for irregular overtime performed 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's (OPM's) government-wide 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 a good steward of taxpayer dollars very seriously. Within DHS Components, allegations of misconduct that are raised by employees are typically provided to and addressed by Component internal affairs offices and/or the DHS Office of the

[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

Inspector General in conjunction with the Component's human resources office. If merited, employees found to have engaged in misconduct are subject to disciplinary action.

In disclosure cases, the Office of Special Counsel (OSC) evaluates whether there is a "substantial likelihood" that an employee has alleged a violation of law, rule, regulation, gross mismanagement or other similar conduct. Upon making a finding of "substantial likelihood," OSC refers the matter to the affected agency for investigation. Within DHS, OSC referral letters are forwarded to the Office of the General Counsel (OGC). OGC first checks with the DHS Office of Inspector General (OIG) to determine if OIG wishes to pursue an investigation or to defer the matter. Should OIG defer, the OGC subsequently forwards the disclosure or allegation to the investigative office or internal affairs division of the Component at which the allegations are based. Counsel at the involved Component liaises with the OSC during the pendency of the investigation. Going forward, the Office of the Chief Human Capital Officer (OCHCO) will also be provided a copy of the OSC referral letter, allowing OCHCO to identify significant issues and trends that require immediate attention even before investigations are complete.

Prior to OSC's most recent referral, CBP initiated a comprehensive review of all positions currently eligible to earn AUO. The purpose of this review is to document and validate previous eligibility determinations of more than 150 positions, and to identify those that no longer meet the requirements so that appropriate action may be taken. The Border Patrol has also issued official guidance on AUO to all Chief Patrol Agents and Division chiefs, most recently via a December 2012 memorandum.

In its referral letter, OSC suggested that a Department-wide review into the use of AUO be conducted. On October 31, 2013, then-Acting Secretary of Homeland Security Rand Beers directed OGC to conduct such a review. CBP, OCHCO, 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. In addition, OGC will refer all specific allegations regarding the misuse of AUO to OIG.

Prior to the conclusion of this review, however, the Department has taken, and will continue to take, interim steps to suspend the use of AUO in certain categories or areas in order to fully align with the regulatory requirements for the use of AUO. These interim measures do not prevent the Department from authorizing overtime work and payment under other overtime rules available to Department management and the workforce.

A number of internal investigations are being conducted in addition to the OGC and OIG reviews. This includes investigations into AUO use at CBP, ICE, and USCIS. Pending the conclusion of each investigation, DHS will consider appropriate remedial measures, including disciplinary action and AUO decertification.

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

Testimony of Brandon Judd

On Behalf of the

National Border Patrol Council

January 28th, 2014

Senator Tester and Ranking Member Portman, members of the Committee, on behalf of the 16,500 rank and file Border Patrol Agents whom I represent, 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. I have been a Border Patrol Agent for a little over 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 sector.

The Special Counsel's report confirmed what the line agents have known for a long time. When AUO was first instituted in the 1970s, there were fewer than 4,000 Border Patrol Agents. 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 their shift was over, the Agent could simply keep working. Because those hours were unscheduled, the extra hours worked were covered under AUO.

Today, the Border Patrol has over 21,000 agents. It is 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.

For example, 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. Those two hours have been traditionally covered under AUO, even though they are routine and foreseeable.

From my perspective, a reform of the Border Patrol pay system to address the problem is long overdue. What worked forty years ago doesn't work for today's operational needs and threats. Today, 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, and often extremely violent. They also have extensive intelligence and surveillance networks. 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.

The real question is where do we go from here? How do we reform the AUO system while ensuring manpower on the border? Last week, Chairman Tester and Senator McCain introduced legislation, Senate Bill 1691, to reform AUO and there is companion legislation in the House introduced by Congressman Chaffetz. On this point I want to be clear – Border Patrol Agents completely support this legislation. It is long overdue.

