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BORDER SECURITY: EXAMINING THE IMPLICATIONS OF S. 1691, THE BORDER PATROL AGENT PAY REFORM ACT OF 2013

HEARING

BEFORE THE

COMMITTEE ON
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

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BORDER SECURITY: EXAMINING THE IMPLICATIONS OF S. 1691, THE BORDER PATROL PAY REFORM ACT OF 2013

MONDAY, JUNE 9, 2014

U.S. SENATE,
COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 3:34 p.m., in room SD–342, Dirksen Senate Office Building, Hon. Thomas R. Carper, Chairman of the Committee, presiding.

Present: Senators Carper, Tester, and Coburn.

OPENING STATEMENT OF CHAIRMAN CARPER

Chairman CARPER. The hearing will come to order.

Welcome, everyone. I am going to make a pretty short statement here and turn it to Dr. Coburn, and Senator Tester, if you would like to make a statement, as well, that would be great. I understand that Senator McCain is tied up. My thanks to our colleagues, our witnesses, for working with our staffs to enable us to put this hearing together fairly quickly.

The purpose, as you know, of this hearing is to examine the merits of S. 1691, the Border Patrol Agent Pay Reform Act (BPAPRA) of 2014, introduced by Senators Tester and McCain, cosponsored by Senators Heitkamp and Ayotte. This bill would make badly needed reforms to the overtime system of the Border Patrol, which is currently too complicated and too difficult to manage.

Before I get into the bill, I want to briefly talk about what is happening currently along our borders. Over the past few years, we have seen a surge in unauthorized migration from Central America, which is nearing record highs. An unprecedented number of people we are apprehending at the border are unaccompanied children, some as young as 10 years of age. Our laws—appropriately—require that these vulnerable children be treated differently than other migrants. They must be transferred to the Department of Health and Human Services (HHS) and there are strict rules about their care. Secretary Johnson, last week, announced that he was creating an interagency task force and devoting additional resources to coordinate the care and resettling of these children. I commend that announcement.

Since I became Chairman of this Committee 18 months ago, I visited the Southern Border with Mexico in Arizona and Texas on a number of occasions. I have seen firsthand the crowded condi-

tions at our Border Patrol stations in the Rio Grande Valley (RGV). I have also visited Mexico, Guatemala, and El Salvador, and I hope to spend some time down in Honduras.

What I have come to understand is that what happens along our borders is only a symptom of the problem. It is not the underlying cause. Today's hearing will focus on how we can better address one of these symptoms by increasing enforcement. The Tester-McCain bill we are examining today will save, we hope—taxpayers money, hopefully a good deal of it, and increase our ability to patrol—and secure—our borders. In fact, one estimate I have seen shows that this bill would add the equivalent of 1,400 agents to the border. That is a lot.

Given the challenges we face on the border, which have only been underscored by recent events, I have to say that moving this bill would seem like, on the surface, to be a no-brainer. I fully support moving forward with the bill as soon as possible.

And, while we need to do all we can to treat these symptoms, we cannot stop there. It is critical that we understand and address the root causes of why all these people are willing to literally risk everything, life and limb, to come here in the first place and to struggle through Mexico to get here. Based on what I have seen in my trips to some of these countries, those root causes are lack of economic opportunity and hope and deteriorating security situations in El Salvador, Guatemala, and Honduras. I describe it as squeezing the balloon in one place, Northern Mexico. The bad guys go south. A lot of them ended up in those three Central American countries and they are creating not just mischief, but mayhem.

Nearly one year ago, the Senate passed a bipartisan comprehensive immigration reform measure that addresses many of the root causes of undocumented immigration. And while the bill is imperfect, it is a significant improvement over the status quo and provides our Nation with an important opportunity to fix our broken immigration system and grow our Nation's economy by almost one trillion dollars. But, in order for this solution to become law, we need our colleagues in the House to act. We also need to do a better job at helping Central American countries improve their prospects for their young people and those not so young by helping provide them with jobs and safe and secure communities and a future, so they stay and build their own countries instead of trying to get to ours.

On June 19, I will be convening a roundtable of experts from across the U.S. Government, to multilateral banks, as well as private institutions to discuss how we continue to improve the prospects of young people and not-so-young people in these Central American countries, and I would urge and invite all of our colleagues in this Committee to join us for this roundtable.[1]

Dr. Coburn, please.

[1] The prepared statement of Senator Coburn appears in the Appendix on page 35.

OPENING STATEMENT OF SENATOR COBURN

Senator COBURN. Well, first of all, thank you, Mr. Chairman, and thanks to Senator Tester and Senator McCain as well as Senator Portman. Senators Portman and Tester held an important hearing on this in January and I am the one that asked for this hearing because—two points I would make.

One is, with the Administratively Uncontrollable Overtime (AUO), my goal is not to take anything away from our Border Patrol Agents, and we have, I think, about 900 or so that AUO is no longer authorized for. The goal should be adequate pay for the risk and effort that they put in. But, I am really concerned about what we are doing here in terms of setting up a system that could become governmentwide, and the question I ask as both a former accountant and a former business manager is if, in fact, we need to have about $28,000 above, or $29,000 above a GS–12 maxed out the way we are going to do this, why would we not just change the base pay? Why would we not just change the base pay system rather than have this overtime system?

The other question that I have associated with what we are doing is, things change, and what we are doing is we are talking about putting a payment system into statute that guarantees a certain amount of overtime every pay period that is not a part of contractual obligations. This is statute. So, I am a little concerned about that, as well, because if, in fact, the border becomes more difficult, requiring greater risk, requiring greater expertise, we are going to be somewhat limited by how we have done this.

So, I am looking forward to asking questions to try to get settled in my mind: how do we compensate our Border Patrol Agents at the level at which they have been being compensated and make sure they are secure in the future? I do not want to take 25 percent of anybody's pay away, and that is not our intent. Our intent is to make sure it does not go away as we reform AUO.

The other point that I would make is there are a lot of positions within the Border Patrol that do not have to do a write-up at the end of the day, do not have to travel back from a position assignment, and yet we are including all those in this that should not have an AUO payment. In other words, their jobs should not require it. And so the characteristics of the mix is important to me, as well.

So, what I want to do is get answers to critical questions today. I have a statement that is written for the record.[1]

And, again, I want to fix this. I am not trying to stop it from getting fixed. My understanding is a very limited number of people no longer have AUO as a comparison to the total workforce, and I want to make sure when we fix it, we fix it right, and we also fix it in a way that the House is going to accede to so that we actually solve the problem.

So, I appreciate, really, Senator Tester's acquiescence on not moving this bill on the last markup and pledge my support to get this problem solved when I get my questions answered.

Chairman CARPER. Good enough.

All right. Senator Tester, good to see you.

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[1] The prepared statement of Senator Coburn appears in the Appendix on page 37.

OPENING STATEMENT OF SENATOR TESTER

Senator TESTER. Well, thank you, Chairman Carper, Ranking Member Coburn, and I think I could answer your questions now, but I think it would be better left to the expert panelists to answer the questions about things changing, because I think you are right. Things do change. That is really why we are here today, is because things have changed.

Senator McCain and I introduced this legislation a little over a year ago, and we did have a hearing back in January. Since our initial introduction, we have worked closely with the Customs and Border Protection (CBP), the Border Patrol Union, the Department of Homeland Security (DHS), the Office of Personnel Management (OPM), and others to make this bill even stronger. We have worked together, something that is fairly uncommon in the Senate these days. It is cosponsored by Senators Heitkamp and Ayotte, and a companion bill is in the House, sponsored by Representative Chaffetz and a host of others, both Democrats and Republicans. The bill is supported by both the CBP and the Border Patrol Union, which represents 16,500 agents in the field.

It saves money. It creates more stability for Border Agents and their families, and it increases manpower along the border, so the security is increased and the agents are better equipped to do those jobs that are so very important to all of us.

The reform of the Border Patrol pay system is long overdue. The operational needs from 40 years ago are quite different from the criminal operations that we see on the border today. Things have changed. We have waited long enough. We need to move forward with this bill because it ensures stability for our Border Patrol Agents and makes sure that our borders are properly manned.

In the end, I appreciate the opportunity to have a full Committee hearing on this bill. I can tell you that as I look at this bill, it increases enforcement, it saves money, and I think it makes—it allows for our borders to be as secure as they possibly can to meet the dangers of terrorism, drugs, and illegal immigration that is so common on both Northern and Southern Borders.

So, with that, Mr. Chairman and Ranking Member Coburn, I appreciate the opportunity to hear from our witnesses and be able to ask them questions about this important issue and hopefully end up being able to get this bill out of this Committee and off the floor of the Senate and over to the House.

Thank you, Mr. Chairman.

Chairman CARPER. You bet. Thank you very much, Senator Tester.

Let me just take a minute to welcome our panel of distinguished witnesses and I will just give very brief introductions.

Our first witness is Ron Vitiello. Mr. Vitiello is Deputy Chief in the U.S. Border Patrol. In this capacity, he is responsible for the daily operation of the Border Patrol and routinely assists in planning and directing nationwide enforcement and administrative operations. Deputy Chief Vitiello was one of the contributors to the unification of U.S. Customs and Border Protection and the creation of the Department of Homeland Security. Is that true?

Mr. VITIELLO. I was on detail with the Department during the stand-up.

Chairman CARPER. OK. Good. Thank you. Good to see you.

Our second witness is Brandon Judd. Mr. Judd has more than 15 years of experience as a Border Patrol Agent. He currently serves as President of the National Border Patrol Council, representing more than 17,000 Border Patrol Agents and support staff. Mr. Judd has spent much of his career on the Southwest Border in the El Centro, California, and Tucson, Arizona, Sectors. In the past, he has been stationed as a Field Training Officer and Canine Officer at one of the busiest border crossings in Naco, Arizona. And, from 2001 to 2002, he was an instructor at the Border Patrol Academy. Welcome, Mr. Judd. Nice to see you.

Our next witness is Paul Hamrick. Mr. Hamrick is the Deputy Assistant Commissioner of the Office of Internal Affairs (OIA) for U.S. Customs and Border Protection, a post he has held since 2012. I understand that Mr. Hamrick just became our witness this morning due to some leadership changes announced by the Commissioner today. That is not much warning, but thanks for joining us. We very much appreciate Mr. Hamrick stepping up to serve as our witness, given his extensive knowledge of the issue we are going to discuss today. He joined the Customs Service in 1986 as a Special Agent. He has been with the Office of Internal Affairs since 2007. Thank you again for joining us on such short notice.

Our final witness is Adam Miles. Mr. Miles is the Director of Policy and Congressional Affairs at the U.S. Office of Special Counsel (OSC). Prior to joining the Office of Special Counsel, he was on the staff of the House Committee on Oversight and Government Reform. We thank you for your service.

We thank all of you for your service and for your testimony today. If you want to give us your testimony in roughly 5 minutes, that would be fine. If you run a little over it, that is OK. If you run way over that, we will have to rein you in, and then we will start some questions. But, we are glad you here and look forward to an informative hearing. Thank you all for joining us.

And, Mr. Vitiello, why do you not go first.

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

Mr. VITIELLO. Thank you, Chairman Carper, Ranking Member Coburn, distinguished Members of the Committee. Thank you for the opportunity to appear before you today to address the need for Border Patrol Agent pay reform.

This is a matter of concern to the Department of Homeland Security, U.S. Customs and Border Protection, and the U.S. Border Patrol. We welcome the opportunity to work with you in finding solutions at an affordable cost.

The DHS and the Border Patrol missions require properly paying our border security personnel and properly managing their pay system. Our application of overtime, specifically Administratively Uncontrollable Overtime, stretches back many years, but existing AUO authorities no longer meet the needs of a modern Border Patrol.

[1] The prepared joint statement of Mr. Vitiello appears in the Appendix on page 41.

S. 1691, Border Patrol Agent Pay Reform Act, would replace AUO with a system that controls costs, fairly compensates certain agents for irregular and necessary work, and maximizes agent capability for critical law enforcement and border security responsibilities. If enacted, it would ensure that the entire Border Patrol workforce is scheduled to continue work and meet mission requirements beyond the eighth hour of his or her shift while providing predictable rotations around the clock. Agents would receive compensation for any work over 8 hours per day and would remain eligible for other types of scheduled overtime when emergencies occur or special mission sets require it.

In addition to increasing patrol hour capacity by over 2.5 million hours, the Act would reduce overall costs. It would eliminate Fair Labor Standard Act (FLSA) pay, FLSA compensation, for most agent assignments, which totaled $105 million in 2013. Based on the cost estimates briefed by CBP, BPAPRA would save $38 to $67 million annually.

Border Patrol has a business practice and leadership development requirement that relies on agents rotating into and out of headquarters assignments and the training environment. This maintains up-to-date field experience in those positions. It prepares leaders as they advance. Like other Federal law enforcement agencies, this bill contemplates portable pay for employees who cycle through those assignments and back out into the field. The cost to train and maintain an agent's skills is considerable, and scheduling overtime is much more cost effective than getting the equivalent number of hours via more agents. CBP moves resources around the country to maximize their impact and is committed to continuing to do so.

The bill also provides strict thresholds and management controls, which will ensure cost savings and mission capability. Without relief legislatively, effectiveness will suffer and morale is very likely to take a downward turn.

We commend the Committee's commitment to modernizing the pay structure for Border Patrol Agents and for proposing legislation that would provide CBP the flexibility to administer a credible, cost efficient, and equitable compensation system that would meet the needs of a 21st Century Border Patrol. We look forward to continuing to work with Congress on this endeavor.

Chairman Carper, Ranking Member Coburn, Members of the Committee, I look forward to this opportunity and answering all your questions.

Chairman CARPER. OK. Thanks, Mr. Vitiello.

Mr. Judd, you are recognized. Please proceed.

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

Mr. JUDD. Chairman Carper, Ranking Member Coburn, Senator Tester, on behalf of the 16,500 Border Patrol Agents whom I represent, I would like to thank you for having this hearing today to discuss S. 1691. I would especially like to thank Senator Tester, and if Senator McCain were here, I would like to thank them for introducing this important legislation.

Instead of reading a prepared statement—I have given that to you last Thursday—I would like to speak with you. I am looking forward more to answering your questions than to giving you a prepared statement that you already have. But, there are a couple key issues that I would like to point out.

The first issue is we are no longer dealing with mom and pop smuggling organizations on the border. We are dealing with sophisticated criminal cartels. They control all traffic that is happening that comes into the United States and that goes into Mexico. They also control the illegal activity that happens on the Northern Border and on the Coastal Border.

Approximately a year ago, all Border Patrol agents were notified that their hours per 2-week pay period would be cut from 100-plus down to approximately 95. Since that time, we have seen almost an immediate increase of smuggling across the border. In fact, on the map up here,[2] not only are we seeing an increase in the RGV Sector—we know about that tidal wave that is currently happening—but we have seen an increase in important corridors like El Paso, Texas, San Diego, California. These were considered operationally controlled areas. They have increased in arrests in the last year since we have cut these hours by nearly 15 percent.

We have also seen, Senator Tester, in your neck of the woods, in Havre, Montana, we have seen an increase in arrests since these hours were cut by nearly 50 percent. That is a huge increase. We have also seen an increase on the Coastal Border, in Miami, Florida. We have seen an increase by almost 30 percent on the Coastal Border. These cartels know what we do, how we do it, and when we do it. They know when we are vulnerable, and right now, due to the hours that have been cut, we are vulnerable. Fifty percent in Havre, Montana—that is huge.

The second point that I would like to address is the retention. In Senator McCain's neck of the woods, the busiest station in the Tucson Sector, historically, one of the busiest stations in the entire Nation—I believe it currently seizes more drugs than any other Border Patrol station in the Nation—we have seen 5 percent of the workforce leave in the last year due to the number of hours that have been cut and the pay reduction that we are experiencing. We also have another 15 percent at this station alone who have pending applications in for other agencies. We cannot afford to lose 20 percent of a station, especially a station that is so important to the Tucson Sector, but that is what is happening under the economic climate.

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[1] The prepared statement of Mr. Judd appears in the Appendix on page 48.
[2] The map referenced by Mr. Judd appears in the Appendix on page 47.

The last point that I would like to make, and I would like to read this statement, back in 1997, when I came into the Border Patrol, the recruitment that I was offered was 25 percent Administratively Uncontrollable Overtime for the rest of my career. That is what we were told we were going to get. That has now been cut. We no longer have that, and there are two reasons, budgetary issues and legal issues.

We approached Congress 4 years ago and we tried to get the powers that be to amend the AUO laws to allow us to continue to do what we need to do to control the border. Unfortunately, because it is an expensive system, we could not get any traction. Because of that, we have worked diligently with the agency to come up with a plan that will satisfy all parties. It will satisfy the taxpayers in a huge cost savings. It will satisfy the agency, as it will give the number of hours that are needed on the border to secure the border. And, it will satisfy the Border Patrol Agents as we will have a consistent and constant paycheck that we will know what it is year to year.

I want to make it clear that no Border Patrol Agent is happy about the prospect of losing $6,400 per year. We recently made another push to keep FLSA, but we were again unsuccessful. We are sacrificing a lot, but in the end, it will prove to be a boon for border security, the American public, the agency, and the agents whom I represent. It is very rare that Congress has the opportunity to consider a piece of legislation that saves money and enhances the agency's capability, and that is exactly what this does.

I look forward to answering your questions. Thank you.

Chairman CARPER. Thanks for your testimony.

Mr. Hamrick, please proceed.

TESTIMONY OF PAUL L. HAMRICK,[1] DEPUTY ASSISTANT COMMISSIONER, OFFICE OF INTERNAL AFFAIRS, U.S. CUSTOMS AND BORDER PROTECTION, U.S. DEPARTMENT OF HOMELAND SECURITY

Mr. HAMRICK. Chairman Carper, Ranking Member Coburn, Senator Tester, it is a privilege to appear before you today to discuss the ongoing review of Customs and Border Protection's overtime compensation systems, specifically those used by the U.S. Border Patrol. Properly paying our border security personnel and appropriately managing our pay systems are essential to the CBP mission.

CBP's application of overtime, specifically AUO, the primary compensation system used by the Border Patrol, stretches back many years. Established more than 40 years ago, AUO is a payment mechanism that allows for the compensation of certain employees for irregular, unscheduled, but necessary overtime. Approximately 77 percent of AUO paid at DHS goes to employees of CBP, including more than 20,000 Border Patrol Agents. In order to be eligible for AUO, an employee must be in a position in which the hours of duty cannot be controlled administratively and which require substantial amounts of irregular or occasional overtime work.

[1] The prepared joint statement of Mr. Hamrick appears in the Appendix on page 41.

CBP takes seriously its responsibility to ensure the proper use of taxpayer funds. While many front-line officers and agents across the Department require work hour flexibility, often through the use of AUO, misuse of these funds is not tolerated. Within DHS components, allegations of misconduct that are raised by employees are typically provided to and handled by component internal affairs offices and/or the DHS Office of Inspector General, in conjunction with the component's human resources office. If merited, employees found to have engaged in misconduct are subject to disciplinary action.

CBP's Office of Internal Affairs conducted a series of investigative inquiries regarding the alleged improper use of AUO by specific entities within CBP. Internal Affairs field offices in Washington, D.C., Houston, Texas, San Diego, California, and Seattle, Washington, conducted AUO-related investigations at specific Border Patrol sector headquarters, stations, training entities, and the CBP Commissioner's situation room.

Although the Office of Special Counsel received complaints that overtime hours compensated under AUO were not being worked—allegations that, if proven, could constitute criminal or administrative violations—our investigations did not substantiate any OSC allegations that employees had received AUO compensation for hours that were not worked. The investigations did, however, substantiate aspects of the allegations that questioned whether AUO was the appropriate mechanism for specific overtime compensation.

In short, the investigations determined that work was conducted, and, importantly, even where AUO was not the proper overtime mechanism, CBP had an obligation and CBP employees had an entitlement to be appropriately compensated for the overtime hours worked.

DHS and CBP have taken steps to address the situation. On January 27, Secretary Johnson issued a memorandum directing component leadership to take immediate action to suspend AUO for certain categories of employees on an interim basis. As a result, approximately 600 CBP headquarters personnel, full-time trainers, and employees found to have misused AUO in completed investigations were suspended from receiving AUO.

After additional review, on May 23, Deputy Secretary Mayorkas issued a memo directing components to develop a comprehensive agency plan within 30 days to address AUO compliance issues. The components will also work with the DHS Management Directorate to develop a Department-wide directive formalizing these efforts and new reforms. The directive will include requirements for independent audits of AUO records and mandate disciplinary measures for those who violate AUO policies in the future, including supervisors and managers who permit employees to misuse AUO.

Until such time the CBP can address all of its AUO compliance issues, CBP leadership has directed additional interim measures, such as a comprehensive position review of AUO eligibility, to eliminate CBP's use of AUO where the available evidence suggests that its use is impermissible.

Chairman Carper, Ranking Member Coburn, Senator Tester, thank you for the opportunity to testify here today. I look forward to answering your questions.

Chairman CARPER. Mr. Hamrick, thanks again for showing up on such short notice and testifying.

The next and final witness is Adam Miles. Please proceed.

TESTIMONY OF ADAM MILES,[1] DEPUTY SPECIAL COUNSEL FOR POLICY AND CONGRESSIONAL AFFAIRS, U.S. OFFICE OF SPECIAL COUNSEL

Mr. MILES. Chairman Carper, Ranking Member Coburn, and Senator Tester, thanks very much for inviting me to testify today on behalf of the United States Office of Special Counsel. I am pleased to have the opportunity to discuss OSC's cases and our ongoing work to address widespread misuse of overtime payments to DHS employees.

I want to acknowledge quickly OSC's DHS Overtime Team, many of whom are sitting behind me: Catherine McMullen, Lynn Alexander, Johanna Oliver, Nadia Pluta, and Treyer Mason Gale. Together, their work with whistleblowers has helped to identify and address over $37 million in annual misuse of overtime pay.

Special Counsel Carolyn Lerner's October 31, 2013, communication to Congress and the President outlined longstanding concerns about systemic misuse of Administratively Uncontrollable Overtime. This is an issue OSC first addressed in 2007.

The communication in October 2013 prompted significant debate on the legitimacy and legality of AUO payments to DHS employees, and particularly within CBP. Encouraging this type of discussion, with the goal of rooting out waste and achieving meaningful reform, is at the heart of OSC's mission. As stated in OSC's October 31 letter, abuse of overtime pay is a violation of the public trust and a gross waste of scarce government funds. It is incumbent upon DHS to take effective steps to curb the abuse, and it is up to the administration and Congress to develop a revised pay system, if warranted, that ensures fair compensation for employees who are legitimately working overtime.

Since October 2013, and particularly in response to Senator Tester's Subcommittee hearing in January 2014, DHS has taken steps to place better controls on AUO use. This includes decertifying at least some of the positions where employees should not be collecting AUO payments. While it has taken many years and more needs to be done, we are encouraged by the steps that DHS is now taking.

In addition, as OSC told Senator Tester's Subcommittee in January, we are also pleased that Congress is helping CBP to find ways to solve this longstanding problem, including through legislative reform. While OSC does not have a position on the Border Patrol Pay Reform Act of 2013, our update today on pending cases will provide some context for the Committee as it considers the legislation.

In particular, I want to compare and contrast two recent reports that were prepared by OIA and set sort of the legal and factual framework for this discussion. These were in response to whistleblower disclosures at an asset forfeiture office in San Diego, California, and CBP's Laredo North Station in Laredo, Texas.

[1] The prepared statement of Mr. Miles appears in the Appendix on page 50.

The whistleblowers in these cases and in 14 others that came to OSC separately from locations all around the country had basically the identical disclosures, that Border Patrol Agents or Immigration and Custom Enforcement (ICE) Officers claimed 2 hours of AUO each day, but the extra 2 hours of overtime work are unlawful because they do not meet the requirements for AUO.

The reports to OSC, again, prepared by OIA substantiated the core allegations. The reports confirmed that agents in these locations basically just extend their regular shifts by 2 hours every day, routinely, and that is in violation of AUO rules that require unpredictable or irregular law enforcement or compelling reasons to stay on duty.

In addition to the across-the-board substantiation of the AUO misuse, there are key differences in the reports that I think are worth going through, and these are based on the duties of the agents in those locations.

I want to start by addressing the Border Patrol Agents in Laredo, Texas. The OIA report noted that the agents claimed AUO in order to complete the post-shift work necessary to travel back and forth from a border assignment to the station. They call it routine post-shift activities. The agents that were interviewed by OIA all indicated that the post-shift activity simply cannot be completed in 8 hours. Border Patrol managers insisted in the report that employing 10-hour shifts is the most cost-effective approach to securing the border, even if that means misusing AUO as it is currently used.

As Congress considers legislative proposals to address AUO misuse, it may want to consider the arguments in support of a 10-hour shift and the unique demands on agents in areas like Laredo, Texas.

The reports on San Diego, California, and a similar report addressing AUO abuse at the training facility in Glynco, Georgia, present different issues. They illustrate simply how broadly AUO misuse extends within CBP. For example, the report states that some Border Patrol Agents in San Diego work as paralegals. The Border Patrol Agents assigned to paralegal duties work a scheduled 10-hour shift and claim 2 hours of AUO daily, just like agents in the field. The report notes that Border Patrol Agents in the parallel section have the same duties as non-Border Patrol Agents in the section, who are referred to as civilians. For example, the paralegal Border Patrol Agents, they send out notices on seized properties and they draft correspondence and do other tasks in support of law enforcement efforts, but they are basically in an office setting. The non-Border Patrol Agents with the same duties are not eligible for AUO and do not work 10-hour shifts, yet, they sit side-by-side with the Border Patrol Agents who are working the 10-hour shift.

