

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

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5 TUESDAY, JANUARY 28, 2014

6 United States Senate,
7 Subcommittee on the Efficiency and Effectiveness of
8 Federal Programs and the Federal Workforce,
9 Committee on Homeland Security and Governmental Affairs,
10 Washington, D.C.

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

14 Present: Senators Tester and Portman.

15 OPENING STATEMENT OF SENATOR TESTER

16 Senator Tester. I will call to order this hearing of
17 the Subcommittee on Efficiency and Effectiveness of Federal
18 Programs and the Federal Workforce.

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

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

1 to work with.

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

12 However, the OSC's report showed that employees from
13 multiple DHS agencies regularly misuse AUO. For example,
14 employees working in purely administrative functions in the
15 commissioner situation or an office within CBP claim to have
16 worked two hours of AUO following their assigned shift
17 approximately 90 percent of the time. Investigators found
18 that these hours were not a result of unpredictable or
19 compelling law enforcement activities. Instead, they were
20 spent performing administrative functions, and in some
21 cases, watching TV or surfing the Internet.

22 What is most disturbing is that this is not the first
23 time we have heard about AUO abuses at DHS. The OSC
24 released a very similar report regarding Border Patrol
25 officers in Washington State in 2008. When this last report

1 came out five years ago, DHS and CBP promised reforms, but
2 we have not gotten very far.

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

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

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

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

21 OPENING STATEMENT OF SENATOR PORTMAN

22 Senator Portman. Great. Thank you, Mr. Chairman.

23 I appreciate the witnesses being here and I join the
24 Chairman in saying we appreciate your hard work to try to
25 get at this abuse. More importantly, I appreciate the

1 service that Department of Homeland Security employees
2 perform every day, including dangerous activities on our
3 border and around the world. We are here today to talk
4 about an instance where the taxpayer is not being served,
5 and this is this abuse of AUO, administratively
6 uncontrollable overtime.

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

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

1 Improper claims of AUO have reportedly cost taxpayers
2 up to \$9 million annually at 68 DHS offices identified by
3 whistleblowers. While the total amount and cost of annual
4 AUO abuse throughout the Department is unknown, maybe we
5 will get more of those numbers today from you.

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

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

25 Today, we will try to get to the bottom of this. I

1 thank, again, the folks here today with us and others that
2 are on a path to correct this issue and fix this condoning
3 of this practice, and Mr. Chairman, I look forward to
4 hearing from our witnesses today.

5 Senator Tester. Well, thank you, Senator Portman.

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

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

18 Ron Vitiello is the Deputy Chief of U.S. Customs and
19 Border Protection. In this role, he serves as Chief
20 Operating Officer for the Border Patrol and is responsible
21 for daily operations. It is good to see you again, Chief.

22 Catherine Emerson is the Chief Human Capital Officer at
23 DHS. She is responsible for recruiting, diversity, and
24 inclusion, learning and development, workforce planning,
25 policies, and technologies in support of the DHS mission.

1 You have got a full plate. Thank you for being here today,
2 Catherine.

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

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

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

17 Ms. Lerner. I do.

18 Mr. Vitiello. I do.

19 Ms. Emerson. I do.

20 Mr. Judd. I do.

21 Senator Tester. Let the record show that the witnesses
22 all answered in the affirmative.

23 It goes without saying, your written testimony will be
24 entered in its totality in the record. I would ask you to
25 keep your oral statements to around five minutes, the closer

1 the better, and the record will be open for 15 days
2 following this hearing.

3 So, Ms. Lerner, I will let you kick off the testimony.

4 Go ahead, Carolyn.

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

3 Ms. Lerner. Thank you very much, Chairman Tester,
4 Ranking Member Portman, members of the Committee. Thank you
5 for inviting me to testify today about overtime abuse at the
6 Department of Homeland Security.

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

13 I want to just start by very briefly explaining the
14 Office of Special Counsel's role in disclosure matters. OSC
15 provides a safe channel for Federal employees to disclose
16 Government wrongdoing. We evaluate disclosures using a
17 substantial likelihood standard. If the standard is met, I
18 refer the allegations to the head of the appropriate agency,
19 who, in turn, is required to conduct an investigation and
20 submit a report to my office. After reviewing the agency's
21 report, I make two determinations, first, whether the report
22 contains the information required by statute, and second,
23 whether the findings of the agency appear reasonable. My
24 office then transmits the report with an analysis and
25 recommendation to the President and the appropriate

1 oversight Committees.