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. The more manpower we have, the better equipped we are at handling criminal cartels, aliens, and anyone who wants to do us harm. This bill provides the equivalent of 20 percent more manpower, or 5,000 trained agents at the border. The legislation gives us the capacity we need to do our job.

I would also 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.

We heard last week from Deputy Chief Vitiello of the Office of Border Patrol that the proposed legislation gives the Agency the flexibility to schedule agents where and when needed. In addition, the reform saves money when compared to the current operating model. We also heard from the Special Counsel last week about how the current AUO system has been abused for financial gain at taxpayers' expense since at least 2008. During the QA session, we heard from DHS' Chief Human Resource Officer that no immediate solution is possible absent legislation. Again, let me be clear – we see no sound reason why any agency or department would not support a bill that will curb abuse, allow for scheduling flexibility, and save taxpayers' money. I testified two weeks ago that this bill gives the Agency and our country more security and safety at our nation's borders while saving over $1 billion in the next ten years. That remains true today. We welcome any support and collaboration from Department of Homeland Security, Customs and Border Protection and the Office of Border Patrol.

In conclusion, I want to thank the Committee for the opportunity to testify in front of you. I want to leave you with the firm notion that the 16,500 Border Patrol agents support Senate Bill 1691 and its House companion. The Border Patrol is overdue a system that fits current threats and operational needs that is also cost effective and ensures manpower and agent safety.

Post-Hearing Questions for the Record
Sen. Tom A. Coburn

Carolyn Lerner, Special Counsel
U.S. Office of Special Counsel

Examining the use and abuse of Administratively Uncontrollable Overtime at the Department of Homeland Security
Subcommittee on the Efficiency and Effectiveness of the Federal Workforce
January 28, 2014

The U.S. Office of Special Counsel (OSC) October 2013 Administratively Uncontrollable Overtime (AUO) report:

1) The OSC investigated six Department of Homeland Security (DHS) offices and found nearly $9 million of fraudulent AUO claims:

   a. Would the OSC describe their report of AUO fraud as an isolated occurrence or a problem that permeates throughout DHS?

      The cases described in OSC's report are not isolated. In my October 31, 2013, letter to the President, I outlined allegations of AUO abuse at six separate DHS offices. These cases included disclosures from employees at several DHS components, including Customs and Border Protection (CBP), U.S. Citizenship and Immigration Services (USCIS) and Immigration and Customs Enforcement (ICE). In addition, as public and congressional scrutiny of AUO misuse grew in response to our October letter, more whistleblowers stepped forward to report concerns. Since the fall, OSC referred six additional AUO abuse cases to DHS for further investigation, bringing the total to 12 separate offices, and raising further concerns about the broad scope of AUO misuse, especially within CBP.

      The cost of abuse at these 12 offices, which includes CBP headquarters, is estimated to be in the tens of millions of dollars annually.

   b. The OSC reported that some DHS managers "authorize and abet" the fraudulent use of AUO. At this time, does the OSC know if these DHS mangers have been held accountable for their actions?

      OSC is not aware if any managers have been held accountable for confirmed misuse of AUO. OSC requested and is awaiting additional information from DHS concerning any efforts to discipline managers within the CBP Office of Training and Development for failing to respond to disclosures of AUO abuse made directly to them.

   c. Does the OSC have confidence that DHS will hold accountable all DHS employees who are found to have abused AUO?

      Over the course of several decades, many thousands of DHS employees misused AUO. Accordingly, it is not likely that all DHS employees

who abused AUO will be held accountable through disciplinary proceedings.

As discussed above, OSC is seeking additional information about disciplinary action against certain managers that received disclosures about AUO misuse and did not act. In addition, the DHS Office of Inspector General is investigating discrete allegations of AUO abuse at an ICE facility that may result in disciplinary actions.

d. Is DHS taking appropriate and timely actions to combat and root out this AUO fraud?

