

**NOMINATIONS OF CLAIRE M. GRADY AND  
HENRY KERNER**

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**HEARING**

BEFORE THE

COMMITTEE ON  
HOMELAND SECURITY AND  
GOVERNMENTAL AFFAIRS  
UNITED STATES SENATE  
ONE HUNDRED FIFTEENTH CONGRESS

FIRST SESSION

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NOMINATIONS OF CLAIRE M. GRADY TO BE UNDER SECRETARY FOR  
MANAGEMENT, U.S. DEPARTMENT OF HOMELAND SECURITY AND  
KENRY KERNER TO SPECIAL COUNSEL, OFFICE OF SPECIAL COUNSEL

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JUNE 28, 2017

Available via the World Wide Web: <http://www.fdsys.gov/>

Printed for the use of the  
Committee on Homeland Security and Governmental Affairs



U.S. GOVERNMENT PUBLISHING OFFICE

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## NOMINATIONS OF CLAIRE M. GRADY AND HENRY KERNER

WEDNESDAY, JUNE 28, 2017

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

The Committee met, pursuant to notice, at 9:58 a.m., in room SD-342, Dirksen Senate Office Building, Hon. Ron Johnson, Chairman of the Committee, presiding.

Present: Senators Johnson, Daines, McCaskill, Carper, Tester, Heitkamp, Peters, Hassan, and Harris.

### OPENING STATEMENT OF CHAIRMAN JOHNSON<sup>1</sup>

Chairman JOHNSON. Good morning. This hearing will come to order.

This hearing is the nomination hearing to consider Claire M. Grady to be Under Secretary for Management of the U.S. Department of Homeland Security (DHS), and Henry Kerner to be the Special Counsel, Office of Special Counsel (OSC).

Today the Committee will consider two nominations within its jurisdiction that are integral to ensuring the Department of Homeland Security is efficient and effective, and that people who raise issues of waste, fraud, and abuse throughout the Federal Government are protected.

The Under Secretary for Management for the Department of Homeland Security is responsible for ensuring that DHS' workforce has clearly defined responsibilities and the means to efficiently carry out the Department's mission. The Under Secretary of Management's office handles a budget of just under \$1 million—I have to admit I am surprised at how small it is based on the responsibility—with approximately 1,800 full-time equivalents.

More broadly, the Under Secretary of Management oversees the Department's budget of almost \$66 billion, which is a whole lot larger, the appropriations associated with that budget, expenditure of funds, accounting, and finance; procurement processes; human resources (hr) and personnel of approximately 240,000 employees; information technology (IT) systems, facilities, property, equipment, and other material resources; and if that is not quite enough, also performance measurements.

Several programs that fall squarely under the Under Secretary of Management's responsibilities have been flagged by nonpartisan

<sup>1</sup>The prepared statement of Senator Johnson appears in the Appendix on page 25.

government watchdogs as being at high-risk for abuse, including the Department's management of human capital—including employee morale and engagement, and cohesion among component leadership—management of its grant and acquisition programs, and the Department's cybersecurity.

Let me just say, Ms. Grady, I appreciate your willingness to step up to the task. It is a big task, and we certainly wish you well.

The Special Counsel of the Office of Special Counsel—that is quite the title—is the head of the Office of Special Counsel, an independent agency created by Congress in 1979. The Office of Special Counsel has over 100 employees and operates a budget of almost \$25 million each year. The Office of Special Counsel is charged with: one, providing a safe haven for Federal employees to make protected disclosures—with the exception of certain intelligence agencies; and, two, investigating allegations of whistleblower retaliation or other prohibited personnel practices. Federal employees are protected when they disclose allegations of: a violation of law, rule, or regulation; gross mismanagement or waste; abuse of authority; or dangers to public health or safety.

If the OSC reviews a protected disclosure and finds there is a “substantial likelihood” of wrongdoing by an agency, it transfers the matter to the agency for investigation and issues a report to Congress and the President. It cannot, however, force the agency to take other action. If the OSC finds that an individual faced retaliation for the disclosure, it may negotiate disciplinary action with the agency against the retaliating employee and prosecute when appropriate.

The OSC also investigates Hatch Act violations and protects the employment and reemployment rights of civilian military members. Finally, it plays an important role in training agencies on how to handle whistleblowers and employees on their rights through its outreach and 2302(c) Certification Program.

I have been on this Committee now 6½ years. Both of these positions, both of these offices, are integral to our oversight capability and our duty also to protect whistleblowers. So I take these nominations very seriously, and I truly do appreciate that the President has nominated two high-quality individuals to fill these positions, and I really appreciate your willingness to serve and want to thank you for your testimony today and coming before the Committee for your nomination hearing.

With that, I will turn it over to Senator Heitkamp, who has her own opening statement.

#### **OPENING STATEMENT OF SENATOR HEITKAMP<sup>1</sup>**

Senator HEITKAMP. Thank you, Mr. Chairman. First, I want to acknowledge that Ranking Member McCaskill wishes she could be here today. I know she appreciates the nominees' work with hers and Chairman Johnson's staff throughout this process. Claire sits on the Senate Armed Services Committee. One of the great roles is to do defense authorization. They are in that process right now, and so it is critical that she be there to make sure that she is par-

<sup>1</sup>The prepared statement of Senator Heitkamp appears in the Appendix on page 27.

ticipating in that process. So I expect to see her a little bit later on.

I am honored that Ranking Member McCaskill asked me to step in for her this morning, and I am looking forward to hearing from both nominees regarding how they can best serve the American people through their roles in the Office of Special Counsel and the Department of Homeland Security, if confirmed.

At the heart of the Office of Special Counsel is the mission to protect Federal employees from prohibited personnel practices, and specifically from illegal retaliation against whistleblowers.

As the Ranking Member of the Homeland Security and Governmental Affairs Subcommittee with oversight over the Federal workforce, I cannot emphasize enough what a critical time it is to make sure that our Federal workforce knows that they have a safe and independent agency to turn to in the Office of Special Counsel.

In 2016 alone, the Office of Special Counsel received over 6,000 new matters. That was a 53-percent increase from 2010. That is a tremendous upturn, and it speaks not only to the large number of prohibited personnel practice complaints in general, but also to the trust that the Federal employees had in Special Counsel Lerner during her tenure at the OSC.

At a time when our Federal workforce is undergoing a number of new challenges such as reorganization at the behest of the Office of Management and Budget (OMB), it is important that the Special Counsel remain an independent, just, fair, and unbiased voice when it comes to protecting Federal employees when they report any wrongdoing within their respective agencies.

The DHS Under Secretary for Management plays also a critical role in achieving excellence in all areas of DHS mission support. While DHS has made considerable progress in recent years to unify its component agencies, major management challenges remain in the four key areas of human capital, acquisitions, fiscal management, and IT.

Failure to address these challenges could have serious consequences for U.S. national and economic security, and that is why it is absolutely critical we have a qualified individual at the helm.

Specifically, we need someone with demonstrated leadership and experience, a robust understanding of DHS and its various components, a willingness to engage with various stakeholders, and the ability to find opportunities to improve the way DHS functions.

We appreciate the nominees' time today, and I am looking forward to hearing Ms. Grady's and Mr. Kerner's responses to the Committee. Welcome. We are grateful when we see candidates of the caliber that we have in front of us willing to offer their service to the people of our great country. And so, again, congratulations to you and your family for putting your name forward. I look forward to the discussion.

Chairman JOHNSON. Thank you, Senator Heitkamp.

It is the tradition of this Committee to swear in witnesses, so if you will both stand and raise your right hand? Do you swear that the testimony you will give before this Committee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Ms. GRADY. I do.

Mr. KERNER. I do.

Chairman JOHNSON. Please be seated.

I was remiss, by the way, in not welcoming your families—I am sure you have some family members here, and I will let you introduce your family members, but welcome.

Our first nominee, is the President's nominee to be the Under Secretary for Management of the U.S. Department of Homeland Security, Ms. Claire M. Grady. Ms. Grady has extensive experience in acquisitions and procurement. She is currently the Director of Defense Procurement and Acquisition Policy at the Department of Defense (DOD) and previously served as the Deputy Assistant Commandant for Acquisition and Director of Acquisition Services for the United States Coast Guard (USCG). Ms. Grady also has previously served at the Department of Homeland Security as the Director of Strategic Initiatives in the Office of the Chief Procurement Officer. Ms. Grady has an MBA degree from the University of Maryland, a Master of Science degree from the National Defense University's Industrial College of the Armed Forces, and a Bachelor of Arts degree from Trinity University. Ms. Grady.

**TESTIMONY OF CLAIRE M. GRADY,<sup>1</sup> TO BE UNDER SECRETARY FOR MANAGEMENT, U.S. DEPARTMENT OF HOMELAND SECURITY**

Ms. GRADY. Good morning. Chairman Johnson, Ranking Member McCaskill, and distinguished Members of this Committee, it is an honor to appear before you today as the President's nominee to be the Under Secretary for Management for the Department of Homeland Security. I am grateful to the President, Secretary Kelly, and Deputy Secretary Duke for the trust and confidence they have placed in me.

I would like to thank the Members of this Committee and their staffs for the important work you do. I appreciated the opportunity to speak with several of you about your thoughts and priorities regarding management operations of the Department of Homeland Security. For those of you that I have not yet had the privilege to meet during this process, if confirmed, I look forward to the opportunity to do so in the future.

I would also like to thank the many current and former employees of the Department who have contacted me throughout this process to offer their support and encouragement. It is truly the men and women of DHS who ensure mission success, frequently working very long hours and overcoming challenging circumstances to do so. There is no more dedicated or talented group of professionals anywhere in the world, and their outreach and expressions of support have been both humbling and inspiring.