So, again, as Congress considers pay reform, it may want to consider whether and to what extent pay reform should cover Border Patrol Agents assigned to paralegal or other office roles where non-Border Patrol Agents have the same duties, but are not eligible for AUO. And the same issue is present with instructors at the Glynco, Georgia, Training Academy and is summarized in detail in my written statement.

I hope this information is useful to the Committee's deliberations and would be pleased to answer your questions. Thanks very much for having me.

Chairman CARPER. Thank you very much for your testimony. Thanks to all of you.

I see we have a couple of cameras here, and I presume this may be broadcast on C–SPAN. There are some people watching this around the country, or will later tonight or tomorrow, and they are going to want to know, what are they talking about? And, I am just going to start off, and I asked our staff, I said, who among these four witnesses can actually explain this so that someone watching on television, somebody who is maybe not even here on this Committee, somebody who might have stumbled into the room could actually understand what is the problem we are trying to fix, all right. What is it? And, do not use acronyms. Use just regular language and just explain it.

Mr. Vitiello, what are we trying to fix here? What is the problem we are trying to fix?

Mr. VITIELLO. We are trying to get ourselves in a situation where Border Patrol Agents are sufficiently ready and capable and authorized, in whatever format, to engage in post-shift activities. And so all agents are scheduled for 8 hours a day, and if you were on a factory floor and your boss came in at the end of the shift and said, "I need you to stay. Someone is not coming for the next shift," they would ask you to stay and perform that same activity for the subsequent 8 hours, and in most factory settings, that would be double-time. That would be considered overtime.

The government is not different in the sense that it requires people to stay on their shift or to do things at the end of their shift that prepare the rest of the team to be better informed and prepared as they deploy. So, there needs to be an overlap, an exchange of information, and so the government calls that overtime.

In the current configuration, that is called Administratively Uncontrollable Overtime. It is more complex as it relates to AUO, because the statute allows for individual agents to assess what mission requirements are in front of them and, in essence, self-deploy against the work that is in front of them.

Now, that is a good thing back in the day when it was established because it allowed agents the flexibility to work, even though their shift might have been over. The other good thing it does is it allows for people not to watch the clock. If there is work in front of them that is necessary for the mission, they can complete that work.

What this legislation proposes is to continue that practice, but it covers all the work post-shift, so, whether it is, in fact, chasing a group, or arresting people, or preserving the chain of custody for evidence, or informing the next shift, or things that are in an administrative setting that prepare the next team to be more capable in the shift.

Now, I think it is important to recognize that in this setting, both for AUO and what is contemplated in the legislation, it is straight time. So, the compensation for the first hour of the shift and the compensation for the tenth hour of the shift in this configuration would be the same rate of pay.

Chairman CARPER. All right. What concerns have been raised, and you can answer this if you want, or if someone else is better prepared, that would be fine. But, the concerns about abuse, how the current system has been abused or rewarded people who should not be rewarded in this manner. Could someone just speak to that for us? And, maybe, Mr. Miles, you might be the best person to do so.

Mr. MILES. So——

Chairman CARPER. Concerns have been raised. Talk to us about those concerns.

Mr. MILES. They have——

Chairman CARPER. And, the next question I am going to ask is, what has the Department tried to do about this on its own, and then talk with us about the legislation. So, what are the concerns about abuses?

Mr. MILES. So, the CBP witnesses are going to be in a much better position to discuss the changed circumstances and why it is that this overtime authority is being misused. But, in general, decades ago, when AUO was first developed, the idea was that the border was very big and there were not a whole lot of agents, and so if somebody needed to stay after hours to arrest somebody or to follow a lead, then they were able to do that, and they did not have to report back to headquarters, they did not have to call up their boss and ask, "Can I stay on the job?"

Now, the situation has changed. There are more agents and the border has not grown, but technology has been developed quite a bit. And so the way in which the border is being guarded has changed significantly, and again, I am way out of my lane in talking about law enforcement issues, but now, it is much more regular, it is much more routine, and it is much more predictable, the way that agents are being told to fulfill their duties. And so the legal framework, the statutory framework that allows for this overtime compensation authority says that it has to be unpredictable.

But, when you look at the reports that have come into OSC and what 16 whistleblowers from across the country have told us is that, basically, the way that AUO is being used is the exact opposite of how it was intended. It is routine. It is daily. It is 2 hours a day. And, it is, in contrast to the rules that require irregular, unpredictable, and you cannot control it, you cannot manage it. And so there is a core legal problem with the way that AUO is being used.

And then we have had secondary allegations that were addressed by CBP testimony that said that people are staying on the clock just to fulfill those hours, just so that they can work a 10-hour day, but they are not doing any work. And those allegations, to date, have not been substantiated, that, basically, people are goofing off, that they are surfing the Internet during the extra 2 hours and not doing any law enforcement work. And that has been a concern. It has been one that we have not been able to pin down, but that is the secondary concern that is going on here.

Chairman CARPER. OK. My next question is, what can the Department do to address the abuses but make sure that we are treating our Border Patrol Officers fairly, making sure we have the human resources we need, on the border? What can the Depart-

ment do itself? What have they tried to do themselves to address these concerns?

Mr. VITIELLO. So, I think previously that Paul mentioned that the Secretary's memo of January 27, which suspended AUO in specific categories. Prior to that and since then, CBP, the Department, and others have undertaken a position-by-position review to try to discriminate which of the job categories, specifically in the Border Patrol in our instance, are still eligible, given the rubric for AUO, and which are not. And so that suspension went forward January 28 for those discrete categories and the position-by-position review.

Additional training has been authorized and deployed to the field. We need to put ourselves in a place, based on the subsequent memo of May 23 from the Deputy Secretary, put ourselves in a place to better document the actual use and the correct use of AUO, even in the field, where it is understood that the field is the biggest user of AUO, but there are other problems with the way we have been documenting the use of it.

And in the other categories that are referenced in these allegations and the findings of the investigations, there has been this overall generalization of how AUO is used and authorized, and so we have gotten ourselves in a place where it was used in the training environment, it was used at the headquarter environment, which sometimes is unpredictable, but more often than not, and in the current interpretation, it is, in a sense, work that can be scheduled. And so we are getting smarter about how we teach ourselves that, and going forward, we will have better documentation about the work that is being done, whether it is irregular or otherwise.

So, the work is still there in each of the environments, both in the field and at the administrative and training regiments, but we are going to use different types of compensation, and in either case, in both environments, we want to be able to document it more specifically.

Chairman CARPER. OK. I have a number of other questions in a second round, and I will just telegraph some of those now. They include how would the legislation that Senators Tester and McCain crafted, how would it address these concerns? Why is it fair to folks who work in Border Patrol and to taxpayers? Are there any unintended consequences that flow from the legislation?

Actually, we are told that this is legislation that would save anywhere from $25 to $50 million a year—that is a lot of money—and, at the same time, effectively put another 1,000 to 1,200 Border Patrol Officers on the border. That is a pretty attractive combination. So, I want to find out just how that works.

All right. Dr. Coburn.

Senator COBURN. Thank you.

Mr. Judd, would you say again what you said in your opening statement, when you were recruited, that you, in fact, were told that you would have guaranteed overtime.

Mr. JUDD. Yes. There were——

Senator COBURN. And that was what year?

Mr. JUDD. That was back in 1997.

Senator COBURN. OK.

Mr. JUDD. And, I do not remember what the specific announcement that was on the OPM website was, but there were—we do job

recruitments—we still do job recruitments where we send recruiters out to different college campuses and different areas and, yes, at that time, we were told we would earn 25 percent AUO.

Senator COBURN. And, I understand, that is the expectation.

Mr. JUDD. Yes.

Senator COBURN. I am not critical of that, I am just wanting to get that in the record.

Mr. JUDD. Certainly.

Senator COBURN. Chief, you said that you need to reform the post-shift activities. What about jobs that do not have post-shift activities but receive AUO?

Mr. VITIELLO. So, I think we are talking about where the suspensions are now, right, the headquarters and the training environment. It is the normal course of business at the academies and in headquarters that people regularly have assignments that carry them past the eighth hour of their shift. I will give you some specific examples.

Over the weekend, I was on several conference calls dealing with the situation in which we were moving individual unprocessed illegal aliens from South Texas to points west, namely El Paso and specifically Tucson Sector. And so arranging for the flights, that was being coordinated in the interagency not just by me and my team, but arranging for the flights, arranging for the destination location so that it was sufficiently prepared, that it was sufficiently staffed by Border Patrol Agents and others in the interagency, and then giving the specific instructions to the Rio Grande Valley Sector to make sure that those people were——

Senator COBURN. I understand that. I am just saying, your testimony, then, is that all the departments, all the management, all the training facilities need extra time. Everybody that works for CBP in a management or training facility is going to have at least 2 hours of overtime everyday.

Mr. VITIELLO. I think they regularly exceed the shift that they are assigned for the specific purposes of preparing for the classroom work—again, this work that we did over the weekend, we were managing other incidents at the same time that required cross-sector coordination, and my team was——

Senator COBURN. Well, can you imagine, what about other areas of the Federal Government? What about the military? They are doing that stuff all the time, are they not?

Mr. VITIELLO. They are.

Senator COBURN. Yes. What about the FDA, if they are having a drug problem? They are doing it. To me, it is incomprehensible that somebody in a training facility needs to be working an extra 2 hours a day to meet the requirements of that training facility. That either says we have poor management or we have not structured our force right.

Mr. VITIELLO. So, it may require a different force structure, but what I am saying is that the Academy curriculum is an 8-hour day, so instructors need some time to prepare for the intake of those students——

Senator COBURN. How long have they been being instructors?

Mr. VITIELLO. It just depends. That is an individual specific data point and, we assign hundreds of people. When we were doing the surge, there were over a thousand instructors at the Academy.

Senator COBURN. Yes.

Mr. VITIELLO. And they stay for rotations of three to five, sometimes longer. The portability comment in my opening statement was about having people who have sufficiently spent time in the field and recognize the challenges that individual journeyman agents and supervisors struggle with on a day-to-day basis. It is very prudent and desirable and necessary for our business practice to develop those people.

Those make your best instructors, people who are successful in that environment. They also make the best staff officers that I have at the headquarters because they recognize the challenges in the field so that when we send a question downrange, when we push a requirement downrange for cross-sector coordination, that the people who are sending and receiving the information have sufficient experience to know what it means. They can fill in the blanks. They can provide informed counsel with a requisite level of expertise. That is a desirable business model for us.

Senator COBURN. OK. So, even the administrative assistants in the training facilities would need to have two extra hours, and even the janitors in the training facilities would need to——

Mr. VITIELLO. No, my experience is that——

Senator COBURN. My point is, is when you ask the American public about people in administrative offices getting guaranteed two extra hours a day, and all of them have jobs, and I am kind of wishing—I would rather go back to the Federal labor portion of this and either pay them or increase the number so that we adequately reflect it. I just find it a bit hard to swallow that everybody that works in management at the Border Patrol and everybody that works in the training facilities at Border Patrol have a need to have 20 percent more, or 25 percent more time added to get their job done, and that, to me, says we are not staffed correctly, one, or we are managed improperly.

Mr. VITIELLO. Well, I think that the staffing at the Academy locations is adequate for the mission at hand. At headquarters, in my environment, the staff that I manage, we have a very light footprint about 200 officer corps people in my headquarters——

Senator COBURN. But, the point is, if you bring somebody in to train, they know how to train or you would not have brought them in to train. And, to sit here and make the point that they have to have two extra hours at the end of the day to prepare for tomorrow in terms of training when they are not consuming the whole 8 hours during the training anyway just does not make sense. It does not pass the smell test, to me. And, again, I do not want any cut in pay. I want this stuff restored.

My question is, is the assumptions under which we are doing all this do not pass muster for common sense. Now, your testimony is that everybody at the Border Patrol needs an extra 2 hours a day to get their job done, and that is whether they are on the border or they are not, and I am not sure, even with your statement, that you can justify it.

Mr. Miles, how many allegations of AUO abuse at CBP has your office received?

Mr. MILES. Sixteen, at 16 different locations dating back to 2007.

Senator COBURN. And, what percentage of those cases did the whistleblower allege not just that overtime was being mis-billed as AUO, but that overtime was actually not being worked by some agents, whether agents left early or they were doing non-work activities like watching TV or surfing the Internet or hanging out?

Mr. MILES. Some variation of that disclosure was made in eight of those cases.

Senator COBURN. OK. And, have you been satisfied with CBP's reports concluding they cannot substantiate allegations that agents were billing hours they did not actually work?

Mr. MILES. Umm, I may not give you a direct yes or no, but we have been very satisfied with the——

Senator COBURN. OK. I do not want to get that going.

Mr. MILES. Yes.

Senator COBURN. I will withdraw that question.

Some of the allegations substantiated by CBP involve cases where CBP agents were working alongside CBP Officers or other civilians who are not entitled to overtime pay. You talked about that.

Mr. MILES. Right.

Senator COBURN. Did not the CBP Agents have the exact same job as those that were not CBP Agents?

Mr. MILES. Yes, and that is why I think that the framework that OIA has put forth has been helpful for this conversation.

Senator COBURN. OK.

Mr. MILES. We can go into more detail about the training facility. For example, the Border Patrol Agents who testified they were in the instructor position said that they needed 10 hours a day in order to get the work done, and I am sorry for the acronym, Chairman Carper, but as a Customs and Border Protection Officer (CBPO), who is not eligible for AUO but is in the same instructor position, they routinely testified that they can get the work done within 8 hours——

Senator COBURN. That is my point.

Mr. MILES [continuing]. And they——

Senator COBURN. That is my point. To your knowledge, has management ever tried to stop agents who perform these job responsibilities from working past 8 hours a day?

Mr. MILES. I am not aware of any.

Senator COBURN. OK. Mr. Hamrick, describe for me your investigation of the OSC referrals in terms of those people who were not working. How did you go about the investigation to substantiate or to not substantiate those claims?

Mr. HAMRICK. The Office of Internal Affairs conducted six separate investigations regarding allegations of AUO misuse by CBP employees. In each of those investigations, our Internal Affairs Agents collected all the relevant documentary evidence that was available. We conducted interviews with all the relevant employees, interviewed complainants where the complainants were identified, interviewed all available witnesses as well as employees who were alleged to be misusing the AUO compensation system, documented

those investigated steps, in at least one case, conducted surveillance out in the field, documented——

Senator COBURN. Describe that.

Mr. HAMRICK. Our agents actually were in the field watching employees at a——

Senator COBURN. Were the employees aware?

Mr. HAMRICK. No. Covert surveillance, sir. Watching the employees to see what time they reported to work, what time they left work, and then comparing those activities with the hours that were documented.

Senator COBURN. OK.

Mr. HAMRICK. Once our investigations were complete, all the investigative activities were fully documented. The investigative reports went through a series of management reviews within the Office of Internal Affairs, both at the field office level as well as at headquarters. Once our Internal Affairs managers were satisfied that the investigations were adequate and complete, the investigative reports were subject to a second level of review at the Office of Chief Counsel at CBP. Once that level of review was complete, the reports were forwarded through the leadership to the Office of Special Counsel.

Senator COBURN. But, the employees, in general, were aware that AUO was a hot topic.

Mr. HAMRICK. Sir——

Senator COBURN. This had been in the press.

Mr. HAMRICK. Yes, sir.

Senator COBURN. Yes. So, basically, observing agents at work, you determined that everything else that the whistleblower said, other than eligibility, was not accurate——

Mr. HAMRICK. In——

Senator COBURN [continuing]. In most instances.

Mr. HAMRICK. In each of the six investigations that we conducted regarding allegations of AUO misuse, what we confirmed was that the hours claimed were being worked. We also confirmed that those hours that were worked were not properly compensated under the AUO provisions and that another overtime compensation mechanism should have been used.

Senator COBURN. OK. I am way over time. Senator Tester, sorry.

Chairman CARPER. Jon, you are on.

Senator TESTER. That is perfectly all right.

I will just start out a little bit talking about the benefits of the bill and then we will get into some meat here in a second. I think all of us can agree this is an antiquated pay system, set up 40 years ago, that does not meet the needs today. I think the Border Patrol has come to us asking for some reforms. I think it is appropriate that we listen to their work that they are doing in the field. I went through border stations several times, but I have to tell you, I have never packed a gun on the Northern Border and faced what you guys face, putting your lives on the line everyday.

But, yet, coming to us in support of a pay cut—and we will get into that in a second—I would just say that one thing that this bill does—and it does many things—is it gives stability to the hours that they need, and I think that stability in hours is very impor-

tant. When you have folks up there, the last thing they need to be thinking about is when the shift goes off.

But, at any rate, I would ask you, Deputy Chief Vitiello, is the CBP supportive of this legislation?

Mr. VITIELLO. Yes, sir.

Senator TESTER. How about you, Mr. Judd? Is your organization supportive?

Mr. JUDD. Yes, sir.

Senator TESTER. For both Mr. Judd and Mr. Vitiello, do you believe this legislation increases the Border Patrol's operational capacity and its effectiveness?

Mr. VITIELLO. It will.

Mr. JUDD. I do not believe it will, I know it will.

Senator TESTER. OK. Will it help or hurt recruitment and retention of Border Patrol Agents?

Mr. VITIELLO. I think it will help.

Mr. JUDD. It will help.

Senator TESTER. Does it provide more certainty for the agents and their families, both of you?

Mr. VITIELLO. Agree, it does.

Mr. JUDD. Absolutely.

Senator TESTER. And, we are probably going to get into cost savings in a minute, but does your group and your agency believe that this saves money?

Mr. VITIELLO. It does. The key provision of eliminating FLSA for overtime work, as the workforce is now entitled, would save us considerably.

Senator TESTER. OK. I want to talk about training for just a little bit. Mr. Vitiello, who do you use for training?

Mr. VITIELLO. There are a variety of assignments at the Academy, but some of the instructors are, in fact, Border Patrol Agents that teach operational aspects of the work in the Academy setting.

Senator TESTER. OK. And, you said these are 8-hour sessions?

Mr. VITIELLO. The curriculum is 8 hours, plus lunch, et cetera.

Senator TESTER. OK. One thing that I would really like to point out is that if I am on a Northern Border and somebody asks me to become a trainer—and, by the way, I applaud the fact that you guys are using Border Patrol Agents to train with—there is no way I am going to take a reduction in pay to come here. And, I think furthermore, if, in fact, you are using agents, that solves a problem that I have with a lot of the agencies around here that actually have people in training positions that do not know what is going on out in the field. You are using folks that know what is going on in the field to train the folks that are going to be out in the field, that is correct?

Mr. VITIELLO. Correct. We use lawyers to teach the law. We use physical training (PT) instructors to teach physical techniques. We use Border Patrol Agents who have driven in the field and know how to operate our vehicles and systems, et cetera. And then the whole range of operational techniques are taught by agents, as well.

Senator TESTER. OK.

Mr. JUDD. Senator, may I——

Senator TESTER. Yes. Sure.

Mr. JUDD. I taught at the Academy. I would have never went to the Academy if I was going to lose 25 percent of my pay. It would not have happened.

Senator TESTER. OK. We are currently, in this day and age, using—I hate to even bring this up—but unmanned aircraft and drones to secure our borders, and we have been successful using technology to fight against terrorism. The question is, with this age of technology, why do we need more agents? Go ahead.

Mr. JUDD. Senator, the technology is fantastic, but the technology does not arrest anybody. When I am dealing with groups of illegal aliens or drug smugglers, I am dealing with anywhere between 20 to 40 persons and those drones cannot put hands on those individuals to arrest them. Normally, when I am dealing with these groups, it is me and one other person. And so the drones do a phenomenal job of spotting the groups, but now I have to get to the groups and I have to actually arrest them. Those drones cannot do that. That is why we have to have the manpower to effectuate the arrests.

Senator TESTER. OK. Mr. Miles, I believe in your testimony you said that the research bore out that five 10-hour shifts—correct me if I am wrong—five 10-hour shifts is optimal?

Mr. MILES. We received a report back, and again, a very helpful report from OIA discussing the San Diego Sector, and managers there—I am sorry, Laredo North Station, Laredo, Texas.

In Laredo, the managers insist, and they provide—they do an extensive discussion on the costs and benefits of doing a 10-hour shift versus an 8-hour shift.

Senator TESTER. Right.

Mr. MILES. And, I think that is a legitimate area for Congress to consider. What the report confirms is that that 10-hour shift is currently being compensated with AUO, and that is not lawful, and so——

Senator TESTER. Yes, I have that.

Mr. MILES [continuing]. We need to figure out if 10 hours really is the best way in that particular——

Senator TESTER. And the reason it is not lawful is because when AUO was set up, it was set up for conditions that were unpredictable, correct?

Mr. MILES. Correct.

Senator TESTER. If it would have been set up and said, we are going to make it predictable. You use the AUO whenever you want and do whatever, it would have been fine. But, the fact is, unpredictability.

Mr. MILES. Right, and that is why, I think, we wanted to flag that, because it really is worth understanding from the CBP witnesses why 10 hours is the most cost-effective approach to securing the border.

Senator TESTER. OK. Mr. Judd, when discussing pay reform, and we are discussing this bill, we are talking about how much money it is going to save, why would your folks be in favor of it?

Mr. JUDD. Because the alternative is worse. What we have found is, again, Mr. Miles has testified that what we are doing is not actual AUO. Mr. Hamrick has testified that the hours are being worked, but it is being improperly compensated.

Senator TESTER. Yes.

Mr. JUDD. If it was properly compensated, you would actually be paying me more money than what AUO pays. I would love to keep AUO. In fact, if I could convince you to amend the AUO laws so that I can keep AUO and FLSA, I would do that. But, unfortunately, we have this budgetary constraint where nobody is willing to consider a time-and-a-half overtime system, and, therefore, we are asking you for this.

Senator TESTER. Fine. We are going to have several rounds, right, so my time is up.

Chairman CARPER. I was about halfway through my questioning when I yielded to Dr. Coburn. I want to just come back and pick up where I left off.

The next question I want to come back, and we have talked about this a little bit, but I want to talk about it some more, and the question I would ask—let me just start with you, Mr. Miles, and come from my right to my left—what concerns have been raised about—well, let us just go back. What concerns were raised about the original policy that has been in place for a number of years? What concerns have been raised? And how does this legislation address those concerns?

Mr. MILES. Yes. So, I think, three separate concerns. One, that AUO is unlawful, because it is being used routinely instead of for unpredictable work. Two, a lot of the whistleblowers were concerned that AUO was being used in an office setting or in an administrative setting and by managers in those types of settings. And, three, which we have discussed in some detail, that AUO is being claimed for hours that are not worked at all or while people are doing various things.

So, the legislation would clearly address the first issue, on whether or not the hours that are being worked that can be scheduled in advance, it would provide a legal framework for compensating the individuals who are working those hours.

Chairman CARPER. All right. Mr. Hamrick, same question, please.

Mr. HAMRICK. I would echo Mr. Miles. The legislation will allow CBP to properly compensate employees for their overtime work, which they are entitled to, while alleviating the issues that we are currently experiencing with the limitations on AUO and what type of overtime hours can be worked under AUO and how those can be paid.

Chairman CARPER. OK. Mr. Judd.

Mr. JUDD. Simply, this would make what we do legal. I do not know how better to state it.

Chairman CARPER. All right. Mr. Vitiello.

Mr. VITIELLO. I agree. There are specific mission requirements that, in the system like what is contemplated in the legislation, would allow for us to do. And then, if we—and avoid some of the transactions that occur if you were on a fee-for-service issue. You would change what the expectations are of both managers and individual agents and they would always be watching the clock versus what we can accomplish now, which is to continue the work until the end of the shift.

Chairman CARPER. OK. I am just going to lay out an example. Let us just say, instead of Senator Coburn and myself and Senator Tester being Senators, let us just say we are Border Patrol Officers, and we will say that Dr. Coburn is over in California along the border there. Maybe I am in the Tucson Sector, and Senator Tester is in South Texas.

There is not much going on along the California border, and after 8 hours, Senator Coburn is done. I am on a part of the border where there is a lot going on and I have maybe 20 people that I am tracking across the border and trying to catch up with them, and I am working well beyond my shift and maybe work an extra 4 hours just to try to track them down and hold them until somebody can come and relieve me. And Senator Tester is actually going the other way, down into—maybe across the border and trying to apprehend somebody who slipped back across the border and he uses up an extra 2 or 3 hours.

I think most people who are familiar with overtime issues know that people working in similar kinds of jobs do not always have to work as long every day. So, common sense—my dad always used to say, just use some common sense. I think somebody using some common sense here would say, well, somebody is working—Officer Coburn over here is working an extra 4 hours to track down and hold 20 people, or I am and he is not, whatever, why do we not just pay people along those lines? I think I know the answer, but I would like to hear you say it anyway.

Mr. JUDD. If you would, I would like to take that question.

Chairman CARPER. Please. In fact, I want each of you to.

Mr. JUDD. OK. If you were a Border Patrol Agent, you would love your job. You may not like where you live, but you love your job. What we have seen, again, since we have cut the number of hours, we have seen that these criminal cartels are exploiting the holes that we have created.