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

14 By regulation, this type of overtime may only be used
15 when an employee's hours cannot be scheduled in advance due
16 to a substantial amount of irregular and unpredictable work
17 or a compelling law enforcement purpose. For example, AUO
18 is appropriate when an employee is apprehending a suspected
19 criminal along the border and it would constitute negligence
20 for the employee to leave the job unfinished.

21 Each of the employees in the DHS cases here are not
22 using AUO as the result of an unpredictable or a compelling
23 law enforcement need. Instead, AUO is used routinely,
24 nearly every day, and is an entrenched part of the culture
25 at CBP and other parts of DHS. In some cases, the

1 allegations extend to extreme misconduct. According to the
2 whistleblowers, many employees spend the extra overtime not
3 working at all. They relax, surf the Internet, and
4 sometimes they are not even present at the workplace.

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

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

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

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

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

25 This morning, for the first time, DHS lawyers told my

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

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

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

13 [The prepared statement of Ms. Lerner follows:]

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

4 Ron, we look forward to your testimony.

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

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

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

17 While much of CBP's critical efforts are performed at
18 official ports of entry and at the land and maritime borders
19 in between, advancements in technology are increasingly
20 enabling aspects of front-line law enforcement activities,
21 such as gathering intelligence and surveillance and
22 detection, to be accomplished remotely. The
23 responsibilities of a Border Patrol agent are arguably the
24 most unpredictable of all the CBP law enforcement positions.

25 While the function of the Border Patrol has changed and

1 expanded dramatically since its inception 89 years ago, its
2 primary mission remains unchanged. The Border Patrol
3 protects our Nation by reducing the likelihood that
4 dangerous people and capabilities enter the United States
5 between the ports of entry. This effort is accomplished by
6 maintaining surveillance, following up leads, responding to
7 electronic sensor alarms and aircraft sightings, and
8 interpreting and following tracks. We also maintain traffic
9 checkpoints along highways leading away from the border,
10 conduct city patrols, transportation checks, and support
11 anti-smuggling investigations. Regularly working in
12 isolated harsh terrain, agents of the Border Patrol patrol
13 on foot, in vehicles, in boats, and in some areas on horses,
14 all-terrain vehicles, bikes, and snowmobiles.

15 The frontline border security efforts are increasingly
16 augmented by advancements in technology, including enhanced
17 sensor, video, and radar technology. The technology is
18 sometimes affixed to unmanned aircraft systems and increases
19 the Border Patrol's capabilities in the land, air, and
20 maritime domains between the ports of entry. The vast
21 amounts of information gathered from this technology
22 requires review and analysis and rapid interpretation into
23 actionable information for use by agents on the ground.

24 The work of a Border Patrol agent is, by its very
25 nature, dynamic and unpredictable. In the course of any

1 given day, agents are continually presented with new
2 conditions and new situations. This type of work requires
3 agents, both patrolling on the ground, processing
4 intelligence at remote locations, following leads, and to go
5 where the illegal activity takes them, even if it takes them
6 beyond their standard duty hour.

7 When it comes to paying Border Patrol agents for work
8 beyond their regularly scheduled hours, the Department and
9 CBP are committed to working with Congress to modernize and
10 streamline the compensation structure to reflect the
11 expanded responsibilities of our workforce. AUO, a system
12 established almost 50 years ago, no longer meets the needs
13 of a 21st century law enforcement environment, where
14 increasing amounts of surveillance, intelligence, and border
15 security activities are conducted remotely. The work of
16 securing the border is no longer limited to physical
17 presence and our compensation system should reflect the
18 current operational environment.

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

24 Prior to the issuance of the Special Counsel's report,
25 CBP did initiate internal working groups on AUO to review

1 current practices and update internal policies, where
2 applicable, to reflect the roles and responsibilities of the
3 positions earning AUO. The Border Patrol also regularly
4 issues official guidance on AUO to Chief Patrol Agents and
5 Division Chiefs, most recently in December of 2012.

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

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

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

25 [The prepared statement of Mr. Vitiello follows:]

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

3 Catherine Emerson, you are up.

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

4 Ms. Emerson. Chairman Tester, Ranking Member Portman,
5 members of the Subcommittee, thank you for the opportunity
6 to appear before you today to address the Department of
7 Homeland Security's use of administratively uncontrollable
8 overtime, AUO.

9 I serve as the first career Chief Human Capital Officer
10 of the Department of Homeland Security and am responsible
11 for the Department's human capital program, which includes
12 workforce planning, policies, and technology in support of
13 the DHS mission. I assumed the CHCO position in August of
14 2011. Additionally, I advise the Under Secretary for
15 Management and the Secretary and the Deputy Secretary on
16 workforce issues, and I greatly appreciate their the
17 leadership of our employees in the issues that affect them.

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

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

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

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

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

1 as a result.