Before I speak further about the important work the Department of Homeland Security does to safeguard our Nation, I would like to express my gratitude to the friends and family who were able to attend in person to support me today, including: my mother, Mary Grady; my aunt and uncle, Helen and Vincent Walters; my son-in-law, Lieutenant Michael Berl; my oldest sister, Kelly Grady, and her husband, Michael Zuckerman; and Maggie Meisberger, the

<sup>1</sup>The prepared statement of Ms. Grady appears in the Appendix on page 29.



oldest of my five nieces—each of whom is amazing in their own right.

I would also like to thank my husband, Colonel Rick Cornelio. I am so proud of him and his service to the country. He served our country 34 years in uniform in the Air Force and continues to serve now as a member of the civil service. His love and support are a tremendous source of strength for me.

Senator CARPER. Mr. Chairman, if I could? Could I ask the folks you just named just to raise your hand? Is that your mom over to the right?

Ms. GRADY. It is.

Senator CARPER. Good work, Mom. [Laughter.]

Ms. GRADY. Thank you, sir.

More than 15 years after September 11, 2001, the threats to our Nation, our people, and our way of life remain. The world is a dangerous place, and the velocity of threats is ever changing and accelerating. Round the clock, whether at a computer, in our communities, at an airport, at a port of entry (POE), at a desk, in the air, in the classroom, on the border, in a command center, or in a lab, the professionals of DHS valiantly serve our Nation and keep us safe. They have committed themselves to thwarting our Nation's adversaries—natural or man-made—in an environment where a single incident can have devastating consequences. And if tragedy were to befall our Nation, they are prepared to respond and aid in the recovery. I can think of no greater honor than to be considered for a position to help those dedicated men and women safeguard our Nation by strengthening and integrating the Department's management functions.

Let me share some more information about my professional background. I am a career Federal civil servant and have had the privilege of supporting our Nation for more than 25 years. I started as a GS-7 intern, progressed through positions of increasing responsibility and scope, and have been a member of the Senior Executive Service (SES) for over a decade. I served in senior positions at the component and headquarters levels of two different agencies—the Departments of Defense and Homeland Security—leading large, diverse, and geographically dispersed workforces to deliver results.

My parents raised me to value hard work, discipline, and perseverance. They instilled in me the expectation that when things get difficult, it is our obligation to help—to take on the tough challenges and make things better. I was never more aware of this responsibility than when approached to consider this position. I recognize the many challenges that DHS has: the diverse mission set, myriad stakeholders, complex oversight, and the urgency and criticality of the work itself. I know none of this is easy. But I am impressed by the progress that has been made through the efforts of not just a few, but a multitude of individuals throughout the Department at all levels.

If confirmed, I would be committed to building on the great things that are underway throughout DHS, striving for excellence in all areas of mission support, and delivering maximum value for every dollar entrusted to the Department. I would welcome the opportunity to engage collaboratively with Members of this Committee and other Members of Congress to assist and inform their

important work of oversight and support for the Department. Finally, I would be dedicated to ensuring a culture of respect and professionalism; the men and women of Homeland Security and our Nation deserve nothing less.

Thank you for your consideration, and I look forward to answering your questions.

Chairman JOHNSON. Thank you, Ms. Grady.

Our second nominee is the President's nominee to be the Special Counsel of the Office of Special Counsel, Henry Kerner. Mr. Kerner is currently the assistant vice president of investigations at the Cause of Action Institute. Prior to that, he was the Deputy Director of Investigations of the House Oversight and Government Reform Committee and the Staff Director and Chief Counsel of this Committee's Permanent Subcommittee on Investigations (PSI) under then-Ranking Member McCain. Mr. Kerner also has years of litigation experience working as a deputy district attorney at the Los Angeles County District Attorney's Office. Mr. Kerner has a law degree from Harvard University and a master's and bachelor's degree from UCLA.

Welcome, Mr. Kerner. You may want to introduce your family as well.

**STATEMENT OF HENRY KERNER,<sup>1</sup> TO BE SPECIAL COUNSEL,  
OFFICE OF SPECIAL COUNSEL**

Mr. KERNER. Thank you, Mr. Chairman.

Chairman Johnson, Ranking Member McCaskill, and distinguished Members of this Committee, thank you for the honor to appear before you today and for the privilege of your consideration of my nomination. I am humbled and honored to have been nominated by the President to lead this important office that protects the whistleblowers so vital to holding our government accountable.

I would like to start by thanking a few people. First and foremost, a big thank you to my family who are in California, so they are watching online. But I wanted to thank my parents in particular, Mark and Larissa. They have been tremendously supportive, and I appreciate their frequent encouragement and unconditional love.

I would also like to thank Katherine and Nick Rossi, who are sitting behind me, who have been tremendous friends. And I am terrifically grateful to Senator John McCain, who gave me the opportunity to serve as his Staff Director on this Committee's Permanent Subcommittee on Investigations during the 113th Congress, making today something of a homecoming to me—although I must confess it is different sitting on this side of the dais.

Additionally, I am heartened and touched by the attendance of so many current and former colleagues and friends of mine. They have come to support me, and they are here in the audience, and I really appreciate that support. I have learned so much from all of them, and I just appreciate their continued support and affection.

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<sup>1</sup>The prepared statement of Mr. Kerner appears in the Appendix on page 86.

A special thank you to John Vecchione and Julie Smith of Cause of Action Institute for being so accommodating with me during this confirmation process.

Last, I would be remiss if I failed to express my appreciation to the outgoing OSC leadership. Special Counsel Carolyn Lerner, Acting Special Counsel Adam Miles, along with the career staff at OSC should be commended for dramatically increasing productivity at OSC and significantly advancing protections for whistleblowers. I am especially grateful that Mr. Miles, who is currently the Acting Special Counsel, decided to bring on Mr. Tristan Leavitt, also sitting directly behind me, as the new Principal Deputy Special Counsel to assist with the transition process. Mr. Leavitt is an 8-year Hill veteran, I have worked with him previously, and he is just exceptionally talented and completely committed to the mission of the agency. I am absolutely thrilled he chose to join OSC last week, and I look forward to working with him again, should I be confirmed.

As for my own background, I have been a government lawyer and counsel for nearly my whole professional life. I served as a prosecutor in Los Angeles County for nearly two decades, most of which I spent in the city of Compton, California. That experience taught me how crucial it is for citizens to have confidence in the law and the legal system—to trust, and be given tangible reasons to believe, that government officials with integrity are striving to apply the law fairly to each and every person.

Once I transitioned to the Hill, I was one of the primary congressional investigators of the Fast and Furious scandal, which involved allegations of “gunwalking” made by whistleblowers to Congress. My work with whistleblowers continued when I became the minority staff director on PSI and again when I returned to the House Oversight and Government Reform Committee in a leadership role. Through my interactions with whistleblowers, I have learned about what animates people to speak out when others may not and what a vital impact such brave civil servants can have on our country’s policies.

To that end, I am particularly pleased that this Committee has done so much to advance legislation to protect whistleblowers. Just last month, the Senate passed this Committee’s Dr. Chris Kirkpatrick Whistleblower Protection Act. It was developed in response to the Committee’s work with Department of Veterans Affairs (VA) whistleblowers, but it will also help Federal employees governmentwide once enacted.

In addition, I know that Chairman Johnson and Ranking Member McCaskill and their staffs have put an immense amount of work into the Office of Special Counsel Reauthorization Act, which was reported to the Senate floor last month. I have already heard from staff at OSC about how beneficial that legislation is in clarifying Congress’ longstanding intent to provide OSC with access to all materials necessary to carry out its responsibilities.

These and other provisions like them, such as the Follow the Rules Act and S. 1083, which the President signed into law just yesterday, will greatly strengthen my capacity to protect whistleblowers should I be confirmed as Special Counsel. For that I am grateful.

In closing, I would just like to highlight a few of my goals for OSC, should I be confirmed, based on my discussions to date with members and staff in Congress, stakeholders, and OSC employees.

First, as I already mentioned, I want to continue to build on Ms. Lerner's successes at OSC.

Second, I want to continue to implement the information technology system upgrades currently in progress, while paying special attention to cybersecurity and caseload efficiency gains.

Third, I want to address how best to optimize intake of an ever-expanding caseload in order to provide appropriate response times to whistleblowers.

Fourth, I want to increase education and outreach with agency and congressional staff, especially with regard to the Hatch Act and whistleblowers' rights.

And, finally, I want to place an increased emphasis on litigation to promote accountability, deter future violations, and strengthen OSC's bargaining position when negotiating settlement agreements for whistleblowers.

If confirmed, I look forward to the opportunity to work collaboratively with this Committee and other stakeholders to protect one of the Federal Government's most important assets: dedicated Federal employees who are willing to "blow the whistle" on misconduct and violations of the public trust.

Thank you, and I would be happy to answer any questions the Committee may have.

Chairman JOHNSON. Thank you, Mr. Kerner.

There are three questions the Committee asks every nominee for the record, and I will ask the questions, and each of you answer separately in order.

Is there anything you are aware of in your background that might present a conflict of interest with the duties of the office to which you have been nominated? Ms. Grady.

Ms. GRADY. No.

Chairman JOHNSON. Mr. Kerner.

Mr. KERNER. No.

Chairman JOHNSON. Do you know of anything, personal or otherwise, that would in any way prevent you from fully and honorably discharging the responsibilities of the office to which you have been nominated? Ms. Grady.

Ms. GRADY. No.

Chairman JOHNSON. Mr. Kerner.

Mr. KERNER. No.

Chairman JOHNSON. Do you agree without reservation to comply with any request or summons to appear and testify before any duly constituted committee of Congress if you are confirmed? Ms. Grady.

Ms. GRADY. Yes.

Chairman JOHNSON. Mr. Kerner.

Mr. KERNER. Yes.

Chairman JOHNSON. Thank you. I just want to say I appreciate the Members' being here, and in the interest and being respectful of your time, I am going to delay my own questioning, and I will go right to Senator Heitkamp, if you are ready.

Senator HEITKAMP. I am. Thank you, Mr. Chairman.

Obviously, I know that this role of being Special Counsel is absolutely critical to making sure that we have a role here in oversight. So for me, a lot of what you are going to be looking at is stuff that over the long haul is absolutely critical to us performing the oversight function and mission.