Just because you are in a patrol function and you might not be arresting somebody does not mean that you are not performing an essential job. What you are doing is you are actually deterring the entrance of illegal aliens. So, if you are out there and you are patrolling the border, just because you are not putting hands on somebody who is committing crime, you are letting them know that your presence is there and that you are ready to put hands on them, if need be. And when I say, "put hands on them," I am talking in a legal and lawful way. But, we are ready and we are prepared to deal with the threat that will present itself if we are there.

Chairman CARPER. Let me hear from others, please.

Mr. VITIELLO. So, in the simple example in San Diego, before you were done with the assignment at the line, even if there is not anything specifically spectacular going on, we want someone to relieve you, and so there needs to be a compensation mechanism that allows for that relief and so that I can use a three-shift model to expand the deployment versus some kind of four-or five-shift model where there is an overlap before the end of your shift for relief. So, AUO is not suited, and we have been called on that administratively and in the legal framework, for using it as relief, and so you cannot. So, AUO is not specifically for that.

In the tracking example in Laredo or elsewhere, that is pretty straightforward. That is what AUO was designed to do. But, in the AUO construct, when you have 85.5 hours, when you hit the 85.5-hour threshold, we are going to pay you more for those extra hours beyond 85.5. That is what FLSA compensation and the law allows for. So, it would be more expensive at that point going forward, and the same is true for RGV. There are additional hours. It is not just the 25 percent. It gets you up to 25 percent, and once you get beyond that 85.5 hours, then you are getting closer to a time-and-a-half model versus what is contemplated in the legislation, which is straight pay for the first 10 hours.

Chairman CARPER. Mr. Miles, Mr. Hamrick, can you add or take away to this, please.

Mr. MILES. So, I think the only thing that we would want to add to the conversation is a fourth and a fifth example. It is the instructor at the training facility and the paralegal in San Diego. And, I think Mr. Judd makes really good arguments, that from a recruitment and retention standpoint, maybe you cannot get a Border Patrol Agent to go to Glynco, Georgia, if he is not going to get a promised ninth and tenth hour.

But, that is really a cost-benefit analysis that we do not feel comfortable making, but just wanted to flag that issue and put it out there as far as whether, in all three of your examples plus the additional two administrative or office settings or training settings, whether that is something that should be institutionalized.

Chairman CARPER. Could we not just say, if you want to have somebody who is really experienced out in the field, he would make a good instructor, in order to induce him or her to come and be an instructor, pay them a stipend. Pay something extra. What is wrong with that?

Mr. VITIELLO. I think that would work in a general sense. We are just not equipped—the tools do not exist for us to do that now.

Chairman CARPER. OK. Before I yield to Dr. Coburn, just very briefly, unintended consequences. Any unintended consequences that would flow from the legislation that Senators Tester and McCain have worked on, please? Mr. Judd.

Mr. JUDD. We have looked at this every way imaginable. This is a 4-year process that we are seeing and I think that we have attacked this the best that we possibly can and I just do not see any unintended consequences.

Chairman CARPER. Others, please.

Mr. VITIELLO. I would just say that we have learned from the mistakes and the problems with AUO. This legislation borrows from existing structures. The rest of Federal law enforcement, both in the Academy and in the headquarters setting, use the Law Enforcement Availability Pay (LEAP) model, which is 25 percent compensation for those formats. So, we have looked at that. It resonates a bit in this, but this is, I think, a better scenario for CBP and the Border Patrol because it contemplates not being available as in some of the other statutes but actually being assigned.

Chairman CARPER. OK. Mr. Hamrick or Mr. Miles, please, and then I will yield.

Mr. HAMRICK. I have nothing to add, sir.

Chairman CARPER. OK. Mr. Miles.

Mr. MILES. And, we have tried to flag the issues that we think are worth all of you considering as you debate and discuss this bill, so do not want to go into those again.

Chairman CARPER. OK. When I come back, I would like to talk about—Dr. Coburn may have already raised this issue—but the issue of the calculation of pensions and how it works now and how it would change under this legislation. Dr. Coburn.

Senator COBURN. Chief Vitiello, would you support capping the number of agents getting 100 hours at 90 percent until an audit is done that would say you need to go above that?

Mr. VITIELLO. What is contemplated in the legislation is for Border Patrol to have a baseline requirement in every location, at least 90 percent of the core workforce to be at the level one, which is maximum capability.

Senator COBURN. Yes.

Mr. VITIELLO. We think that is important for stability and projection of cost.

Senator COBURN. You mentioned availability pay by the Federal Bureau of Investigation (FBI), Secret Service, and some of these other law enforcement agencies, but are they not required to be available on a 24-hour basis to get that availability pay?

Mr. VITIELLO. They are required, but the difference between that statute and my understanding of it, because I do not administer it, and what is contemplated here is this compels a 10-hour day. LEAP does not.

Senator COBURN. OK. I just wanted to put something in the record. In 2013, we had 21,391 Border Patrol agents. In 2005, we had 11,264. Arrests were 1,189,000 in 2005. They were 420,789 in 2013. Technology has helped us a great deal, but we have doubled the Border Patrol and yet our arrests are down. Part of that is because we do not have the ingress, I would think you would agree. It had decreased for a period of time due to the economic condition that we went under.

The other thing I want to enter into the record is the National Journeyman Border Patrol gross earnings and agency cost. This is a comparison of AUO versus Federal Employee Pay Act (FEPA) FLSA and the bill as put forward, and it does document some savings that will be there.

And, I will come back again to you, Chief. Until we can know just from a common sense standpoint who really needs overtime within your organization—I agree that the 90 percent number is a good number, Jon. I do not have any problem. I have a problem getting above that in some of these other areas where it would not seem fair to people that work in other areas of the Federal Government that we are going to compensate people who are not doing things that require extra time, that they get paid for that. So, in your written answers to our Committee, you said that you would support that. I am trying to get you to answer that question now.

Mr. VITIELLO. So, I think it is appropriate, given your description of the growth over the last several years, that the Border Patrol, CBP, and the Department take time now to refine how we use the hours that are available. I prefer maximum capability in every location, and we are building a system by which we can show you

and others how many hours are spent at each location, and not only that, but in discrete categories of work.

And so I think that is important, and we are happy to be a part of a demonstration to this body and others that says, here are where all the 21,000 agents are, here is where they spent all the time, hour by hour. That is a refinement that we are pursuing. We think it is important. Given the growth that we have had, the increase in capability, we agree that the environment has changed. But, it is still a dynamic place, and over time, we would like to be in a position to account for hours worked and attribute them to the work being done. I think it would be easy for us to substantiate the maximum capability.

Senator COBURN. So, does that tie in with the study that you all are doing now in terms of the AUO and everything, in terms of—you are trying to get a better management handle by metrics and by location and by area. Does that tie in with what the Secretary has asked in terms of an AUO evaluation and the study that you all are doing now?

Mr. VITIELLO. They are independent in the sense that one was started with in mind to reform the situation that we are in, and to the extent that we can improve the AUO condition, we are going to do that. The management requirements determination process will support our effort to refine and demonstrate to you the capabilities that are being used and how they are being used, but it will also inform the Secretary's work and the task that he has given us to reform this issue going forward. We will be able to quantify and justify the hours as they are being used.

Senator COBURN. OK. All right. I just have a couple other pieces of paper I would like to put into the record for comparison.[1]

Chairman CARPER. Without objection.

Senator COBURN. And, I have no other questions.

Chairman CARPER. All right. Senator Tester.

Senator TESTER. Yes, thank you, Mr. Chairman.

A couple questions for Mr. Miles real quick. We have two Special Counsel reports that outline the abuse and misuses of AUO. Your office has published two reports on the issue, one in 2008 and, I think, one in October of this last year. Do you think DHS has provided adequate redress during the 5-years the agency has known about the problem?

Mr. MILES. I think our October letter outlined a lot of concerns with the pace that DHS was making reforms and, for example, in 2007 and 2008, DHS committed to issuing a Department-wide directive to address the AUO issue, and in then in the 2013 communication, we noted that the directive was still lacking. However, since you held your hearing on AUO——

Senator TESTER. Yes.

Mr. MILES [continuing]. They have taken a lot of productive steps and a lot of those are making a difference.

Senator TESTER. I want to talk a little bit about a suggestion that Senator Coburn brought up in his opening remarks, and you guys can add to it. He talked about just changing the base pay, not doing all this, what we are doing in this bill, but just changing the

[1] The papers submitted by Senator Coburn appears in the Appendix on page 56.

base pay, and my take on that is that we do need to address the extra hours needed on the border that that would not address. And we do need to address the overtime issue that that would not address. And, we need to provide some stability in the schedule because the previous two, that would not address. Would either Mr. Judd or Mr. Vitiello want to add to that at all.

Mr. JUDD. In essence, we are, in fact, changing the base pay. The overtime hours, although it is beyond 8 hours, it is still being paid at straight time, so, in essence, you are just changing the base pay. What you are doing is you are putting a guarantee in there that this is what we are going to make, which is what we do not currently have. So, you are changing the base pay. This will become part of the base package.

Senator TESTER. Mr. Vitiello.

Mr. VITIELLO. The current system supports a regular work—what is contemplated in the legislation better supports irregular work, but it also gives us management controls that Border Patrol leadership does not have now in the self-deployable overtime and it gives us greater accountability with regard to where people are in relation to their base pay and then the extra hours that they are putting in each day.

Senator TESTER. Mr. Hamrick, do you believe, and I do not want to put words in your mouth, but do you think part of the problem with AUO is just bad management?

Mr. HAMRICK. No, Senator Tester, I believe that the biggest issue is the challenge in identifying what overtime hours are legally compensated through AUO and what overtime hours are not. I once was an AUO earner myself, many years ago, before the LEAP law came into effect, and in nearly 28 years in Federal law enforcement, I have learned more about LEAP, or AUO, in the last 12 months than I ever knew as an AUO earner. So, it is a complicated pay system that is difficult to navigate.

Senator TESTER. Would you agree this would simplify that pay system?

Mr. HAMRICK. Yes, sir.

Senator TESTER. Make it easier to audit?

Mr. HAMRICK. Yes, sir.

Senator TESTER. I want to talk about retention and recruitment for just a second. I should have brought a picture of my farm in here. I live about 75, 80 miles south of the Northern Border. What impact do you think—you already said that this would help with retention and recruitment, Mr. Judd, and Senator Coburn has always said he does not want to reduce pay, and I believe both of you, OK. The question becomes, if we—I am very concerned about retention and recruitment, and kind of, Mr. Judd, could you give me your take on how this will be accepted versus completely redoing the system and not giving the kind of predictability that I think this bill does.

Mr. JUDD. Senator, it is very simple. Back in 1997, when I pursued a career with the Border Patrol, I was in the process of two other local law enforcement agencies. These local law enforcement agencies were in very desirable locations in which to live. The only reason that I took the Border Patrol job was because with the AUO, it was more money.

Senator TESTER. OK.

Mr. JUDD. I moved to a very, well, frankly, a less desirable location to live, but I did that because I was making more money, and over the long term and with retirement, it would have been better for me. If you get rid of this 25 percent, you will not be able to recruit quality individuals to do this job.

Senator TESTER. OK. I appreciate that. I would just like to make one real quick statement. It deals with making the floor the cap that Senator Coburn had talked about. And, I would just say, we really depend on Customs and Border Protection and the folks that are out in the field to determine what their needs are the same way we depend upon the military to tell us what their needs are and we act. We are hearing from the agency and we are hearing from the folks that are working on the ground that 90 percent is a reasonable floor.

And, I think it would be dangerous to use it as a cap, because these are the guys that are out there. They know the impacts that are happening every day. They know the kind of intrusions on that border that, quite frankly, I do not hear about and most of the folks that live closer to the border than I do not hear about.

I do not speak for Senator McCain, and it is too bad he is not here. If there wanted to be an audit done and that audit showed that that 90 percent floor was too high or not high enough, that might be a way to go. But, I think, to put it as a ceiling would be dangerous.

Senator COBURN. That is fine with me.

Senator TESTER. OK. I yield.

Senator COBURN. I just have a couple other questions for Mr. Hamrick. OSC has referred 10 cases of AUO abuse to CBP, and six of those are under your office. That is my understanding. Is that right?

Mr. HAMRICK. My office has conducted six investigations that were referred to us by the OSC——

Senator COBURN. There were 10 total referrals, right?

Mr. HAMRICK. I——

Senator COBURN. Yes, that is the number.

Mr. HAMRICK. OK.

Senator COBURN. So, where are the other four cases, and who is investigating those?

Mr. HAMRICK. Because there was an allegation of AUO misuse against the Office of Internal Affairs, our agents are no longer——

Senator COBURN. Got you.

Mr. HAMRICK [continuing]. Conducting those investigations. They have been referred to the IG——

Senator COBURN. That is fine. I understand that. Thank you.

Chairman CARPER. I want us to go back in time a couple of years, I think, to 2012. I know the problem with Administratively Uncontrollable Overtime is not a new one. In fact, I think the President, I want to say it was in his fiscal year 2012 budget request included a legislative proposal that attempted to address this problem by putting Border Patrol into a system, as you know, known as the Law Enforcement Availability Pay. And, as I understand it, the Law Enforcement Availability Pay proposal generally applies to criminal investigators such as the FBI, such as the Drug

Enforcement Agency (DEA) or Secret Service Agents, gives them a 25 percent increase in their base salary based on the expectation that they will be available to work as needed. And, that was a proposal in 2012. Congress failed to act.

Let me just ask, if I could, Mr. Vitiello, and then Mr. Judd, could you explain to us what happened in 2012 with this legislative proposal, and if you would, please explain why you believe the Tester-McCain bill is an improvement over the 2012 legislative proposal to put Border Patrol on LEAP along with DEA, the FBI, and the Secret Service. Mr. Vitiello.

Mr. VITIELLO. So, the agency and through the request advocated for conversion to LEAP in the sense that it did offer the same kind of savings that are contemplated here. But, there were several stakeholders that were opposed to the way LEAP is used, and for our work on——

Chairman CARPER. Who might those stakeholders be?

Mr. VITIELLO. The National Border Patrol Council, among others, seated to my left.

Chairman CARPER. OK. [Laughter.]

And, what were their reservations?

Mr. VITIELLO. Well, like what is contemplated here, FLSA was not going to be remuneration going forward, and they were concerned, and I will let Brandon speak for himself, but the concerns we heard from them was that there was not a threshold to which to manage against or to. And, they were concerned that management could abuse that.

What is contemplated in the legislation are thresholds and unilateral ability for management right to assign folks to keep them below or near or at the threshold. And so what is here is much improved from that experience. This borrows a lot from LEAP in the sense that it solidifies the macro budget picture. It allows us to forecast going forward without using FLSA as an unpredictable cost in the future.

Chairman CARPER. Mr. Judd, do you agree? Did you approve this message? [Laughter.]

Mr. JUDD. I absolutely agree that it was the National Border Patrol Council that was adamantly opposed to LEAP. The simple reason that we are opposed to LEAP is because this whole notion that all you have to do is be available to be paid, somebody needs to go back and read the law and I think that you need to start investigating some other agencies.

In fact, the law specifically states that you must maintain a certain number of hours that you have to be scheduled. The problem with LEAP is you can schedule me for 10 hours, but if I work over 10 hours for that day, it is free. And there is no mechanism to force them to let me go after 10 hours.

So, in other words, in a real world sense, if I am in a certain area on the border and the relief that is going to relieve me for today calls in sick, the agency could call me up and say, hey, your relief just called in sick. We did not schedule this to happen. We need you to work a double shift. And, by the way, that double shift is now going to be free.

So, we needed a mechanism to ensure that the agency was not going to work us beyond 10 hours per day and work us for free,

and that is what this legislation does. This gives us what we call back-end protections to ensure that we get compensated for the work that we do.

Chairman CARPER. OK. Thanks. I have another question. In fact, I have a couple more. Let me just use my time and then I will yield back to you, Senator Tester, if you would like to take more time.

I have a question on operational tempo, the number of shifts worked per day, if I could, and I think I will probably address these couple questions to you in this regard, to you, Mr. Vitiello. But, I understand that one of the most widespread misuses of Administratively Uncontrollable Overtime at the Border Patrol has been to pay for the extra time it takes employees to transition from one shift to another, and this has allowed the Border Patrol to use three, I am told, three 10-hour shifts at many locations rather than four 8-hour shifts. In fact, the Office of Special Counsel noted in its written testimony that Border Patrol, and this is a quote, I think, "managers insist that employing three 10-hour shifts is a more cost-effective approach to securing the border, even if Administratively Uncontrollable Overtime may not properly be used for routine activities." That is a quote.

A couple of questions, if I could. Mr. Vitiello, I would like to ask you to explain why the Border Patrol believes that using three shifts instead of four is a more cost effective approach to securing the border.

Mr. VITIELLO. So, I agree with the managers in San Diego who pointed that out in those interviews. In an ideal setting, 24-by-7, 7-day-a-week workload along the border, you would have to transition between shifts, however it is better to have three shifts with the overhead, the managers, and the supervisors, versus four or five shifts to predict and then schedule that overlap. It is better to have a three-shift model, with time for one shift to transfer information to each other before one starts and the previous shift is relieved. Under the current system, AUO does not allow for relief to be paid for using AUO.

So, whatever system we went going forward, it is always better to have three shifts instead of four. You have better capability that way. But, you would still need to figure out how to transfer that knowledge, and that requires time.

Chairman CARPER. Let me just followup on this. You addressed this, at least in part, but I am going to ask it anyway. What would be the impact on your operations and your ability to secure the border if you were forced to move to four shifts across the board as a result of not being able to use Administratively Uncontrollable Overtime to pay for shift changes?

Mr. VITIELLO. You would just need more agents to do the same amount of work. We would prefer, and it is most advantageous to the organization as it relates to predicting costs and the future stability that you have three shifts instead of four. It is more cost effective. You would have to hire more agents to get the same level of deployment across the 24-hour period.

Chairman CARPER. And, finally, Mr. Vitiello, how will the Tester-McCain bill we are considering today impact your ability to schedule fewer shifts and, thus, deploy additional agents to the border each day?

Mr. VITIELLO. What is contemplated here is that it would allow for using this model to compensate people for that relief. There are also lots of missions that occur after the shift is over—transferring information, landmarking apprehensions, developing trends to inform the next day's deployment, the next shift's deployment, the trends that are happening in real time. We want agents to record and transfer that at the end of their shift so that the next shift is more capable, and so that as they deploy the next day, they are smarter about where they place their assets and how supervisors move people from one side of a deployment area to another. So, you need to have that transfer of knowledge. You need that overlap, not only for the physical presence, but for the information and the rapid response that is required based on the information that they develop while in their shift.

Chairman CARPER. Thanks very much. Senator Tester.

Senator TESTER. Thank you, Mr. Chairman.

I want to thank each one of the witnesses today for your testimony and for your straightforward answers.

I would just like to say, it is seldom in the U.S. Senate that we get a bill that makes a situation simpler, that the agencies want, that the people that are employed by the agencies want, that saves money, that increases efficiency, that increases predictability, and we do not throw it out of here as quick as we can.

We have a problem. I think all four of the witnesses have pointed out what the problem is. And, I think that if the Senate does what it does so very well, and that is talk it to death and delay it to death, we will not get this problem solved. And the ultimate thing that will happen if we do not get this problem solved is our borders will be less secure and we will be looking around, pointing our fingers at you guys, saying, why did you not do this or why did you not do that, when, in fact, it is our obligation to make sure you have the tools to be able to do your job to protect the border in a way that you know how it needs to be protected.

With that, Mr. Chairman, I would say that we are in the first or second week in June. If we do not get this bill out of Committee and if things go upside down on our border, we can reconvene this Committee of Homeland Security and talk about how we have screwed up.

With that, Mr. Chairman, I will ask you, when will there be a markup on this bill?

Chairman CARPER. I am going to confer with Dr. Coburn. We will let you know later this week.

Senator TESTER. Later this week, we ought to have a markup on this bill, Mr. Chairman.

Chairman CARPER. I will confer with Dr. Coburn. We will let you know later this week, and we will invite you to be part of that conversation, along with Senator McCain.

Senator TESTER. Well, just let me make it very clear. This is not something we should screw around with. We have people out here that were probably watching this on C–SPAN right now wanting to know what we are going to do. We have folks who work for CBP that like their job, are proud of their job, and that if we do not set some certainty down for these folks, they are going to go to work somewhere else. We need to fix it so it can be audited, so that we

know what we are doing, and so that these folks have some predictability.

Chairman CARPER. OK.

Senator TESTER. Now, we can put it off until the end of the month, but keep in mind, the longer we put this off, we have to get it off the Senate floor, we have to see if the House can get it done, and then we need to get it implemented, and time is a waiting. We have 11 weeks left.

Chairman CARPER. OK. Well, I think, Senator Tester, I think you know that there has been a lot of discussion about whether or not—if this bill saves as much money as we are told it might, that it might be available to serve as an offset to strengthen our cyber capabilities——

Senator TESTER. I appreciate that.

Chairman CARPER [continuing]. Within the Department of Homeland Security. So, believe me, I understand the need for moving it along.

Senator TESTER. Mr. Chairman, I would tell you, if this bill does not save one thin dime, if it is revenue neutral, we ought to do it.

Chairman CARPER. Fair enough. I hope it saves more than a few thin dimes. And I thank you very much for all the work that you and your staff and that of Senator McCain have done. I wish he could be here. I understand he could not, but we will put our heads together and talk this week, and if we can do it early this week, we will do it early this week.

Senator TESTER. I am free tomorrow afternoon, just so you know.

Chairman CARPER. All right. Well, that is good. [Laughter.]

I am getting your drift. All right. This might be my last question. It deals with the surge that we have seen in unauthorized migration from Central America, particularly the record numbers of unaccompanied minors that are coming, and the effect they are having on the Border Patrol's ability to carry out other parts of its mission. Specifically, I think you noted that the surge we are seeing is, and I think this is a quote, "compromising DHS's capabilities to address other trans-border criminal activity, such as human smuggling and trafficking, and illicit drugs, weapons, and commercial and financial operations."

Mr. Vitiello, I am going to ask you to please expand on this, if you would. What exactly has the impact of this current surge in unauthorized migration been on the Border Patrol's capacity to carry out its mission? Let us start with that, and then I will ask a second question.

Mr. VITIELLO. So, as it relates to the conditions specifically in the Rio Grande Valley, we are faced in a situation where the facilities that are available for the eight stations that are in the Valley are insufficiently large enough to accommodate the number of people who we find ourselves arresting. And so given the timeframe that we need to book people in and to treat juveniles via the statute, to turn them over to HHS before the 72-hour clock runs out, we were insufficiently prepared to do that given the space that is available there.

That is why the Secretary immediately designated it as a level four event, made myself the coordinator for the DHS response and the liaison with the interagency, and then the President since has

designated as a humanitarian event and put Administrator Fugate into the Federal coordination role to drive more resources as we started to the Valley to do what the Federal Emergency Management Agency (FEMA) calls wrap-around services for our facilities in the Valley, and then to make the system work more efficiently, to have more placement for these children. And what it means to the operations down there is that we were using enforcement resources in order to do this care and to make these facilities as safe and as useful as possible and to provide the right setting for the people who were in custody.

That help is downrange considerably. It has changed considerably since the end of May and early June, and since the President's designation of Administrator Fugate to coordinate the interagency, it has gotten much better. We were concerned—the text that you speak of is a draft that my staff had prepared for me. We had not sent it to the Interagency Coordinating Group (ICG), but it was a concern that has been existing in the Valley for a while and we have moved forward to improve those conditions since the time of that writing.

Chairman CARPER. All right. Let me followup with this. I understand that due to budgetary constraints in the past couple of years, the Border Patrol has had to reduce the amount of hours worked by its agents to reduce overtime costs. What impact has this had on the Border Patrol's capacity to deal with the surge and migration we are currently seeing as well as other threats in the border region? I think you have addressed this, at least in part. Do you want to take another shot at it, and then I am going to ask Mr. Judd if he would just share his thoughts with us, too.

Mr. VITIELLO. So, in late 2012, we looked at the 2013 and the 2014 budget picture before sequestration and recognized that there was some savings based on our emerging awareness and understanding of the challenge we had with the AUO rule book, and we decided that we could take some risk in reducing hours in order to drive savings from those accounts.

We decided in 2013 to do that as an experiment, to see how well we could monitor what is by statute uncontrollable. I think we did a fair job of that before and after sequester, and the sequester plans made that ultimately more difficult. In 2014, we drive for more savings. But, what that means, really, is shrinking hours of agent deployment, and so the overlaps. You go from a three-shift model to a four-shift model or more. And then you are pulling hours out of the workforce in order not to make FLSA payments to agents. And so what that means is you are reducing capability.

Now, we think that those risks that we were taking were adequate and substantial, but manageable. And in the situation as it relates to RGV, we recognize now that that cannot be the way forward. The work set that is down there, and in other places, we cannot continue to do that. So, we have reduced those costs to meet the targets in 2013 and attempted to do the same in 2014, but there are certain locations where that is just not an acceptable risk anymore.

Chairman CARPER. All right. Mr. Judd, any thoughts on this?