In response to OSC's initial findings, DHS announced a department-wide review of AUO practices. This review is ongoing. In addition, AUO reportedly has been suspended at DHS Headquarters and within USCIS. At CBP, the agency stated it will "determine which of the 158 positions within CBP should continue to be eligible for AUO and which should be decertified." At the January 28 hearing, DHS also announced that approximately 900 positions were no longer eligible to receive AUO. If these positions are permanently decertified, that would translate into a savings of up to $18 million annually.

These are long-overdue, but important steps. DHS should complete its departmental-level review without delay, make these preliminary steps permanent, and issue department-wide rules to end abuse of AUO.

2) The OSC's AUO findings were due to whistleblowers within DHS:

a. Please describe the actions taken by the OSC to protect these whistleblowers.

OSC is currently investigating allegations of reprisal by five DHS whistleblowers who disclosed evidence of AUO abuse. OSC negotiated a stay of a pending personnel action in one case, is engaged in settlement discussions with DHS in a second case, and three cases are in a preliminary review stage. OSC will keep the Committee updated on the status of these pending claims.

b. Is the OSC concerned of potential whistleblower retaliation? If so, what actions can the OSC take to ensure retaliation does not occur?

OSC provides a safe channel for federal workers to disclose evidence of waste, fraud, abuse, or other misconduct. It is critical that any employee who exercises their right to contact OSC not face retaliation or threats of retaliation. As stated, OSC is actively investigating five allegations of prohibited personnel practices, and has negotiated a stay of a pending personnel action in one case. If OSC finds evidence of retaliation, OSC can seek corrective and/or disciplinary action from DHS or the Merit Systems Protection Board.

c. Please describe why these whistleblowers came to the OSC and not to the DHS Office of Inspector General?

At least two of the whistleblowers who came to OSC first contacted the DHS

Office of Inspector General. All of the individuals who reported violations to OSC first reported their concerns internally.

d. The OSC submitted the report to the president in October 2013. Has the Obama Administration responded to the report?

The White House did not respond to OSC, and typically does not in these cases. Communications with OSC are largely handled by the agency involved.

e. What action(s) should DHS take to ensure whistleblowers' rights are protected?

DHS should consider instructing its components to complete OSC's whistleblower certification program under 5 U.S.C. § 2302(c). Section 2302(c) requires agency heads to ensure, in consultation with the Office of Special Counsel, that employees are informed of the rights and remedies available to them under the Whistleblower Protection Act. Under the 2302(c) Certification Program, OSC will certify an agency's compliance with 5 U.S.C. §2302(c) if the agency meets the following five requirements:

1. Placing informational posters at agency facilities;

2. Providing information to new employees about the Whistleblower Protection Act (WPA) [including the 13 prohibited personnel practices] and the Whistleblower Protection Enhancement Act (WPEA) as part of the orientation process;

3. Providing information to current employees about the WPA/WPEA;

4. Training supervisors on the WPA/WPEA; and

5. Displaying a link to OSC's website on the agency's website or intranet.

Post-Hearing Questions for the Record
Sen. Tom A. Coburn

Ronald Vitiello, Deputy Chief, U.S. Border Patrol
U.S. Department of Homeland Security

Examining the use and abuse of Administratively Uncontrollable Overtime at the Department of Homeland Security
Subcommittee on the Efficiency and Effectiveness of the Federal Workforce
January 28, 2014

The abuse of Administratively Uncontrollable Overtime (AUO) at the Department of Homeland Security (DHS):

1) Since 2010, according to DHS, around $1.9 billion of AUO has been claimed by DHS personnel. This includes roughly:

   - $1.5 billion at U.S. Customs and Border Protection (CBP);
   - $407 million at U.S. Immigration and Customs Enforcement (ICE); and
   - $26 million at U.S. Secret Service (USSS).

   a. Since 2010, provide the total number of AUO hours claimed by CBP personnel.

2) The OSC investigated six Department of Homeland Security (DHS) offices and found nearly $9 million of fraudulent AUO claims:

   a. When did senior members of the U.S. Border Patrol become aware of potential AUO abuse?