And so I find it, rewarding and—not rewarding, but I find it, a very good fit that someone has been nominated with so much Hill experience, because I think you can appreciate and understand how critical that role is to the work that this Committee does, either in the Permanent Subcommittee on Investigations or certainly just oversight in agencies.

One of the questions that we have been very concerned with on this Committee is the issue of whether requests from Committee Members, regardless of whether you sit in that chair or in any other chair, whether those requests will be fulfilled. The Office of Legal Counsel has issued an opinion. Are you both familiar with that opinion? Ms. Grady.

Ms. GRADY. Yes, I am.

Senator HEITKAMP. Mr. Kerner.

Mr. KERNER. I am as well, yes.

Senator HEITKAMP. OK. Obviously, we believe that the opinion—I think the opinion is shortsighted and probably wrong, but the opinion does offer an opportunity to exercise some discretion.

Ms. Grady, if I send you a letter and ask for information, would you respond to that letter?

Ms. GRADY. Absolutely.

Senator HEITKAMP. Thank you. Mr. Kerner.

Mr. KERNER. Absolutely.

Senator HEITKAMP. Thank you. I will get that out of the way.

Senator CARPER. That was the right answer.

Senator HEITKAMP. Yes, that is the right answer. [Laughter.]

Chairman JOHNSON. Yes. Thank you.

Senator HEITKAMP. Let us get to the personnel and resources at the Office of Special Counsel. I along with the Chairman are concerned about resources and whether you have enough resources to do the important work that you need to do. Can you tell me, have you looked at the resourcing issues? And what would be your intention if you believed you needed more resources? How would you approach getting that allocation or appropriation?

Mr. KERNER. Yes, so Ms. Lerner talked a lot about how she has been able to manage more with less. There have been over 6,000 cases. That is a huge record. Yet the agency has been able to get better and better results. The way they have done it is they have combined certain functions; they have become more efficient. For example, they have assigned one lawyer to four different functions as opposed to having four different people looking at it. So making those efficiencies, they have been able to utilize their resources better.

I think one of the things that I would look to is in the OSC Reauthorization Act, it talks about—OSC has a mandate to investigate all complaints, but some of them are on their face not going to work. They are not in the right—they should not even be at OSC. They have passed the statute of limitations. There are other obvious disqualifiers. In the act, there is an opportunity for OSC to dis-

pense with those without having even to conduct an investigation and go through a lot of staffing on that. So that would be, for example, very helpful.

But in terms of other things, the IT system is going to be redone at OSC. Hopefully, it will be more efficient. Hopefully, the case intake is absolutely crucial because once you determine what cases go through the process, that requires an investment of resources. So once we have—

Senator HEITKAMP. Is the answer you think you are going to manage with what you have so far? But what happens if you get there and you get double the amount of complaints? How will you manage that?

Mr. KERNER. Absolutely. If the resources are not enough and the work has to be done, we will come to the Congress and ask for resources, and the appropriation has gone up a little bit, so to the extent that the Congress funds OSC to a greater degree, that would obviously be very helpful.

Senator HEITKAMP. One of the concerns that I have is communication back to supervisors. How do you plan to communicate to supervisors that listening to their employees is in the best interest of their organization, might be, in fact, a way that they can see your face by actually encouraging them to listen, to reach out to employees, to actually use better management practices? What role can you play in improving that level of supervision?

Mr. KERNER. Absolutely. One thing you have to set is you have to set a tone where that challenge process is respected. You have to allow people to bring concerns to their chains, to supervisors, and not be punished for it. It would be ultimately very ironic if an agency whose main task is to protect whistleblowers and protect the disclosures punishes its own people for disclosures. We are going to try not to do that.

Senator HEITKAMP. Ms. Grady, obviously personnel and recruitment is going to be a huge issue, especially if we see the level of plus-up that we are talking about. We have been doing some legislation here that we think will help streamline it, but I am deeply concerned about the lack of resources on the Northern Border and how discouraged staff gets on the Northern Border when they do not get any additional help.

As Under Secretary for Management, what strategies can you use to address recruitment, retention, and morale challenges? How will you advocate for those internally?

Ms. GRADY. The human resources are the essential element of the Department, and filling critical vacancies is absolutely an essential part of the Department's success. So, if confirmed, I would work with the Chief Human Capital Officer (CHCO) to look at what is working and what is not working. Based on actual data, we would be able to develop and formulate a plan to better address those gaps, those vacancies as those were to occur, and look to take advantage of the flexibilities that this Committee has given to the Department.

Senator HEITKAMP. This is a really critical issue, and we hear the same answer. I think every year that I have been on this Committee, which has been my entire term in the Senate, we talk about morale at DHS; we talk about recruitment and retention; we

talk about the lack of consolidated, visionary mission, understanding. And so, we need to quit talking about it, and we need to develop strategies that actually achieve the result.

Ms. GRADY. I fully agree, and I believe the Department has started to make progress and will continue to make progress because, instead of studying the problem, there are action plans that are resourced associated with furthering the efforts of employee engagement. Those action plans are based on analysis of data at a lower level, not looking at the Department in aggregate, which significantly masks the actual problems, because you want to go after the root cause, not the symptoms.

Senator HEITKAMP. Thank you.

Chairman JOHNSON. Thank you, Senator Heitkamp. Senator Carper.

#### OPENING STATEMENT OF SENATOR CARPER

Senator CARPER. Colleagues, this is a woman after my own heart. These guys up here have heard me talk about root causes for much of the last—I do not know how many years. It is a pleasure to hear it out of your lips.

Mr. Kerner, did you say your parents might be tuned in from the west coast?

Mr. KERNER. Yes. They are in Los Angeles.

Senator CARPER. Mark and, what is it, Larissa?

Mr. KERNER. Larissa.

Senator CARPER. I do not know if they are watching, but if they are, just tell them one of the joys of this job is we get to nominate young men and women to attend the Naval Academy, West Point, Air Force Academy, and the Merchant Marine Academy. When our nominees win appointments to those academies, we have the chance to call them and congratulate them, and I always ask to talk to the parents of our nominees. I always tell them this message: “Thank you for raising this young man or young woman and preparing them for this opportunity, this responsibility.” I would say the same to Mark and Larissa.

I would say, Claire, to your mom, “Thank you for raising this kid. It looks like she has turned out pretty well.”

I have had the privilege of serving on this Committee, this is my 17th year, and I have been very much involved, as some of you may know, in trying to work with my colleagues on making sure that the Department of Homeland Security has what it needs in order to be successful. One of those is excellent leadership, and we worked very closely—Claire and Ron and myself worked very closely with Jeh Johnson, with Ali Mayorkas, to make sure that they had top-tier Senate-confirmable positions filled with excellent people. One of those is following Russ Deyo, who headed up the management section, Under Secretary for Management, and I think you probably know him. Is that right? OK. And Rafael Borrás. Did you know Rafael?

One of the things I talked with Mr. Kerner about yesterday was making sure that he and Carolyn Lerner had a good ongoing conversation. I got to be Governor of Delaware and had the blessing in my life of having Mike Castle as my predecessor and a great colleague, mentor, Pete du Pont before that, others before that, and

they served me as a great source of inspiration and terrific mentors, and I made good, full use of them. I would just ask how you might have that kind of relationship with Russell or Rafael. Could you? Would you?

Ms. GRADY. Absolutely. They have valuable insight, having been in the position and worked at some of the tough challenges and made progress. Both them, Paul Schneider, and Elaine Duke, there has been a tremendous source of wisdom from those predecessors.

I have not yet had an opportunity to talk to either Russ or Rafael, but I have talked to Chris Cumiskey, Paul Schneider, and Elaine Duke in preparation for this and would solicit their advice and input in terms of their thoughts on what they wished they could have gotten done and what impediments they encountered.

Senator CARPER. What I would do from time to time as Governor, a new Governor, was invite them to come by the Governor's house and have lunch together, or breakfast, and just talk. I would say, "Give me some good advice." And, boy, they would. I benefited enormously from that. You might want to keep that in mind.

I first heard the words "St. Elizabeths," I do not know, maybe 6 or 7 years ago, and I thought, Why would anybody want to go out there and create a headquarters for the Department of Homeland Security? That does not make any sense. Then I talked to Tom Ridge, who is a former Secretary; Judge Chertoff, former Secretary; Janet Napolitano, former Secretary; and then Jeh Johnson, and I said, "Why do we need to spend all this money on St. Elizabeths?" And they said, basically to a person, "This Department is scattered all over Hell's Half Acre. We have 40 or 50 entities that are spread all over the greater Washington area, into Virginia and Maryland and across D.C., and it is an almost impossible management task for us to get our hands around."

Would you speak to that?

Ms. GRADY. Certainly. I believe the consolidation of DHS at St. Elizabeths, creation of a DHS headquarters is absolutely essential in terms of furthering the unity of effort across the Department. I believe it will significantly help to strengthen and integrate the Department and accelerate decisionmaking.

Senator CARPER. Thank you. I agree. I am Tom Carper, and I approve that message.

Does the name Jane Holl Lute mean anything to you.

Ms. GRADY. Yes, sir.

Senator CARPER. She was Deputy Secretary when Janet was our Secretary, and do you know what she used to do? She would take the High-Risk List from the Government Accountability Office (GAO) that comes out every 2 years, high-risk waste, wasted money, and the Department of Homeland Security figured most prominently every 2 years. It was released at the beginning of every Congress. Jane Holl Lute just started going to meet with the senior, the top people at GAO, and saying, "How do we get off of your list?" They worked it, they worked it, they worked it. The Department of Defense, as my colleagues know, is still looking for their first clean audit, and, lo and behold, the Department of Homeland Security in less than 10 years has gotten three, four, five of them. They really set a good example of how this can be done.



Talk to us about the High-Risk List. I like to describe it as our—what do I call it, Claire? I call it our “to-do list,” our to-do list in this Committee. What do you think?