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

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

23 I have taken several additional actions as a result of
24 the OSC disclosures. Based on my concerns, all future OSC
25 complaints related to workforce issues will be provided to

1 my staff, which should improve coordination and better
2 enable us to identify trends that may be emerging.

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

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

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

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

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

1 Senator Tester. Thank you, Catherine. We appreciate
2 you being here today.

3 Brandon Judd, your testimony.

1 TESTIMONY OF BRANDON JUDD, PRESIDENT, NATIONAL
2 BORDER PATROL COUNCIL

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

8 Senator Tester. Truly God's country. Go ahead.

9 Mr. Judd. Chairman Tester and Ranking Member Portman,
10 on behalf of the 16,500 rank-and-file Border Patrol agents
11 whom I represent, I would like to thank you for having this
12 hearing to explore reforming the administratively
13 uncontrollable overtime system.

14 The Special Counsel's report confirmed what the line
15 agents have known for a long time. When AUO was first
16 introduced in the 1970s, there were fewer than 4,000 Border
17 Patrol agents. Most agents worked alone or in small groups
18 with little or no supervision. AUO made sense 40 years ago,
19 because if an agent was tracking smugglers or illegal aliens
20 after their shift was over, the agent could simply keep
21 working. Because those hours were unscheduled, the extra
22 hours were covered under AUO.

23 Today, the Border Patrol has over 21,000 agents. It is
24 a 24-hour-a-day operation, and in order to maximize manpower
25 in the field, the Border Patrol utilizes a three-shift

1 rotation with each shift lasting eight hours. The challenge
2 is how to handle shift changes, because it is common for an
3 agent's patrol area to be over an hour away from the Border
4 Patrol station.

5 For example, an agent's shift may be done, but the
6 oncoming relief is still an hour away. After a handover
7 with an oncoming agent, the off-going agent still has to
8 drive an hour back to the Border Patrol station to turn in
9 all equipment. So, while a shift may be eight hours, the
10 agent has to work an extra two hours per day to ensure
11 border integrity. Those two hours have been traditionally
12 covered under AUO, even though they are routine and
13 foreseeable.

14 From my perspective, a reform of the Border Patrol pay
15 system to address the problem is long overdue. What worked
16 40 years ago does not work for today's operational needs and
17 threats. Today, gone are the mom-and-pop smuggling
18 organizations, replaced by multinational cartels that
19 smuggle both drugs and illegal aliens into our country.
20 These cartels are well organized, well funded, heavily
21 armed, and are often extremely violent. They also have
22 extensive intelligence and surveillance networks. With each
23 tunnel coming into the United States that is discovered by
24 law enforcement, the American public is made aware of just
25 how well funded and organized these cartels are.

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

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

14 I would also like to address the cost savings that
15 would be achieved by this legislation. This legislation
16 will save the taxpayers over \$1 billion in the next ten
17 years. Moving to this new system will be a pay cut from
18 what Border Patrol agents have traditionally earned.
19 However, we believe ensuring proper manpower, long-term
20 stability, and safety is worth a pay reduction.

21 We heard last month from Deputy Chief Vitiello of the
22 Office of Border Patrol that the proposed legislation gives
23 the agency the flexibility to schedule agents where and when
24 needed. We also heard from the Special Counsel last month
25 about how the current AUO system has been abused for

1 financial gain at taxpayers expense since at least 2008. We
2 heard from DHS's Chief Human Resource Officer that no
3 immediate solution is possible, absent legislation. And,
4 finally, just earlier this month in the joint explanatory
5 statement of the fiscal year 2014 omnibus appropriations
6 bill, Congressional leadership has directed Customs and
7 Border Protection to work with the National Border Patrol
8 Council to develop a sensible pay reform.

9 Let me be clear. We see no sound reason why any agency
10 or department would not support a bill that will curb abuse,
11 allow for scheduling flexibility, increase border security,
12 and saves taxpayers money. I testified a month ago that
13 this bill gives the agency and our country more security and
14 safety at our Nation's border while saving over \$1 billion
15 in the next ten years. That remains true today. We welcome
16 any support and collaboration from the Department of
17 Homeland Security and the Office of Customs and Border
18 Protection. The time to take action is now. We owe it to
19 the American public and taxpayers and to the agents at the
20 borders.

21 In conclusion, I want to thank this Committee for the
22 opportunity to testify. I want to leave you with the firm
23 notion that Border Patrol agents support S. 1691 and its
24 House companion. The Border Patrol is overdue a system that
25 fits current threats and operational needs, that is also

1 cost effective and ensures manpower and agent safety.

2 I look forward to any questions that you might have for

3 me.