Mr. JUDD. Absolutely. To those that are watching on C–SPAN, to keep this in layman's terms, what we are seeing with this surge

that is coming over in RGV, it is pulling agents out of the field. They are no longer patrolling the border. They are having to deal with this huge influx of minors that are coming in. They are having to process them. They are having to watch them. They are having to feed them. They are having to do all of these different things instead of actually being out and patrolling the border.

Not only is that happening in RGV, but because they do not have the facilities to manage the influx of crossings, they are now sending them to places like El Paso, the Tucson Sector, and what that is doing, that is also pulling resources out of the field, Border Patrol Agents out of the field, that would normally be patrolling the border and they are now having to do those same things. They are having to process these illegal aliens. They are having to watch them. They are having to feed them. They are having to take care of all of the needs while they are in our custody, and what it is doing is it is straining to the breaking point the number of agents that we are able to deploy out into the field and it is hurting us.

Chairman CARPER. All right. Thanks. How will the Tester-McCain bill address this issue, or these issues?

Mr. VITIELLO. So, specifically, the hours past—the FLSA remuneration is not part of the compensation package going forward, so straight time for the assigned 8 hours, or for the assigned 10 hours through the shift. That would give us more capability. It is, in essence, giving us nearly 1,500 agents more capability along the borders with current staffing levels. So, it allows us to flex in that overlap. It allows us to have a core capability across the force, and so I do not have to shrink hours in order to reduce those payments of that budget picture.

Mr. JUDD. In essence, you will be paying me the same amount of money to work 10 hours as what you are currently paying me to work 9.3 hours, and that is where the additional 1,000, 1,200 agents comes in. Because you are paying me FLSA right now, I am only able to work 9.3 hours because we have this overtime budget and we cannot exceed that overtime budget. So, I am working 9.3 hours. The Senator McCain and Senator Tester bill will allow me to work 10 hours for the exact same amount of pay as what I would work at 9.3, 9.25 hours.

Chairman CARPER. OK. The last question I have relates to something Dr. Coburn said to me early in the hearing, and it dealt with the calculation of pension benefits for those that work under this kind of pay arrangement. And he suggested that it would save—he felt it would save money in the near term, but in the long term, may cost money because of additional pension payments. Can somebody just speak to that? In fact, all of you are welcome to address that, if you would like. Mr. Miles, do you have anything you want to say on that front?

Mr. MILES. No, sir.

Chairman CARPER. OK. Mr. Hamrick.

Mr. HAMRICK. No, sir.

Chairman CARPER. Why not? [Laughter.]

Mr. HAMRICK. I have nothing to add, sir.

Chairman CARPER. All right. Mr. Judd.

Mr. JUDD. That is absolutely incorrect. Our pension right now is based upon 25 percent AUO plus our base pay. This would keep

everything exactly the same. This would not change anything. It would not cost more. It would not cost less. The pension would be the same.

Chairman CARPER. All right. Chief.

Mr. VITIELLO. It is not a change as it relates to AUO payments or other statutes that are out there like LEAP.

Chairman CARPER. OK. I think we are going to wrap it up here. I think we are just about to start some votes over in the Senate.

I think, with that, I want to thank each of you for coming today. Thanks for making time to be with us, probably on fairly short notice—one of you, at least, very short notice. We appreciate your testimony. We appreciate your answering our questions.

The hearing record is going to remain open for 15 days—that is until June 24 at 5 p.m.—for the submission of statements and questions for the record. I am going to urge my colleagues, if they have any additional questions, to submit them well before June 24 so that we can get very prompt answers to those questions.

But, with that having been said, it has been a good hearing. I am appreciative of the time that has been invested by our witnesses, by our staff, and by the Members.

This hearing is adjourned. Thanks so much.

[Whereupon, at 5:21 p.m., the Committee was adjourned.]

APPENDIX

Opening Statement of Chairman Thomas R. Carper
"Border Security: Examining the Implications of S. 1691,
the Border Patrol Agent Pay Reform Act of 2013"
June 9, 2014

Prepared for delivery:

My thanks to my colleagues and our witnesses for working with my staff and me to quickly put this hearing together. The purpose of this hearing is to examine the merits of S. 1691, the Border Patrol Agent Pay Reform Act of 2014, introduced by Senators Tester and McCain and cosponsored by Senators Heitkamp and Ayotte. This bill would make badly needed reforms to the overtime system at the Border Patrol, which is currently too complicated and too difficult to manage.

Before we get into the bill, however, I want to briefly talk about what's currently happening along our border. Over the past few years, we have seen a surge in unauthorized migration from Central America, which is nearing record highs. An unprecedented number of the people we are apprehending at the border are unaccompanied children.

Our laws—appropriately—require that these vulnerable children be treated differently than other migrants. They must be transferred to the Department of Health and Human Services, and there are strict rules about their care. Secretary Johnson, last week, announced that he was creating an interagency task-force and devoting additional resources to coordinate the care and resettling of these children. I commend that announcement.

Since I became Chairman of this Committee 18 months ago, I have visited the Southern border with Mexico in Arizona and Texas multiple times. I've seen first-hand the crowded conditions in our Border Patrol stations in the Rio Grande Valley. I've also visited Mexico, Guatemala, and El Salvador. What I have come to understand is that what happens along our borders is only a symptom of the problem—not its underlying cause.

Today's hearing will focus on how we can better address one of these symptoms by increasing enforcement. The Tester/McCain bill we are examining today will save taxpayers money, and increase our ability to patrol—and secure—our borders. In fact, one estimate I have seen shows that this bill would add the equivalent of 1,400 agents to the border.

Given the challenges we face on the border—which have only been underscored by recent events—I have to say that moving this bill seems like a no-brainer to me. I fully support moving forward with this bill as soon as possible.

While we need to do all that we can to treat these symptoms, we cannot stop there. It is critical that we understand and address the root causes of why people will risk everything to come here in the first place. Based on what I have seen in my trips to some of these countries, those root causes are the lack of economic opportunity and the deteriorating security situation in El Salvador, Guatemala, and Honduras.

Nearly one year ago, the Senate passed a bipartisan, comprehensive immigration reform that addresses many of the root causes of undocumented immigration. While the bill isn't perfect, it is a significant improvement over the status quo and provides our nation with an important opportunity to fix our broken immigration system—and grow our economy by almost one trillion dollars. But in order for this solution to become law, we need our colleagues in the House to act.

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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 Tomsheck, 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.

TESTIMONY OF

RONALD VITIELLO
Deputy Chief
Office of the Border Patrol

and

PAUL L. HAMRICK
Deputy Assistant Commissioner
Office of Internal Affairs

U.S. Customs and Border Protection
Department of Homeland Security

BEFORE

Senate Committee on Homeland Security and Governmental Affairs

ON

"S.1691, Border Patrol Agent Pay Reform Act (BPAPRA)"

June 9, 2014
Washington, DC

Chairman Carper, Ranking Member Coburn, distinguished Members of the Committee, thank you for the opportunity to appear before you today to address the need for pay reform within the Border Patrol. We welcome the opportunity to work with you on finding solutions at an affordable cost.

Properly paying our personnel and appropriately managing our pay system are essential to the Department of Homeland Security (DHS) mission. U.S. Customs and Border Protection's (CBP) application of overtime, specifically Administratively Uncontrollable Overtime (AUO), goes back many years, yet the CBP mission has substantially evolved since that time, and so too should our compensation authorities.

Administratively Uncontrollable Overtime

AUO was established by Congress more than 40 years ago, and is a payment mechanism that allows the compensation of certain employees for irregular, unscheduled, but necessary overtime. Approximately 77% of AUO paid at DHS goes to employees of CBP, including more than 20,000 Border Patrol agents. In order to be eligible for AUO, an employee must be in a position in which the hours of duty cannot be controlled administratively and which requires substantial amounts of irregular or occasional overtime work, with the employee generally being responsible for recognizing, without supervision, the circumstances which require the employee to remain on duty. Once an employee is certified for AUO, AUO pay is the exclusive mechanism for irregular overtime performed. AUO is paid as a percentage—not less than 10 percent nor more than 25 percent—of an employee's rate of basic pay fixed by law or administrative action for the position held by the employee.[1] Under Office of Personnel Management (OPM) government-wide regulations, the rate of AUO pay that is authorized for a position is based on the average number of hours of irregular or occasional overtime work performed per week. For example, a 25 percent rate is authorized for a position that requires an average of over 9 hours per week of irregular or occasional overtime work.[2]

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[1] For this purpose, the rate of basic pay includes locality payments. See 5 U.S.C. 5304(c)(2), 5 C.F.R. 531.610(c), 5 C.F.R. 550.103, and 550.151.
[2] See 5 C.F.R. 550.154

Mr. Chairman, the Department and its law enforcement components welcome your interest in addressing the challenges posed by AUO. As you know, the Department has sought legislative changes for several years that would enable it to reform and rationalize its compensation structure.

Border Patrol Agent Pay Reform Act (BPAPRA)

AUO is ill suited to serve the overtime requirements of a modern day Border Patrol. S. 1691, the *Border Patrol Agent Pay Reform Act* (BPAPRA), would replace AUO for the Border Patrol with a flexible system. The bill would compensate eligible employees for necessary overtime while maximizing agent availability for critical law enforcement and border security responsibilities.

Border Patrol frontline agents work in locations that are desolate, at times dangerous, and subject to extremes in temperature. In addition, today's Border Patrol relies increasingly on technology, intelligence, and analytic support to the frontline. While agents responsible for these elements have similar overtime demands as frontline agents, they may not be eligible for AUO.

If enacted, BPAPRA would provide the necessary tools to ensure that a Border Patrol agent is available to continue work and meet mission requirements beyond the eighth hour of his or her shift, while providing predictable rotations around the clock. Agents would be eligible to receive a regular overtime supplement for extended shifts of 9 or 10 hours and could receive additional overtime pay or compensatory time off when required to respond to emergencies or other mission requirements.

BPAPRA would eliminate Fair Labor Standards Act (FLSA) compensation and would likely reduce overall costs. It would increase the work hour capacity for the Border Patrol by over 2.5 million hours annually. It also has the support of the National Border Patrol Council, which represents 17,000 agents.

Current AUO Management and Allegation Investigations

As you are aware, a number of Department employees have made disclosures to the Office of Special Counsel (OSC) concerning alleged abuses of the AUO system. CBP takes seriously its responsibility to ensure proper use of taxpayer funds. While many frontline officers and agents across the department require work hour flexibility, often through the use of AUO, misuse of these funds is not tolerated. Within DHS Components, allegations of misconduct that are raised by employees are typically provided to and handled by Component internal affairs offices and/or the DHS Office of the Inspector General in conjunction with the Component's human resources office. The Office of the Chief Human Capital Officer (OCHCO) is also provided a copy of the OSC referral letter, allowing OCHCO to identify significant issues and trends that require immediate attention even before investigations are complete. If merited, employees found to have engaged in misconduct are subject to disciplinary action.

CBP's Office of Internal Affairs (IA) conducted a series of investigative inquiries regarding the alleged improper use of AUO by specific entities within CBP. IA Field Offices in Washington, DC, Houston, TX, San Diego, CA, and Seattle, WA, conducted AUO-related investigations at specific Border Patrol Sector headquarters, stations, training entities, and the CBP Commissioner's Situation Room.

Although the OSC received complaints that overtime hours compensated under AUO were not being worked – allegations that, if proven, could constitute criminal or administrative violations – the investigations conducted by CBP Office of Internal Affairs did not substantiate any OSC allegations that employees had received AUO compensation for hours that were not worked. The investigations did, however, substantiate aspects of the allegations that questioned whether AUO was the appropriate mechanism for specific overtime compensation. The investigations did not involve the fiscal analysis necessary to determine short and long term budgetary impact of the improper use of AUO. Importantly, even where AUO was not the proper overtime mechanism, CBP had an obligation, and employees had an entitlement, to be appropriately compensated for overtime hours worked. The results of these investigative inquiries were supplied to the OSC.

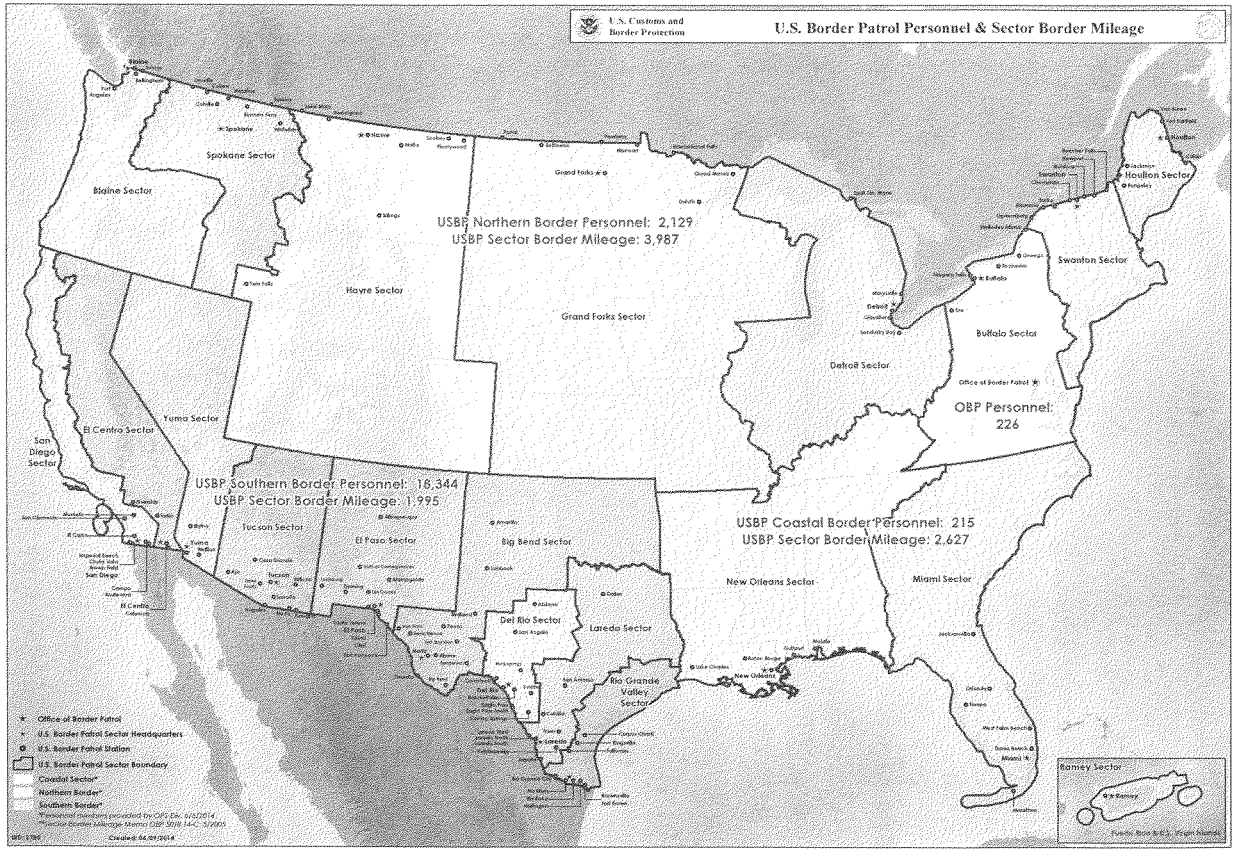
CBP recognizes that it needs to continue to improve its management of AUO. DHS and CBP have taken actions to address the situation. On January 27, 2014, Secretary Johnson issued a memorandum directing the DHS component leadership to take immediate action to suspend AUO for certain categories of employees on an interim basis. As a result, approximately 900 (600 at CBP) component headquarters personnel, full-time trainers, and employees found to have misused AUO in completed investigations were suspended from receiving AUO. After additional review, on May 23, 2014, DHS Deputy Secretary Alejandro N. Mayorkas issued a memorandum to CBP's Commissioner and the heads of several other DHS components, outlining the areas in which the Department must improve its AUO administration. The Deputy Secretary mandated that all components develop a comprehensive plan within 30 days to address AUO compliance issues. The components will also work with the Management Directorate to develop a DHS wide Directive formalizing these efforts and new reforms. The directive will include requirements for independent audits of AUO records and mandate disciplinary measures for those who violate AUO policies in the future, including supervisors and managers who permit employees to misuse AUO.

The Department and CBP take the responsibility to be good stewards of taxpayer dollars very seriously. Until such time that CBP can address all of its AUO compliance issues, CBP leadership has directed interim measures, such as a comprehensive position review of AUO eligibility, to eliminate CBP's use of AUO where the available evidence suggests that its use is impermissible.

Conclusion

We thank the Committee for its commitment to improving the overtime pay system for Border Patrol agents and for developing legislation to address CBP's needs for a cost-efficient and equitable overtime compensation system that would meet the needs of a 21st century border security environment and workforce. The Department looks forward to continuing to work with Congress on this endeavor to ensure that the Border Patrol and other impacted DHS law enforcement components have an effective overtime pay system.

Chairman Carper, Ranking Member Coburn, and distinguished Members of the Committee, thank you for this opportunity to testify today. I look forward to answering your questions.


U.S. Customs and Border Protection
U.S. Border Patrol Personnel & Sector Border Mileage
USBP Northern Border Personnel: 2,129
USBP Sector Border Mileage: 3,987
USBP Southern Border Personnel: 18,344
USBP Sector Border Mileage: 1,995
USBP Coastal Border Personnel: 215
USBP Sector Border Mileage: 2,627
OBP Personnel: 226
Office of Border Patrol
Blaine Sector
Spokane Sector
Havre Sector
Grand Forks Sector
Houlton Sector
Swanton Sector
Buffalo Sector
Detroit Sector
Yuma Sector
El Centro Sector
San Diego Sector
Tucson Sector
El Paso Sector
Big Bend Sector
Del Rio Sector
Laredo Sector
Rio Grande Valley Sector
New Orleans Sector
Miami Sector
Ramey Sector
Office of Border Patrol
U.S. Border Patrol Sector Headquarters
U.S. Border Patrol Station
U.S. Border Patrol Sector Boundary
Coastal Sector*
Northern Border*
Southern Border*
*Personnel numbers provided by OPS-DK, 6/12/2014
**Sector Border Mileage Source CBP 2016 14-C, 5/2005
Created: 06/09/2014

National Border Patrol Council

Testimony of Brandon Judd
On Behalf of the National Border Patrol Council
For the Committee on Homeland Security and Government Affairs
United States Senate
June 9th, 2014

Dear Senator Carper and Ranking Member Coburn, members of the Committee, on behalf of the 16,500 rank and file Border Patrol Agents whom I represent, I would like to thank you for having this hearing on S. 1691. In particular, I would like to thank Senators Tester and McCain for introducing this important legislation.

My name is Brandon Judd and I am the President of the National Border Patrol Council. I have been a Border Patrol Agent for nearly 17 years, 15 of which were spent on the Southwest Border in the El Centro, California and Tucson, Arizona Sectors. I am currently assigned to the Van Buren Station in the Houlton, Maine Border Patrol Sector.

The process that brought us to this hearing today started last February with a meeting at the Office of Management and Budget. The Administration and the Council both recognized that the overtime system that governed Border Patrol pay and overtime was hopelessly broken and coming under legal and budgetary scrutiny.

This system, commonly referred to as AUO, was first instituted in the 1970s when there were fewer than 4,000 Border Patrol Agents covering over 6,000 miles of border nationwide. There were no interoperable communication systems, drones, helicopters, night vision technology or even fencing in most areas and in many areas we did not actively patrol 7 days a week 24 hours a day. Today, in contrast, the Border Patrol has over 21,000 agents and securing our border is 24-hour-a-day operation. Unfortunately, the AUO system has remained unchanged and is currently older than most of the Agents it is paying.

Candidly, AUO is a legacy of a bygone era. What worked forty years ago does not work for today's operational needs and threats. Gone are the mom and pop smuggling organizations that were in place when I joined the Border Patrol. They have been replaced by multi-national cartels that smuggle both drugs and illegal aliens into our country. These cartels are well-organized, heavily armed, and pathologically violent. They also have extensive intelligence and surveillance networks and with each tunnel coming into the United States that is discovered, the American public is made aware of just how well-funded and organized these cartels have become. They have learned to exploit the holes in our system in order to shift the cartels' resources to "problem" areas.

Senate bill 1691 creates a uniformed approach by securing the hours necessary to control the border at all entry points. The more manpower we have, the better equipped we will be to handle criminal cartels, aliens, and anyone who wants to do this nation harm. This bill provides the equivalent of 20 percent more manpower, or 5,000 trained agents on the border. In short, this legislation gives us the capacity we need to do our job.

Finally, I would like to address the cost savings. On average, Agents will see a $6,200 pay reduction per year over what they have traditionally earned under AUO. CBP estimates that the annual costs saving should be in the $80 million range. We are probably the first labor organization to come before this Committee asking for a pay cut. My Agents are asking you to do this because ensuring proper manpower, stability, and safety, are worth the trade.

Over the last 18 months we have worked diligently with the Administration, the Committee and many dedicated members of your staff. I want to thank everyone who participated in this process for their time, attention, and talent. I do, however, want to urge the Committee to move this measure through markup as quickly as possible. As you are all acutely aware, the number of legislative days left is quickly dwindling. With each passing day this bill is not enacted, we risk border security by not providing agents with the manpower they need to do their job. We owe it to them and to the American public.

Thank you for your consideration. I look forward to your questions.

Testimony of Adam Miles
Deputy Special Counsel, Policy and Congressional Affairs
U.S. Office of Special Counsel

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

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

June 9, 2014, 3:30 P.M.

Chairman Carper, Ranking Member Coburn, and members of the Committee:

Thank you for inviting me to testify today on behalf of the U.S. Office of Special Counsel (OSC). I am pleased to have the opportunity to discuss OSC's cases and our ongoing work to address widespread misuse of overtime payments at the Department of Homeland Security (DHS). We appreciate the Committee's interest in taking a closer look at this problem.

As you know, Special Counsel Carolyn Lerner testified before Chairman Tester's subcommittee in January. My testimony today will update the Committee on OSC's current DHS overtime cases.

Congress has tasked OSC with providing an important oversight role in reviewing government investigations of potential misconduct. We provide a safe channel for federal employees to disclose allegations of waste, fraud, abuse, illegality, and/or threats to public health or safety. We receive approximately 1,200 whistleblower disclosures annually, and refer a relatively small number of these disclosures to the agency involved. After an OSC referral, the agency is required to investigate and submit a written report to OSC. OSC analyzes the agency's report, receives comments from the whistleblower, and transmits our findings and recommendations to the President and Congress. Our efforts to support whistleblowers often address the identified problem and lead to reforms that prevent wasteful, inefficient, or unsafe practices from recurring.

OSC's October 31, 2013, communication to Congress and the President prompted significant discussion and debate on the legitimacy and legality of certain overtime payments to DHS employees, particularly at Customs and Border Protection (CBP). Encouraging this type of discussion, with the goal of rooting out waste and achieving meaningful reform, is at the heart of OSC's mission. As stated in OSC's October 31 letter, "[A]buse of overtime pay is a violation of the public trust and a gross waste of scarce government funds. It is incumbent upon DHS to take effective steps to curb the abuse. It is up to the administration and Congress to develop a revised pay system, if warranted, that ensures fair compensation for employees who are legitimately working overtime."

While OSC does not have a position on the Border Patrol Pay Reform Act of 2013, our update today on pending cases will provide context for the Committee as it considers the legislation. I will also highlight several issues we believe are relevant for your consideration.

Background

In September 2012, OSC received a disclosure from a CBP employee who alleged that DHS employees working in the CBP Situation Room in Washington, D.C., regularly abuse Administratively Uncontrollable Overtime (AUO). According to the employee, routine overtime payments to Situation Room employees functionally extend their daily shift by two hours, nearly every day, increasing pay by 25%, and this practice is a violation of the regulations governing AUO.

AUO may only be used when an employee's hours cannot be scheduled in advance due to a substantial amount of irregular work. For example, AUO is appropriate when an employee's work requires responding to the behavior of suspected criminals and it would "constitute negligence" for the employee to leave the job unfinished. AUO may only be used for irregular and unpredictable work beyond an employee's normal shift.

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

We referred these allegations to then-DHS Secretary Janet Napolitano for investigation. In April 2013, we received the agency's report, prepared by the CBP Office of Internal Affairs (OIA), which substantiated the allegations. The report concluded that previous warnings regarding proper use of AUO were disregarded, and it was "evident that the regular and consistent addition of two hours of AUO to the regularly scheduled eight-hour day implies hours of duty are controllable by management."

Recent Whistleblower Cases, Reports, and Issues for Congressional Consideration

OSC has since received nearly identical disclosures from whistleblowers throughout DHS. According to estimates provided by the whistleblowers, the total cost of AUO misuse at the locations they identified exceeds $37 million annually.

A detailed description of four of the more recent whistleblower cases is provided below. We have highlighted significant issues from our ongoing work in these cases for your consideration.

1. ***San Ysidro, CA, Asset Forfeiture Office, CBP***

Allegations

Two whistleblowers at the CBP Asset Forfeiture Office (AFO) in San Ysidro, CA, alleged that Border Patrol Agents (BPAs) routinely claim two hours of AUO each day, but fail to perform duties that qualify for AUO payments. The whistleblowers further alleged that employees work on routine administrative matters during the claimed AUO periods or are not even present for the AUO time they claim.