Ms. GRADY. Certainly. I very much respect GAO’s role in strengthening government and coming up with better ways to govern and execute the functions across the agencies. The High-Risk List is a very important look that they take across the Federal Government, and the work that DHS has done with GAO, not just in identifying those risks but looking at what corrective action plans and resources and sustained leadership commitment are necessary to start to address those. The Department has made tremendous progress in terms of working away at that list.

There are still a number of significant challenges, but to me, what was impressive is the Department’s leadership commitment to work through those, that they have resourced it, they have action plans to address it, and they are measuring progress against it to get to that sustained progress necessary to get off the list.

I also think the continued engagement with GAO is absolutely essential to continue to work with that, and they are a very valuable resource to identify opportunities to improve.

Senator CARPER. Good. Sometimes I have heard the key to people being happy about the jobs that they do is that, first of all, they know that what they are doing is important, and the second key ingredient is that they feel like they are making progress. One of the ways to indicate and show people that we are making progress is actually through the GAO High-Risk List and to involve your folks.

You may want to take your new Deputy Secretary with you. Just take them and go meet with the folks at GAO. Do it on a regular basis, and they will be happy to help, and you will be glad you did.

I will close with this: Colleagues, when Mr. Kerner was by to visit with me yesterday, we talked a bit about what I am just about to mention—I am almost done—and I reminded him that about 2,000 years ago, far away in the Middle East, a bunch of Pharisees confronted a young rabbi, and they said to him, “What is the greatest commandment of all?” And he said, “There is not one. There are actually two.” And the second one was, “Love thy neighbor as thyself,” which we know as the Golden Rule: Treat other people the way we want to be treated.

Very briefly, how might that apply in your job?

Mr. KERNER. I think one of the most important parts is when you have a Federal workforce, you have to show that they are appreciated. You have to protect them. You have to safeguard them and make sure that when they blow the whistle, when they expose waste, fraud, abuse, and other violations, that they are going to do so safely, that we appreciate them for doing that, and that we are going to protect them to the best ability that we have.

Senator CARPER. Mr. Chairman, Ranking Member, to that I would say, “Amen.”

Chairman JOHNSON. Senator McCaskill.

**OPENING STATEMENT OF SENATOR MCCASKILL**

Senator MCCASKILL. Thank you, Mr. Chairman.

Mr. Kerner, first of all, I have to tell you—and I know my colleague Kamala, who was here earlier, from California, would echo this—anybody who was a real prosecutor for almost 18 years, it would be really hard for me ever not to be for you. I have particular sensitivity to the job you held for so long. You are the ones that—it is the local prosecutors, the State prosecutors, that handle 99 percent of the crime in this country, not U.S. Attorneys. They do not answer 911 calls. They get to pick and choose which crimes they go after. State prosecutors have to go after every crime that is committed, and so thank you for your years of service there.

I think the most important thing I want to emphasize today is the independence of your office and the obligation you have to keep it independent. You spent many years as a local prosecutors, but you also have close ties to the Republican Party. I think it is important to point out that Carolyn Lerner, the previous Special Counsel, was the first Special Counsel to find sitting Cabinet Secretaries in violation of the Hatch Act. Both Julian Castro and Kathleen Sebelius were found in violation of the Hatch Act. That is an example of independence.

How can you assure the current whistleblower community and the Members of this oversight Committee that you understand the independent role that you are stepping into, if you are confirmed?

Mr. KERNER. Yes, thank you, Senator, and I appreciate the kind words about my background.

For almost my entire career, I have not been really working in a partisan environment. When you said I am close to Republicans, I have worked for Republican office holders, but not on campaigns, not in the sort rough and tumble—

Senator MCCASKILL. Right.

Mr. KERNER. The prosecutor's office was obviously completely nonpartisan. When I was the Staff Director for Senator McCain on PSI, we had a tremendous relationship with Carl Levin, the Chairman. Throughout the 2 years, we joined many of the reports. We did a lot of hearings jointly. We had such a good relationship that at the end, when I got my picture with Senator McCain that he signed, I also got one from Senator Levin, just he and I, and he thanked me for all the hard work. I think I have shown that I am absolutely capable of working independently.

As far as enforcement, and you mentioned the Hatch Act, I believe there are three pillars to the Hatch Act. Number one, you have to have clear guidelines and communicate those guidelines, make sure that people know what is required, make sure they know what the law is. The Hatch Act has some regulations that have not been updated in, apparently, 22 years, and with the new media and all the new requirements, it is really important that people know what to do. Then you have to enforce it, nonpartisan, completely independent. Much like the prosecutor work I did, you go where the facts are, you go with what the law shows, and if people violate it and you have trained them, then you just hold them accountable.

Senator MCCASKILL. In May, the Department of Health and Human Services (HHS) issued a memo to staff that any commu-

nication with Congress had to be cleared before it was made. Now, to me, this is in direct violation of the whistleblower laws, and I want to know what you are going to do to communicate to whistleblowers at HHS that the law does not allow HHS to gag them.

Mr. KERNER. Absolutely. I understand that they have been called out on that, and I think there was a clarification issued. It was not as clear as a memo. It was more of an email that said, "Of course, we are not imposing on your right." But I absolutely agree, whistleblowers must know that they cannot be chilled; their communications with Congress, with Inspectors General (IGs), with OSC are absolutely protected. The whistleblower law requires under Section 13 and 2302(b) to have language to that effect, and that language was missing. We would counsel and educate all the agencies, not just HHS, that they have to have the relevant language in order to comply with the law.

Senator MCCASKILL. Will you ask HHS to rescind the memo with the required language? Because I believe that clarifying what the law is should be done in the same manner as the original directive. The fact that the latter—what they did was informal and through an email, will you direct them to, in fact, send out a memo correcting the previous memo and laying out the language that is required by law?

Mr. KERNER. I will speak to them and tell them what is required by law, and we will have that conversation.

Senator MCCASKILL. OK. Could you explain—in your policy questionnaire, you said there are serious flaws with the legal reasoning of the Department of Justice (DOJ) Office of Legal Counsel opinion that Executive Branches can ignore the Ranking Member of the main Senate oversight committee. As Senator Grassley said, I think he put it as eloquently as you possibly can, if you are from my part of the world. He called it "nonsense."

Could you explain what flaws you find in the OLC's legal opinion that they issued?

Mr. KERNER. Yes. I believe in the policy questionnaire my reference was to Senator Grassley, who had criticized it, and I pointed out that there were issues with it.

I think the biggest problem is that the Privacy Act does not talk about Chairmen, so it does not actually have that language. Instead, what it talks about is giving it to committees, and Ranking Members are as much a part of the committee as the Chairman is. You are both doing oversight. You both require information. And OSC I think has actually a long history of complying with providing information to both sides.

Senator Heitkamp asked Ms. Grady and me as well whether we would make information available to both sides, and we both committed to that.

Senator MCCASKILL. Thank you. Thank you very much.

First of all, I like your name. In the old days there were not many of us. Now there are lots of Claires. I was the only Claire growing up, and now there are Claires everywhere.

I would ask you, based on your role in management at DHS, are there any circumstances in which you would support a project that went ahead that would spend tens upon millions, hundreds of millions dollars, potentially, without a cost-benefit analysis?

Ms. GRADY. I believe cost-benefit analyses are essential for major acquisitions. You need to look at the range of alternatives in terms of how to achieve the outcomes. So look at measures of effectiveness and cost of investment before you make any commitment to a major investment decision.

Senator MCCASKILL. Do you believe there should be a cost-benefit analysis done of a wall built for 2,000 miles along the Southern Border?

Ms. GRADY. I believe that there is an analysis that will be conducted or is being conducted, but I am not familiar with the details of that.

Senator MCCASKILL. Well, I would depend on you as the management person there to exercise the kind of authority that you should have to make sure that there is a cost-benefit analysis being done on the proposal for a 2,000-mile wall, sea-to-shining-sea wall, which the Secretary has said is not going to happen. Pretty much everybody acknowledges it is not going to happen except the President. If you would make sure a cost-benefit analysis is done, I think that would go a long way to explain to the American public why there are other, more effective ways to utilize our resources to make sure we secure the border.

Thank you, Mr. Chairman.

Chairman JOHNSON. Senator Hassan.

#### **OPENING STATEMENT OF SENATOR HASSAN**

Senator HASSAN. Thank you very much, and good morning to you both. It is nice to see you. And thank you, Mr. Chairman and Ranking Member McCaskill, for the opportunity.

Ms. Grady, it was very nice meeting with you—I think it was a couple of weeks ago—and I thank you for the time you took to do that.

Last month, I introduced with Senator Portman the Hack DHS Act, which calls upon the Department of Homeland Security to establish a pilot program that would allow ethical and vetted hackers to probe DHS' network and public-facing website for potential cyber vulnerabilities. In exchange for this service, DHS would pay these ethical hackers a small monetary sum for each previously undiscovered vulnerability that he or she identifies for DHS. This effort was modeled on programs used by industry and specifically the Department of Defense's bug bounty program known as "Hack the Pentagon."

If I recall from our meeting in my office, you were quite familiar with this Pentagon program. If you are confirmed and our bill becomes law, your office at DHS would likely be responsible for implementing the program. What are your thoughts on establishing a bug bounty pilot program at DHS?

Ms. GRADY. I think it is a very valuable tool that industry has found tremendous benefit for a relatively small return in terms of what is actually paid out for the bug bounties. I think the Department of Homeland Security can take advantage of the lessons learned from the Department of Defense, who did both Hack the Pentagon, Hack the Army, and Hack the Air Force. And a key element associated with that is working very closely not just from a procurement perspective but with the Chief Information Officers

(CIOs) to ensure that it is conducted in an effective way and that we are prepared to respond to the findings that will result from a bug bounty.

