

**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**

**“Strengthening Government Oversight: Examining the Roles and Effectiveness of
Oversight Positions within the Federal Workforce”**

November 19, 2013, 2:30 P.M.

Chairman Tester, Ranking Member Portman, and Members of the Subcommittee:

Thank you for the opportunity to testify today about the U.S. Office of Special Counsel (OSC). OSC is an independent investigative and prosecutorial federal agency. We protect the merit system for over 2.1 million civilian federal employees in four distinct mission areas. OSC protects federal workers from “prohibited personnel practices,” especially retaliation for whistleblowing. We provide a safe and secure channel for whistleblowers to report waste, fraud, abuse, and health and safety issues. We enforce the Hatch Act, keeping the federal workplace free from improper partisan politics. Finally, OSC enforces the Uniformed Services Employment and Reemployment Rights Act (USERRA).

We fulfill these important roles with a staff of approximately 110 employees – and the smallest budget of any federal law enforcement agency. I am pleased to report that our dedicated staff is performing more efficiently and effectively than at any point in OSC’s 35-year history.

However, our capacity for improving government is limited by extreme resource challenges. In the past two years, OSC’s caseloads skyrocketed to historic levels. In addition, Congress imposed important new mandates on OSC with passage of the “Whistleblower Protection Enhancement Act of 2012.” Despite these increases in our workload, OSC’s already flat budget took a dramatic hit with sequestration, causing workforce reductions.

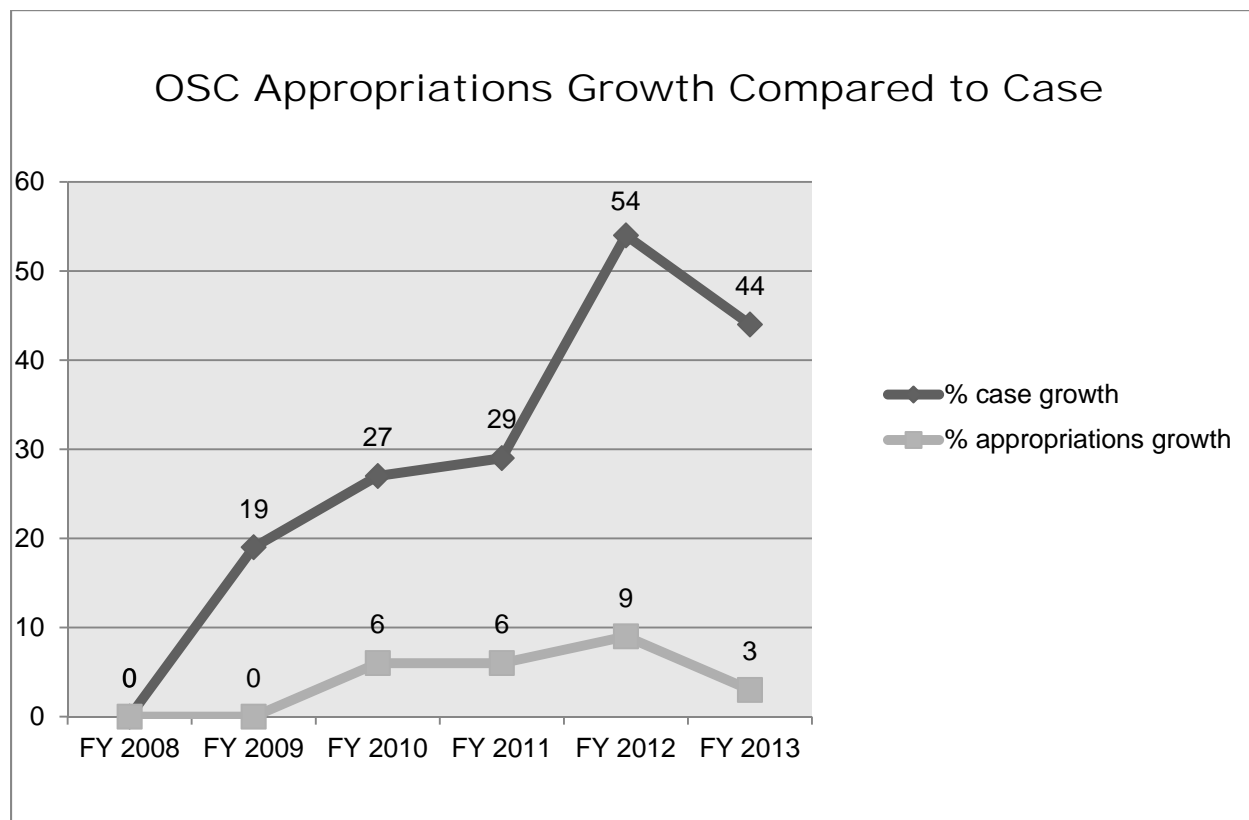
The simple mathematics of historically-high case levels and a shrinking budget poses the biggest challenge to OSC in realizing our oversight potential. The good news is that Congress and the administration recognize that the status quo is not sustainable. The President’s Fiscal Year 2014 budget request for OSC provides a necessary increase of approximately \$1.7 million, which both the House and Senate Appropriations Committees approved. While we are currently operating, like most agencies, under a continuing resolution, I am hopeful that final spending bills for 2014 will include this modest increase.