      Response: The U.S. Border Patrol (USBP) was made aware of potential AUO abuse in the findings of the 2008 Office of Special Counsel. At the time, the leadership of the Office of the Border Patrol did not interpret the problems identified in that report as misconduct. USBP has worked to reemphasize Administratively Uncontrollable Overtime (AUO) procedures. A December 10th, 2012 memorandum from Chief Michael Fisher to the field, directed Border Patrol managers to ensure that work claimed and recorded is done so in compliance with the Office of Personnel Management guidance and the current AUO administrative manual. See memo attached below.

   b. What action(s) did the U.S. Border Patrol take to curb these AUO abuse?

      Response: USBP has provided training to affected parties; provided overtime guidance as it relates to the management, administration, and proper use of AUO; mandated all AUO claims be appropriately documented and claimed in quarter-hour increments; and is currently identifying new documentation and certification protocols in addition to conducting internal audits supported by independent third-party reviews of the Agency's AUO use. USBP has also worked with internal and external investigative bodies and taken corrective action where allegations of

misconduct were substantiated. Since 2008, USBP has taken disciplinary action in 12 cases and issued 7 formal letters of counseling in response to allegations of misconduct related to AUO. All cases resulting in disciplinary action involved circumstances where the employees were found to have failed to follow agency procedures concerning the documentation of AUO. In these cases, 8 non-supervisory employees received a written reprimand and 4 supervisors were charged with failing to enforce agency procedures and received suspensions.

Since July 2013, USBP has been participating in the agency-wide review of AUO-eligible positions led by CBP's Office of Human Resources Management. The purpose of this initiative is to ensure that all U.S. Customs and Border Protection (CBP) positions are accurately certified for AUO. Additionally, following Secretary Johnson's order in January 2014 to immediately suspend AUO payments for certain categories of positions and locations with the Department, CBP decertified AUO for 587 employees. These employees included Border Patrol Agents assigned as Training Instructors and those assigned to USBP headquarters.

Likewise, the issue of AUO and how we compensate our employees for the work they perform is something that needs immediate attention and swift resolution. Today, there is a substantial amount of irregular work required in securing America's borders and USBP will continue to use AUO and other applicable and appropriate overtime mechanisms to remain adaptable and dynamic in accomplishing that mission.

It is apparent in light of these investigative findings that we, as an organization, need to adopt a new framework for documenting AUO claims in addition to instituting new management controls for its certification. The work being performed by the men and women of the USBP that extends them past their regularly scheduled shift was and continues to be necessary. Moving forward, USBP will conduct quarterly audits to ensure that all claims comply with laws and regulations pertaining to the management, administration, and proper use of AUO. In addition, the Office of Internal Affairs (IA) will conduct reviews of AUO hours claimed by USBP personnel to independently verify the overtime hours claimed are properly documented. The IA reviews will be completed in an expeditious manner to ensure compliance with all applicable regulations governing AUO.

c. As the Deputy Chief of the U.S. Border Patrol, do you see this AUO issue as one that must be corrected? If so, what will your office do to hold managers accountable to report proper AUO hours?

Response: Emphatically, yes. As noted above, USBP has taken disciplinary action against when allegations of misconduct were substantiated. Specifically, 4 supervisors were charged with failing to enforce agency procedures and received suspensions. USBP will take further disciplinary actions whenever a manager is found to have engaged in misconduct. AUO was created and implemented in 1974 when the Border Patrol was a significantly smaller organization with drastically fewer non-personnel resources available to conduct surveillance and support agents.

d. According to DHS, since 2010, the average AUO amount per DHS employee was around $16,000 per year. Is this number accurate for employees at the U.S. Border Patrol?