Senator HASSAN. Thank you. Two weeks ago, we had a hearing in this Committee on the ideology of Islamic State of Iraq and Syria (ISIS) and al-Qaeda. One of the witnesses was the former Director of the National Counterterrorism Center (NCTC), Mike Leiter. Mr. Leiter, who is a veteran of both Republican and Democratic Administrations and an expert on stopping terrorism, repeatedly called out the work performed by the DHS Office for Community Partnerships and its Director, George Selim, as the only office in the government that focuses on trying to prevent ISIS and al-Qaeda from recruiting Americans into their ranks. Despite this, the President's budget eliminates the grant funding that Director Selim's office uses to try to prevent these homegrown attacks.

What is your position on our government's role in preventing homegrown terrorist attacks? Do you support cutting off funding to the only office in the government that is dedicated to preventing young Americans from falling prey to these terrorist groups' recruitment propaganda?

Ms. GRADY. I believe our government's role and responsibility is to prevent threats, regardless of source, against our homeland and our homeland security. I am not familiar with the particular grant program that you referenced. I would need to look into that and study it and get back to you on the status and the future of that program.

Senator HASSAN. I thank you for that. I would encourage you to do that. Among other things, they found a real hunger for these grant dollars from local and State partners who were really trying to get at this recruitment issue and trying to prevent our young people from being recruited. I look forward to further conversations with you about that.

To Mr. Kerner, I want to thank you for being here as well, and thank you for all your work as a public servant for many years. I know that you worked as a prosecutor for almost 20 years, and that is really difficult work, and important, and I thank you.

After that, you came to D.C. and worked under different circumstances, this time as a political staff member. As you know, that is more of a partisan role. While the investigative committees in Congress have a strong tradition of bipartisanship, I still think it is safe to say that being a committee staffer is more of a partisan job than being a prosecutor is.

But the job you are nominated for now requires a truly strictly independent, nonpartisan approach, so I would like to just hear from you how you plan to transition from that more partisan work to this nonpartisan role and whether you agree that you will need to be independent of politics at the Office of Special Counsel.

Mr. KERNER. Thank you, Senator, and thank you for the kind comments about my background. I appreciate that.

I spent most of my time in a nonpartisan role. I was a prosecutor, and there is no politics at all. Then when I transitioned to the Hill, while it is true that I worked for Republican members, I was not in a campaign. I was not working out there campaigning for or against candidates. I was in an oversight role. When I was

the Staff Director for Senator McCain on PSI especially, we were in a particularly bipartisan role. We worked very closely with our Chairman, who was Senator Carl Levin. We signed on and joined a number of joint staff reports. We had joint hearings. We worked so closely together that at the end of the tenure, I received pictures from both Senators separately, thanking me for the hard work.

I realize and I recognize the fact that OSC is a nonpartisan office. It is supposed to safeguard the merit system. It is supposed to safeguard all Federal employees and have credibility with them, and I intend to be completely independent in that job.

Senator HASSAN. Thank you very much. And, again, thank you both for being here.

I yield the remainder of my time, Mr. Chairman.

Chairman JOHNSON. Senator Daines.

#### **OPENING STATEMENT OF SENATOR DAINES**

Senator DAINES. Thank you, Mr. Chairman, Ranking Member McCaskill.

Ms. Grady, Mr. Kerner, thank you both for your testimony and your willingness to serve. The positions you have been nominated for are critical to accountability. Without good people in these roles, the Federal Government is more susceptible to wasting taxpayer dollars and more susceptible to internal, unethical, corrupt, or illegal activities.

I want to start with Ms. Grady. DHS spends over \$7 billion annually on acquisition programs. According to a recent GAO report, last year's DHS acquisitions averaged a 6-month delay and cost overruns of nearly \$1 billion. This is unacceptable to those on the front line keeping us safe as well as to the American people.

I very much appreciated in your testimony your commitment to maximizing the value of every dollar entrusted to DHS. This is one issue largely devoid of politics, and we have, I think, some bipartisan solutions. Senator McCaskill and I have been working closely to develop legislation that would codify best practices, increase transparency, accountability, and, importantly, improve technology delivery to the front line.

I have had a short career in politics but a long career in the private sector, including technology, and I like talking about accountability and quicker deployments, meeting schedules at or below cost.

Ms. Grady, you currently serve on the Defense Acquisition Review Board. One of the bills I authored would codify an Acquisition Review Board within DHS ensuring uniformity and synergy across Department component acquisitions.

Would you please expand on your experience on the DOD Review Board and how you would utilize and take this expertise to DHS?

Ms. GRADY. Certainly. I had the benefit of being part of the DHS Acquisition Review Board as well as the Defense Acquisition Board, so I have had the opportunity to see both systems at play. From a DOD perspective, the one lesson that I took away was one size does not fit all and that you really need to tailor both documentation and oversight appropriate to the investment, and there needs to be metrics and data and accountability associated with deliv-

ering results. That is definitely what I would take back to DHS from my experience on the Defense Acquisition Board.

Senator DAINES. One of the concerns, I think, for many of us who observe and work within the bureaucracies in the Federal Government is the duplicity that can occur when some of these departments who sit under the same header in terms of an agency might as well be working in separate countries, it seems, even though they may be a few feet apart in the same building.

Would you also elaborate how DHS's acquisition is different than DOD's as well as ideas you might have to improve the overall efficacy of the DHS process?

Ms. GRADY. Certainly. I think one of the big differences between DHS and DOD is the requirements process. DOD has the joint staff. They can staff and validate requirements that cover across the Department. DHS has stood up a Joint Requirements Council, which I think is a tremendous step, because acquisitions live and die by getting the requirements right. By getting the requirements right, I mean meeting the needs and the mission gaps of the end users who are actually on the front line. So making that connection of the individuals who are going to utilize the capability or capacity that needs to be delivered to keep our homeland safe. I believe the Joint Requirements Council is a great step that DHS has taken to strengthen that requirements process. That has been a big focus, and I think that is really important in terms of delivering value through acquisition as well as unity of effort.

Senator DAINES. Thank you, Ms. Grady.

Mr. Kerner, I want to shift gears and talk about VA accountability. One hurdle that we have seen to providing veterans the medical services that they deserve at the VA has been a fear of whistleblowing. This has stifled accountability, stifled internal reforms necessary to better serve those who served us. I am the son of a Marine. In your testimony, you touched on legislation that I cosponsored to strengthen the whistleblower protections.

My question is this: As Special Counsel, how will you not only protect whistleblowers but get the facts to substantiate accusations and foster an environment where people feel safe to speak out against misconduct at the VA?

Mr. KERNER. Yes, thank you, Senator. I think one of the important things—and, obviously, OSC has had a lot of VA cases. I think out of the 6,000 or so cases they had recently, about 35 to 40 percent are VA cases. So OSC has done a tremendous job of working with whistleblowers to get them reinstated, to counter that culture.

But to the extent that culture still exists, the most important thing is you have to get accountability, and OSC is partly an investigative agency, but it also has a prosecutorial component. By utilizing prosecutorial tools and going in front of the board and holding managers who punish people for whistleblowing, holding managers accountable for their actions through discipline, I think you send a message that whistleblowers will be protected; people who bring protected disclosures forward will not be retaliated against. If you obtain this kind of accountability and discipline against managers, I think it is going to serve us well with all other whistleblowers as well.

Senator DAINES. I was struck by Secretary Kelly when he went through the confirmation process, one of the phrases that he used was “the importance of speaking truth to power.” I am grateful that we have a four-star Marine on top of the DHS organization. I think he is an outstanding Secretary.

Mr. Kerner, the thoughts you had there, how can we scale this up and approve this accountability across the entire Federal Government? We talk about draining the swamp. This is about as swamp-like as it gets at times. There is change we need to make fundamentally within the Federal Government. How would we expand this?

Mr. KERNER. I think it is important to set the tone and to let the entire Federal workforce know that we are behind them, we stand behind them. Congress is going to give us the tools—and by “us,” I mean OSC, should I be confirmed. But it will give OSC the tools to protect whistleblowers, to make sure that whistleblowers have a safe place to go to make their disclosures where two things will happen:

One, they will get the results. Back when I was the investigator on Fast and Furious, gunwalking, which was a crazy practice of essentially allowing high-grade weapons to go to Mexican drug cartels, we stopped that. Once the light was shined on it, that was going to stop.

The second thing is the whistleblowers will be protected. And one of the things I am most proud of is that many of the Fast and Furious whistleblowers were, in fact, not punished. The leadership was. They were held accountable. But the people who blew the whistle are now in that leadership.

Senator DAINES. Well, that is the desired outcome—right?—that you just described there. Thank you. Thank you both for your testimony, your thoughtful answers, your passion for the role. Very important.

Chairman Johnson, thank you for holding this hearing, and I respectfully urge—I have some bipartisan acquisition reform bills—that we may consider those at the next markup.

Chairman JOHNSON. OK. Thank you, Senator Daines.

Mr. Kerner, as long as you were talking about Fast and Furious, I know it is somewhat off subject, but I just met with a delegation of Mexican senators yesterday, and that was their primary complaint. We have the drugs flowing in because of our insatiable demand for drugs. We have held multiple hearings on the lack of our border security. I certainly pointed that out as one of if not the root cause of our unsecured borders, our insatiable demand for drugs. And, they talked about, on the flip side of that, all that money flowing into Mexico is then used to purchase weapons coming out of America.

Because you were so involved in Fast and Furious, what kind of information do you have in terms of the reality of the arms flow in Mexico? I have not really talked to our staff. I think this would be a good topic for a hearing in the future.

Mr. KERNER. Absolutely, Mr. Chairman. So in Fast and Furious, of course, we talk about 2,000-plus AK-47 type guns, or AR-15s, going there because the Federal Government wanted them to go there.



Chairman JOHNSON. Again, that was a Federal Government operation. What about the entire illegal flow? That was an attempt to really target the kingpins there. Do you have knowledge of the total illegal flow?

Mr. KERNER. Yes. When we were looking at Fast and Furious, a lot of the times people would bring up the fact that they are legal. They call that, I think, "the iron river." A lot of the guns are going there.