With that overview, I want to provide more detail on OSC’s track record over the last two years and conclude by briefly noting issues beyond resource challenges that may pose obstacles to OSC.

OSC Accomplishments with Limited Resources and Staff

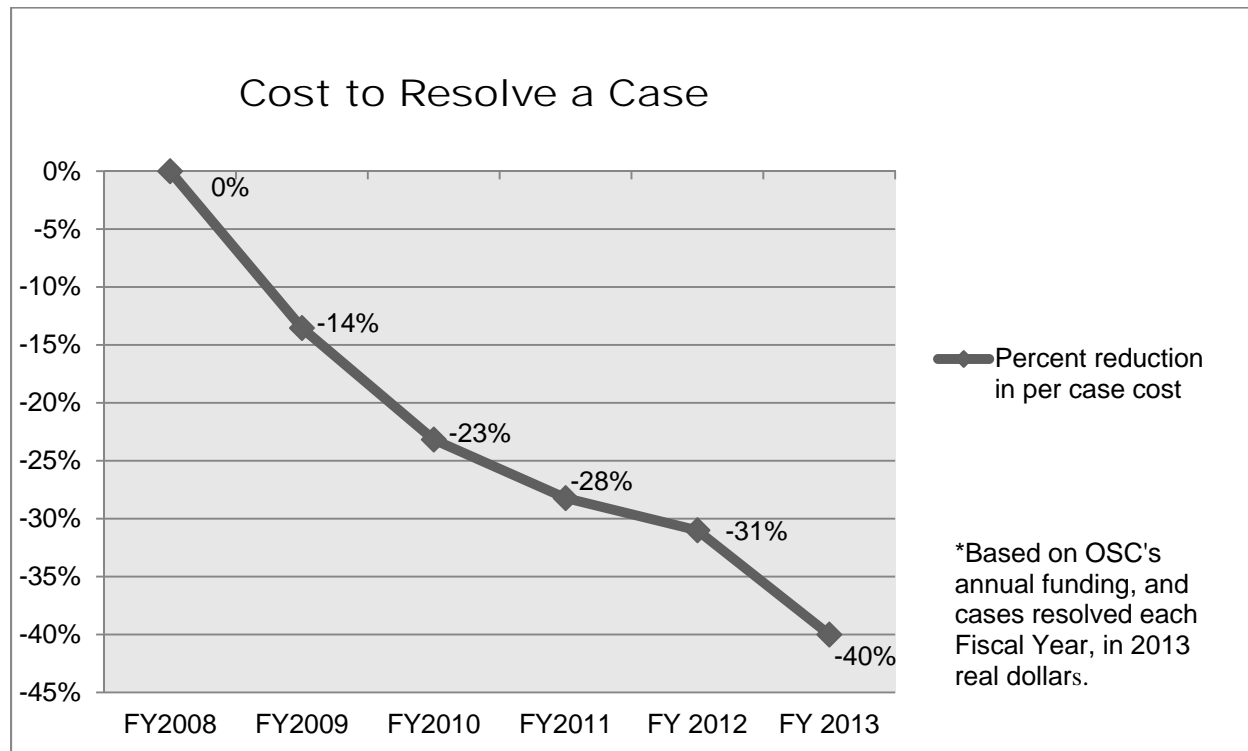
The last two fiscal years (FY2012 and FY2013) have been a record-setting period for OSC. By nearly every statistical measure, OSC achieved the most positive results in its history. These successes result in greater confidence in OSC's ability to perform its good government mission. However, such confidence can be a double-edged sword, as it directly correlates to our increased caseload.