4 [The prepared statement of Mr. Judd follows:]

1 Senator Tester. Thank you for your testimony. I want
2 to thank all the witnesses for their testimony, and so we
3 will go to the questions. I think we will put seven minutes
4 on the clock and do as many rounds as we want.

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

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

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

22 Senator Tester. Okay. Catherine, very quickly, you
23 talked about three areas--and correct me if I did not get it
24 down right--three areas where AUO would not be allowed.
25 Component headquarter offices, what I have got written down,

1 training instructors, and employees that the internal
2 investigations say are not relevant. Fairly accurate, in
3 that you are nodding your head. What percentage of the
4 overall employees that were eligible for AUO are going to be
5 eliminated from its use, and do you expect this list to
6 expand with time? What is the short-term and long-term
7 goals here?

8 Ms. Emerson. This is an interim measure, and you did
9 get those three categories correct, for the most part. It
10 will--preliminarily, it approximately affects approximately
11 900 employees--

12 Senator Tester. Okay.

13 Ms. Emerson. --and they are--take a rough guess of how
14 many employees in the Department are using AUO is probably
15 anywhere from 25,000 to 28,000.

16 Senator Tester. Okay.

17 Ms. Emerson. And they are primarily in CBP.

18 Senator Tester. Okay. Okay. So--well, maybe I will
19 stick to the script here, but I guess the question I have is
20 that as we look down the road, I mean, how--look, Mr.
21 Vitiello said that the Border Patrol has changed. Brandon
22 Judd said that the Border Patrol has changed. The question
23 becomes, as we look forward--assuming that my bill does not
24 pass, because I hope it does and we are going to work to get
25 it passed, but I do not know that it is or it is not--how is

1 the Department going to take care of this? How are they
2 going to--this is somewhat of a measure put forward now that
3 is going to probably be expanded upon later, I would think,
4 potentially. What kind of metrics are you going to be using
5 to determine whether it should be used or not, and what kind
6 of metrics were used in this?

7 Ms. Emerson. Well, we have new leadership. We have a
8 new Secretary, a new Deputy Secretary who inherited this
9 situation and were briefed on it when they came in, and they
10 have taken it very seriously, as we see from the memo that
11 was put out yesterday, the 27th. This is an interim
12 measure, and as there are a number of reviews that are going
13 on, one with GAO. We have the OSC that has brought some
14 cases to our attention. We have our Office of General
15 Counsel that is doing a review, as well as the components
16 are doing reviews, as well. So, there are a number of
17 reviews underway and this number could expand as we go
18 forward. We are looking at the AUO practices and procedures
19 that are in place and making sure that AUO is properly being
20 accounted for.

21 Senator Tester. Okay. Ms. Lerner--maybe I should
22 start with you, Catherine. The whistleblowers, did they
23 have the ability to--did they come to anybody within DHS
24 before they went to OSC?

25 Ms. Emerson. I am not aware that they did. Perhaps

1 Mr. Vitiello can speak to that regarding the CBP ones.

2 Senator Tester. Yes. Right.

3 Ms. Emerson. But we appreciate the whistleblowers--

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

10 Mr. Vitiello. I would have to refer that. I am not
11 specifically aware of that, although we encourage employees
12 to go to their supervisors for all manner of--

13 Senator Tester. Gotcha. Carolyn.

14 Ms. Lerner. I can answer that.

15 Senator Tester. Sure.

16 Ms. Lerner. At least for the first six, the group of
17 six that we referred and talked about in our October letter--
18 -

19 Senator Tester. Right.

20 Ms. Lerner. --all six of them tried internally to
21 complain and bring this problem to their supervisors and the
22 IG's attention. They did not get a result, which is why
23 they came to us.

24 Senator Tester. I have got you.

25 Ms. Lerner. They are not required to come to us first.

1 Senator Tester. I have got you.

2 Ms. Lerner. They can, but--

3 Senator Tester. Okay. So, moving forward, I would
4 think that--and I think this is in your purview, Catherine,
5 and if not, maybe it is in Mr. Vitiello's purview--but,
6 moving forward, do you not think that is important, to open
7 up the ability for people to come and actually encourage
8 them so that you guys can deal with it up front?

9 Ms. Emerson. Yes, I agree with you. In fact, they can
10 go to our Office of Inspector General. They can go to the
11 components' Internal Affairs. But encourage the
12 whistleblowers to come forward, yes, sir.

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

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

21 Senator Tester. Okay.

22 Ms. Emerson. In fact, I put out an information request
23 to the components in looking at any disciplinary actions
24 that have occurred for abuse of AUO, and also the
25 whistleblowers, any retaliation--

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

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

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

23 And I just--I wanted to mention one other thing, which
24 is that these are terrific interim steps. We are really
25 pleased at some progress.