Response: As indicated in the below chart, the 4-year average is approximately $16,000 for USBP, though the average amount of AUO for Border Patrol agents has been steadily increasing since 2010 due to grade maturation. Grade maturation in the Border Patrol agent population is due to a number of causes. In August 2010, the journeyman career ladder target for Border Patrol agents was increased from GS-11 to GS-12. USBP also increased the Border Patrol population throughout FY 2010, and has been experiencing declining attrition. Border Patrol agent attrition rates have decreased from 4.7% in FY 2010 to 3.0% in FY 2013. The average grade and step for Border Patrol agents has been increasing since FY 2010, and is projected to continue rising as the workforce matures.

	FY 2010	FY 2011	FY 2012	FY 2013
Total S2B AUO ($000s)	290,605	324,980	360,523	365,189
Total S2B Counts	20,760	21,665	22,752	21,305
Average AUO	$13,998	$15,000	$15,846	$17,141
Rounded Average AUO	$14,000	$15,000	$16,000	$17,000

Post-Hearing Questions for the Record Sen. Tom A. Coburn

Catherine Emerson, Chief Human Capital Officer U.S. Department of Homeland Security

Examining the use and abuse of Administratively Uncontrollable Overtime at the Department of Homeland Security Subcommittee on the Efficiency and Effectiveness of the Federal Workforce January 28, 2014

The abuse of Administratively Uncontrollable Overtime (AUO) at the Department of Homeland Security (DHS):

1) Since 2010, according to DHS, around $1.9 billion of AUO has been claimed by DHS personnel. This includes roughly:

   - $1.5 billion at U.S. Customs and Border Protection (CBP);
   - $407 million at U.S. Immigration and Customs Enforcement (ICE); and
   - $26 million at U.S. Secret Service (USSS).

   a. Since 2010, provide the total number of AUO hours claimed by DHS personnel. Please breakdown by DHS component.

   Response: Below is a breakdown of AUO hours claimed by DHS personnel, broken down by component:

Number of AUO Work Hours Claimed

	2010	2011	2012
CBP	8,753,940	8,968,362	9,307,151
DMO	7,836	8,417	7,043
ICE	2,764,425	2,657,182	2,688,911
NPPD	78,990	95,260	95,802
OIG	-	120	1,320
USCIS	9,371	9,828	9,797
USSS	152,684	156,593	163,056
TOTAL	**3,013,306**	**2,927,400**	**2,965,929**

2) Accountability and AUO abuse since 2008:

a. The U.S. Office of Special Counsel's (OSC) October 2013 report accused, in certain instances, DHS managers of aiding and abetting AUO fraud. What actions will DHS take to hold these DHS managers accountable?

Response: On October 31, 2013, Special Counsel Carolyn Lerner sent a letter to then Acting DHS Secretary Rand Beers. The letter was related to the April 17, 2013, report completed by U.S. Customs and Border Protection (CBP), Internal Affairs (IA) as a result of its investigation into OSC Disclosure matter DI-13-0002. This matter involved allegations of AUO abuse at CBP in the Commissioner's Situation Room (CSR). Pursuant to OSC's statutory requirements, Ms. Lerner also sent a letter, with a copy of the report completed by CBP, to the President. The investigation completed by CBP concluded that both the CSR Director and Assistant Director aided and abetted the improper use of AUO. The matter is presently being reviewed to determine what level of corrective action is necessary.

b. It appears that DHS managers allow personnel to willfully ignore AUO regulations, why does DHS not hold mangers accountable for not following AUO regulations?

Response: DHS does not tolerate willful misapplication of the AUO laws, regulations, or policies. As stated above, CBP is reviewing the matter concerning the CSR to determine what corrective action is necessary. As a result of the Secretary's January 27, 2014 memo setting forth DHS-wide interim measures related to AUO use, AUO has been suspended for the CSR employees.

c. What actions will DHS take to hold accountable DHS personnel that abused AUO? Will DHS seek to reclaim fraudulent AUO claims? If not, why not?

Response: The findings of the AUO disclosure investigations will be referred through the appropriate disciplinary channels, and employees who are found to abuse AUO will be held accountable. At this time, DHS has not made a decision with regard to reclaiming any AUO payments made to individual employees.

d. Does DHS believe this AUO abuse might be more prevalent than just a couple of offices cited in the OSC report?