To illustrate, cases increased by 50% in five years, with the sharpest increase over the last two. During this period, funding levels actually decreased in real terms, considering inflation, automatic pay adjustments, and other mandatory expenses.



In addition to receiving more cases, OSC is processing them more efficiently and effectively. For example, in FY2008, OSC completed a total of 2,875 cases. In FY2013, just five years later, OSC resolved 4,808 cases, nearly doubling our productivity. Completing cases quickly benefits employees and enables agencies to manage their workforce with less disruption and uncertainty.

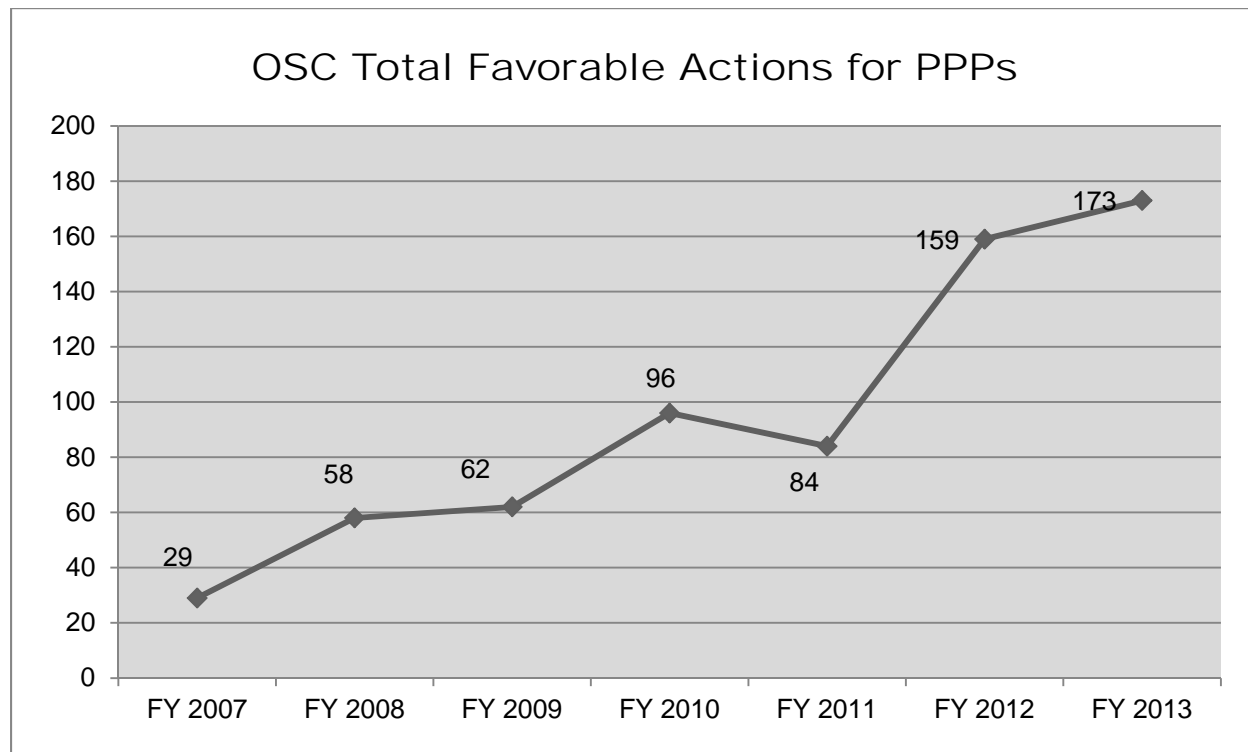
OSC's increased efficiency helps us manage the growing caseload, and translates into real savings. OSC's cost to resolve a case dropped by 40% in the last 5 years, a decrease of over \$2,640 per case. Stated simply, we're making every dollar count.



Our increased efficiency has not compromised OSC's effectiveness. In fact, when evaluating the most important statistic for OSC – the number of favorable actions on behalf of whistleblowers and the merit system – we are again setting records. We're not just closing cases, we're getting more relief than ever before for whistleblowers. Favorable actions include the relief that OSC secures for employees who are the victims of retaliation, such as back pay, reinstatement, or reassignment to a non-retaliatory environment. They include disciplinary actions taken against employees who engage in retaliation or other prohibited conduct. And favorable actions also include cases where we work with agencies to implement systemic reforms to prevent problems from recurring.