Report

OSC referred the case to DHS, and received a report on January 23, 2014. The investigation, conducted by CBP's Office of Internal Affairs, confirmed that "Overtime work at the San Diego Sector AFO was improperly paid as AUO." Specifically, the report states, "A majority of the time, San Diego Sector AFO BPAs and [Supervisory Border Patrol Agents] claimed two hours of daily AUO work." Additionally, "The AUO work hours documented and claimed were not irregular or occasional and basically were just an extension of their regularly scheduled eight-hour shift, i.e., employees just continued performing the same work duties as they had been performing during the regular shift hours."

Additional Issues for Congressional Consideration

In addition to confirming AUO misuse throughout the AFO, the report illustrates how broadly AUO misuse extends within CBP. For example, the report confirms that BPAs in the AFO paralegal section worked a scheduled 10-hour shift and claimed 2 hours of AUO daily. The report notes that BPAs in the paralegal section have the same duties as non-BPAs in the section. The non-BPAs are not eligible for AUO and do not work 10-hours shifts. The report confirms, "[T]he duties in the paralegal section could have been accomplished the next day, and it was not necessary to extend the work day an additional two hours, which is what happened. The additional two hours of AUO worked and claimed each day should not have been paid as AUO."

Congress may want to consider whether and to what extent pay reform should cover BPAs assigned to paralegal or other similar administrative duties.

2. Glynco, GA, Office of Training and Development, CBP

Allegations

A whistleblower at the CBP Office of Training and Development (OTD) in Glynco, GA, alleged that agents routinely abuse AUO by claiming two hours of AUO daily while failing to perform any qualifying duties. According to the whistleblower, CBP pays out nearly $5 million annually to employees in OTD, including to 50 managers at Headquarters.

Report

OSC referred the case to DHS, and received a report on January 23, 2014. OIA conducted the investigation for CBP and concluded that "the payment of AUO to OTD employees is inconsistent with the relevant regulations and policies." The report adds, "[I]t is evident that the regular and consistent addition of up to two hours of AUO to the regularly scheduled eight hour day implies hours of duty are controllable by management," and improperly claimed as AUO.

Additional Issues for Congressional Consideration

The OIA report on OTD also confirms that BPAs routinely claim AUO for performing the same duties as Customs and Border Protection Officers (CBPOs). CBPOs are not eligible for AUO and therefore do not receive AUO for completing the same tasks as the agents. For example,

within OTD, the position of instructor is occupied by both BPAs and CBPOs. The BPA instructors who teach classes claim they frequently do not have enough time to complete all of their duties within an 8-hour day, and therefore claim AUO for the additional hours worked. In contrast, CBPO instructors who teach classes state that they generally have enough time to complete their other duties. When it is not possible to complete all additional instructor duties within an 8-hour day, CBPO instructors generally complete these types of duties without compensation because AUO is not available to them.

Congress may want to consider whether and to what extent pay reform should cover BPAs assigned to positions with the same duties as CBPOs or other employees who are not currently eligible for AUO.

3. ***Houston, TX, Enforcement and Removal Operations, Immigration and Customs Enforcement***

Allegations

A whistleblower at the Immigration and Customs Enforcement (ICE) facility in Houston, TX, alleged that ICE supervisors authorize and abet the improper use of AUO. The whistleblower disclosed that employees are directed to stay beyond their normal duty hours to complete routine administrative tasks that are not time-sensitive or investigative in nature. These employees are instructed to certify the time as AUO.

Report

OSC referred the case to DHS, and received an initial report on September 11, 2013, and a supplemental report on January 27, 2014. The subsequent ICE Office of Professional Responsibility (OPR) investigation, after conducting a random sampling of timesheets for 28 employees, determined that 54% of the AUO justifications were noncompliant with AUO rules, and another 33% were found to be "undetermined," because they were vague and it was unclear whether the justifications supported the AUO claim. OPR further noted that the lack of ICE policy and guidance on AUO contributed, at least in part, to employees providing justifications for overtime that are inconsistent with the purpose of AUO.

Additional Issues for Congressional Consideration

While misuse of AUO is most widespread within CBP, substantiated misuse in other DHS components may indicate a need for congressional action if DHS reforms are not sufficient to correct these identified problems. OSC currently has five pending cases alleging misuse of AUO at ICE and one pending case alleging AUO misuse at U.S. Citizenship and Immigration Services (USCIS).

4. ***Laredo, TX, Laredo North Station, CBP***

Allegations

A whistleblower at the CBP facility in Laredo, TX, alleged that BPAs at the Laredo North Station improperly claim AUO for routine shift-change activities. The whistleblower also alleged that supervisors told agents they could exercise during the last half-hour of the two-hour period claimed as AUO.

Report

OSC referred the case to DHS and received an initial report on November 26, 2012, and a supplemental report on January 23, 2014. The supplemental report and investigation, conducted by CBP-OIA, confirmed that "BPAs are regularly remaining at their duty stations two hours beyond the end of their shift in order to earn AUO pay." The report concludes, "The evidence supports the allegation that BPAs are not performing duties that justify the receipt of AUO pay." CPB noted, "[I]t is clear that AUO is being inadequately documented and/or utilized improperly for work that is not compensable under AUO."

The report did not substantiate the allegation that supervisors told BPAs that they could exercise during the last half-hour of the two-hour period claimed as AUO. According to the report, there is a current program that allows BPAs to exercise on duty, but BPAs all know that AUO cannot be claimed for working out.

Additional Issues for Congressional Consideration

The investigation substantiated the allegation that BPAs are not performing duties that justify the receipt of AUO pay, but noted that the majority of the duties performed by agents claiming AUO are routine post-shift activities. The agents interviewed indicate that the work cannot be completed in an eight-hour shift. The report contains an extensive discussion of the cost and benefits of continued misuse of AUO versus the alternative of transitioning to four shifts per day without AUO. According to senior BPA managers, a deliberate choice was made to continue with three, ten-hour shifts per day utilizing AUO to facilitate the shift changes. The managers insist that employing three, ten-hour shifts is a more cost-effective approach to securing the border, even if AUO may not properly be used for routine activities.

Summary of all OSC Whistleblower Cases Involving AUO

Since 2007, OSC has referred allegations of AUO abuse at 10 CBP locations. To date, CBP/OIA has substantiated the allegations at 5 of these locations. This includes a 2007 case in Blaine, WA, which was discussed at length in OSC's prior testimony. The other substantiated cases include those discussed above at the Commissioner's Situation Room in Washington, D.C.; San Ysidro, CA; Glynco, GA (OTD); and Laredo, TX. The DHS Office of Inspector General is currently investigating 5 other cases, including allegations of AUO misuse at the Office of Internal Affairs; at the Office of Border Patrol Headquarters; in El Centro, CA; at the National Targeting Centers; and in El Paso, TX. Summaries of these cases were provided in OSC's January 2014 testimony. The current due date for the OIG investigations is June 13, 2014.

AUO abuse allegations are not limited to CBP. OSC referred allegations of AUO abuse at five ICE locations and one USCIS location. To date, one allegation of AUO abuse has been

substantiated at an ICE office in Houston, Texas (discussed above). ICE OPR is currently investigating four additional allegations of AUO abuse at facilities in Chattanooga, TN; Salem, VA; Bakersfield, CA; and Columbus, OH. DHS OIG has nearly completed an investigation of AUO abuse at the USCIS Office of Security and Integrity in Washington, D.C. The reports in these cases are currently due in June and July 2014.

I thank you for the opportunity to provide this update and summary of OSC's work, and would be pleased to answer your questions.

Border Patrol Statistics: 2005 to 2013

Apprehensions, Budget, Personnel

Office/ Statistics	2005	2006	2007	2008	2009	2010	2011	2012	2013
BP Apprehensions	1,189,075	1,089 ,092	876,704	723,825	556 ,041	463,382	340 ,252	364,768	420,789
Border Patrol Budget	$1,524,960	$2,115,268	$2,277,510	$2,245,261	$2,656,055	$2,958,108	$3,549,295	$3,530,994	$3,466,880
Border Patrol Agents	11,264	12,349	14,923	17,499	20,119	20,558	21,444	21,394	21,391

BP Apprehensions data obtained from http://www.cbp.gov/sites/default/files/documents/U.S.%20Border%20Patrol%20Fiscal%20Year%20Apprehension%20Statistics%201925-2013.pdf and accessed 6/5/14.
BP Budget data obtained from http://www.cbp.gov/sites/default/files/documents/BP%20Budget%20History%201990-2013.pdf and accessed 6/5/14.
BP Agents data obtained from http://www.cbp.gov/sites/default/files/documents/U.S.%20Border%20Patrol%20Fiscal%20Year%20Staffing%20Statistics%201992-2013.pdf and accessed 6/5/14.

Notional Journeyman Border Patrol Agent Gross Earnings and Agency Cost - Current AUO vs. FEPA/FLSA vs. BPAPRA

GS 12 Step 3[1]	AUO				FEPA/FLSA				BPAPRA			
	25% AUO Annual	25% AUO Bi-Weekly	20% AUO Annual	20% AUO Bi-Weekly	25% AUO Annual	25% AUO Bi-Weekly	20% AUO Annual	20% AUO Bi-Weekly	Level 1 Annual	Level 1 Bi-Weekly	Level 2 Annual	Level 2 Bi-Weekly
Annual/Bi-Weekly OT Hours	~468	~18	~364	~14	~468	~18	~364	~14	~520	~20	~260	~10
Salary	75,435	2,901	75,435	2,901	75,435	2,901	75,435	2,901	75,435	2,901	75,435	2,901
Pay Differentials[2]	4,733	182	4,733	182	4,733	182	4,733	182	4,733	182	4,733	182
AUO	18,859	725	15,087	580	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
BPAPRA	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	18,859	725	9,429	363
FEPA	N/A	N/A	N/A	N/A	18,970	730	14,754	567	N/A	N/A	N/A	N/A
FLSA	5,236	201	4,177	161	7,512	289	5,806	223	N/A	N/A	N/A	N/A
Total Gross Pay	**104,263**	**4,010**	**99,432**	**3,824**	**106,650**	**4,102**	**100,729**	**3,874**	**99,027**	**3,809**	**89,597**	**3,446**
Medicare	1,512	58	1,442	55	1,546	59	1,461	56	1,436	55	1,299	50
FICA	6,464	249	6,165	237	6,612	254	6,245	240	6,140	236	5,555	214
Group Health	9,546	367	9,546	367	9,546	367	9,546	367	9,546	367	9,546	367
Group Life	198	8	190	7	158	6	158	6	198	8	178	7
TSP Basic	943	36	905	35	754	29	754	29	943	36	849	33
TSP Match	3,772	145	3,621	139	3,017	116	3,017	116	3,772	145	3,395	131
FERS Annuity	24,799	954	23,807	916	19,839	763	19,839	763	24,799	954	22,319	858
Total Agency Benefit Cost[3]	**47,234**	**1,817**	**45,676**	**1,757**	**41,474**	**1,595**	**41,021**	**1,578**	**46,834**	**1,801**	**43,141**	**1,659**
Grand Total	**151,497**	**5,827**	**145,108**	**5,581**	**148,124**	**5,697**	**141,750**	**5,452**	**145,860**	**5,610**	**132,739**	**5,105**

[1] Locality adjustment based on BPA population distribution

[2] Estimated night, Sunday and holiday differentials earnings

[3] Estimated agency benefits cost only - does not reflect employee contributions

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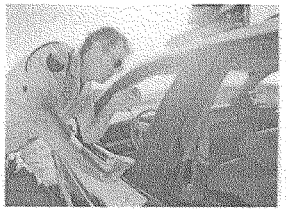
Police and Detectives

EN ESPAÑOL | PRINTER-FRIENDLY

Summary | What They Do | Work Environment | How to Become One | Pay | Job Outlook | Similar Occupations | More Info

Summary

Quick Facts: Police and Detectives	
2012 Median Pay	$56,980 per year $27.40 per hour
Entry-Level Education	High school diploma or equivalent
Work Experience in a Related Occupation	See How to Become One
On-the-job Training	See How to Become One
Number of Jobs, 2012	780,000
Job Outlook, 2012-22	5% (Slower than average)
Employment Change, 2012-22	41,400



Police officers enforce laws to protect people and their property.

What Police and Detectives Do

Police officers protect lives and property. Detectives and criminal investigators, who are sometimes called *agents* or *special agents*, gather facts and collect evidence of possible crimes.

Work Environment

Police and detective work can be physically demanding, stressful, and dangerous. Police officers have one of the highest rates of injuries and illnesses of all occupations. Working around the clock in shifts is common.

How to Become a Police Officer or Detective

Education requirements range from a high school diploma to a college, or higher, degree. Most police and detectives must graduate from their agency's training academy before completing a period of on-the-job training. Candidates must be U.S. citizens, usually at least 21 years old, and able to meet rigorous physical and personal qualifications.

Pay

The median annual wage for police and detectives was $56,980 in May 2012.

Job Outlook

Employment of police and detectives is projected to grow 5 percent from 2012 to 2022, slower than the average for all occupations. Continued interest for public safety will lead to new openings for officers; however, jobs may be competitive, depending on location.

Similar Occupations

Compare the job duties, education, job growth, and pay of police and detectives with similar occupations.

More Information, Including Links to O*NET

Learn more about police and detectives by visiting additional resources, including O*NET, a source on key characteristics of workers and occupations.

What They Do ->

SUGGESTED CITATION:
Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2014-15 Edition*, Police and Detectives, on the Internet at http://www.bls.gov/ooh/protective-service/police-and-detectives.htm (visited *June 09, 2014*).

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Deputy Secretary
U.S. Department of Homeland Security
Washington, DC 20528

June 6, 2014

Statement from Deputy Secretary Alejandro Mayorkas

Earlier this year, Secretary Johnson issued a memorandum limiting the use of AUO for certain discrete categories of DHS employees, including law enforcement at the U.S. Border Patrol and Immigration and Customs Enforcement (ICE). This was in response to allegations of improper use of Administratively Uncontrollable Overtime (AUO) within the Department of Homeland Security (DHS). While this measure was necessary in order to comply fully with existing legal authority and ensure appropriate stewardship of limited federal resources, this decision also posed very real financial difficulties for the affected employees, the overwhelming majority of whom had engaged in no wrongdoing whatsoever. As a result, it is absolutely imperative that DHS and Congress work together to find a comprehensive solution that both complies with the law and also ensures the well-being of all of our DHS law enforcement personnel, who are this Department's most valuable asset.

On behalf of DHS, I want to thank the Committee for recognizing the importance of reforming the manner in which the U.S. Border Patrol is compensated, and for its work to replace the broken AUO system, provide Border Patrol Agents with the financial security they deserve, improve employee morale within the Border Patrol, and enable DHS to save tens of millions of dollars annually. Similarly, DHS hopes that ICE officers covered by AUO are moved to a modern premium pay system that reflects their important homeland security mission as well. According to OPM, DHS has 97% of all AUO earners in the federal government. In part this is due to the fact that other agencies have come to be are covered by different pay systems that are easier to manage and meet their overtime needs better than AUO.

In the coming months, DHS will take further action to ensure full compliance with the law and regulations. While law enforcement personnel from ICE as well as CBP components other than the Border Patrol are in need of pay reform, this is an important first step. I am grateful for the Committee's efforts, and appreciate your continued support of the dedicated men and women who make up the DHS workforce.

Post-Hearing Questions for the Record
Submitted to Ronald D. Vitiello and Paul L. Hamrick
From Senator Tom A. Coburn, M.D.

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

June 9, 2014

Question#:	1
Topic:	The Office of Special Counsel
Hearing:	Border Security: Examining the Implications of S.1691, The Border Patrol Agent Pay Reform Act of 2013
Primary:	The Honorable Tom A. Coburn
Committee:	HOMELAND SECURITY (SENATE)

Question: The Office of Special Counsel (OSC) testified before the Committee on June 9, 2014 that it has received sixteen allegations of Administratively Uncontrollable Overtime (AUO) at U.S. Customs and Border Protection (CBP) at sixteen different locations.

Please provide a detailed status of each case that OSC has referred to CBP Internal Affairs, including the following if applicable: the general allegations of each case, including whether there are allegations of work not being performed; when you received the case; when and how you investigated the case; when a report is due; whether a report has been issued; and the findings of the report.

For any case in which OSC requested a supplemental report after the investigation by Internal Affairs had been completed, please explain what was requested and why, and when you expect to provide the information if you have not already.

Response: Please see the below chart showing OSC Whistleblower Disclosure Cases investigated by OIA regarding AUO:

Office JICMS # OSC File	Date Received Location Office	Summary of Allegation(s), Finding(s), and Corrective Action Taken or To Be Taken
OBP 200707137 DI-07-0929	5/17/07 Blaine, WA Blaine Sector	Summary of Allegation(s): Border Patrol Agents in Blaine Sector receiving overtime payments for work not performed, receiving AUO for work that is controllable and schedulable, overtime documentation insufficient. Finding(s): Evidence did not demonstrate employees received overtime pay without work being performed. AUO was improperly paid for duties that do not justify receipt of AUO pay. Overtime documentation was insufficient and did not conform with regulatory requirements and U.S. Border Patrol (USBP) Policy. Corrective Action(s): During CBP's investigation following receipt of the

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		OSC report, USBP issued clarifying guidance to all Sectors, HRM staff delivered training to Blaine Sector managers and employees in the 2009-2010 timeframe, concerning the appropriate use of AUO and requirement for review and certification. In addition, CBP recently developed CBP-wide training on AUO use and documentation requirements – which will be required for all managers and supervisors of employees who receive AUO. This training was delivered to supervisory USBP staff in Blaine Sector on May 22-23, 2014.
OBP 200804855 DI-08-0663	2/20/08 Blaine, WA Blaine Sector	Summary of Allegation(s): Border Patrol Agents (BPA) receiving AUO for work that is controllable and schedulable, and routinely claiming standard hours of AUO each day. Finding(s): AUO was paid for duties that do not justify receipt of AUO pay overtime work. Overtime documentation was insufficient and did not conform with regulatory requirements and USBP policy. Corrective Action: During CBP's investigation following receipt of the OSC report, USBP issued clarifying guidance to all Sectors, HRM staff delivered training to Blaine Sector managers and employees in the 2009-2010 timeframe, concerning the appropriate use of AUO and requirement for review and certification. In addition, CBP recently developed CBP-wide training on AUO use and documentation requirements - which will be required for all managers and supervisors of employees who receive AUO. This training was delivered to supervisory USBP staff in Blaine Sector on May 22-23, 2014
OBP 201207836 DI-12-1105	7/20/12 Laredo, TX Laredo North Station	Summary of the original allegation: Insufficient number of BPAs are assigned to patrol the border area of responsibility (AOR) for in Laredo North Station because too many BPAs are assigned to work the highway; BPAs are called in from the border to process aliens caught in other zones, leaving the Laredo North's AOR unsecure; BPAs also leave their shifts prior to relief from incoming shift, leaving the border unsecure between shifts; BPAs work one hour and five minutes and claim two hours of AUO; and BPAs leave 5-15 minutes past the hour and claim one hour of AUO. Employee named five of the alleged "worst abusers" of AUO. Finding(s): In their original report, evidence did not support the allegation of the AOR being left unsecure because of BPA assignments or because of BPAs being called to assist with processing aliens; evidence did not support that BPAs leave their shifts early before being properly relieved; evidence did not support allegation of rampant AUO abuse. However, overtime documentation was insufficient and did not conform with regulatory requirements and USBP Policy. OSC characterized Agency's report as inadequate, stating that the names of the five alleged worst abusers were merely representative and report failed to cover a sufficient timeframe. Additionally, allegations were made that management allowed BPAs to

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		exercise during the last half-hour of the two-hour period claimed as AUO, and BPAs are staying for two hours after their shift has ended to perform routine shift change activities. Corrective Action(s): Completed report transmitted to OSC on January 23, 2014. Since the report, CBP has delivered training on the proper use of AUO (July 8-9, 2014) and other forms of overtime compensation and the requirements for documenting AUO eligible activities. CBP is following up with an AUO compliance validation of claims for AUO at the Laredo North Station for 60 days. Under this validation review, AUO claims will be contemporaneously reviewed by the CBP Office of Internal Affairs Management Inspections Division (MID) for independent verification that the hours claimed are valid and in compliance with current requirements for compensation under AUO, and MID will inform OBP management of instances that do not meet AUO requirements prior to supervisory approval. Any work performed that is not compensable under AUO will instead be compensated under the applicable appropriate overtime statute for that employee (i.e. FLSA or FEPA) going forward. This review is schedule to begin no later than August 1, 2014. Concurrently, CBP will act upon the findings of the internal eligibility review conducted by its Office of Human Resources Management. The purpose of this review was to determine which of CBPs 158 positions within CBP should continue to be eligible for AUO and which should be decertified. The HRM review is currently being finalized. CBP is preparing to implement a new AUO Directive aimed at improving the integrity of its AUO program, in concert with DHS. CBP is cooperating fully with a recently initiated department-wide audit of AUO use at DHS being conducted by the Government Accountability Office. CBP is continuing to explore the possibility, through legislation, of comprehensive pay reform for Border Patrol Agents and other job categories earning AUO.
OIIL 201303940 DI-13-0002	01/02/13 Washington DC Commissioner's Situation Room (CSR)	Summary of Allegation(s): At least 26 Headquarter CSR employees abuse AUO pay by remaining at their duty stations two hours after their regularly scheduled eight-hour shift, relaxing, joking around, surfing the Internet, and taking care of personal matters. Employees also switch television stations from news coverage to sports and entertainment channels. Finding(s): Evidence did not demonstrate employees received overtime pay without work being performed. AUO was improperly paid for duties that do not justify receipt of AUO pay. Specifically, overtime documentation was insufficient and did not conform with regulatory requirements and USBP Policy. Evidence revealed deficiencies in the CSR's controls over the authorization of AUO. Insufficient written documentation was available to enable an independent outside reviewer to determine whether

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		an employee is entitled to the rate of AUO pay received. Local records maintained for BPAs assigned to the CSR did not contain an adequate description of overtime duties performed to determine whether they met AUO criteria. Thus, CBP stated that a determination as to the eligibility to earn AUO and the appropriate percentage of AUO to authorize cannot be accurately made. Prior warnings regarding proper use of AUO were disregarded. OSC advised that the Agency appeared unwilling or unable to adequately address the AUO abuse issue and therefore, she found the Agency's report unreasonable. Corrective Action(s): This case was closed on July 7, 2014 with the institution of the CBP wide AUO systemic education. NOTE: Subsequent to the closure of this case, AUO was suspended for employees in these positions, per Secretary Johnson's January 2014 direction.
OBP 201312641 DI-13-2853 DI-13-3516	07/29/13 San Diego, CA San Diego Sector Asset Forfeiture Office	Summary of Allegation(s): The allegations state that San Diego Sector Asset Forfeiture Office BPAs claims two hours of AUO beyond their normal duty hours daily, part of which is spent on controllable, routine administrative work, and part of which is not worked at all, and that BPAs frequently left work and were not present for the remainder of the AUO they were claiming. Finding(s): Findings indicate that AUO was improperly paid for duties that do not justify receipt of AUO pay. Corrective Action(s): Completed report transmitted to OSC on January 23, 2014. As indicated in the report, CBP stated that it intends or has taken the following actions: • The function of Asset Forfeiture Specialist deauthorized from AUO, nationwide. Employees performing this function will have their overtime compensated via the applicable and appropriate overtime statute for that employee (i.e. FLSA or FEPA) going forward. Additionally, CBP is also exploring the potential of having these functions carried out by job series other than GS-1896 Border Patrol Agents. • CBP will act upon the findings of the internal eligibility review conducted by the CBP Office of Human Resources Management (HRM) to determine which of the 158 positions within CBP should continue to be eligible for AUO and which should be decertified. • Issue a revised AUO directive after the department-wide AUO review and in concert with Immigration and Customs Enforcement's own directive. • CBP is cooperating fully with a recently initiated department-wide audit of AUO use at DHS being conducted by the Government

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		Accountability Office. • CBP is continuing to explore the possibility, through legislation, of comprehensive pay reform for Border Patrol Agents and other job categories earning AUO.
OTD 201312916 DI-13-4124	9/12/13 Multiple - CBP Academies	Summary: Allegations included that an estimated 200 BPAs working in the Office of Training and Development's five facilities nationwide abuse AUO by working extra hours that are administrative, optional, and controllable. Finding(s): Findings indicate that AUO was improperly paid for duties that do not justify receipt of AUO pay. Corrective Action(s): Completed report transmitted to OSC on January 23, 2014. The reviewing official in this case found that discipline was not merited. The Office of Training and Development staff will receive training from the Office of Human Resources Management on the appropriate use of overtime mechanisms other than AUO. CBP has or intends to take the following actions: • Initially, the function of instructors at all of the CBP training academies has been de-authorized from AUO. Employees performing this function will have their overtime compensated via the applicable and appropriate overtime statute for that employee (i.e. FLSA or FEPA) going forward. • Additionally, CBP will act upon the findings of the internal eligibility review conducted by the CBP Office of Human Resources Management (HRM) to determine which of the 158 positions within CBP should continue to be eligible for AUO and which should be decertified. The HRM review is currently being finalized. • Issue a revised AUO directive after the department-wide AUO review and in concert with Immigration and Customs Enforcement's directive. • CBP is cooperating fully with a recently initiated department-wide audit of AUO use at DHS being conducted by the Government Accountability Office. • CBP is continuing to explore the possibility, through legislation,

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		of comprehensive pay reform for Border Patrol Agents and other job categories earning AUO.

