



JUNE 9, 2014

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

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

ONE HUNDRED THIRTEENTH CONGRESS, SECOND SESSION

---

## HEARING CONTENTS:

### *OPENING STATEMENTS:*

**Thomas R. Carper** [\[view PDF\]](#)

Chairman, Senate Committee on Homeland Security and Governmental Affairs

**Thomas Coburn** [\[view PDF\]](#)

Ranking Member, Senate Committee on Homeland Security and Governmental Affairs

### *WITNESSES:*

**Ronald D. Vitiello** [\[view PDF\]](#)

Deputy Chief, U.S. Border Patrol, U.S. Customs and Border Protection, U.S. Department of Homeland Security

**Brandon Judd** [\[view PDF\]](#)

President, National Border Patrol Council

**Paul L. Hamrick** [\[view PDF\]](#)

Deputy Assistant Commissioner, Office of Internal Affairs, U.S. Customs and Border Protection, U.S. Department of Homeland Security

**Adam Miles** [\[view PDF\]](#)

Deputy Special Counsel for Policy and Congressional Affairs, U.S. Office of Special Counsel

### *AVAILABLE WEBCAST(S)\*:*

Link to full hearing webcast (duration 02:24:01):

- <http://www.hsgac.senate.gov/templates/watch.cfm?id=ae916769-5056-a032-5218-5e45c2431a1b>

*COMPILED FROM:*

- <http://www.hsgac.senate.gov/hearings/border-security-examining-the-implications-of-s-1691-the-border-patrol-agent-pay-reform-act-of-2013>

*\* Please note: Any external links included in this compilation were functional at its creation but are not maintained thereafter.*

**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.

###

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

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

**June 9, 2014**

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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.<sup>1</sup> 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.<sup>2</sup>

---

<sup>1</sup> 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.

<sup>2</sup> 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 21<sup>st</sup> 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.



# 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 9<sup>th</sup>, 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-hour 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

Adam Miles – Office of Special Counsel

June 9, 2014

Page 6 of 7

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.