In FY2012, the first full year of my tenure, our staff achieved an 89% increase in favorable actions from the prior fiscal year. This was a 175% increase from five years ago. FY2012's total of 159 favorable actions, or "victories" for whistleblowers and the merit system, exceeded any previous year in the agency's history. We set an extremely high bar in FY2012, and then surpassed it in FY2013. The total number of favorable actions rose again in FY2013 – to 173. This is an astonishing total, considering only 29 favorable actions were achieved in 2007.

It is a testament to the hard work of our dedicated career staff, who have endured furloughs and increased caseloads while managing to improve productivity and outcomes in all measures.



These numbers don't tell the whole story. Statistics cannot capture the true impact and value of OSC's work. Our efforts to support whistleblowers often stop the immediate problem and spark reforms that prevent wasteful, inefficient, or unsafe practices.

For example, OSC recently issued a report detailing serious overtime abuse by Department of Homeland Security employees. Improper claims of Administratively Uncontrollable Overtime, or AUO, cost the government up to \$9 million annually at six DHS offices identified by whistleblowers in OSC cases. The annual cost of AUO abuse nationwide is likely to reach tens of millions of dollars, according to the whistleblowers. And this estimate excludes overtime claims by agents in the field – those whose need for AUO would seem to be most justified. It is my sincere hope that OSC's role in highlighting this gross waste of scarce government funds will assist the Subcommittee in its efforts to reform the DHS overtime system, and I applaud you for your efforts in this area.

In the past year, OSC also worked with whistleblowers at the VA Medical Center in Jackson, Mississippi. Physicians and other employees raised concerns about unlawful prescriptions of narcotics, chronic understaffing of the Primary Care Unit, unsterile medical equipment, and other threats to Veterans at the facility. OSC's efforts resulted in greater oversight of the Jackson VAMC by the administration and Congress, and we are continuing to work with whistleblowers to identify and address similar problems throughout the VA system.

In the last two years, OSC also successfully carried out its expanded role to protect the rights of returning service members under USERRA. Under a three-year pilot program mandated by Congress, OSC is investigating half of all federal sector USERRA claims, while the Department

The Honorable Carolyn N. Lerner

November 19, 2013

Page 5 of 6

of Labor continues to investigate the other half. OSC is using an effective and low-cost approach to resolving USERRA cases through Alternative Dispute Resolution. OSC achieved a 100% success rate in resolving USERRA claims referred to mediation.

In one recent USERRA case, a member of the Air Force Reserves worked with the Department of Energy in New Mexico. Upon her return from active duty, the Department refused to promote her, after initially promising that it would. Management officials cited her absence for military service as the reason. OSC investigated and informed the agency of its obligations under USERRA. The Department of Energy then gave the reservist a retroactive promotion with corresponding back pay and reassigned her within the agency, enabling her to get the experience and training necessary for further promotion.

Among the favorable actions OSC received for whistleblowers was a case originating in Syracuse, NY. Two whistleblowers at the Transportation Security Administration blew the whistle on misuse of a government vehicle, misuse of financial rewards, and a hostile work environment at the Syracuse Hancock International Airport. The whistleblowers were retaliated against after making these disclosures, and both received full corrective action after OSC's investigation. One of the whistleblowers told a Syracuse newspaper, "We were a little frustrated, like no one's going to help us . . . And (OSC) hung in there and did good things for us." The whistleblower specifically noted the work of OSC Attorney Clarissa Pinherio, who worked on the case for three years and ultimately was able to negotiate relief for the employees.

Finally, during 2012, OSC successfully enforced the Hatch Act during a difficult presidential election year, including finding a sitting cabinet secretary in violation of the Hatch Act for the first time in the Act's history.

Whistleblower Protection Enhancement Act (P.L. 112-199) Will Further Increase OSC's Caseloads

OSC is also in the process of implementing the first major reform to the federal whistleblower law in 20 years. The Whistleblower Protection Enhancement Act (WPEA) was signed into law on November 28, 2012. The landmark reform was supported by a broad, bipartisan coalition in Congress, with strong support from good government and taxpayer protection organizations. OSC is the primary agency responsible for implementing this good government reform and already has seen a significant increase in claims. During the first quarter of FY2013, OSC experienced the highest number of quarterly filings in the agency's 35-year history.