Question#:	2
Topic:	CBP Internal Affairs 1
Hearing:	Border Security: Examining the Implications of S.1691, The Border Patrol Agent Pay Reform Act of 2013
Primary:	The Honorable Tom A. Coburn
Committee:	HOMELAND SECURITY (SENATE)

Question: You testified before the Committee on June 9, 2014 that investigators documented their investigations into allegations that work was not being performed during overtime hours, yet CBP Internal Affairs' reports on the Situation Room, San Ysidro, Laredo, and Blaine cases provided little more than a sentence regarding these allegations.

For each of the above cases, please explain what documentary evidence CBP Internal Affairs has regarding the investigative steps it took to determine that agents were doing work during the AUO overtime hours they claimed, rather than leaving early, exercising, or doing other non-work related activities.

Response: In each investigation conducted by the CBP Office of Internal Affairs (IA), investigators conducted investigative interviews with all relevant witnesses and reviewed documentation to include time and attendance records and Administratively Uncontrollable Overtime (AUO) tracking forms regarding the regular and overtime hours claimed by the employees. Reports of investigation in the format required by the Office of Special Counsel (OSC) were prepared by CBP IA, reviewed by the CBP Office of Chief Counsel, and returned to the OSC. No evidence discovered during the investigations substantiated the original allegations of work not being performed while receiving AUO; however, the investigations confirmed the overtime hours were not compensable under AUO, but more appropriate for compensation under an alternative mechanism such as Federal Employee Pay Act of 1945 or Federal Employees Pay Act.

Question#:	3
Topic:	CBP Internal Affairs 2
Hearing:	Border Security: Examining the Implications of S.1691, The Border Patrol Agent Pay Reform Act of 2013
Primary:	The Honorable Tom A. Coburn
Committee:	HOMELAND SECURITY (SENATE)

Question: You testified before the Committee on June 9, 2014 that agents were not aware they were being watched when CBP Internal Affairs conducted the six investigations.

In any of the cases, did agents have any reason to believe their location was being investigated for AUO abuse prior to surveillance being conducted?

Response: For clarification purposes, U.S. Customs and Border Protection (CBP) Office of Internal Affairs (IA) investigators conducted covert surveillance in the investigation of alleged Administratively Uncontrollable Overtime abuse by Border Patrol Agents (BPA) assigned to Laredo North. The surveillance consisted of CBP IA Special Agents covertly observing the entry and egress of BPAs into and out of the Border Patrol station. There is no reason to believe the BPAs were aware of the surveillance conducted by CBP IA.

Question: What steps did CBP Internal Affairs take to ensure agents were not aware they were being watched?

Response: In general, conducting surveillance is one of many tactical decisions made during the course of an investigation. Knowledge of such a tactical decision is considered "close hold" and investigators involved in surveillance would observe operational security protocols to ensure the existence of surveillance is not compromised. There is no reason to believe the surveillance conducted as part of the Laredo North investigation was compromised.

Question: In the CBP Situation Room case referred by OSC to CBP Internal Affairs, how did CBP Internal Affairs determine that agents were not goofing off, watching T.V., or attending to personal matters during overtime hours?

Response: With respect to the Commissioner's Situation Room (CSR), the original allegation was that at least 26 CSR employees abused AUO by remaining at their duty stations two hours after their regularly scheduled shift, relaxing, joking around, surfing the Internet, and taking care of personal matters. The original complaint also included allegations that the televisions in the CSR were switched from news channels to entertainment and sports channels.

Question#:	3
Topic:	CBP Internal Affairs 2
Hearing:	Border Security: Examining the Implications of S.1691, The Border Patrol Agent Pay Reform Act of 2013
Primary:	The Honorable Tom A. Coburn
Committee:	HOMELAND SECURITY (SENATE)

CBP IA conducted interviews with the personnel assigned to the CSR, reviewed time and attendance records, and AUO documentation. OIA did a thorough investigation and the evidence collected did not support allegations that employees failed to perform work while being paid overtime. CBP IA also found the overtime hours were not properly compensated under AUO.

Question: Given the small number of people in the Situation Room, wouldn't agents have noticed if there were investigators observing them?

Response: CBP IA investigators did not conduct surveillance in the CSR. Covert surveillance was limited to the Laredo North investigation.

Question: Did CBP Internal Affairs conduct surveillance at the Situation Room prior to interviewing employees there?

Response: CBP IA investigators did not conduct surveillance in the CSR. Covert surveillance was limited to the Laredo North investigation.

Question#:	4
Topic:	OSC 1
Hearing:	Border Security: Examining the Implications of S.1691, The Border Patrol Agent Pay Reform Act of 2013
Primary:	The Honorable Tom A. Coburn
Committee:	HOMELAND SECURITY (SENATE)

Question: OSC discussed two cases at great length in its testimony before the Committee on June 9, 2014: one involving instructors at training facilities and one involving paralegals at San Ysdiro, California, where agents were found to have the same duties as officers or civilians but complete the work in ten hours as opposed to eight.

Didn't CBP Internal Affairs substantiate the allegations in these two cases?

Response: In both instances, the U.S. Customs and Border Protection (CBP) Office of Internal Affairs (IA) investigations disclosed Administratively Uncontrollable Overtime (AUO) was the not the proper compensation mechanism; however, no evidence was developed during the investigations to indicate CBP employees were not actually working the overtime hours claimed. CBP did not investigate the mission-necessary nature of the work performed while on overtime.

Question: Was anyone disciplined as a result of these two cases?

Response: After review of the investigative file addressing the training academy instructors, management determined discipline was not warranted. The case involving the Asset Forfeiture function at San Ysidro is currently under review by management for a determination as to whether discipline should be taken.

Question: Did CBP perform a review to determine why agents are permitted to work ten hours in those locations when they can complete their duties in eight?

Response: CBP did not investigate the mission-necessary nature of the work performed while on overtime. IA made no determinations or conclusions as to what type of work was performed, or whether the work being performed on overtime was necessary to be performed on overtime; such determinations are made by the local supervisors.

Question: Did CBP Internal Affairs perform a review to determine whether the hours being worked and billed as overtime in the six cases referred by OSC were mission-necessary hours?

Response: CBP IA investigated the allegations received regarding alleged abuse of AUO and found in each of the six cases that the overtime hours were being worked; however,

Question#:	4
Topic:	OSC 1
Hearing:	Border Security: Examining the Implications of S.1691, The Border Patrol Agent Pay Reform Act of 2013
Primary:	The Honorable Tom A. Coburn
Committee:	HOMELAND SECURITY (SENATE)

the overtime hours were not properly compensated under AUO. CBP did not investigate the mission-necessary nature of the work performed while on overtime.

Question: In light of the numerous allegations of AUO misuse, do you believe such a review should be performed?

Response: The mission essential nature of overtime hours at any specific CBP location is a tactical decision made by law enforcement officers and their managers who have real-time awareness of day-to-day operational requirements.

Question#:	5
Topic:	OSC 2
Hearing:	Border Security: Examining the Implications of S.1691, The Border Patrol Agent Pay Reform Act of 2013
Primary:	The Honorable Tom A. Coburn
Committee:	HOMELAND SECURITY (SENATE)

Question: I understand OSC has received whistleblower complaints about the leadership and investigators at CBP Internal Affairs, including allegations that individuals at CBP Internal Affairs misused AUO, covered-up employee misconduct, and altered reports.

Please provide a detailed list of each case, the allegations being investigated, and which agency is investigating.

Response: Allegations of Administratively Uncontrollable Overtime (AUO) abuse by U.S. Customs and Border Protection (CBP) Office of Internal Affairs (IA) were referred to the Department of Homeland Security Office of Inspector General. CBP IA has no direct or detailed information regarding the content of the allegation.

Question: Do any of the cases regarding misconduct at CBP Internal Affairs involve allegations against you personally? If so, please explain.

Response: I am unaware of any allegation against me personally regarding abuse of AUO.

Question: Do any of the cases regarding misconduct at CBP IA involve allegations against Mr. James Tomsheck, who was removed as Assistant Commissioner the morning of this hearing? If so, please explain.

Response: Although OIA is not in possession of the specific allegations, it is our understanding that some of the allegations regarding misconduct at CBP IA concern Mr. Tomsheck.

Question: In the case alleging AUO misuse by CBP Internal Affairs investigators, are there any allegations that mission-necessary work was not performed during the overtime hours claimed? If so, please explain.

Response: The specific AUO-related allegations involving CBP IA were referred to the DHS Office of Inspector General. CBP is not in possession of the detailed allegations.

Question: Is there any truth to the allegations that AUO was being abused within CBP Internal Affairs? If so, please explain.

Question#:	5
Topic:	OSC 2
Hearing:	Border Security: Examining the Implications of S.1691, The Border Patrol Agent Pay Reform Act of 2013
Primary:	The Honorable Tom A. Coburn
Committee:	HOMELAND SECURITY (SENATE)

Response: Although the use of AUO to compensate overtime certain employees in CBP IA was believed to be appropriate, a recent evaluation of all AUO eligible positions in CBP, conducted by the Office of Human Resources Management and the Office of the Chief Counsel, determined AUO was not the appropriate compensation mechanism for paying overtime to personnel assigned to CBP IA's Credibility Assessment Division, the Operational Field Testing Division, the Integrity Programs Division, and the headquarters component of the Investigative Operations Division. This review did not find that overtime hours were not being worked but only that compensation under AUO was not the correct payment mechanism.

Question: Do you believe any of the whistleblower complaints suggest conduct which, if substantiated, would call into question the integrity of the AUO investigations conducted by Internal Affairs? If so, please explain.

Response: The AUO-related investigations conducted by CBP IA were completed in a thorough and impartial manner, and reviewed by both senior managers in IA and the CBP Office of Chief Counsel. While any investigation may be scrutinized and the findings challenged, there is no evidence to substantiate the AUO-related investigations conducted by CBP IA were biased, or conducted in other than a professional manner. CBP IA investigators fully and completely documented the facts and accurately reported the information in the format required by the Office of Special Counsel.

Question#:	6
Topic:	performance and effectiveness
Hearing:	Border Security: Examining the Implications of S.1691, The Border Patrol Agent Pay Reform Act of 2013
Primary:	The Honorable Tom A. Coburn
Committee:	HOMELAND SECURITY (SENATE)

Question: The Office of Inspector General for the Department of Homeland Security issued a report in December, 2013 that concluded: "CBP is challenged in its ability to measure its performance and effectiveness." The same report notes that the border patrol's use of apprehensions on the southwest border as an interim 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."

Does the U.S. Customs and Border Protection (CBP) use any metrics other than apprehensions to measure its performance and effectiveness at each sector?

Response: We have standardized the collection and formulation for interdiction effectiveness. Effectiveness is (Apprehensions + Turnbacks)/ divided by Entries. We also use other data like recidivism, Integrated Automated Fingerprint Identification System criminal history results, assaults on agents, deployment density, and geospatial information to build Chief Fisher's state of the border presentation.

Question: In 2005, DHS apprehended 1.2 million illegal aliens with 11,264 border patrol agents and with an operating budget of $1.25 billion. 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. If increased hours and agents at the border breed success, then why have the number of apprehensions gone down?

Response: The increase in staffing and patrol hours has raised situational awareness and efficiency. These are key pieces for improvements in border security compared to 2005, before the increase in U.S. Border Patrol resources. However, apprehensions are trending higher the last few years. There were 340,252 in Fiscal Year (FY) 2011 and 364,768 in FY 2012. After apprehending 421,000 in FY 2013, the U.S. Border Patrol is currently 20 percent higher for apprehensions so far in FY 2014 year to date.

Question: Would you agree that there is some seasonality to the rate at which illegal aliens cross the border, and that in certain cases, the high and low times can be predictable to a degree?

Question#:	6
Topic:	performance and effectiveness
Hearing:	Border Security: Examining the Implications of S.1691, The Border Patrol Agent Pay Reform Act of 2013
Primary:	The Honorable Tom A. Coburn
Committee:	HOMELAND SECURITY (SENATE)

Response: Transnational Criminal Organizations (TCOs) are well resourced and build their business on opportunity and success. Predictability is that if cargo is smuggled successfully into the United States, TCOs will continue to exploit that advantage and increase their activity. The Rio Grande Valley has not seen the traditional seasonal slowdown as evidenced by the FY 2014 increase in unaccompanied children. Similarly, if Border Patrol staffs certain stations/sectors based on seasonal risk, TCOs will exploit opportunities during seasons with lower staffing.

Question#:	7
Topic:	Agents 1
Hearing:	Border Security: Examining the Implications of S.1691, The Border Patrol Agent Pay Reform Act of 2013
Primary:	The Honorable Tom A. Coburn
Committee:	HOMELAND SECURITY (SENATE)

Question: You testified on June 9, 2014 before the Committee that you would prefer to have maximum capabilities, or all agents working 100 hours per pay period at each location.

How many agents work as Crossfit or other fitness instructors?

Response: There are no positions dedicated to Crossfit or fitness instructors with the Office of Border Patrol. As with the physical training department at the Academy, there are agents who are certified as Cross-Fit instructors. These agents are assigned the collateral duty as Cross-Fit instructors for a period of time or as a detail. Some large sectors assign 2-6 instructors per day to teach a few classes on regular time for agents who participate before or after work. Other sectors have less or do not have a program at all.

Question: Why should Crossfit or other fitness instructors work more than 80 hours a pay period and be paid time-and-a-quarter to do so?

Response: There are no positions dedicated to Crossfit or fitness instructors with the Office of Border Patrol. Cross Fit instructors do not receive overtime. Any instruction is done on regular time and it is primarily done as a collateral duty in occasional 4 or 8 hour blocks. Agents still perform their core duties as Border Patrol agents beyond this collateral duty or detail.

Question: The Office of Internal Affairs at U.S. Customs and Border Protection found that in San Ysidro, California and at the CBP academies, agents were performing the same work as officers or civilians and doing it in ten hours rather than eight so they could maximize their overtime pay. Why should these agents work more than 8 hours a day and be paid time-and-a-quarter to do so, when there are individuals performing their same job who are not entitled to overtime pay?

Response: The Border Patrol believes there should always be equal pay for equal work. A GS-1896 Border Patrol agent has historically performed other duties as assigned and needed that many times goes beyond the "job" and work plan they are in at a point in time. The Border Patrol career path encompasses many different assignments in multiple locations over a 20-30 year period of time. The portability of the pay system is preferred,

Question#:	7
Topic:	Agents 1
Hearing:	Border Security: Examining the Implications of S.1691, The Border Patrol Agent Pay Reform Act of 2013
Primary:	The Honorable Tom A. Coburn
Committee:	HOMELAND SECURITY (SENATE)

just as law enforcement availability pay is portable for criminal investigators in different assignments.

Question: Another report by the Office of Internal Affairs investigating Laredo, Texas noted that agents are permitted to exercise during their shift. What is CBP's policy on agents exercising during a shift?

Response: The Health Improvement Program authorizes non-bargaining unit Border Patrol Agents up to 3 hours a week for exercise. CBP has completed an injury study and management continues to look for ways to improve the health and well-being of the workforce.

Question: Are there any positions worked by CBP agents that do not require regularly working more than 8 hours each day?

Response: The U.S. Border Patrol does not have enough data to accurately answer this question. We are developing the Manpower Requirements Determination to refine our data and better determine hourly requirements. Agents in Border Patrol Headquarters have transitioned to compensation for 8 hours a day and scheduling of Federal Employees Pay Act overtime as warranted and as available. CBP's Office of Human Resources Management (HRM) is undertaking a position review to determine which positions should continue to be eligible for Administratively Uncontrollable Overtime (AUO) and which positions should be decertified from receiving AUO. The HRM review is being finalized.

Question#:	8
Topic:	Crossfit trainers and paralegals
Hearing:	Border Security: Examining the Implications of S.1691, The Border Patrol Agent Pay Reform Act of 2013
Primary:	The Honorable Tom A. Coburn
Committee:	HOMELAND SECURITY (SENATE)

Question: CBP management has known since at least 2008 that AUO was being abused throughout the force, including by agents in positions like Crossfit trainers and paralegals.

In the wake of all the whistleblower allegations, did CBP ever perform a component-wide review to determine whether there are overtime hours being billed by some agents that should not be worked at all?

Response: No agency-wide review has been performed to determine whether the claimed overtime is necessary. We are developing the Manpower Requirements Determination to refine our data and better determine hourly requirements. The hours worked in question supported border security but it was determined that the work was schedulable.

Question: Has CBP done anything to evaluate what positions do not need to work overtime?

Response: The position review has been discussed with the Commissioner and further de-certifications will occur in the fourth quarter of Fiscal Year 2014. The U.S. Border Patrol has also restructured the organization and some positions have been transitioned from a GS-1896 series to others that are not law enforcement or AUO eligible.

Question: What can CBP management do moving forward to ensure they are minimizing the need for agents to work overtime?

Response: The U.S. Border Patrol focuses on being a good steward of the taxpayer dollar and management always focuses on scheduling the minimum amount of overtime necessary. AUO is a self-deployable mechanism and can be initiated by the agent for uncontrollable work so the USBP has managed that within our budget thresholds to stay in compliance with AUO rules.

Question#:	9
Topic:	Agents 2
Hearing:	Border Security: Examining the Implications of S.1691, The Border Patrol Agent Pay Reform Act of 2013
Primary:	The Honorable Tom A. Coburn
Committee:	HOMELAND SECURITY (SENATE)

Question: According to the Department of Homeland Security, there were 29 border patrol agents working 100% official time for the union and an additional undetermined number of agents working 25%, 50% or a few hours each pay period. In total, over 73,000 hours were worked in FY 2013 by border patrol agents performing official time for the union.

Are agents who take official time during their pay period eligible for overtime pay?

Response: It depends. For example, part-time union representative may be eligible for AUO depending on the number of uncontrollable overtime hours they work when they are not acting on behalf of the union. They are still required to meet the "substantial hours" requirement of the AUO statute and regulations when they are not acting as union representatives. In addition, the percentage of AUO to be paid to such employee would be based on the average amount of irregular overtime work performed during each week of the review period making no adjustment for the time the employee was not performing work for the agency. The Office of Personnel Management has been clear that agencies may not deduct non-work hours (in this case, hours the employee is performing union duties) from the weekly periods used in calculating the average hours of irregular or occasional overtime work per week for AUO purposes.

Employees who perform full-time representational work, however, are not eligible for Administratively Uncontrollable Overtime (AUO) because they do not perform compensable overtime work. Accordingly, it is contrary to law to provide AUO coverage to these employees. While union representatives are "authorized official time" during periods "the employee otherwise would be in a duty status" under 5 U.S.C. § 7131(a) and (d), for purposes of engaging in union activities, employees on official time are not engaging in "work" and are not "on duty" within the meaning of overtime statutes and regulations, including those underlying AUO.

CBP included rectifying this practice with its position review. On August 29, 2014, CBP notified the National Border Patrol Council of its intent to cease the payment of AUO to full-time union officials, providing them the option to (1) continue as a full-time National Border Patrol Council (NBPC) representative and not earn AUO (making arrangements to be available to work overtime that does not qualify for AUO); or (2) return to work operating as a NBPC representative on a less than full-time basis and earn AUO based on actual hours of applicable overtime that are worked. NBPC representatives who opt to

Question#:	9
Topic:	Agents 2
Hearing:	Border Security: Examining the Implications of S.1691, The Border Patrol Agent Pay Reform Act of 2013
Primary:	The Honorable Tom A. Coburn
Committee:	HOMELAND SECURITY (SENATE)

continue to perform full-time representational functions will be decertified AUO and no longer be able to exclude full-time representational functions from the computation period.

Question: If so, for each agent that claimed official time in FY 2010 – FY 2013, please provide totals of how many overtime hours (whether AUO or otherwise) the agent was paid.

Response: As provided in an earlier request, 222-465 agents used at least one hour of official time during the Fiscal Year (FY) 2010-FY 2014 period for negotiation, grievance preparation/response, ongoing labor management relations activity and/or appeals representation. All of these agents are certified between 10-25 percent AUO and earned the Fair Labor Standards Act (FLSA) overtime pay for any hours worked beyond 85.5 hours in a pay period. (Supplemental FLSA overtime pay was provided for AUO hours at a half rate. Regularly scheduled overtime hours were compensated by FLSA overtime at the time-and-one-half rate.)

Count of Border Patrol Employees Claiming Union Time in U.S. Customs and Border Protection Overtime Scheduling System by Fiscal Year and Series

Series	2010	2011	2012	2013	2014*
1896	222	294	298	465	335

**FY 2014 as of pay period 10.*

From the governing past practice in the collective bargaining agreement, the service agrees that there shall be no restraint, interference, coercion, or discrimination against a Union official because of the performance of such duties during the period they are serving as Union officials.

Question#:	10
Topic:	Agents 3
Hearing:	Border Security: Examining the Implications of S.1691, The Border Patrol Agent Pay Reform Act of 2013
Primary:	The Honorable Tom A. Coburn
Committee:	HOMELAND SECURITY (SENATE)

Question: On June 9, 2014, you suggested to the Committee that agents will leave CBP if they are not paid the 25 percent in overtime they have come to expect. Yet according to the U.S. Bureau of Labor Statistics, the average law enforcement officer's pay is approximately $18,000 less than the average border patrol agent's base pay.

What evidence is there that CBP agents will leave the force if they are no longer eligible for the 25 percent overtime increase?

Response: The U.S. Border Patrol has seen an increase in applications to U.S. Customs and Border Protection's (CBP) Office of Field Operations since the reduction to a 20 percent Administratively Uncontrollable Overtime (AUO) baseline in the field. The majority of agents in the U.S. Border Patrol have served more than 3 years of service so their leave and earning statement used for financial decisions, alimony, child support, etc. included AUO pay. Many agents felt that their earnings were worthwhile when deciding if their location of residence was worth it. Many border locations do not have the infrastructure, resources, and comforts that many residents in urban or suburban United States have. Many border locations deal with extreme temperatures and weather throughout much of the year as well.

Question: If they do leave, what other equivalent law enforcement agencies do you believe would be the most likely landing place for the agents?

Response: Any federal law enforcement agency that has Law Enforcement Availability Pay, a position that offers COPRA premium pay such as the Office of Field Operations, state police/Department of Public Safety, local police, or sheriff departments. Also, any organization that gets them closer to home, allows them to relocate in more desirable areas, or stabilizes their work schedule (no shift work).

Question#:	11
Topic:	overpayments
Hearing:	Border Security: Examining the Implications of S.1691, The Border Patrol Agent Pay Reform Act of 2013
Primary:	The Honorable Tom A. Coburn
Committee:	HOMELAND SECURITY (SENATE)

Question: The Department of Homeland Security has estimated it overpaid the average agent maxing out their AUO over $5,500 more each year toward their pension and retirement benefits than they would have had the hours been paid under the proper overtime pay structure.

What is CBP doing to determine how much money it overpaid into federal retirement plans as a result of the AUO abuse that has been documented by the Office of Internal Affairs?

Response: The estimate for the overpayment in pension and retirement benefits is based on an assumption that a Border Patrol Agent is not eligible to earn retirement-creditable AUO overtime at all, and instead should have received overtime pay under the Fair Labor Standards Act that is not retirement-creditable basic pay. Thus, agency retirement contributions based on AUO pay would be viewed as an overpayment. Since this estimate was developed, CBP has completed its position eligibility review – which found that the overwhelming majority of Border Patrol Agents (including front line Agents and first line supervisors) remain eligible and will continue to work AUO.

To date, CBP is not able to determine that an overpayment in retirement contributions was made to any specific employee for a specific period of time.

Question: I understand there are pending law suits by agents to recover the difference in direct pay they believe they are entitled to had they been paid for scheduled overtime as opposed to AUO. If agents recover money under that theory, what does CBP plan to do to recover the overpayments it made to agents retirement and pension accounts?

Response: U.S. Customs and Border Protection is aware of three lawsuits, Abad, et al. v. United States, Abrego, et al. v. United States, and King, et al. v. United States, which involve claims by U.S. Border Patrol Agents and/or Border Patrol Agent Canine Handlers alleging various claims of non-payment for hours worked under the Administratively Uncontrollable Overtime statute and/or the Fair Labor Standards Act. None of the cases currently pending allege that incorrect payments were made under the wrong statute. If the effect of the courts' resolution of these matters establishes that agents should be paid in a manner that would result in overpayments to their retirement and pension accounts, U.S. Customs and Border Protection will honor its legal obligation to recoup those payments, by pursuing all avenues of recovery afforded by law.

Post-Hearing Questions for the Record
Submitted to Ronald D. Vitiello and Paul L. Hamrick
From Senator Claire McCaskill

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

June 9, 2014

Question#:	12
Topic:	AUO overtime 2
Hearing:	Border Security: Examining the Implications of S.1691, The Border Patrol Agent Pay Reform Act of 2013
Primary:	The Honorable Claire McCaskill
Committee:	HOMELAND SECURITY (SENATE)

Question: During the hearing you argued that extending the work day from 8 hours to 10 hours would allow Border Patrol Agents to complete their work and decrease the use of AUO overtime.

If this legislation is enacted, how do you plan to ensure that the extended 10-hour day will be used effectively and efficiently across all departments?

