

**Testimony of Special Counsel Carolyn N. Lerner
U.S. Office of Special Counsel**

**U.S. Senate
Committee on Homeland Security and Governmental Affairs**

Nomination of Michael J. Missal to be Inspector General, U.S. Department of Veterans Affairs, and the Honorable Carolyn N. Lerner to be Special Counsel, Office of Special Counsel

January 12, 2016, 10:00 A.M.

Chairman Johnson, Ranking Member Carper, and Members of the Committee:

Thank you for inviting me to testify today. I am honored that the President nominated me to serve a second term as head of the Office of Special Counsel (OSC). I would like to thank my family for their support and encouragement over the past 4 ½ years as I took on the new challenge of heading OSC.

I want to acknowledge the OSC leaders who are here with me today. I am very proud to serve with these exemplary public servants. I can say, without hesitation, that OSC is engaged in the most productive period in its history. This productivity is due to the hard work of the individuals in the room today and all of OSC's employees throughout the country, in D.C., Dallas, Detroit, and Oakland.

Our strong results in whistleblower retaliation, whistleblower disclosure, Hatch Act, and Uniformed Services Employment and Reemployment Rights Act (USERRA) cases demonstrate this office's ability to promote better and more efficient government. For example, our work with whistleblowers has prompted improvements in the quality of care provided to veterans at Department of Veterans Affairs (VA) medical centers across the country. And, by protecting and promoting the disclosures of over a dozen Customs and Border Protection whistleblowers, and working with this Committee, we curbed hundreds of millions of dollars of waste and improper overtime payments.

We helped the Air Force better fulfill its sacred mission on behalf of fallen service members and their families and protected the employees who blew the whistle on gross abuses at the Port Mortuary, Dover Air Base. We vigorously enforced the Hatch Act and worked with then-Chairman Akaka and Senator Mike Lee to modernize the Act by limiting the federal government's unnecessary interference with state and local elections. This has allowed OSC to better allocate our resources toward more effective enforcement of this important law. Finally, we have vigorously protected the employment rights of returning service members and helped them to restore successful post-deployment civilian careers in the government.

When I was first nominated as Special Counsel in 2011, I often remarked that OSC was the best kept secret in the federal government. I wanted this to change, so that more employees and taxpayers could benefit from the work of this small but effective agency.

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Our commitment to protecting whistleblowers and other employees, and our efforts to reach out to the federal community, are moving us in the right direction. In 2015, for the first time in the agency's history, we received and resolved over 6,000 cases, a 50 percent increase from 2011, when I took office.

This dramatic increase in filings indicates that whistleblowers believe they can make a difference by bringing a claim to OSC. Studies have shown that the number one reason employees do not report waste, fraud, or abuse is not because they fear retaliation. It is because they do not believe any good will come from their risk. If the number of whistleblower cases is any indication of employees' willingness to raise concerns—and I think it is—then we are certainly moving in the right direction.

Over the past four years, demand for OSC's services has far exceeded our small agency's resources. Given our small size, we have needed to find new and more efficient ways to approach resource management and increasing caseloads. And we have.

OSC's cost to resolve a case is down by 45 percent, leading to record levels of productivity. My efforts to promote greater efficiencies have been large and small. I have focused on being a careful steward of taxpayer dollars by cutting unnecessary expenditures and found better ways to manage our cases.

I have implemented several policy initiatives to better manage our caseload. For example, I reinvigorated our alternative dispute resolution program. Mediation saves OSC, the employee, and the agency time and resources, while often resulting in better solutions for complainants and agencies alike. Advocates for whistleblowers and agency counsel have praised OSC's mediation program and its ability to bring about effective results. And, we are currently experimenting with a new and innovative approach to managing whistleblower cases. The new approach consolidates four OSC positions: intake examiner, disclosure attorney, investigative attorney, and mediator. We are receiving positive feedback from employees and agencies, because they no longer have to communicate with multiple OSC staff when seeking resolution on the same case.

By taking these smart approaches to our growing caseload, and focusing on positive outcomes for whistleblowers and employees, we have managed to generate efficiencies without compromising the quality of OSC's work. Indeed, when evaluating what is arguably the most important statistic for OSC—the number of favorable actions on behalf of whistleblowers and the merit system—we are consistently setting records. In fact, each year since my term began, OSC has reached new milestones.

In 2015, we secured 278 favorable actions for whistleblowers and other employees, up from 201 favorable actions in 2014. Prior to my tenure, the number of favorable actions had dropped to 29, and was consistently below 100 per year throughout the agency's 35-year history. These "victories" for whistleblowers include reinstatement, back pay, and other remedies, such as stays of improper removals or reassignments, and disciplinary actions against those who retaliate. These actions are a key measure of OSC's success.

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While I am proud of these accomplishments, our numbers do not tell the whole story. Statistics cannot capture the true impact and value of OSC's work. Our efforts to support whistleblowers often save lives and spark reforms that prevent wasteful, inefficient, or unsafe practices.

For example, early in my tenure, whistleblowers at the Air Force's Port Mortuary in Dover, Delaware, disclosed misconduct regarding the improper handling of human remains of fallen service members. After OSC reviewed the allegations and made recommendations to congressional oversight committees, the Air Force took important corrective action. OSC's work helped to ensure that problems were identified and corrected, and the Air Force is now better able to uphold its sacred mission on behalf of fallen service members and their families.

In addition, OSC's work with whistleblowers at the Department of Homeland Security (DHS) exposed the Department's longstanding failure to manage hundreds of millions of dollars in annual overtime payments. The lack of adequate safeguards in these overtime payments resulted in a significant waste of taxpayer dollars over many years. Investigations in response to OSC referrals confirmed that overtime payments were routinely provided to individuals who were not eligible to receive them. This work resulted in a series of reforms within DHS, multiple congressional hearings, including by this Committee, and bipartisan support for legislation to revise the pay system for Border Patrol agents that will result in \$100 million in annual cost savings at DHS—an amount roughly four times the size of OSC's annual appropriation.

OSC's work with VA whistleblowers has improved the quality of care for veterans throughout the country and promoted accountability. In numerous reports to the President and Congress, I documented severe shortcomings in VA internal investigations of threats to patient care at VA hospitals throughout the country. This led to an overhaul of the VA's internal medical oversight office, as well as other systemic changes at the VA.

In summary, I am grateful for the opportunity to have served as Special Counsel. But there is still much to be accomplished. If confirmed for a second term, I will look to expand the important work of this office by building on our current successes, continuing to protect VA and all other employees from retaliation, and finding additional ways to utilize our limited resources to build better and more accountable government. I will further increase our efforts to educate federal managers and employees, because the best way to safeguard the merit system and cut waste, fraud, and abuse is by preventing problems from occurring in the first place. By highlighting the important work of whistleblowers and this office, I hope to promote a culture in the government that encourages disclosures of waste and acts quickly to correct identified wrongs.

Mr. Chairman and Ranking Member Carper, thank you for the opportunity to testify today, and for 4 ½ years of a productive relationship that has made our government more accountable, efficient, and safer. I look forward to answering your questions.

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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.

Ms. Lerner earned her undergraduate degree from the Honors College at 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.