I think that goes really more toward DOJ. They are going to have to do interdictions. One of the efforts that was attempted was to stop straw buyers, that that was where you stop it. You get people who go in and purchase guns for others. You follow them, and when they turn them over, you arrest the people higher up. That is obviously a law enforcement solution.

There are various other solutions in terms of—the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) obviously does also registration or do they give licenses to federally licensed firearms dealers. One of the things is close cooperation with them to make sure that the guns go to legal American citizens who are buying the guns for their purposes, legal purposes, and not to be trafficked.

Chairman JOHNSON. OK. Before I start questioning Ms. Grady, I just want to again reinforce that this Committee will hold the Administration accountable. From my standpoint, the best way to deter wrongdoing or any kind of corruption is to let people realize we will hold them accountable. I think that is the strongest message certainly you can send in your new capacity, that there will be no partisanship here when it comes to enforcing the law and enforcing ethical standards.

Ms. Grady, you spoke about your strong support for St. Elizabeths, and certainly as somebody who has managed operations, I can certainly understand that as well. I do not expect you to be up to speed in terms of all the specifics, but you have been so involved in appropriations and the procurement policies both in DHS and DOD, such a massive undertaking. I do not have a real strong understanding. What have been the impediments? What are we going to need to do to complete it? Can you just in general kind of describe your current understanding of that and what we need to move forward?

Ms. GRADY. My understanding is somewhat dated and primarily shaped by the fact that I was part of the Coast Guard that moved over to St. Elizabeths. There were challenges associated with consistent funding not just for the buildings themselves but for the infrastructure to accommodate the additional traffic flow into the area. The desire was not to disrupt the community but make sure that that happened.

There are also additional challenges in that it is a historic property, so it is hard enough to do renovations on a building that is in good repair let alone the restrictions that are associated with a historic property. Those are challenges that I believe the Department has encountered as well as consistent funding streams.

Chairman JOHNSON. So just a few bullet points: You have not had a consistent funding stream. Anytime you start doing construction in the neighborhood, that creates local, I guess, zoning issues

or whatever. And then the historic nature of the buildings has also been a real impediment.

Ms. GRADY. The reference I was making to the local infrastructure is actually off ramps from the major highways so that you are not putting a large amount of traffic through neighborhoods.

Chairman JOHNSON. OK. We held a hearing from the front lines, and we had union representatives from the primary people charged with enforcing immigration laws and securing our border. I think one of the highlights of that hearing was really understanding the lack of pay parity, employment policy parity, and the concern of some of the agencies, probably in the lower scale in terms of benefits and pay and policies, afraid that they are just going to lose their workforce to the other agencies that are doing the hiring.

We have tried to, in, I think, a very bipartisan fashion, work with Elaine Duke and the Department to try and find out exactly what those issues are and give the support to the Department to fix that. Can you talk a little bit about that? Do you know what I am talking about? Can you give us certainly from your standpoint how you would be involved in coming to a rapid conclusion of creating parity or more parity?

Ms. GRADY. I am generally aware of the issue but have not been involved in specific discussions relative to the ongoing Department's efforts. I understand that the Deputy Secretary is leading efforts and is working closely with the Chief of Human Capital to look at harmonizing the pay and benefits across the Department to ensure that if there are differing pay scales or differing treatment, that those are commensurate with highly sought after skills, retention, that they are addressing a specific challenge and they are looking across the Department. But I am not aware of specific actions that they are taking in response to that.

Chairman JOHNSON. OK. My final question just is a pretty simple one. As you are entering this new position, what will be your top priority? I will start with you, Mr. Kerner.

Mr. KERNER. The top priority will be to make sure that the employees at OSC know that I believe in their mission, that I believe in what they are doing, and that it is our job to protect all the Federal employees and that we are going to do so independently, we are going to do so fairly, and we are going to do so aggressively. We are going to protect the workforce to the best of our ability.

Chairman JOHNSON. That sounds pretty good. Ms. Grady.

Ms. GRADY. My top priority would also be workforce. DHS has tremendous folks who are doing amazing things every day, so ensuring that they understand just how valued their contributions are within and external to the Department, and reinforce the importance of the mission and that they realize that every single one of them is contributing to our Nation's safety every day.

Chairman JOHNSON. OK. Let me just say what I have seen of Secretary Kelly being just an exceptional leader and the effect that has had on the workforce is really pretty amazing, quite honestly. I am glad to hear both of you list it as a top priority, particularly in an agency that has had problems with morale and that type of thing. It is good that you are going to be focusing on that.

I truly appreciate your willingness to serve. The confirmation process is not particularly fun. The fact that you are willing to sub-

ject yourself to it, I appreciate. I appreciate your families' willingness to do that. I certainly want to thank your husband, Ms. Grady, for his service to this Nation, and both your families for the fact that they are probably going to be seeing both of you a little bit less, maybe a lot less. But the fact that you are patriots and you are willing to serve your Nation in this capacity in such important roles, this Committee truly appreciates.

With that, the nominees have made financial disclosures and provided responses to biographical and prehearing questions submitted by the Committee.<sup>1</sup> Without objection, this information will be made part of the hearing record with the exception of the financial data,<sup>2</sup> which are on file and available for public inspection in the Committee offices.

Chairman JOHNSON. This hearing record will remain open until noon tomorrow, June 29th, for the submission of statements and questions for the record.

Chairman JOHNSON. This hearing is adjourned.

[Whereupon, at 11:04 a.m., the Committee was adjourned.]

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<sup>1</sup>The information of Ms. Grady appears in the Appendix on page 31.

<sup>2</sup>The information of Mr. Kerner appears in the Appendix on page 89.



## A P P E N D I X

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**Opening Statement of Chairman Ron Johnson  
Nomination Hearing to Consider Claire M. Grady to be Under Secretary for Management,  
U.S. Department of Homeland Security and  
Henry Kerner to be Special Counsel, Office of Special Counsel  
June 28, 2017**

Today the Committee will consider two nominations within its jurisdiction that are integral to ensuring the Department of Homeland Security is efficient and effective, and that the people who raise issues of waste, fraud, and abuse throughout the federal government are protected.

Under Secretary for Management, Department of Homeland Security (DHS)

The Under Secretary for Management (USM) is responsible for ensuring that DHS's workforce has clearly defined responsibilities and the means to efficiently carry out the Department's mission. The USM's office handles a budget of just under \$1 million and approximately 1,800 full time equivalents.

More broadly, the USM oversees the Department's budget of almost \$66 billion, appropriations, expenditure of funds, accounting, and finance; procurement processes; human resources and personnel of approximately 240,000 employees; IT systems, facilities, property, equipment, and other material resources; and performance measurements. Several programs that fall squarely under the USM's responsibilities have been flagged by non-partisan government watchdogs as being at high-risk for abuse, including the Department's management of human capital (including employee morale and engagement, and cohesion among component leadership), management of its grant and acquisition programs, and the Department's cybersecurity.

Special Counsel, Office of Special Counsel

The Special Counsel is the head of the Office of Special Counsel (OSC), an independent agency created by Congress in 1979. The OSC has over 100 employees and operates a budget of almost \$25 million each year. The OSC is charged with: (1) providing a safe haven for federal employees to make protected disclosures (with the exception of certain intelligence agencies); and (2) investigating allegations of whistleblower retaliation or other prohibited personnel practices. Federal employees are protected when they disclose allegations of: a violation of law, rule or regulation; gross mismanagement or waste; abuse of authority; or dangers to public health or safety.

If the OSC reviews a protected disclosure and finds there is a "substantial likelihood" of wrongdoing by an agency, it transfers the matter to the agency for investigation and issues a report to Congress and the President. It cannot, however, force the agency to take other action. If the OSC finds that an individual faced retaliation for the disclosure, it may negotiate "disciplinary action" with the agency against the retaliating employee and prosecute when appropriate.

The OSC also investigates Hatch Act violations and protects the employment and reemployment rights of civilian military members. Finally, it plays an important role in training agencies on how to handle whistleblowers and employees on their rights through its outreach and 2302(c) Certification Program.

Claire Grady

Ms. Grady has extensive experience in federal acquisitions and procurement. She is currently the Director of Defense Procurement and Acquisition Policy at the Department of Defense, and previously served as the Deputy Assistant Commandant for Acquisition and Director of Acquisition Services for the United States Coast Guard. Ms. Grady also previously served as the Director of Strategic Initiatives in the Office of the Chief Procurement Officer at the Department of Homeland Security shortly after it was created. Ms. Grady has a Master of Business Administration degree from the University of Maryland, a Master of Science degree from the National Defense University's Industrial College of the Armed Forces, and a Bachelor of Arts degree from Trinity University.

Henry Kerner

Mr. Kerner is currently the Assistant Vice President of Investigations at the Cause of Action Institute. Prior to that, he was the Deputy Director of Investigations at the House Oversight and Government Reform Committee, and the Staff Director and Chief Counsel of this Committee's Permanent Subcommittee on Investigations under then-Ranking Member McCain. Mr. Kerner also has years of litigation experience working as a Deputy District Attorney at the Los Angeles County District Attorney's Office. Mr. Kerner has a law degree from Harvard University and Master of Arts and Bachelor of Arts degrees from UCLA.

I'd like to thank the nominees for agreeing to serve in these important positions, and I look forward to hearing their testimony.

**Opening Statement of Senator Heidi Heitkamp (in Ranking Member role)**

**Committee on Homeland Security & Governmental Affairs**

*Nominations of Claire M. Grady to be Under Secretary for Management, U.S. Department of Homeland Security and Henry Kerner to be Special Counsel, Office of Special Counsel*

**Wednesday, June 28, 2017**

*As Prepared:*

Thank you Chairman Johnson.

I know Ranking Member McCaskill wishes she was able to be here today, and I know she appreciates the nominees' work with hers and Chairman Johnson staffs throughout this process.

I am honored that Ranking Member McCaskill asked me to step in for her this morning, and I am looking forward to hearing from both nominees regarding how they can best serve the American people through their roles in the Office of Special Counsel and the Department of Homeland Security, if confirmed.