1 Senator Tester. Yes. Yes.

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

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

17 With that, Senator Portman.

18 Senator Portman. Thanks, Chairman. I appreciate it.

19 And thanks for the testimony today and for your
20 willingness to not just come here today and testify, but
21 help us get to the bottom of this and provide the
22 information to deal with the issue administratively in your
23 Department.

24 It sounds like there are a couple of instances where it
25 has been abused. One is based on what Mr. Judd and Chief

1 Vitiello said. You have got a shift change and there is no
2 better tool right now to cover that shift change because
3 this goes back to the 1960s. It is antiquated. It is being
4 used when you should have a better tool.

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

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

12 Mr. Vitiello. That is a fair description.

13 Senator Portman. One of the things that troubles me as
14 I look at this is that we have got these allegations that
15 have come forward related to DHS as a group and that it
16 seems like CBP was kind of put in a position to deal with
17 it, and specifically this Office of Internal Affairs. And,
18 Ms. Emerson and Chief Vitiello, in Ms. Lerner's testimony,
19 she says that within Customs and Border Protection's Office
20 of Internal Affairs, a whistleblower alleges that
21 approximately 275 CBP employees improperly claim AUO, up to
22 two hours a day, every day, with the full knowledge and
23 approval of the Office of Internal Affairs leadership. I
24 just want to confirm with both of you that that is the same
25 office that is being charged with investigating the claims

1 of AUO abuse in other CBP offices. Is that accurate?

2 Mr. Vitiello. So, it is true that a part of--a couple
3 of parts of the Internal Affairs Office at CBP are
4 compensated in overtime using AUO. That is correct.

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

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

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

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

25 Senator Portman. Yes.

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

7 Senator Portman. Ms. Emerson.

8 Ms. Emerson. Until recently, the majority of the cases
9 were CBP. So, it was not until recently where we had ICE
10 and USCIS added to that. So, the practice within DHS is
11 when the OSC referral letters came in, that was handled as a
12 legal matter. So, it was referred to OIG. They had the
13 right to refuse it. And then it went over to the
14 components, and that is where it went to the Internal
15 Affairs Office for investigation. It did not come to my
16 office. I did not find out about the OSC referral letters
17 until November, early November of 2013. So, now there is a
18 process in place where those letters come to me right when
19 they come into the Office of General Counsel.

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

25 So, the October 31 report from the Office of Special

1 Counsel stated that these abuses were taking place in
2 assignments where it is really inconceivable that the
3 employees would be conducting work that makes them eligible,
4 based on the criteria. And so, I guess, again, Ms. Emerson
5 and Chief, what is the process for selecting which employees
6 are eligible for AUO? I know the interim measures may
7 change this, but what is the process for selecting
8 employees?

9 Mr. Vitiello. So, the bulk of the individuals involved
10 are in the Border Patrol, and so when they come to a
11 headquarters assignment, they are coming from the field.
12 All of my staff that is in uniform were people who
13 previously served in the field in all manner of what the
14 Border Patrol does in the field, and so you spoke briefly
15 about the culture and how this is kind of a systemic
16 problem. Incorrectly--now, looking at it going backwards,
17 we incorrectly interpreted the eligibility. There was a
18 scenario in which we used AUO not as it is in the reg as a
19 discrete resource, but, in fact, used it to get whatever the
20 work in front of particular agents were. And so, again, the
21 actions that the Department is taking today will right that
22 problem interimly [phonetic] and then we will learn more
23 about it as we have over the last year.

24 Senator Portman. So, if you have a largely
25 administrative job, you think that after these interim

1 measures are expired, there will be something in place that
2 will make that clear, that that person would not be
3 qualified--

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

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

20 Mr. Vitiello. Correct.

21 Senator Portman. Okay. Well, listen, again, we
22 appreciate the fact that there is work being done. The
23 interim steps are starting to be taken. I think we need to
24 learn, though, from what happened. It is, as the Chairman
25 said, critical to get more people on the border, and we are

1 all looking at tight budgets. Certainly, the appropriations
2 process going on right now is difficult with regard to your
3 Department, particularly, but generally for DHS, and we have
4 got to be sure that the money is being spent in the most
5 efficient way possible.

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

14 Ms. Emerson. That is correct.

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

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

24 Senator Portman. Does the internal review so far
25 corroborate what the OSC found?

1 Ms. Emerson. Yes.

2 Senator Portman. Okay. Thank you, Mr. Chairman.

3 Senator Tester. Thank you, Senator Portman.

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

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

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

22 Ms. Emerson. I had an offsite with my HR Directors the
23 end of April, and that is when a couple of them were talking
24 about some inconsistencies in the way AUO was applied.