Response: Reviews of AUO use at the Department are on-going by the DHS Office of the General Counsel (OGC) and the Office of the Inspector General (OIG).

e. At this time, does DHS have an idea of how large this AUO fraud is?

According to the OSC, DHS had been aware of certain AUO abuse claims since 2008, yet very little action has been taken and a "culture" of abuse hangs over DHS. Besides the recent announcements by the DHS Secretary to address this issue what actions will DHS take to correct this abuse?

Response: The DHS-wide review of AUO practices is pending.

f. Regarding the OSC's findings at the Customs and Border Protection (CBP) Commissioner's Situation Room, what actions is DHS taking to hold these individuals accountable?

Response: The CBP IA investigation into allegations of AUO abuse in the CSR was formally closed by CBP IA in April 2013. The results of the investigation were forwarded to the CBP Office of Human Resources Management, Labor and Employee Relations Directorate (LER). The case is being reviewed to determine what level of corrective action is necessary. As a result of the Secretary's January 27, 2014, memo setting forth DHS-wide interim measures related to AUO use, AUO has been suspended for the CSR employees.

3) Allegations of AUO abuse and the treatment of DHS whistleblowers:

a. Provide the amount of allegations of AUO abuse received by the DHS Office of Internal Affairs for the past two years.

Response: In the past two years, DHS has received 13 allegations of AUO abuse from the Office of Special Counsel (OSC). They are as follows:

1. DI-12-1105: Alleged AUO abuse at the U.S. Customs and Border Protection (CBP), Office of the Border Patrol (OBP), North Laredo, Texas. The OSC referral letter was sent on August 4, 2012. CBP, Internal Affairs (IA) completed its investigation and submitted a report to OSC in December 2012. OSC requested a supplemental investigation and report, which CBP IA sent to OSC in January 2014.
2. DI-13-0002: Alleged AUO abuse at CBP in the Commissioner's Situation Room. The OSC referral was sent on January 2, 2013. CBP IA completed its investigation and submitted a report to OSC in April 2013. This matter remains open.
3. DI-13-1556: Alleged AUO abuse at the Immigration and Customs Enforcement (ICE) Houston Field Office. The OSC referral letter was sent on May 10, 2013. ICE, Office of Professional Responsibility (OPR) completed its investigation and submitted its

report to OSC in September 2013. OSC requested a supplemental investigation and report, and ICE OPR sent the report to OSC in January 2014. This matter remains open.