Response: If enacted, the U.S. Border Patrol would be able to go to a 3-shift model in the field and maximize hours of manpower. This will provide the greatest level of coverage and allow for proper communication of traffic patterns, officer safety alerts, and the return of additional weapons (rifle) or technologies checked out from the armory. It will also allow for the smallest footprint possible at the Headquarters and the Academy so that maximum resources can be sustained along our borders. The Manpower Requirements Determination has been used to conduct initial analysis on key patrol border group functions. It has standardized our Sector intelligence and special operations organizations and it will define functions essential to the U.S. Border Patrol mission success.

IA Assistant Commissioner Paul Hamrick & Deputy Chief Ronald Vitiello
Senate Committee on Homeland Security and Governmental Affairs
"Border Security: Examining the Implications of S. 1691, The Border Patrol Agent Pay Reform Act of 2013"
June 9, 2014

QUESTIONS FOR THE RECORD SUBMITTED BY

THE HONORABLE Tom Coburn

OSC 2

Question #5d: In the case alleging AUO misuse by CBP Internal Affairs investigators, are there any allegations that mission-necessary work was not performed during the overtime hours claimed? If so, please explain.

ANSWER:

The Office of Inspector General (OIG) is not aware of any specific allegations that "mission-necessary work was not performed" during overtime hours. However, according to anonymous whistleblowers, CBP Internal Affairs investigators perform work during AUO hours that is regular, predictable, and controllable. Tasks that are regular, predictable, and controllable generally would not qualify for AUO but may qualify for other types of overtime compensation. We are conducting an evaluation of AUO use within CBP Internal Affairs and expect to deliver a report on our findings to DHS Office of General Counsel by September 2014. Separate from that evaluation, on June 27, 2014, the OIG received a specific whistleblower allegation that employees within a certain component of CBP Internal Affairs were instructed to falsify time sheets to give the appearance of compliance with governing AUO regulations. This allegation has been referred to the OIG's Office of Investigations.

Post-Hearing Questions for the Record
Submitted to Brandon Judd
From Senator Tom A. Coburn, M.D.

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

June 9, 2014

1. On June 9, 2014, you testified in front of the Committee that, back in 1997 when you were applying for a position at the U.S. Customs and Border Protection (CBP), job recruiters and postings advertised to agents they would earn 25 percent above their salary in Administratively Uncontrollable Overtime (AUO).

    a. To your knowledge, prior to 2008, were job recruiters for CBP or representatives of the National Border Patrol Council (the Union) still advertising a 25 percent increase in pay as if it were guaranteed?

    Answer -- The NBPC does not play a role in the recruitment of Agents. However, prior to 2008 it is my understanding that the Agency was promoting 25 percent AUO in the recruitment and hiring process. Please see Attachment 1.

    b. Now that CBP's AUO abuse has come to light, are job recruiters for CBP or representatives of the Union still advertising a 20 or 25 percent increase in pay as if it were guaranteed?

    Answer -- Again, the NBPC has no role in the recruitment of Agents. My understanding is that the Agency had stopped using the claim of 25 percent AUO in response to sequestration approximately 2 years ago. The recruiting process now states that a new Agent will be eligible to earn a substantial amount of overtime.

2. CBP has said it would like all of its agents to elect the maximum pay level, or 100 hours a pay period.

    a. What percentage of your members do you estimate will elect to work at the Level 1 maximum 100 hours if given the opportunity to do so?

    Answer -- Based upon the number of Agents that were at 25 percent AUO prior to sequestration, I estimate that approximately 92-97 percent of the Agents will elect Level 1.

3. AUO hours worked are counted toward an agent's pension calculations, while scheduled overtime hours worked and paid under the Federal Employees Payment Act (FEPA) are not. The Department of Homeland Security has estimated it over-paid the average agent maxing out their AUO over $5,500 more each year toward their pension and retirement benefits than they would have had the hours been paid under the proper overtime pay structure.

    a. If the border patrol agents are successful in their pending and forthcoming lawsuits alleging they should have been paid under FEPA rather than AUO, is it

your understanding that they will be required to pay back the additional money CBP paid into their pensions and retirement accounts?

Answer -- The NBPC has no intention of filing litigation in this matter. There is, however, pending litigation regarding Agents being required by CBP to maintain government issued equipment on personal time that is not compensated for.

b. Has the Union ever represented to border patrol agents they could keep their additional pension and retirement payments?

Answer -- As the President of the National Border Patrol Council, I have personally never made that assertion. Furthermore, to my knowledge, no one with authority within the NBPC has made any such assertions. While I am President, the NBPC will not litigate this issue.

4. On June 9, 2014, you testified in front of the Committee you believe agents will leave CBP if they are not paid the 25 percent in overtime they have come to expect. Yet according to the U.S. Bureau of Labor Statistics, the average law enforcement officer's pay is approximately $18,000 less than the average border patrol agent's base pay.

a. What evidence is there that CBP agents will leave the force if they are no longer eligible for the 25 percent overtime increase?

Answer – First, let me address the issue with pay. You are correct that the average state or local law enforcement officer earns less than an Agent. It is important to note that this is an average. For example, officers with the San Diego Police Department, where there is a large Border Patrol presence, earn $72,000 a year in base pay after four years compared to approximately $68,000 in base pay for Border Patrol Agents with equivalent experience. San Diego's pay scale is comparable to other large Police Departments in border regions. In addition, they also tend to have more generous retirement benefits than those offered under FERS.

The Ajo Border Patrol Station is a good example of the current challenges we face in keeping our trained Agents. In this case, approximately 120 out of 470 agents have applied for other federal law enforcement jobs. Since 2013, and not counting the 120 agents that currently have pending applications, the Border Patrol has lost nearly 5% of its workforce at this location. Furthermore, Ajo is not an anomaly, this is occurring in several other locations in the Border Patrol. The reason is relatively simple, they cannot afford to take a 25% pay cut and continue to make their mortgage and car payments.

b. If they do leave, what other equivalent law enforcement agencies do you believe would be the most likely landing place for the agents?

Answer -- The first choice of most Agents would be to transfer to any one of the 65 Federal agencies that have criminal investigators (1811). Such a transfer offers several benefits:

- **Higher pay as they would most likely be a GS-13 as opposed to a GS-12 upon transfer**
- **25 percent LEAP differential**
- **Depending on the agency, they may be allowed to take the work vehicle home**

- **Agents would have a more stable home life as they would no longer be required to do shift work**
- **Agents may be transferred to a more desirable location. Many Border Patrol Agents love their jobs but not where they live. Border communities tend to have poorer local schools and amenities, and limited employment opportunities for the spouses of the Agents.**

As we've seen in the past, younger Border Patrol Agents also tend to leave for local law enforcement jobs. Please see Attachment 2, an email from the Baltimore, Maryland Police Recruiting Department.

5. The Office of Inspector General for the Department of Homeland Security issued a report in December, 2013 that concluded: "CBP is challenged in its ability to measure its performance and effectiveness." The same report notes that the border patrol's use of apprehensions on the southwest border as an interim 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."

   a. Does CBP use any metrics other than apprehensions to measure its performance and effectiveness at each sector?

      Answer -- To my knowledge there are no other metrics. I believe this is a question that should be directed to CBP.

   b. In 2005, DHS apprehended 1.2 million illegal aliens with 11,264 border patrol agents and with an operating budget of $1.25 billion. 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. If increased hours and agents at the border breed success, then why have the number of apprehensions gone down?

      Answer -- There are multiple factors to consider regarding apprehensions as a measure of success. The first is that the driver of illegal immigration is the promise of employment opportunities in the United States that are not present in an immigrant's home country. In 2008, the U.S. went through the greatest economic downturn since the Great Depression. Many illegal immigrants in the wake of the downturn self-deported because they could not sustain themselves. As our economy improves, and the magnet of employment increases, we have seen a corresponding increase in apprehensions.

      The second factor is deterrence. Ground zero for illegal immigration in this country was originally San Diego and El Paso. Over the last 20 years the Border Patrol has made significant investments in personnel, fencing, and technology to harden the border in these two sectors. As a result, apprehensions are a fraction of what they once were. However, since agent's

hours were cut in 2013, we've seen a significant increase in traffic in both of these areas. Lower apprehension rates are not a sign of failure or success; the number of apprehensions compared to the number of entries is the true test of success or failure. As we've already seen, if manpower is reduced in a border sector, organized crime will respond accordingly.

c. Would you agree that there is some seasonality to the rate at which illegal aliens cross the border, and that in certain cases, the high and low times can be predictable to a degree?

Answer – One needs to look at this issue sector by sector and differentiate between narcotics and alien smuggling. Narcotics smuggling is less seasonal due to consistent demands for drugs in the US. Although alien smuggling is typically lower on the Southwest border during the summer months, the influx of unaccompanied minors inundating CBP is occurring at the height of summer; something very few would have predicted.

6. Following the hearing, you suggested to my staff that Congress could exert control over the level of coverage on the border by adjusting the number of border patrol agents down if circumstances so required.

   a. Do you believe that adjustment of the number of border patrol agents is a more appropriate mechanism than adjusting the number of hours worked by each agent?

   Answer -- NBPC made this suggestion about modifying the number of Agents prior to the hearing. NBPC believes that the Agency will not be able to recruit and retain the quality personnel without a stable compensation system. If Congress desires a more flexible system where manpower is deployed more effectively, the goal can be achieved through attrition and hiring in targeted sectors.

   b. If so, should such a mechanism be included in any effort to reform the pay for border patrol agents?

   Answer -- NBPC does not believe that this needs to be included in the underlying pay reform legislation. The authority to make the changes already exists through the annual budget submission and appropriations process.

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Map of Border Patrol Sectors (pdf - 5,461 KB.)

Border Patrol Career Videos

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on the web:

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Office of Personnel Management

U.S. Department of Defense

U.S. Office of Personnel Management - Service Credit Deposits and Refunds

Office of Pesonnel Management - Forms

Department of Veteran Affairs

Applications Manager

OPM.gov

Q: What is the Border Patrol and what is its mission?

A: The United States Border Patrol is the mobile, uniformed law enforcement arm of the U.S. Customs and Border Protection (CBP) within the Department of Homeland Security (DHS). It was officially established on May 28, 1924 by an act of Congress passed in response to increasing illegal immigration. As mandated by this Act, the small border guard in what was then the Bureau of Immigration was reorganized into the Border Patrol. The initial force of 450 officers was given the responsibility of combating illegal entries and the smuggling business of alien smuggling

combating illegal entries and the growing business of alien smuggling.

Since the terrorist attacks of September 11, 2001, the focus of the Border Patrol has changed to detection, apprehension and/or deterrence of terrorists and terrorist weapons. Although the Border Patrol has changed dramatically since its inception over 75 years ago, its overall mission remains unchanged: to detect and prevent the illegal entry of aliens into the United States. Together with other law enforcement officers, the Border Patrol helps maintain borders that work - facilitating the flow of legal immigration and goods while preventing the illegal trafficking of people and contraband.

The Border Patrol is specifically responsible for patrolling the 6,000 miles of Mexican and Canadian international land borders and 2,000 miles of coastal waters surrounding the Florida Peninsula and the island of Puerto Rico. Agents work around the clock on assignments, in all types of terrain and weather conditions. Agents also work in many isolated communities throughout the United States.

Q: What are the major activities or duties of a Border Patrol Agent?

A: One of the most important activities of a Border Patrol Agent is line watch. This involves the detection, prevention and apprehension of terrorists, undocumented aliens and smugglers of aliens at or near the land border by maintaining surveillance from a covert position, following up leads, responding to electronic sensor television systems, aircraft sightings, and interpreting and following tracks, marks and other physical evidence. Some of the major activities are farm and ranch check, traffic check, traffic observation, city patrol, transportation check, administrative, intelligence, and anti-smuggling activities.

Q: How do I apply to be a CBP Border Patrol Agent?

A: It's actually very easy. When the CBP Border Patrol is actively recruiting for agents, information will be posted on the CBP.gov website or on the USAJobs website. (USAJobs)) If you are ready to complete the Online Registration please fill out the Border Patrol Agent Online Application to apply for a position as a Border Patrol Agent. (Border Patrol Agent Online Application)

Q: Do I have to speak Spanish to join the U.S. Border Patrol?

A: Not in order to get hired. You must learn Spanish while at the Border Patrol Academy and you must pass a series of Spanish tests after entering on duty in order to continue in the Border Patrol.

Q: What is the CBP Border Patrol entrance examination like?

A: The U.S. Border Patrol entrance examination is a three part test which covers logical reasoning, Spanish language (or, if you don't speak Spanish, an Artificial Language that predicts your ability to learn Spanish), and an assessment of your past experience. For more information on the test, see Border Patrol Entrance Examination. (Border Patrol Study Guides)

Q: I have heard I have a choice in the entrance examination to take either a Spanish test or something called an Artificial Language Test. What should I do?

A: If you are fluent in formal Spanish, you may wish to take the Spanish Test. However, for those who consider themselves to be native speakers of Spanish are often surprised by the difficulty of the test. If you speak "Spanglish" or "Tex-Mex" you should be aware that standard grammar and vocabulary are emphasized. You also have the option to take the Artificial Language Test (ALT). The ALT is a test that helps us predict your ability to learn Spanish. The test may, at first glance, seem intimidating. It is, in fact, based on the grammar and syntax of neo-Latin languages such as Spanish and French. A good grasp of common structures (how the various parts of speech fit together) combined with a thorough reading of the ALT study guide that you receive when you apply will prepare you for this test.

Q: How long does it take to get hired after you receive a tentative offer letter?

A: This varies from applicant to applicant. Statistically speaking, it takes an average of six to nine months to get through the process. Some of the things that can increase the amount of time it takes are: health issues, complications in your background investigation, or a lack of sufficient or requested information. We recommend that you fill out all materials completely and return them to us promptly, and comply with all the requests of the CBP Minneapolis Hiring Center as quickly as possible to make your application and eventual hiring quick and efficient.

Q: What is the "Oral Board"?

A: The Oral Board is a structured interview given by three Border Patrol Agents. The interview consists of situational questions that do not require technical knowledge. The structured interview assesses a candidate's judgment/decision making, emotional maturity, interpersonal skills, and cooperativeness/sensitivity to the needs of others. These qualities are the key to successful performance as a Border Patrol Agent. The oral board is a pass/fail interview. Candidates must receive a "pass" in all areas in order to continue in the hiring process. The Oral Board Interview usually takes place within six weeks after you receive a tentative selection letter.

Q: Do I have to pass a drug screening test?

A: Yes. Because the CBP Border Patrol is a federal law enforcement position, you are required to pass a urinalysis drug test in order to be hired. This is a drug test designated position and incumbents are subject to random testing.

Q: What are the Medical Requirements for a Border Patrol Agent?

A: All candidates must be physically able to perform all of the strenuous duties required of a Border Patrol Agent. The duties of this position involve physical exertion under rigorous environmental conditions; irregular hours of work; patrol duties on foot, motor vehicle and aircraft; and participation in physical training. Physical training includes firearms training; employing arrest techniques, defensive tactics and weapons techniques; physical conditioning (for example, running, weight training, swimming, sprinting, etc.); completion of a confidence course including practice sessions and a final timed proficiency course (for example, wall climbing, rope and ladder climbing, crawling through a simulated culvert, ditch jumping); and operating a motor vehicle including simulating emergency responses. All candidates are required to complete a comprehensive pre-employment medical examination to determine your physical ability to effectively perform the strenuous duties of this position without being a hazard to yourself or others. For more information on the medical requirements, please see the information that is available on this web site under the "application process".

Q: Is the Pre-Employment Fitness Test (PFT 1) different from the medical exam?

A: Yes. Trainees are required to successfully pass a pre-employment fitness test (PFT 1). Administration of the PFT 1 ensures that all new Border Patrol Agents are able to meet the physical demands of both training and day to day operations. The PFT 1 has 3 timed components: 1) push-ups, 2) sit-ups, and 3) an endurance step test. Detailed information on test requirements, including the standards for passing and photographic illustrations of the tests, can be found by visiting the Border Patrol Fitness Requirements located on this web site. (Border Patrol Agent Candidate Fitness Requirements)

Q: **What is the PFT2?**

A: The PFT 2 is a 2nd pre-employment fitness test all candidates must pass in order to enter on duty (EOD) and attend the academy. Once your EOD has been established, you will be scheduled to take the PFT 2. The PFT 2 will occur approximately 30 days prior to your start date. For more information see PFT 2 FAQS (PFT2 FAQS)

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Background Investigation & Polygraph Requirements

Q: **What kind of inquiries will CBP make into my background?**

A: The background investigation will include credit and criminal history checks, records checks to verify citizenship of family members, verification of birth, education, employment history, and military history. Interviews will be conducted of sources who know the candidate and of any current or former spouse (divorced within the past ten years). Residences will be confirmed, neighbors interviewed, and public records queried for information about bankruptcies, divorces, and criminal or civil litigation. Additional interviews will be conducted, as needed, to resolve any inconsistencies or developed issues.

Q: **What types of issues would render me unsuitable for employment?**

A: Issues such as poor credit history, criminal background, or association with undesirable individuals or foreign nationals could render an individual unsuitable for employment.

Q: **How long does a background investigation take and why do some investigations take longer than others?**

A: If you do not provide accurate information or answer all of the questions on the background investigation forms, the investigative process may be delayed. Some individuals have more complex backgrounds than others and, consequently, more time is required to conduct a complete investigation. Other factors that may delay the process are overseas coverage, multiple geographic areas, and numerous employments.

Q: I have a shoplifting conviction (or other misdemeanor crime conviction). Will that keep me out of the Border Patrol?

A: Often this depends on the nature and the frequency of the crime. Many times a small misdemeanor offense will not prevent you from serving in federal government service. However, a conviction for a misdemeanor crime of domestic violence that prevents you from carrying a firearm – a requirement for a Border Patrol Agent – is a serious issue. Failure to disclose information on your background investigation will definitely prevent you from serving as a Border Patrol Agent. You will be better served by making everything known before the background investigators find problems regarding your background. Problems with bad credit and other possible difficulties in your background should also be disclosed.

Q: **Do I have to take a Polygraph Test in addition to having a Background Investigation?**

A: The BPA position is a polygraph designated position. There is a high probability that you will be subject to a polygraph examination. The results will be used to determine your suitability for the position.

Q: **How should I prepare for the polygraph examination?**

A: Try to get plenty of sleep the night before your scheduled exam. Eat something prior to arriving for your exam. Dress is business casual, but you should wear comfortable clothing. If any issue would preclude you from being tested on your scheduled date, please call the examiner and re-schedule your exam. Do not schedule other events for the same day as your scheduled exam. The polygraph process generally takes four to six hours to complete, but may run longer. Bring photo identification (Driver's License, passport…) and any updated e-QIP (SF-86) information to your exam.

Q: **What type of questions will be asked?**

A: You will be administered a standardized polygraph exam, that will include questions on your suitability for employment with CBP and national security concerns. All questions will be explained and reviewed with you prior to the actual examination. You will be given an opportunity to discuss any concerns or issues you may have with any question, prior to the actual exam.

Q: **What are the possible outcomes of the polygraph exam?**

A: Before you leave the polygraph suite, the examiner will advise you if you passed or failed the exam, and offer you the opportunity to comment on any areas of mutual concern. The examiner will explain the (polygraph) Quality Control process to you. In some instances, the examiner may schedule you for additional testing.

Q: **What is Quality Control?**

A: Under Federal polygraph policies and procedures, your Polygraph Exam and results are submitted to the Polygraph Quality Control (QC) section in the Credibility Assessment Division for final review. If QC concurs with the examiner's opinion of your polygraph examination, the results are final and will be forwarded to the Personnel Security Division for inclusion in your background investigation file. Otherwise, you may be contacted for additional testing (re-test).

Q: Will the Credibility Assessment Division (Polygraph Unit) contact me again after the Polygraph Exam?

A: Generally no, unless additional testing is required.

Q: Does the Credibility Assessment Division (Polygraph Unit) decide if I get hired?

A: No. The Credibility Assessment Division does not make hiring decisions.

Q: How will I know if I will continue in the application process?

A: Polygraph results are submitted to the Personnel Security Division, and are adjudicated as part of your background investigation. The Credibility Assessment Division (polygraph program) does not participate in the adjudications process. PSD may contact you during the background investigation process to schedule additional interviews or request additional information. You can check the status of your application by visiting Applications Manager website. (Applications Manager)

Q: What is adjudication and what is involved in the adjudication process?

A: Adjudication is the evaluation of data contained in a background investigation, a polygraph exam, and/or any other available relevant reports, to determine whether an individual is suitable for federal employment or eligible for access to classified information.

Q: What is the difference between Suitability and Security?

A: Suitability is a determination based on an individual's character or conduct that may have an impact on the integrity or efficiency of an agency's mission. Security is a determination of eligibility for assignment to, or retention in, sensitive national security positions.

Q: What is a security clearance?

A: A security clearance is an administrative determination based upon the results of an investigation that an individual is trustworthy and may be granted access to classified national security information.

Q: Why are you going to investigate me? I'm only applying for an entry-level job and I don't need a security clearance.

A: Suitability is always a consideration for federal employment. All individuals employed by the federal government shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States. This means that the appointment of each employee in any department or agency of the government is subject to investigation. The scope of the investigation will vary, depending on the nature of the position and the degree of harm that an individual in that position could cause.

Q: What happens when I finish all the hiring process requirements?

A: You will be offered a position in the CBP Border Patrol at a pay grade of GL-5, GL-7 or GL-9, depending on your qualifications. This is when you will be told where on the Southern border you will be stationed. The initial offer will be made by phone, followed by a confirmation letter. You will be given a time, date and place to report. Though we try to avoid this, the time between receiving your notification and the time for reporting may be just barely enough time to give your current employer appropriate notice, so please be prepared.

Q: I am currently in the National Guard. Can I be a Border Patrol Agent?

A: Absolutely! The Border Patrol will work with agents on a case-by-case basis to accommodate service with the National Guard. Usually, an agent will take a sabbatical from the National Guard while in training at the academy, and then work with his or her commanding officer to be re-assigned to a unit within commuting distance of his/her duty station.

Q: What should I do if I would like to apply for a Border Patrol Agent position but am currently in the military and won't be able to start work for a couple of years?

A: If you are interested in future employment, you may certainly obtain information on the website or by speaking with a Border Patrol recruiter in order to prepare yourself. However, we usually recommend that candidates who are active military wait until they are about a year from separation to start the application process with the Border Patrol. If you are so enthusiastic about becoming an Agent that you would like to start the process much earlier, apply on-line through the Border Patrol website and upon successful registration, you will need to contact Minneapolis Hiring Center (MHC) and work out the details on a case by case basis. (U.S. Border Patrol) There are many issues involving overseas duty and being present in the US for the parts of the hiring process that will need to be taken into consideration.

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Job Requirements

Q: What are the key requirements?

A: The key requirements are:

- U.S. citizenship

- No Conviction of Domestic Violence
- Residency requirement – Candidates must be a US resident for at least three (3) years
- Must have valid driver's license at the time of appointment
- Age requirement – Candidate must not be 40 years of age or older at the time of selection. Exceptions to this is if an applicant currently holds or has previously held a qualifying federal civilian law enforcement (non-military) position with , OR can claim and provide proof of veterans' preference.
- Medical Exam
- Drug Testing
- Physical Fitness
- Background Investigation
- Polygraph Designated Position
- Physical Fitness Test-2
- Qualified for GL-5, GL-7 or GL-9

Q: Is there an age limit in the Border Patrol?

A: Yes. Currently you must not have reached your 40th birthday by the time of your referral for selection. However the age restriction may not apply if you are currently serving or have previously served in a federal civilian law enforcement (non-military) position covered by Title 5 U.S.C. 8336(c) or Title 5 U.S.C. 8412(d). The age restriction does not apply if you are a veterans' preference eligible. Applicants claiming veterans' preference will be required to provide proof of preference after they have been tentatively selected for the position of BPA. Applicants who are still on active duty and therefore cannot obtain a DD Form 214 can provide a statement of active service dates and a list of medals and awards they have received in lieu of their DD-214.

Q: Are trainees required to learn the Spanish language?

A: Yes. Knowledge of Spanish is essential since many of the persons with whom Border Patrol Agents come into contact speak only Spanish. Within the first two weeks of arrival at the academy, trainees will be tested for their Spanish language skills, and if the applicant passes the language test, they will return to their duty station upon successful completion of the basic training. Trainees who do not pass the Spanish Language test will complete the basic training and will also attend an additional 8 weeks of Spanish language training. Applicants must pass a series of Spanish tests after entering on duty in order to continue in the CBP Border Patrol.

Q: What are some of the training requirements during the first year of employment as a BPA?

A: During the first year of service, the trainee must meet academic and physical training requirements. First, a trainee must attain a passing grade (70%) in each subject while at the Border Patrol Academy. Failure to attain a passing grade will result in termination of the trainee. Second, training continues at the duty station. Post-Academy examinations are also given to the trainee on completion of 6½ and 10 months of service. These examinations are as critical as successfully completing the Academy. Failure to attain a passing grade (70%) on the 6½ or 10-month law and Spanish examinations is considered inadequate performance and becomes grounds for separation.

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Pay and Benefits

Q: What is the pay and benefits package?

A: New agents are hired at the GL-5, GL-7 or GL-9 grade level depending on education and experience and are paid at a special salary rate for Federal law enforcement personnel. Salaries can be found at. (OPM.gov) . Border Patrol Agents are also provided with opportunities to earn overtime pay. In addition, Agents will receive a uniform allowance of $1500.00 and an excellent Federal Government benefits package including life insurance, health insurance, liberal retirement benefits, and a thrift savings plan (401-K).