The Congressional Budget Office conservatively estimated that OSC would need an additional \$1 million annually to successfully implement the WPEA. However, under sequestration, OSC's resources have been reduced by \$1 million since enactment of the WPEA, significantly impeding OSC's ability to carry out the law's good government mandates. While we shifted additional staff to our Investigation and Prosecution Division to help manage the workload, our budget to pay for basic investigative expenses – such as transcription services – is inadequate. Similarly, we cannot afford to conduct on site investigations in whistleblower reprisal cases and other matters, except for the most extraordinary circumstances.

The WPEA's mandates include: a significant expansion of OSC's jurisdiction; a requirement to conduct investigations in hundreds of whistleblower cases that previously would have been dismissed; a direction from Congress to initiate more formal litigation and disciplinary actions against agency managers; and training requirements for all other government agencies. The WPEA also provides OSC with the authority to file amicus briefs in federal court cases that involve whistleblower protection issues. OSC exercised this new authority for the first time in the case of *Kaplan v. Conyers*, arguing that the Federal Circuit Court of Appeals' decision threatened to undermine the enhanced whistleblower protections passed by Congress.

Other Challenges

In conclusion, I would like to flag two additional areas that the Subcommittee may want to consider as it examines possible efforts to strengthen oversight positions in the government.

First, the Federal Circuit's decision in *Kaplan v. Conyers* poses a significant threat to whistleblower protections for hundreds of thousands of federal employees in sensitive positions and may chill civil servants from blowing the whistle. I understand that the Subcommittee will hold a hearing to examine the impact of *Conyers*, and I applaud your efforts to better understand this important issue.

While the *Conyers* Court did not specifically address the applicability of the decision to whistleblower and other prohibited personnel practice cases, it may be helpful for Congress to clarify that OSC and the MSPB maintain jurisdiction over employee claims of retaliation and other prohibited conduct, even where an adverse employment action is based on the employee's eligibility to hold a sensitive position. It may also be helpful for Congress to track the number of adverse actions taken because an employee is deemed ineligible to hold a sensitive position, rather than the traditional bases for punishment – employee conduct or performance. If the number of actions based on eligibility begins to trend upward, it would indicate that agencies are more actively utilizing the authority provided by *Conyers*, and my concerns about the impact on the merit system and due process rights for federal workers would increase.

Second, OSC has not been formally reauthorized since 2007. While this does not prevent OSC from receiving appropriations, reauthorization provides Congress with an opportunity to evaluate OSC's authorities and responsibilities and make any necessary adjustments. In light of our steadily increasing workload, Congress may want to consider the onerous procedural requirements imposed on OSC in all prohibited personnel practice cases as a possible area for revision. Additionally, there is no statute of limitations for filing a prohibited personnel practice complaint with OSC. Congress may want to consider whether a reasonable time limit for filing a complaint with OSC is appropriate. Finally, OSC's authority to compel the production of documents in whistleblower disclosure cases could be clarified, and the mechanism for enforcing OSC subpoenas against federal entities should be updated and streamlined.

Investing in OSC is one of the most cost-effective methods of promoting good government and preventing violations of merit system laws. I thank you for the opportunity to testify today, and I look forward to your questions.

Special Counsel Carolyn N. Lerner

The Honorable Carolyn N. Lerner heads the United States Office of Special Counsel. Her five-year term began in June 2011. Prior to her appointment as Special Counsel, Ms. Lerner was a partner in the Washington, D.C., civil rights and employment law firm Heller, Huron, Chertkof, Lerner, Simon & Salzman, where she represented individuals in discrimination and employment matters, as well as non-profit organizations on a wide variety of issues. She previously served as the federal court appointed monitor of the consent decree in *Neal v. D.C. Department of Corrections*, a sexual harassment and retaliation class action.

Prior to becoming Special Counsel, Ms. Lerner taught mediation as an adjunct professor at George Washington University School of Law, and was mediator for the United States District Court for the District of Columbia and the D.C. Office of Human Rights. When she was in private practice, Ms. Lerner was in *Best Lawyers in America*, with a specialty of civil rights law, and was one of *Washingtonian* magazine's top employment lawyers.

Ms. Lerner earned her undergraduate degree from the University of Michigan, where she was selected to be a Truman Scholar, and her law degree from New York University (NYU) School of Law, where she was a Root-Tilden-Snow public interest scholar. After law school, she served two years as a law clerk to the Honorable Julian Abele Cook, Jr., Chief U.S. District Court Judge for the Eastern District of Michigan.