25 Senator Tester. Gotcha.

1 Ms. Emerson. But, I never--I did not know, and neither
2 did my staff know--

3 Senator Tester. Right. So--

4 Ms. Emerson. --about this OSC complaint.

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

12 Ms. Emerson. It was seen as a legal matter. So, the
13 complaints went from OSC to the Office of General Counsel
14 and the Office of General Counsel sent it to OIG to see if
15 they wanted to take it, and they sent it to the component
16 Internal Affairs to investigate, and that is how it went.
17 It never came to the Office of the CHCO. So, it was seen as
18 a component matter. So, CBP received the majority--well,
19 they are the majority of those referral letters from OSC.

20 Senator Tester. Okay. So, what is different today? I
21 mean, what is different today that this same thing is not
22 going to happen again after Senator Portman and I start
23 thinking about doing other things?

24 Ms. Emerson. Well, as you mentioned, we have new
25 leadership and they are extremely concerned about this.

1 They inherited it. They are very concerned. They have only
2 been in there for, what, approximately 30 days, and they
3 have already taken action.

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

9 So, we have also got the additional reviews going on,
10 GAO, IG, component investigations going on. So, there are a
11 lot of reviews right now that are bringing us some
12 information regarding AUO practices and procedures
13 throughout the Department.

14 Additionally, when my office goes and does audits of
15 the human capital policies and procedures, I put this on the
16 list. It is not something that OPM requires, but I am
17 requiring it throughout the Department, that we will review
18 the policies and the procedures of each component on AUO.

19 Senator Tester. Okay. Ms. Lerner, did you put forth
20 recommendations to the Department when you did your
21 research? Did you put forth recommendations to the
22 Department about what has transpired and potentially--and
23 maybe this is not in your purview, I am just asking--any
24 suggestions on how you fix the problem?

25 Ms. Lerner. That is actually not--

1 Senator Tester. Put your mic on, please.

2 Ms. Lerner. Our statutory authority is pretty much to
3 make a substantial likelihood determination, refer it to the
4 agency for their investigation, and then review their
5 report--

6 Senator Tester. And who did you refer it to? Who did
7 you refer your investigative report to?

8 Ms. Lerner. Well, I sent it to the head of the
9 Department, so I would send it to--

10 Senator Tester. Okay.

11 Ms. Lerner. --the first set went to then-Secretary
12 Napolitano.

13 Senator Tester. Gotcha.

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

19 Senator Tester. Okay.

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

25 Senator Tester. Okay.

1 Ms. Lerner. Once we get those reports back, our
2 authority is pretty much just to then report to you all as
3 the oversight Committee--

4 Senator Tester. Right. Yes.

5 Ms. Lerner. --and to the President. We can ask for
6 the Department to get back to us--

7 Senator Tester. Yes.

8 Ms. Lerner. --on remedial efforts that they say that
9 they are going to take, and we are going to do that now. We
10 are going to ask that they report back to us in probably
11 three to six months--

12 Senator Tester. Sure.

13 Ms. Lerner. --about what actions they have taken.

14 Senator Tester. Okay. Good. So, it is up to them to
15 fix the problem. You point out the problem, verify it, and
16 say fix it. Okay.

17 Ms. Lerner. Yes.

18 Senator Tester. Thanks.

19 Ms. Lerner. One of the legislative fixes we have been
20 talking about with your staff is to make it an affirmative
21 obligation--

22 Senator Tester. Yes.

23 Ms. Lerner. --for the agency to report back on
24 remedial actions that they have taken.

25 Senator Tester. I have got you.

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

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

15 Senator Tester. My guess is, because it is not being
16 checked on. So, are there mechanisms today--

17 Mr. Vitiello. Yes, so--

18 Senator Tester. --in which you can check and make sure
19 that the orders that you put down are followed?

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

1 Senator Tester. What if it is the supervisor that is
2 doing it?

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

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

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

25 Senator Tester. Are you reasonably confident today

1 that the verification methods that are in place within your
2 office are adequate and appropriate at this point in time?

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

10 Senator Tester. Okay. Same question for you,
11 Catherine. Within the Department itself, DHS, do you have
12 the tools by which to monitor and do you think they are
13 adequate?

14 Ms. Emerson. Yes. I would like to point out, in the
15 Secretary's memo that he put out yesterday--

16 Senator Tester. Yes.

17 Ms. Emerson. --he specifically said in the last
18 paragraph, "Nothing in this memorandum limits a component
19 head from otherwise restricting or controlling the use of
20 AUO where he or she discovers other circumstances involving
21 misuse of AUO." So, this is from our Secretary saying that
22 it is on the component heads to be responsible for how that
23 AUO is administered.