4. DI-13-2853 & DI-13-3516: Companion cases of alleged AUO abuse in the CBP San Ysidro Asset Forfeiture Office. The OSC referral letter was sent on July 29, 2013. CBP IA conducted the investigation. CBP's Acting Commissioner Thomas S. Winkowski submitted the report to OSC on January 23, 2014. This matter remains open.
5. DI-13-4124: Alleged AUO abuse in the CBP Office of Training and Development, Field Operations Academy, Glynco, Georgia. The OSC referral letter was sent on September 17, 2013. CBP IA conducted the investigation. Acting Commissioner Winkowski submitted the report to OSC on January 23, 2014. This matter remains open.
6. DI-13-3418: Alleged AUO abuse at U.S. Citizenship Immigration Services (USCIS), Office of Security and Integrity. The OSC referral letter was sent November 4, 2013. The DHS Office of the Inspector General is currently investigating the matter. The Department's report was due to OSC on June 16, 2014.
7. DI-14-0539: Alleged AUO abuse at CBP OBP El Centro Sector Headquarters. The OSC referral letter was sent on December 9, 2013. The DHS Office of the Inspector General is currently investigating the matter. The Department's report was due to OSC on June 16, 2014.
8. DI-14-0666: Alleged AUO abuse at CBP, Internal Affairs. The OSC referral letter was sent on December 13, 2013. The DHS Office of the Inspector General is currently investigating the matter. The Department's report was due to OSC on June 16, 2014.
9. DI-14-0631: Alleged AUO abuse at CBP OBP El Paso Sector, Ysleta Station. The OSC referral letter was sent on December 19, 2013. The DHS Office of the Inspector General is currently investigating the matter. The Department's report was due to OSC on June 16, 2014.
10. DI-14-0581: Alleged AUO abuse at CBP National Targeting Centers in Herndon, Virginia and Reston, Virginia. The OSC referral letter was sent on December 20, 2013. The DHS Office of the Inspector General is currently investigating the matter. The Department's report was due to OSC on June 16, 2014.
11. DI-14-1093: Alleged AUO abuse at CBP, OBP Headquarters. The OSC referral letter was sent on January 24, 2014. The DHS Office of the Inspector General is currently investigating the matter. The Department's report was due to OSC on June 16, 2014.
12. DI-14-1100: Alleged AUO abuse at ICE Enforcement and Removal Operations (ERO) in Chattanooga, Tennessee. The OSC referral letter was sent on January 24, 2014. The DHS Office of the Inspector General is currently investigating the matter. The Department's report was due to OSC on March 27, 2014.
13. DI-14-0416: Alleged AUO abuse at ICE ERO in Salem, Virginia. The OSC referral letter was sent on February 21, 2014. The DHS Office of the Inspector General has accepted this matter for investigation. The Department's report was due to OSC on April 23, 2014.

b. Does DHS share these allegations with the Office of Inspector General?

Response: The OIG has visibility on all of these allegations and is currently investigating several of them. The OSC disclosure referral letters are typically sent

by
the OSC to the Secretary via U.S. Mail. In the past, OSC provided a courtesy copy
of
the referral letter to the DHS Office of the Inspector General (OIG). For example,
OSC
sent a copy of the referral letter for DI-12-1105 described above to the OIG. OSC
now
sends a copy of all referral letters to OGC and OGC notifies OIG of each letter.

c. At this time, is DHS aware of any retaliation against DHS personnel who brought allegations of AUO abuse to either the Office of Internal Affairs, Office of the Inspector General, the OSC, or Congress?
Response: Since the beginning of fiscal year (FY) 2012 to present, DHS OIG is aware of the following instance of *alleged* retaliation against one DHS employee who brought forward allegations of AUO abuse at CBP: subsequent to his complaint to OSC, a CBP employee submitted a complaint to OIG in which the CBP employee alleged that he suffered reprisal for reporting AUO abuses at the Border Patrol. OIG referred his complaint to CBP Internal Affairs (IA). CBP IA is presently investigating the allegations.

After OIG recently formed its AUO Task Force to address the eight OSC disclosure matters currently being investigated by OIG, OSC asked the OIG not to pursue any allegations of retaliation that employees may raise with the OIG Task Force, but rather to refer any such employees to OSC instead.

CBP IA is aware of one additional *allegation* of whistleblower retaliation made by a CBP employee who brought allegations of AUO abuse to OSC. This allegation is currently under investigation by the OSC.

d. Explain what actions DHS is taking to ensure that whistleblowers' rights are protected.

Response: Following the Secretary's January 27, 2014, Memorandum setting forth Interim Measures for AUO use, each of the Component Heads with employees who receive AUO sent a message to their respective employees informing them of the Secretary's decision to temporarily suspend AUO for certain categories of employees. Component Heads reminded employees that retaliation against employees for reporting perceived violations of the law, including those related to AUO, is prohibited. In addition, the OIG's website contains a link to Whistleblower Resources that includes information about how to file a whistleblower complaint with both the OIG and the

Post-Hearing Questions for the Record
Submitted to Ms. Catherine Emerson
From Senator Rob Portman

"Examining the Use and Abuse of Administratively Uncontrollable Overtime at the Department of Homeland Security"
January 28, 2014

1. Representatives from CBP have informed our subcommittee that 84 cases of AUO abuse were reported in 2012 and 2013. As of December 2013, of the 84 cases, 43 were still being reviewed, 33 were closed with no action or no findings, 1 was pending with the DHS Inspector General, and a total of 7 of the 84 cases investigators substantiated the allegations of AUO abuse. It is my understanding that those 7 employees were only given oral or written counseling as disciplinary action. Are these numbers still accurate or have there been more cases reported or additional cases adjudicated?