Q: What are the grades and salary levels?

A: Entry level is at grade GL-5, GL-7 or GL-9, depending on qualifications. Upon successful completion of the 6½-month probationary examination, individuals hired at the GL-5 level are eligible for promotion to grade GL-7, and individuals hired at GL-7 are eligible for promotion to GL-9. Career progression to the GS-11 and GS-12 generally follows after one year at the preceding lower grade level (GL-9/GS-11). Positions above the GS-12 level are filled through agency merit promotion competition. Entry-level Agents are entitled to special salary rates for law enforcement officers, and may be entitled to special locality pay. Information on the current salary schedule is available from your local Office of Personnel Management, from any Human Resources Office, or on the Internet at Office of Personnel Management. (Office of Personnel Management)

Q: When will I start getting paid?

A: Pay dates are every two weeks. While at the Border Patrol Academy for basic training, you will earn your regular salary. You will also get free lodging and meals at the Academy, plus a small daily allowance for incidental expenses.

Q: What about salary deductions and insurance benefits?

A: There are deductions for income tax, retirement, and social security. Life and Health insurance plans are available on an optional basis. Deductions vary according to the plans and coverage selected. For additional information, please visit the OPM website. (Office of Personnel Management)

Q: What are the federal leave benefits?

A: Employees earn annual (vacation) leave according to their years of service, including creditable military service, as follows:

- Less than three years of service - 13 days leave per year.
- Three years of service but less than 15 years - 20 days leave per year.
- Fifteen years of service or more - 26 days leave per year.

All employees can earn 13 days of sick leave per year. Sick leave can be accumulated from year to year.

Q: Are there special retirement benefits?

A: Yes, Border Patrol Agents who have at least 20 years of service are eligible for retirement at age 50. This special provision also applies to law enforcement officers and certain supervisory personnel who have been promoted from law enforcement positions. Retirements are mandatory at age 57 with 20 years of service; however, employees could work beyond 57 until they meet the combination of age and service requirements to retire under law enforcement provisions.

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Promotion & Transfer

Q: What are my chances for advancement in the Border Patrol?

A: Excellent! The CBP Border Patrol over the past few years has gone through a phase of unprecedented growth. For those with the skill and ambition, this growth can afford many opportunities for advancement. You'll start out in the low to mid-40's (including over-time, holiday, and night pay) in your first year. In the next two years, assuming you perform all duties in a satisfactory manner, you can expect to be making up to the mid-50's. If you are a talented, dedicated agent with a certain amount of ambition, you can expect to be making approximately $70,000 per year (including over-time, holiday, and night pay) after reaching the journeyman grade level of GS-11. Promotions to GS-12 supervisory positions and higher are available on a competitive basis to those who qualify. Each of these steps assumes a greater range of responsibilities and a focus on leadership.

Q: I have experience working with canines (or I just want to work with canines). What are my chances of getting a dog handler position?

A: With the large emphasis in the Border Patrol on drug and narcotics interdiction, the use of dogs is becoming more and more common, so your chances of working with a dog are relatively good. In order to do this; you must first be promoted to the journeyman level. Not every station has dogs, and dogs are trained for detection of humans and narcotics, not for attack. They can be a heavy responsibility since you will assume all kenneling responsibilities.

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Basic Training

Q: What is the training like?

A: As one of the most rigorous and demanding law enforcement training programs in the country, CBP Border Patrol training has become the envy of the federal law enforcement community. For 58 days, you'll receive instruction in both Border Patrol and federal law enforcement subjects. Specific CBP Border Patrol Courses include: Immigration and Nationality Law, Criminal Law and Statutory Authority, Spanish, Border Patrol Operations, Care and Use of Firearms, Physical Training, Operation of Motor Vehicles, and Anti-Terrorism. Federal Law Enforcement Center (FLETC) courses are: Communications, Ethics and Conduct, Report Writing, Introduction to Computers, Fingerprinting, and Constitutional Law. The CBP Border Patrol Training Academy is located in Artesia, NM. While in training, you will receive full pay and benefits.

Q: How difficult or rigorous is the training?

A: Both the academic and physical training at the Academy are considered to be quite strenuous. Many new Agents say that the amount of academic study required at the Academy was much more than they had anticipated. They also strongly advise those who do not know Spanish to prepare themselves mentally for an intensive Spanish course. The physical part of the program is extremely demanding. Among other physical requirements, at the end of the 55 days, trainees must be able to complete the following: a 1½ mile run in 13 minutes or less; a confidence course in 2 1/2 minutes or less; and a 220 yard dash in 46 seconds or less.

Q: What about expenses at the Academy?

A: Living quarters and meals are provided free at the Border Patrol Academy. In addition, towels, bed linens, and physical training clothing (except tennis shoes) are furnished and laundered at no expense. Trainees are paid a small per diem for incidental expenses in addition to their regular salary.

Q: Can I bring my family to the Academy while I am in training? What about my car?

A: We respectfully discourage trainees from bringing family or automobiles to training. As stated above, Border Patrol training is rigorous. Your off duty hours will be consumed by study and other training-related activities, and the additional responsibilities of family life often prove to be too much for new trainees. The training facilities, in addition, only have living accommodation for trainees. This makes it costly to bring family members. Regarding your car, parking is at a premium at the Academy, and, since in most cases you must fly from your first duty station to training, it is very difficult to bring your car with you. We recommend that you rent a car on weekends if you would like to tour the area.

Q: Who pays travel costs?

A: You pay the initial cost to your assigned sector and then the government pays the cost to and from the training Academy.

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On Duty

Q: As a Border Patrol Agent, where will I be stationed?

A: When registering online you will be able to indicate one of 4 geographic locations along the U.S. Southwest border with Mexico. You can expect your first posting to be in California, Arizona, New Mexico, or Texas. (Many stations are in small isolated communities, some of which have poor schools and medical facilities.) Here you will learn the many challenges and rewards of the CBP Border Patrol job more quickly than anywhere else in the country. As one recent academy graduate put it, "This is where all the action is!" Additionally, if you have a location within the border region that you prefer, you can tell us and we will try to place you there, though we can't guarantee we'll be able to. Placements are made based on the current needs of each post.

Q: What are the work hours like in the U.S. Border Patrol?

A: Your work week consists of 40 hours of regular time plus another 9-10 hours of what is termed Administratively Uncontrollable Overtime (AUO) for covering shift changes, illegal alien processing and other tasks that can't be scheduled. This is generally the same in all other federal law enforcement positions, and is the reason you will make up to 25% over and above your base salary. Since law enforcement is a 24-hour-a-day job, you will often be working nights, and, depending on your schedule, weekends or holidays.

Q: How much overtime and shift work?

A: A Border Patrol Agent is required to work overtime and may work long hours. Sixty-hour weeks and 10 to 16 hour days are not that uncommon. An Agent works irregular rotating shifts every two to four weeks. These shifts are subject to change, often on short notice.

Q: Is housing supplied?

A: Living quarters and meals are provided free at the Border Patrol Academy. You are responsible for your own housing at your duty station. However, a relocation service company is available for candidates who require relocation assistance. You can also pull information from the Internet by searching the Chamber of Commerce for a particular city.

Q: Should family members accompany the trainees to the duty station?

A: We recommend that trainees should not consider movement of their household goods and family to their permanent post of duty until completion of training at the Academy. Trainees are required to live on campus at the Academy. There are no facilities for family members at the Academy.

Q: What about expenses and costs in the first year?

A: The initial expenses and costs of the first year are substantial. Many Agents claim that it is quite beneficial to have a sound financial status before entering the Service.

Q: Do trainees have to buy uniforms?

A: Yes. Upon arrival at the Academy, trainees will be measured for official Border Patrol uniforms and an initial uniform order will be placed. Trainees receive a $1,500 allowance to offset this cost; however, they are encouraged to have on hand an additional $100 for the purchase of temporary uniform items that are required when first arriving at the Academy. Thereafter, an annual uniform allowance of $500 is provided towards additional or replacement uniforms. A complete set of official and rough duty uniforms costs approximately $1,275.

Q: I am the spouse of an applicant. What will my life be like at the new duty station?

A: What your lifestyle is like will largely depend on where you are stationed. If it is a rural area and you are used to city life, you may be surprised by the change. You may have to drive a long distance to get reasonable grocery prices and selection. You may live in an area where you and your children are a racial or ethnic minority. Exotic foods, different languages being spoken, signs on stores written in a language you don't understand can all make culture shock a possibility. If you are able, you might consider taking a Spanish course while your spouse is at the Academy. Employment for you may or may not be available, depending on location. If you are stationed close to the border, you may want to consider federal employment for yourself (also as a Border Patrol Agent, a Customs Border Protection Officer, or other federal worker.) Though there can be significant challenges for the spouse of a Border Patrol Agent, it can also be an adventure. And we are working all the time to help you meet the challenges that do exist.

Q: Is my military service creditable for retirement?

A: If you were on active duty in the military and received an honorable discharge, your military service is potentially creditable under FERS (Federal Employee Retirement System) or CSRS (Civil Service Retirement System).

For employees covered by the Federal Employee Retirement System (FERS), which includes most new applicants for a BPA position, active-duty military service performed AFTER 1956, known as Post-56 military service, is creditable only if a deposit is made. The deposit required is three percent of your military earnings plus accrued interest. The amount of the buyback depends on how soon you begin repayment. Interest does not start to accrue until three years after your retirement coverage begins. Payment can be made in lump sum or over a period of time, minimum individual payment is $25. The full deposit must be made while you are an employee (before you retire). If you are retired military and you become an employee, you may wish to consult a retirement counselor to see if beneficial to combine your military retirement pay with your Federal Retirement pay rather than retaining the separate pensions. Those covered by the Civil Service Retirement System (CSRS) PRIOR to October 1,

1982 may receive credit for military service WITHOUT making a deposit. However, if you will be eligible for Social Security at age 62, or retirement, whichever is later, your retirement annuity will be reduced by eliminating all credit for post-1956 active duty military service UNLESS you make a deposit. Those who became subject to Civil Service Retirement System deductions AFTER October 1, 1982 will ONLY receive credit for active-duty military service IF Post-56 deposit is made.

For additional information on whether your military service is creditable towards federal retirement, how much you will have to pay back and procedures to make a military deposit, please visit the following websites.

(U.S. Department of Defense)
(Explanation of Benefits for New Employees)
(U.S. Office of Personnel Management - Service Credit Deposits and Refunds)

Forms for application to make deposits or re-deposits (SF 2803) and estimated earnings during military service (RI 20-97) can be found at the OPM Forms website. (Office of Pesonnel Management - Forms)

Q: What is the Veterans Education Benefits Program?

A: Veteran employees often take a cut in pay upon their transition from the military to a new-hire federal employee. The monthly education benefit payments they receive are intended to supplement the veteran's income as they make the transition to a new career.

The Department of Veterans Affairs offers an education benefits program to eligible veterans who are in trainee status in training that comprises a condition of employment. This program provides monthly benefit payments to qualified veterans during the period of time that the veteran is in basic training and while in on-the-job training status (OJT).

Q: If qualified for Veterans Education Benefits, can a trainee receive these benefits while at the Border Patrol Academy and while in on-the-job training status?

A: Yes, the VA has approved the Border Patrol curriculum for education benefits. There is a standard payment for curriculum; however, the amount of payment varies depending on whether the veteran is single/married with/without dependents. To apply for these benefits, eligible veterans must complete VA Form 22-1990 and submit the completed paperwork to:
VA Regional Office
PO Box 8888
Muskogee, OK 74402-8888
This form is available on the Department of Veterans Affairs website. (U.S. Border Patrol) The veteran must notify their Sector Coordinator that they have applied for VA education benefits. The Sector Coordinator will submit the Enrollment Certification form (VA Form 22-1999) and Training agreement to the VA. Upon completion of the training, the Sector certifies that veteran has successfully completed the training. If the veteran does not successfully complete the training, they will need to refund the education benefits payments.

Are you ready to apply? Apply now! (Border Patrol Agent Online Application)

recruitment <recruitment@baltimorepolice.org>

to me

Good morning,

My name is Det. Greg Ostrander, and I am a recruiter with the Baltimore Police Department.

I have been watching and have read numerous stories about agents being frustrated about a lot of issues and some are leaving or thinking of leaving. I hate to think of that type of experience leaving law enforcement, when there is a need for what they are trained to do.

We are currently hiring for officers and give those with law enforcement experience the opportunity to purchase up to 10 years up front into our pension system. In addition, experienced law enforcement officers can also enter the department at a higher pay scale than that of an entry level trainee.

If there is enough interest, we might be willing to travel out of state to administer tests and do partial testing.

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Post-Hearing Questions for the Record
Submitted to Adam Miles
From Senator Tom A. Coburn, M.D.

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

June 9, 2014

1. You testified in front of the Committee on June 9, 2014, that the Office of Special Counsel (OSC) has received sixteen allegations of Administratively Uncontrollable Overtime (AUO) at U.S. Customs and Border Protection (CBP) at sixteen different locations.

    a. Please provide a detailed status of each case, including the following if applicable: the general allegations of each case, including whether there are allegations of work not being performed; when OSC referred the case; what agency currently is investigating the case; when a report is due; whether a report has been issued; the findings of the report.

    OSC has received sixteen allegations of AUO misuse across the Department of Homeland Security, including ten at CBP. Six of the sixteen disclosures were from employees at other DHS components, including Immigration and Customs Enforcement and U.S. Citizenship and Immigration Services.

    The CBP cases include:

    1. Washington, D.C., Customs and Border Protection, Commissioner's Situation Room – The whistleblower alleged that employees regularly abuse AUO and that the CSR director and assistant director authorized and abetted the improper use of AUO and abused it themselves. The whistleblower also alleged that employees surfed the internet and engaged in other non-work related conduct during claimed AUO periods. OSC referred the allegations on January 13, 2013. The agency substantiated the allegations of AUO abuse on April 19, 2013. The report did not sufficiently address the allegations concerning non-work related activities during claimed AUO periods. OSC closed the case on October 31, 2013. CBP Office of Internal Affairs (OIA) conducted the investigation.

    2. San Ysidro, CA, Office of Border Patrol – The whistleblowers alleged that Border Patrol agents (BPAs) working at the Asset Forfeiture Office routinely claim AUO each day, but fail to perform duties that qualify for AUO. The whistleblowers also alleged that employees work on administrative matters during the claimed AUO periods, that employees leave early, and that they are not always present for AUO time they claim. CBP OIA investigated the case. OSC received the initial report on January 23, 2014. The report

substantiated the core allegations of AUO misuse, but did not find that employees were absent for claimed AUO periods. OSC received supplemental reports on February 20, 2014, June 23, 2014, and July 9, 2014. Additional information on the supplemental reports is provided below in response to question 1.b3.

3. Glynco, GA, CBP Office of Training and Development (OTD) – The whistleblower alleged that agents routinely abused AUO by claiming AUO on a daily basis but failing to perform duties consistent with the use of AUO. CBP OIA investigated the case. OSC received the initial report on January 23, 2014. The report substantiated the core allegations of AUO misuse. OSC requested supplemental reports and received a series of supplemental communications from DHS (see response to question 1.b3 below).

4. Laredo, TX, Laredo North Station – A whistleblower at the CBP facility in Laredo, TX, alleged that BPAs at the Laredo North Station improperly claim AUO for routine shift-change activities. The whistleblower also alleged that supervisors told agents they could exercise during the last half-hour of the two-hour period claimed as AUO. OSC referred the case to DHS and received an initial report on November 26, 2012, and a supplemental report on January 23, 2014. The supplemental report and investigation, conducted by CBP OIA, confirmed that "BPAs are regularly remaining at their duty stations two hours beyond the end of their shift in order to earn AUO pay." The report concludes, "The evidence supports the allegation that BPAs are not performing duties that justify the receipt of AUO pay." CPB noted, "[I]t is clear that AUO is being inadequately documented and/or utilized improperly for work that is not compensable under AUO."

The report did not substantiate the allegation that supervisors told BPAs that they could exercise during the last half-hour of the two-hour period claimed as AUO. According to the report, there is a current program that allows BPAs to exercise on duty, but BPAs all know that AUO cannot be claimed for working out.

The investigation substantiated the allegation that BPAs are not performing duties that justify the receipt of AUO pay, but noted that the majority of the duties performed by agents claiming AUO are routine post-shift activities. The agents interviewed indicate that the work cannot be completed in an eight-hour shift. The report contains an extensive discussion of the cost and benefits of continued misuse of AUO versus the alternative of transitioning to four shifts per day without AUO. According to senior BPA managers, a deliberate choice was made to continue using three, ten-hour shifts per day utilizing AUO to facilitate the shift changes. The managers insist that employing three, ten-hour shifts is a more cost-effective approach to securing the border, even if AUO may not properly be used for routine activities.

5. Washington, D.C., Customs and Border Protection, Office of Internal Affairs – The whistleblower alleged that employees improperly and with full knowledge of OIA's senior leaders claim AUO on a daily basis at the 25% rate. Additional details of this referral have been omitted to protect the confidentiality of the employee.

6. Customs and Border Protection, Office of Border Patrol Headquarters – The whistleblower alleged that all Border Patrol agents at headquarters claim AUO on a daily basis and fail to perform any duties that justify AUO. Additional details of this referral have been omitted to protect the confidentiality of the employee.

7. El Centro, CA, Customs and Border Protection – The whistleblower alleged that five Border Patrol agents detailed to work as CrossFit instructors at the El Centro Sector Headquarters are improperly receiving AUO. Additional details of this referral have been omitted to protect the confidentiality of the employee.

8. Herndon and Reston, VA, Customs and Border Protection, National Targeting Centers – The whistleblower alleged that employees are improperly claiming AUO. This includes at least 27 NTC chiefs and watch commanders, who claim AUO on a daily basis at the 25% rate and do not perform duties warranting this type of overtime. Additional details of this referral have been omitted to protect the confidentiality of the employee.

9. El Paso, TX, Customs and Border Protection – The whistleblower alleged that Border Patrol supervisors and agents at the Ysleta Station have been improperly claiming AUO. The whistleblower further alleged that supervisors allow agents who are injured or assigned to administrative duties to continue to receive AUO. Additional details of this referral have been omitted to protect the confidentiality of the employee.

10. Washington, D.C., Customs and Border Protection – The whistleblower alleged that employees claim AUO while performing pre-planned and/or administratively controllable work, such as conducting polygraph examinations, travelling to examination areas, prepping for examinations, and writing reports, at management's instruction. Additional details of this referral have been omitted to protect the confidentiality of the employee.

The cases from other DHS components include:

11. Houston, TX, Immigration and Customs Enforcement – A whistleblower at the Immigration and Customs Enforcement (ICE) facility in Houston, TX, alleged that ICE supervisors authorize and abet the improper use of AUO. The whistleblower disclosed that employees are directed to stay beyond their normal duty hours to complete routine administrative tasks that are not

time-sensitive or investigative in nature. These employees are instructed to certify the time as AUO. OSC received an initial report on September 11, 2013. OSC requested and received a supplemental report on January 27, 2014. The subsequent ICE Office of Professional Responsibility (OPR) investigation determined that 54% of the AUO justifications were noncompliant with AUO rules, and another 33% were found to be "undetermined," because they were vague, and it was unclear whether the justifications supported the AUO claim. OPR further noted that the lack of ICE policy and guidance on AUO contributed, at least in part, to employees providing justifications for overtime that are inconsistent with the purpose of AUO.

12. Immigration and Customs Enforcement, Enforcement and Removal Operations (ERO) – The whistleblower alleged that employees claim between ninety minutes and three hours of AUO daily but usually leave early and fail to work the additional claimed hours. The whistleblower also alleged that one supervisor claimed AUO daily but usually left early or failed to work the additional claimed hours, and alleged all other employees earned AUO for duties that did not justify its receipt. Additional details of this referral have been omitted to protect the confidentiality of the employee.

13. Washington, D.C., U.S. Citizenship and Immigration Services – The whistleblower alleged that employees in the Office of Security and Integrity claimed ten hours of AUO every week, but the work was not lawfully claimed as AUO because it was routine or administrative. The whistleblower asked to be decertified from receiving AUO, but supervisors initially declined the request because it would draw negative attention to the office. The whistleblower claimed to have suffered reprisal as a result of the request. The agency report is due August 12, 2014. DHS OIG is conducting the investigation.

14. Immigration and Customs Enforcement, Enforcement and Removal Operations (ERO) – The whistleblower alleged that all employees in the office claim one to four hours of AUO daily. These employees claim AUO while performing pre-planned and/or administratively controllable work. The whistleblower also alleged that employees take one-hour breaks at breakfast, lunch, and midday. As a result, even on days when there is sufficient work during AUO hours, the work could have been completed during an eight-hour shift. Additional details of this referral have been omitted to protect the confidentiality of the employee.

15. Immigration and Customs Enforcement, Enforcement and Removal Operations (ERO) – The whistleblower alleged that all employees in the office claim one to four hours of AUO daily. Because of the low number of detainee cases and arrests made, employees claim AUO while performing pre-planned and/or administratively controllable work. The whistleblower

also alleged that management has advised employees to vary the amount of daily AUO on their timesheets in order to avoid suspicion of illegitimate use. Additional details of this referral have been omitted to protect the confidentiality of the employee.

16. Immigration and Customs Enforcement, Enforcement and Removal Operations (ERO) – The whistleblowers alleged that all employees within the whistleblower's section regularly claim two hours of AUO daily. Because of the low number of detainee cases and arrests made, employees claim AUO while performing pre-planned and/or administratively controllable work. Employees allegedly announce that they are staying late because they are "low on AUO." Management told employees that they can "Google for AUO," meaning they can freely spend time online in order to claim AUO. Additional details of this referral have been omitted to protect the confidentiality of the employee.

b. For any case in which you requested a supplemental report after the investigation had been completed, please explain what you requested and why, and when you expect to receive the information.

In the case concerning the Asset Forfeiture Office (AFO) in San Ysidro, California, we requested supplemental information on the allegation that Border Patrol agents were not working at all during the hours claimed as AUO. In the initial report, CBP OIA stated it did not substantiate this allegation, without providing additional detail. We requested a detailed summary of the evidence relied upon in reaching that conclusion. In the event of conflicting evidence on the issue, we requested an explanation of how conflicting evidence was reconciled to reach the conclusion that the allegation was not substantiated. OSC received additional information on this issue on July 9, 2014, and it is under review by OSC.

In the case involving the Office of Training and Development (OTD), OSC requested supplemental information to determine whether the supervisors responsible for the AUO abuse substantiated in the report would be disciplined or otherwise held accountable. We also requested information to determine how the whistleblower's previous attempts to report AUO abuse within DHS were addressed. The agency responded in a series of emails over the course of several months. OSC is reviewing this information.

2. To your knowledge, did border patrol agents in each of the cases OSC referred have reason to know their location was being investigated prior to CBP Internal Affairs' investigations?

Border Patrol agents are on notice that AUO practices are being scrutinized. But, OSC does not have any specific evidence of Border Patrol agents knowing their location was being investigated prior to CBP OIA

investigations.

3. You discussed in your testimony in front of the Committee on June 9, 2014, two cases, one involving instructors at training facilities (OTD) and one involving paralegals at San Ysdiro, California, where agents were found to perform the same duties as officers or civilians but did so in ten hours as opposed to eight.

   a. Were those facts substantiated by CBP Internal Affairs?

      Yes, CBP IA substantiated that Border Patrol agents working in OTD headquarters and OTD facilities and at the Asset Forfeiture Office (AFO) in San Ysidro, California, were performing the same duties as officers and civilians, and were generally working ten hours a day in order to continue receiving AUO. CBP OIA also substantiated that the duties being performed were routine, administrative, and controllable, and therefore, did not justify the receipt of AUO. It was found that Border Patrol agents were completing work during the hours claimed for AUO that could be completed during their scheduled eight-hour tour of duty. In the San Ysidro case, the investigation further determined that the operational circumstances and work pace at the AFO did not dictate the use of AUO to accomplish the mission of the office.

   b. To your knowledge, was anyone disciplined as a result of these two cases?

      To our knowledge, no one has been disciplined as a result of these cases; however, the matters remain under review.

   c. To your knowledge, did CBP ever perform a review to determine why agents are permitted to work ten hours in those locations when they can complete their duties in eight?

      In the response to the investigative findings in both the OTD and the AFO cases, AUO was de-authorized for Border Patrol agents working as instructors and as Asset Forfeiture specialists. However, whistleblowers subsequently informed OSC that all Border Patrol agents working at the AFO in San Ysidro, California, were given the option to return to a field assignment in order to continue receiving AUO.

   d. Does OSC have a position on whether such a review should be performed?

      In response to an OSC referral, CBP committed "to determine which of the 158 positions within CBP should continue to be eligible for AUO and which should be decertified." In prior testimony, OSC stated that this is a positive step. CBP has committed to decertifying certain positions, such as instructor and Asset Forfeiture specialist. However, OSC has not seen the results of the position-by-position review.

4. I understand OSC has received whistleblower complaints about the leadership and investigators at CBP Internal Affairs.

    a. Do you believe any of the whistleblower complaints suggest conduct which would call into question the integrity of the AUO investigations conducted by Internal Affairs?

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

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