24 Senator Tester. Good.

25 Ms. Emerson. I said there are a number of reviews that

1 are ongoing. I know that there have been--in CBP, there is
2 a position-by-position review going on--

3 Senator Tester. Yes.

4 Ms. Emerson. --on who should be given AUO. I know ICE
5 has done the same thing.

6 Senator Tester. Yes.

7 Ms. Emerson. They are doing an audit.

8 Senator Tester. Right.

9 Ms. Emerson. USCIS has temporarily suspended the use
10 of AUO in their component, as has the Management
11 Directorate.

12 Senator Tester. Okay. Thank you.

13 Senator Portman.

14 Senator Portman. Thank you, Mr. Chairman.

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

24 Ms. Emerson. Honestly, I think the memo that was put
25 out by our Secretary yesterday is a good effort in the very

1 beginning. It is very serious. He is taking this matter
2 very seriously. He is acting quickly, only been on the job
3 for approximately 30 days and already coming out strongly
4 regarding AUO administration.

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

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

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

1 their disciplinary action.

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

10 Mr. Vitiello. I do not have specifics on where the
11 counseling or the disciplinary actions were taken. I can
12 tell you that, again, those cases were referred because they
13 were, in fact, determined to be misconduct, and there is a
14 strict process for that, where employees are given due
15 process. The agency reviews the findings and then each case
16 is looked at based on what did the--what were the
17 supervisor's responsibilities and how did they relate to the
18 employee, or was this something that the employee took on by
19 themselves. You look at the totality of those things to
20 decide what the final outcomes are.

21 Senator Portman. Eighty-four cases, seven
22 substantiated, what do you know--

23 Ms. Emerson. It is my understanding that those are
24 primarily CBP cases. Those disciplinary actions, when
25 allegations of employee misconduct, are handled by the

1 components. However, in the General Counsel's review that
2 is ongoing, I have recently put out a request for
3 information regarding the discipline of employees, so I will
4 be getting that information in the near future.

5 Senator Portman. Any supervisors subject to any kind
6 of punishment for condoning or knowingly approving of these--
7 -

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

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

1 And specifically, I am not talking about the seven
2 being managers, as you say, Chief. You know, if they are
3 managers, they are subject to the same discipline. I am
4 talking about, in those seven cases, were their managers
5 disciplined if they were found to have condoned it--

6 Mr. Vitiello. Let me just--

7 Senator Portman. --because I would suspect that is,
8 from what we know, part of what has been going on.

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

15 Mr. Vitiello. We will get back to you with that.

16 Senator Portman. Thanks, Chief.

17 Thanks, Chairman.

18 Senator Tester. Yes. Thank you, Senator Portman.

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

1 Mr. Vitiello. Yes. I mean, there is no excuse for,
2 knowing what we know now, not to take the actions that have
3 been taken or looking at the findings from OSC and saying
4 that it does not mean what it means, because it is very
5 serious and we take it seriously.

6 Senator Tester. Yes.

7 Mr. Vitiello. But, it is also--like I said, we have
8 been well aware that AUO has been a problem for the last
9 couple of years--

10 Senator Tester. Yes.

11 Mr. Vitiello. --but throughout my career, again, it
12 was not treated as something separate and apart, like our
13 other overtime systems. It was treated not as a discrete
14 resource but as sort of a tool that is used to get all work
15 done.

16 Senator Tester. Give me the definition really quickly
17 again, Ms. Lerner.

18 Ms. Lerner. Sure. By regulation, AUO may only be used
19 when an employee's hours cannot be scheduled in advance due
20 to a substantial amount of irregular and unpredictable work
21 or a compelling law enforcement purpose.

22 Senator Tester. Now, unless--this would just be my
23 opinion, and I am a dirt farmer from Montana, okay--this
24 would just be my opinion, but unless that administrative
25 personnel is directly connected to that agent in the field,

1 that he needs information, I cannot see how any
2 administrative personnel would be eligible for this. That
3 is my opinion. If I am wrong on that, let me know why I am
4 wrong on that as we move forth and try to solve this
5 problem.

