

**Opening Statement of
Senator Tom Coburn, Ranking Member
U.S. Senate Homeland Security and Governmental Affairs Committee**

***Border Security: Examining the Implications of S. 1691,
The Border Patrol Pay Reform Act of 2013***

June 9, 2014

Good morning. I would like to thank the co-sponsors of the bill we're discussing today, Chairman of the Subcommittee on the Efficiency and Effectiveness of Federal Programs and the Federal Workforce, Jon Tester, and Ranking Member of the Permanent Subcommittee on Investigations, John McCain, as well as Chairman Carper, for agreeing to have this hearing. I'd also like to thank Senators Tester and Portman for holding an informative hearing back in January that shed light on the AUO abuse occurring at DHS.

I, like my colleagues, appreciate the service the men and women at U.S. Customs and Border Protection perform every day, including putting their lives at risk on our borders and posts across the world. There are few responsibilities this Committee has that are more important than seeing to it that our agents at Homeland Security have the tools necessary to protect Americans.

I asked for this hearing so we could take a step back to carefully examine the implications of this bill. The *Border Patrol Pay Reform Act* would significantly change the pay structure for U.S. border patrol agents. Experts at CBO and OPM have told us the bill makes sweeping workforce changes the likes of which they have never before had to analyze. CBP tells us the bill saves money and increases national security. Before making these changes, however, it is our job to investigate how the bill would change the agency, and whether it's the best way to reform CBP's overtime system.

As we all know, the backdrop of this hearing is the allegation that CBP has been abusing AUO, and in fact has a culture where everyone expects to maximize their overtime pay. This is not a new problem, though. DHS has known about CBP's AUO abuse since 2008 and, until recently, done nothing to curb it.

Under current law, AUO is supposed to be limited to the relatively rare times when an officer is required to extend his workday. Such pay should be "irregular," and the circumstances that give rise to it must be "uncontrollable." Despite these rules, more than 90% of agents on the border patrol claim AUO each and every day, which demonstrates the work is not "uncontrollable" and it is certainly not "irregular." The problem has become so widespread that even the investigators at CBP's Internal Affairs – the very individuals tasked with investigating whistleblower allegations of AUO abuse by agents – are now being investigated for AUO abuse.

The Committee was expecting to hear today from the head of Internal Affairs, James Tomscheck, but we were informed just hours ago that he would no longer be attending. We hope to get good answers to the allegations about Internal Affairs anyway.

Federal overtime rules have benefited managers and agents alike. For starters, the pot of AUO money available to CBP is much larger than the pot of money put aside for scheduled overtime, so they have more freedom to be loose in scheduling. Moreover, agents get to count their AUO hours worked toward their pension calculations. So while CBP has been wrongly paying out AUO, agents maxing out their AUO have been paid over \$3,000 more in benefits each year.

From all appearances, there is a culture within CBP to treat AUO as if it were a permanent feature of the salary package. As evidence of this, we have been told time and again that new recruits are promised they will get AUO to supplement their pay. There is the base pay, agents are told, and then there's the 25% pay raise they'll receive when – not if – they max out their AUO hours.

This story of AUO abuse has been retold time and again by the whistleblowers that come to the Office of Special Counsel. OSC has evaluated and referred sixteen cases of AUO abuse to CBP, ICE, and USCIS, most of which were received by OSC in the last year. Ten of those cases concern allegations against CBP. To date, five of the ten cases have been investigated by Internal Affairs, and in each one, they found evidence to substantiate AUO abuse.

Some have tried to dismiss the allegations of abuse as nothing more than a paperwork mistake. They say the hours all needed to be worked, and that the only problem was the *kind* of overtime they were paid. However, it is not at all clear this was the situation. In all five cases, whistleblowers alleged that agents - in addition to claiming AUO for hours that were controllable and schedulable – were also requesting overtime pay for hours that *should not have been worked at all*. Some even accused a few agents of using overtime to watch television and exercise.

We've also heard accounts of agents leaving shifts early or of intentionally turning eight-hour days into ten-hour days to make sure they get AUO. In at least three of the substantiated cases, border patrol agents were working alongside border officers or civilians and performing the same type of work, but doing it in eight hours instead of ten.