   Response: Please allow us to clarify the record. The information previously provided by U.S. Customs and Border Protection (CBP) representatives was accurate when it was provided in December 2013. The total number of cases reported was limited to those where internal investigators had completed and submitted an investigative report and/or referred to agency management for consideration as to whether corrective action was needed. It did not include cases that were pending completion of an investigative report by internal investigators. The information provided was based on information that was available as of November 30, 2013. Since then, additional investigative reports have been completed, and agency managers have continued to adjudicate cases.

   As of February 20, 2014, a total of 92 cases involving an allegation of Administratively Uncontrollable Overtime (AUO) abuse or misuse were reported in fiscal years 2012 and 2013. Of that total, 40 cases contained allegations that were unsubstantiated and therefore closed with no action; 33 remain open and are under review; 12 resulted in formal discipline (four suspensions and eight written reprimands); and seven resulted in a formal letter of counseling.

2. What were the offenses in the 7 cases in which disciplinary action was taken?

   Response: As noted above, formal disciplinary action was taken in 12 cases. All 12 cases involved a single set of circumstances where the employees were found to have failed to follow agency procedures concerning the documentation of AUO. Of the 12, eight were non-supervisory employees, and they each received a written reprimand. The remaining four were supervisors, and they were each charged with failing to enforce agency procedures and received suspensions.

3. Were these employees inappropriately directed to use AUO by their management or were they found to being logging these hours when either not doing work or not being present as we've heard in some of these allegations?

   Response: The investigations completed thus far have not uncovered evidence indicating that agency supervisors or managers directed the employees to inappropriately claim Administratively

Uncontrollable Overtime (AUO). The evidence did support more severe discipline for the supervisors based on their failure to enforce agency policy. All four supervisors received suspensions as a result of their respective failures.

The investigation found that the employees failed to follow agency procedures concerning the documentation of AUO. It did not include evidence to demonstrate that the employees received pay for work not performed.

4. If these were cases of fraud, can you please provide an explanation as to why these individuals' employment was not terminated?

Response: One of the elements that must be met (by a preponderance of evidence) to sustain charging an employee with fraud is that the employee knowingly supplied incorrect information and with the intention to deceive. While the employees failed to follow agency procedures concerning the documentation of AUO, there was not sufficient evidence demonstrating the employees' intent to deceive. As a result, the agency could not sustain charging the employees with fraud. All 12 employees were charged with failing to follow agency procedures. Four of the 12 were supervisors, and these four were charged with failing to enforce agency procedures.

5. Have any action been taken against managers who knew about or condoned these fraudulent timecards?

Response: Evidence gathered during the investigation did not support charging the employees with fraud. The supervisors involved were disciplined as they failed to enforce agency procedures.

6. What were the reasons that led to the 33 cases being closed without action?

Response: As of February 20, 2014, a total of 40 cases have been closed with no action. In these cases, evidence gathered during the respective investigations did not substantiate the allegation of Administratively Uncontrollable Overtime abuse or misuse.

7. What is the status of the 43 cases pending as of December 2013 and who is conducting the investigation into these cases?

Response: As of February 20, 2014, a total of 33 cases remain open and are under review. These cases are either in the fact-finding stage, or have been referred to agency management for review and consideration regarding what corrective action is needed, if any. For those cases in the fact-finding stage, the investigations are being conducted by internal agency investigators.

8. In the past 24 months, has the employment of any individual in DHS been terminated due to violations of timecard policies?

Response: 42 employees have been terminated due to violations of timecard policies.

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