At the heart of OSC's mission is the protection of federal employees from prohibited personnel practices, and specifically, from illegal retaliation against whistleblowers.

As the Ranking Member of the Homeland Security and Governmental Affairs Subcommittee with oversight over the federal workforce, I cannot emphasize enough what a crucial time it is to make sure that our federal workers know that they have a safe and independent agency to turn to in the OSC.

In 2016 alone, the OSC received over 6,000 new matters—a 53 percent increase from 2010. That is a tremendous upturn, and it speaks not only to the large number of prohibited personnel practice complaints in general, but also to the trust federal employees had in Special Counsel Lerner during her tenure at the OSC.

At a time when our federal workforce is undergoing a number of new challenges such as reorganization at the behest of the Office of Management and Budget, it is important that the Special Counsel remains an independent, just, fair, and unbiased

voice when it comes to protecting federal employees when they report any wrongdoing from within their respective agencies.

The DHS Under Secretary for Management plays a critical role in achieving excellence in all areas of DHS mission support. While DHS has made considerable progress in recent years to unify its component agencies, major management challenges remain in the four key areas of human capital, acquisitions, financial management, and IT.

Failure to address these challenges could have serious consequences for U.S. national and economic security, and that is why it is critical to have a qualified individual at the helm.

Specifically, we need someone with demonstrated leadership and experience, a robust understanding of DHS and its various components, a willingness to engage with various stakeholders, and an ability to find opportunities to improve the way DHS functions.

We appreciate the nominees' time today, and I am looking forward to hearing Ms. Grady's and Mr. Kerner's responses to the Committee members' questions.

###



**Statement of Claire M. Grady  
Before the  
U.S. Senate Homeland Security and Governmental Affairs Committee  
On Her Nomination to Serve as  
Under Secretary for Management of the Department of Homeland Security**

**June 28, 2017**

Chairman Johnson, Ranking Member McCaskill, and distinguished Members of this Committee, it is an honor to appear before you as the President's nominee to be the Under Secretary for Management for the Department of Homeland Security. I am grateful to the President, Secretary Kelly and Deputy Secretary Duke for the trust and confidence they have placed in me.

I would like to thank the Members of this Committee and their staffs for the important work you do. I appreciated the opportunity to speak with several of you to discuss the matters of particular importance to you regarding the management operations of the Department of Homeland Security. For those of you I have not yet had the privilege to meet during this process, if confirmed, I look forward to the opportunity to do so in the near future.

I would also like to thank the many current and former employees of the Department who have contacted me throughout this process to offer their support and encouragement. It is truly the men and women of DHS who ensure mission success, frequently working very long hours and overcoming challenging circumstances to do so. There is no more dedicated or talented group of professionals anywhere in the world, and their outreach and expressions of support have been both humbling and inspiring.

Before I speak further about the important work the Department does to safeguard our nation, I'd like to express my gratitude to the friends and family who were able to attend in person to support me today, including: my mother, Mary Grady, my aunt and uncle, Helen and Vincent Walters, my son-in-law, Lieutenant Michael Berl, my oldest sister Kelly Grady and her husband Michael Zuckerman, and Maggie Meisberger, the oldest of my five nieces - each of whom is amazing in their own right. I would also like to acknowledge my husband, Colonel Rick Cornelio, who, as always, has my back. I am so proud of him and his service to our nation, first during his 34 years on active duty in the Air Force and now as a civil servant. His love and support have been unwavering. With three simple words "not big enough", he reminds me that while challenges may be serious and daunting, they still can be tackled.

More than 15 years after 9/11, the threats to our nation, our people and our way of life remain. The world is a dangerous place and the velocity of those threats is ever changing and accelerating. Round the clock, whether at a computer, in our communities, at an airport, in a port, at sea, at a desk, in the air, in the classroom, on the border, in a command center, or in a lab, the professionals of DHS valiantly serve our nation and keep us safe. They have committed themselves to thwarting our nation's adversaries (natural or man-made) in an environment where a single incident can have devastating consequences. And if tragedy were to befall our nation,

they are prepared to respond and aid in the recovery. I can think of no greater honor than to be considered for a position to help these dedicated men and women safeguard our nation by strengthening and integrating the Department's management functions.

Let me share some information about my professional background. I am a career Federal civil servant and have had the privilege of supporting our nation for more than 25 years. I started as a GS-7 intern, progressed through positions of increasing responsibility and scope, and have been a member of the Senior Executive Service for over a decade. I served in senior positions at the component and headquarters level of two agencies, the Departments of Defense and Homeland Security, leading large, diverse, and geographically dispersed workforces to deliver results.

Currently, I am the Department of Defense Director of Defense Procurement and Acquisition Policy, responsible for over 30,000 procurement professionals throughout the world, who, in 2017, did brilliant work in obligating \$297 billion in support of the warfighter. I also advise senior DoD leadership on acquisition strategies for major defense acquisition programs and major automated information systems. Prior to this, I proudly worked at DHS for nearly ten years, with assignments at both headquarters and one of DHS' operational components, the United States Coast Guard. During my tenure at the Coast Guard, I played key roles in several important changes, including the stand-up of the Coast Guard acquisition directorate and Coast Guard modernization, which realigned the organization to maximize the operational effectiveness and value delivered to the nation.

My parents raised me to value hard work, discipline, and perseverance. They instilled in me the expectation that when things get difficult, it is our obligation to help our family, friends, neighbors and strangers - to take on the tough challenges and make things better. I was never more aware of this responsibility than when presented with the opportunity to be considered for this position. I recognize the many challenges DHS faces: the diverse mission set, myriad stakeholders; complex oversight; and the urgency and criticality of the work itself. I know none of this is easy. But, I am impressed by the progress that has been made through the efforts of not just a few, but a multitude of people at every level within the Department.

If confirmed, I would be committed to building on the great things that are underway throughout DHS, striving for excellence in all areas of mission support and delivering maximum value for every dollar entrusted to the Department. I would welcome the opportunity to engage collaboratively with Members of this Committee and other Members of Congress to assist and inform their important work of oversight and support for the Department. Finally, I would be dedicated to ensuring a culture of respect and professionalism; the dedicated men and women of DHS and our nation deserve nothing less.

If confirmed, I look forward to returning to the Department and re-joining the nearly 240,000 outstanding security professionals that are DHS.

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

**REDACTED**

**HSGAC BIOGRAPHICAL QUESTIONS FOR EXECUTIVE NOMINEES**

**1. Basic Biographical Information**

Please provide the following information.

<i>Position to Which You Have Been Nominated</i>	
<u>Name of Position</u>	<u>Date of Nomination</u>
<u>Under Secretary of Management, Department of Homeland Security</u>	<u>May 18, 2017</u>

<i>Current Legal Name</i>			
<u>First Name</u>	<u>Middle Name</u>	<u>Last Name</u>	<u>Suffix</u>
Claire	Marie	Grady	

<i>Addresses</i>					
<u>Residential Address</u> (do not include street address)			<u>Office Address</u> (include street address)		
			Street: 3060 Defense Pentagon		
City: Alexandria	State: VA	Zip: 22312	City: Washington	State: DC	Zip: 20301-3060

<i>Other Names Used</i>						
<u>First Name</u>	<u>Middle Name</u>	<u>Last Name</u>	<u>Suffix</u>	<u>Check if Multiple Names</u>	<u>Name Used From</u> (Month/Year) (Check box if estimate)	<u>Name Used To</u> (Month/Year) (Check box if estimate)
N/A					Est ☐	Est ☐
					Est ☐	Est ☐

<i>Birth Year and Place</i>	
<b>Year of Birth</b> (Do not include month and day.)	<b>Place of Birth</b>
1967	Philadelphia, PA

<i>Marital Status</i>					
Check All That Describe Your Current Situation:					
Never Married	Married	Separated	Annulled	Divorced	Widowed
<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

<i>Spouse's Name</i> (current spouse only)			
<u>Spouse's First Name</u>	<u>Spouse's Middle Name</u>	<u>Spouse's Last Name</u>	<u>Spouse's Suffix</u>
Ricky	Joseph	Cornelio	

<i>Spouse's Other Names Used</i> (current spouse only)						
<u>First Name</u>	<u>Middle Name</u>	<u>Last Name</u>	<u>Suffix</u>	<small>Check if Maiden Name</small>	<u>Name Used From</u> (Month/Year) (Check box if estimate)	<u>Name Used To</u> (Month/Year) (Check box if estimate)
N/A					Est <input type="checkbox"/>	Est <input type="checkbox"/>
					Est <input type="checkbox"/>	Est <input type="checkbox"/>

<i>Children's Names (if over 18) Step Children</i>			
First Name	Middle Name	Last Name	Suffix
Christine	Lynn	Berl	
Robert	John	Cornelio	

**2. Education**

List all post-secondary schools attended.

Name of School	Type of School (vocational/technical/trade school, college/university/military college, correspondence/distance/extension/online school)	Date Began School		Date Ended School		Degree	Date Awarded
		(month/year) (check box if estimate)		(month/year) (check box if estimate) (check "present" box if still in school)			
Trinity University	College/University	08/1985	<input type="checkbox"/> Est <input checked="" type="checkbox"/>	05/1989	<input type="checkbox"/> Est <input checked="" type="checkbox"/> Present	BA	05/1989
London School of Economics	College/University --Study Abroad	09/1983	<input type="checkbox"/> Est <input checked="" type="checkbox"/>	12/1983	<input type="checkbox"/> Est <input checked="" type="checkbox"/> Present	none	
University of Maryland	College/University	08/1995	<input type="checkbox"/> Est <input checked="" type="checkbox"/>	08/2000	<input type="checkbox"/> Est <input checked="" type="checkbox"/> Present	MBA	12/2000
Industrial College of the Armed Forces (now the Eisenhower School)	College/University	08/2003	<input type="checkbox"/> Est <input checked="" type="checkbox"/>	06/2004	<input type="checkbox"/> Est <input checked="" type="checkbox"/> Present	MS	06/2004

### 3. Employment

(A) List all of your employment activities, including unemployment and self-employment. If the employment activity was military duty, list separate employment activity periods to show each change of military duty station. Do not list employment before your 18th birthday unless to provide a minimum of two years of employment history.