This was the case in San Ysidro, CA, where agents were assigned to paralegal duties alongside civilian paralegals, yet claimed two hours of overtime every day. The civilians were doing the same work and getting it done in eight hours. Similarly, border patrol officers complained at various CBP training facilities that they are doing the same work as agent instructors but in less time, since they are not eligible for AUO. In this sense, lax enforcement of the overtime rules affected not only the way agents spend their overtime, but also the way they manage their *regular* work hours.

Although Internal Affairs substantiated each of the other factual allegations raised by whistleblowers in Washington, DC; San Ysidro, CA; the CBP Academies; Blaine, WA; and Laredo, TX, none of the failure-to-work allegations were confirmed. And it is easy to see why: confirming this type of activity after the fact is extremely difficult. Agents are not going to skip out on work, lift weights, or watch TV if they know investigators are watching. Given the option, few if any agents are likely to confess to goofing off on the job if asked about it after-the-fact.

Some have said the AUO abuse problem is a reason to adopt this bill. However, I question whether the opposite isn't true. Should we automatically give every agent 100 hours per pay period before we get to the bottom of allegations about misusing the overtime rules?

In other words, I'm concerned that we are quietly sweeping under the rug the misconduct of management and agents at CBP. We are not holding management accountable for their years of acquiescence. We are not holding CBP accountable to justify the hours the agents choose to work. We are not demanding that management review their scheduling policies and practices or evaluate if resources are properly allocated. In short, we are not asking the difficult questions.

Many have encouraged me to look beyond these issues and support the bill because they say it will save money. By CBP's own estimate, if every agent chose to work the maximum 100 hours a pay period, the bill could still save approximately \$40 million each year. The problem, though, is we get these savings by comparing how much CBP spent *in the past* on AUO. If the allegations of AUO abuse are true, then what happened in the past is not a perfect comparison to calculate savings.

OSC estimates at least \$37 million last year was misspent on AUO abuse at several offices within CBP, where it was alleged agents were not doing work-related activities. Unfortunately, it's impossible for us to know how much of that amount should not have been paid under any overtime structure at all.

Another argument I hear frequently from those who favor this bill is that *more hours on the border will necessarily equal more border security*. This is a point I think needs to be evaluated today. An agency can have enormous resources but squander them with poor management. Unfortunately, CBP does not have the metrics to determine what success means and how it is achieved, as it has not developed a border strategy and aligned its missions with resources.

The department's Office of Inspector General issued a report in December, 2013 that concluded, "CBP is challenged in its ability to measure its performance and effectiveness." It notes that the border patrol's use of apprehensions on the southwest border as an interim goal and measure "provides information on activity levels not program results and, therefore, limits DHS and congressional oversight." While finding that border patrol did not identify milestones or timeframes in its last strategic plan, OIG found that "differences in data collection methods and reporting preclude the Border Patrol from comparing the overall effectiveness of each sector's deployment of border security resources."

Even if we are looking at apprehensions as a way to measure success on the border, the numbers do not support the claim that more resources necessarily equal more security. In 2005, DHS apprehended 1.2 million illegal aliens with 11,264 Border Patrol agents while operating on a budget of \$1.525 billion. Eight years later in 2013, apprehensions decreased to 421,000, while the number of agents has almost doubled, along with a 100 percent increase in the Border Patrol's budget.

All this is not to point fingers, but to call attention to the fact that CBP needs to develop a border strategy that specifies its mission goals, justifies what resources are necessary to meet those

goals, and provides metrics to determine how CBP is doing before anyone – Congress or CBP – should mandate a particular level of hours worked or number of agents working at each location.

Yet this bill does exactly that. It mandates that no less than 90% of all agents at each location work 100 hours each pay period. I believe that the number of hours worked should be driven by the mission, and we simply cannot know what that is until CBP prepares a comprehensive audit.

Notwithstanding these issues, I think we can all agree the majority of agents working along the borders are facing daunting tasks. There is no denying that now is a particularly challenging time for border agents. The news coming out today and during the past week about the number of children crossing the border is a disturbing reminder of this. I want to do everything in my power to ensure agents have the tools and resources necessary to meet their mission. But we cannot do so without knowing exactly what they need, and we should not do so with a one-size-fits-all approach.

I think what Senators Tester and McCain are trying to do here is important work and I appreciate their dedication to this issue. I also thank the witnesses for being here today, and I look forward to their testimony.