6 Mr. Vitiello. No, I agree with what you said.

7 Senator Tester. Okay.

8 Mr. Vitiello. I am just saying that when we talked
9 earlier about the culture, incorrectly used--

10 Senator Tester. Yes.

11 Mr. Vitiello. --the actions going forward are the
12 right actions--

13 Senator Tester. Right.

14 Mr. Vitiello. --but, previously, we did not have that
15 same interpretation.

16 Senator Tester. I have got you.

17 Mr. Vitiello. We did not have the--we did not look at
18 it the way we are looking at it now--

19 Senator Tester. Gotcha.

20 Mr. Vitiello. --in the more appropriate--

21 Senator Tester. I guess the point I am trying to make
22 is that the people who defined it as being incorrect are the
23 ones at fault here, not the people who are using it--

24 Mr. Vitiello. I agree with you.

25 Senator Tester. --because if I am told as an

1 administrative person that I can utilize it, that it is okay
2 by my boss, then I will use it.

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

6 Senator Tester. Okay. That is good.

7 I want to talk a little bit to you again, Mr. Vitiello,
8 CBP conducted a comprehensive audit last spring to get a
9 better understanding of the full extent of the costs of AUO
10 use throughout CBP. I would assume that is both costs that
11 have been used by the agents in the field when necessary and
12 some of the administrative costs we have been talking about
13 before. What were the findings of the audit?

14 Mr. Vitiello. So, we have a review, a position--there
15 are 158 positions within CBP, positions and titles--

16 Senator Tester. Sure.

17 Mr. Vitiello. --that are being reviewed. We expect
18 that to be completed sometime in February.

19 Senator Tester. Okay.

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

23 Senator Tester. I assume that audit will be public
24 information?

25 Mr. Vitiello. I am not sure. I would have to--

1 Senator Tester. We would like to get the results of
2 that audit, if you could, to this Committee when
3 appropriate, okay.

4 Mr. Vitiello. All right.

5 Senator Tester. So that we will know what kind of
6 recommendations came down from those folks. I mean, I think
7 if we all work together, we get this problem solved even
8 quicker, so--

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

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

14 Senator Tester. Oh, okay. All right.

15 Ms. Emerson. And they did that before the memo came
16 out.

17 Senator Tester. Okay. Sounds good.

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

1 that role should be.

2 Mr. Judd. There is a role for AUO. I think that what
3 we have to do is we have to go back and look at how this
4 problem started. If you go back and you look at the hiring
5 memorandum that went out to prospective employees, one of
6 the things that it said was that you will receive 25 percent
7 AUO. When I came in the Border Patrol approximately 16-and-
8 a-half years ago, I was told in the job announcement that I
9 would receive 25 percent AUO. It was a recruitment tool
10 that was used, because when we came in the Border Patrol,
11 our entry salaries were not commensurate to other law
12 enforcement, whether it be local, State, or Federal law
13 enforcement.

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

19 We--Rio Grande Valley, for instance, is the hotbed
20 right now for illegal immigration and the agents out there
21 are chasing drug smugglers, alien smugglers in the country
22 well after their eight-hour shift. And so AUO is absolutely
23 applicable, and it is applicable in all parts of the Border
24 Patrol where we are chasing illegal aliens or illegal drug
25 smugglers. The problem is we need to look at a more

1 modernized system.

2 Senator Tester. Let me ask you this, since you bring
3 up another issue. You entered 16-and-a-half years ago. If
4 my math is correct, it was about 1998, maybe a little bit
5 before.

6 Mr. Judd. Nineteen-ninety-seven.

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

10 Mr. Judd. At the entry level, no, they are not.

11 Senator Tester. They are--

12 Mr. Judd. The journeyman level is, but the entry level
13 is not.

14 Senator Tester. Is how much lower, percentage-wise?

15 Mr. Judd. We recently--

16 Senator Tester. Or dollar. I do not care.

17 Mr. Judd. It depends on who you are comparing us
18 against, but when we looked at other law enforcement
19 agencies that people--that are desirable, and that is city
20 law enforcement, city police departments, or other Federal
21 law enforcement, generally speaking, we are about \$10,000
22 less than what other agencies hire their employees at.

23 Senator Tester. Okay. Well, that is another issue for
24 another hearing.

25 I think we will probably wrap this up. Look, the

1 Department has a new Director. It has a new second-in-
2 command. It has a new IG. I can tell you that we want our
3 border secure and we want our people to be able to do the
4 job that they need to do when they are in the field. I can
5 also tell you that, quite frankly, this kind of abuse of a
6 program needs to stop, especially--it needs to stop any
7 time. Even if we were flush with dough, it would need to
8 stop, okay, because it is just not right.

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

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

22 And, I look forward--Senator Portman and I were the
23 only two here today, but I can guarantee you, there is not a
24 person on this Subcommittee and on this Committee as a whole
25 that is not concerned about this. I can guarantee you that.

1 And so I think that if we can work on constructive measures
2 to fix the problem--I think we know what the problem is--I
3 think we all can win from this.

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

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

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