<u>Type of Employment</u> (Active Military Duty Station, National Guard/Reserve, USPHS Commissioned Corps, Other Federal employment, State Government (Non-Federal Employment), Self-employment, Unemployment, Federal Contractor, Non-Government Employment (excluding self-employment), Other	<u>Name of Your Employer/Assigned Duty Station</u>	<u>Most Recent Position Title/Rank</u>	<u>Location</u> (City and State only)	<u>Date Employment Began</u> (month/year) (check box if estimate)	<u>Date Employment Ended</u> (month/year) (check box if estimate) (check "present" box if still employed)
Federal Employment	Naval Sea Systems Command,	Deputy Division Director	Crystal City, VA Washingt on DC (post BRAC)	10/1990 <input type="checkbox"/> Est	10/2006 <input type="checkbox"/> Est
Federal Employment	Department of Homeland Security	Director of Strategic Initiatives	Washingt on DC	10/2006 <input type="checkbox"/> Est	07/2007 <input type="checkbox"/> Est
Federal Employment	United States Coast Guard HQ	Deputy Asst. Commandant for Acquisition	Washingt on, DC	07/2007 <input type="checkbox"/> Est	05/2015 <input type="checkbox"/> Est
Federal Employment	Department of Defense/Pentagon,	Director, Defense Procurement and Acquisition Policy	Washingt on, DC	05/2015 <input type="checkbox"/> Est	Present <input type="checkbox"/> Est
				<input type="checkbox"/> Est	<input type="checkbox"/> Est

(B) List any advisory, consultative, honorary or other part-time service or positions with federal, state, or local governments, not listed elsewhere.

<u>Name of Government Entity</u>	<u>Name of Position</u>	<u>Date Service Began</u>	<u>Date Service Ended</u>	
		(month/year) (check box if estimate)	(month/year) (check box if estimate) (check "present" box if still serving)	
NONE		Est <input type="checkbox"/>	Est <input type="checkbox"/>	Present <input type="checkbox"/>
		Est <input type="checkbox"/>	Est <input type="checkbox"/>	Present <input type="checkbox"/>
		Est <input type="checkbox"/>	Est <input type="checkbox"/>	Present <input type="checkbox"/>

**4. Potential Conflict of Interest**

(A) Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.

In connection with the nomination process, I have consulted with the Office of Government Ethics and the Department of Homeland Security's Designated Agency Ethics Official to identify potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of an ethics agreement that I have entered into with the Department's Designated Agency Ethics Official and that has been provided to this Committee. I am not aware of any other potential conflicts of interest.

(B) Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration or execution of law or public policy, other than while in a federal government capacity.

NONE

**5. Honors and Awards**

List all scholarships, fellowships, honorary degrees, civilian service citations, military medals, academic or professional honors, honorary society memberships and any other special recognition for outstanding service or achievement.

- National Merit Scholarship (undergraduate)
- Trinity University Presidential Scholarship (undergraduate)
- Navy Meritorious Civil Service (2)
- Presidential Rank Award, Meritorious Executive
- USCG Superior Achievement Award
- DoD Distinguished Service Award

**6. Memberships**

List all memberships that you have held in professional, social, business, fraternal, scholarly, civic, or charitable organizations in the last 10 years.

Unless relevant to your nomination, you do NOT need to include memberships in charitable organizations available to the public as a result of a tax deductible donation of \$1,000 or less, Parent-Teacher Associations or other organizations connected to schools attended by your children, athletic clubs or teams, automobile support organizations (such as AAA), discounts clubs (such as Groupon or Sam's Club), or affinity memberships/consumer clubs (such as frequent flyer memberships).

<u>Name of Organization</u>	<u>Dates of Your Membership</u> (You may approximate.)	<u>Position(s) Held</u>
National Contract Management Association (NCMA)	07/2015 to present	Board of Advisors member



**7. Political Activity**

(A) Have you ever been a candidate for or been elected or appointed to a political office?

<u>Name of Office</u>	<u>Elected/Appointed/ Candidate Only</u>	<u>Year(s) Election Held or Appointment Made</u>	<u>Term of Service (if applicable)</u>
N/A			

(B) List any offices held in or services rendered to a political party or election committee during the last ten years that you have not listed elsewhere.

<u>Name of Party/Election Committee</u>	<u>Office/Services Rendered</u>	<u>Responsibilities</u>	<u>Dates of Service</u>
N/A			

(C) Itemize all individual political contributions of \$200 or more that you have made in the past five years to any individual, campaign organization, political party, political action

committee, or similar entity. Please list each individual contribution and not the total amount contributed to the person or entity during the year.

<u>Name of Recipient</u>	<u>Amount</u>	<u>Year of Contribution</u>
N/A		

**8. Publications and Speeches**

(A) List the titles, publishers and dates of books, articles, reports or other published materials that you have written, including articles published on the Internet. Please provide the Committee with copies of all listed publications. In lieu of hard copies, electronic copies can be provided via e-mail or other digital format.

<u>Title</u>	<u>Publisher</u>	<u>Date(s) of Publication</u>
N/A		

(B) List any formal speeches you have delivered during the last five years and provide the Committee with copies of those speeches relevant to the position for which you have been nominated. Include any testimony to Congress or any other legislative or administrative body. These items can be provided electronically via e-mail or other digital format.

<u>Title/Topic</u>	<u>Place/Audience</u>	<u>Date(s) of Speech</u>
GSA Federal Acquisition Training Symposium – DoD Contracting Perspectives	Huntsville, AL / Government and Industry acquisition professionals	4/25/2017 (no written speech)
33rd Annual NDIA Logistics Forum – Panel discussion on sustainment and performance based logistics	Tampa, FL / Government and Industry supply chain and logistics professionals	4/19/2017 (no written speech)
SOCOM Procurement Collaboration & Training Summit – DoD Procurement goals and focus areas	Lexington, KY/US Special Operations Command (SOCOM) Government acquisition professionals	4/12/2017 (no written speech)
DCMA Contracting Functional Training Conference – trends in DoD acquisition	Leesburg, VA/Defense Contract Management Agency Government contracting professionals	3/15/2017 (no written speech)
3rd Annual Information Technology Alliance for Public Sector (ITAPS) Procurement Policy Summit- Emerging acquisition trends	Middleburg, VA/ Industry Association of IT professionals	2/2/2017 (no written speech)
ITAPS Federal Procurement Policy Committee Meeting – DoD contracting update	Washington DC/ Industry Association of IT professionals	9/7/2016 (no written speech)
DoD Contracting & Cost Community Collaboration Conference – Pricing techniques	Leesburg, VA/Federal Cost estimating and pricing personnel	7/21/2016 (no written speech)
Graduation Speaker for the Leadership Excellence in Acquisition Program (LEAP) Partnership for Public Service ( <a href="https://ourpublicservice.org/">https://ourpublicservice.org/</a> )	Washington DC/ Government (future federal acquisition leaders)	6/30/2016 (no written speech)
United States Marine Corps (USMC) Contracts Training	Fredericksburg, VA/Marine Corps Contracting Professionals	6/22/2016 (no written speech)

Event – leadership and professional development		
DCMA Worldwide Training Conference – State of DoD procurement	Leesburg, VA/Government acquisition professionals	6/15/2016 (no written speech)
Senior Acquisition Management Course –trends in acquisition for senior leaders	Ft Belvoir, VA/Government acquisition professionals	6/07/2016 (no written speech)
Procurement Fraud Working Group 2016 Training Seminar – Importance of Collaboration	Alexandria, VA/Government IG, fraud investigators, and acquisition professionals	05/03/2016 (no written speech)
Army Advocate for Competition Workshop – Competition goals and objectives	Fairfax, VA/Army Contracting, program management and competition advocate personnel	05/03/2016 (no written speech)
2016 Army Principal Assistant Responsible for Contracting (PARC) Leadership Workshop – leadership perspective on acquisition	Kansas City, MO/Army contracting leadership	04/19/2016 (no written speech)
ACT-IAC Acquisition Excellence Conference – Emerging trends in acquisition	Washington DC/Government, industry technology and acquisition professionals	03/22/2016 (no written speech)
Panel at the American Bar Association's Public Contract Law Section – emerging issues in acquisition	Annapolis, MD/Government and industry (legal professionals)	05/11/2016 (no written speech)
Procurement Round Table DoD Contracting Perspectives	Washington DC/ Procurement Round Table ( <a href="http://www.procurementroundtable.org/">http://www.procurementroundtable.org/</a> )	01/17/2016 (no written speech)
34 <sup>th</sup> Annual NCMA Government Contract Management Symposium. Goals and initiatives for Defense procurement	Washington, DC/government and industry contracting professionals	12/14/2015 (no written speech)
National Defense Industrial Association (NDIA) DoD Contracting Perspectives	Arlington, VA/government and industry acquisition executives	12/04/2015 (no written speech)
Navy League Sea Air Space – facilitator panel on state of Coast Guard acquisition	National Harbor, MD/government and industry acquisition professionals	Fall 2014 (no written speech)

(C) List all speeches and testimony you have delivered in the past ten years, except for those the text of which you are providing to the Committee.

Title	Place/Audience	Date(s) of Speech
Assessing the Department of Defense's Execution of Responsibilities in the U.S. Foreign Military Sales Program	Rayburn House Office Building/ HASC Oversight and Investigation (O&I) Subcommittee	5/17/2016 (word documents attached)
Assessing the Department of Defense's Execution of Responsibilities in the U.S. Foreign Military Sales Program	Rayburn House Office Building/ HASC Oversight and Investigation (O&I) Subcommittee	03/07/2017 (no written or oral testimony provided)

**9. Criminal History**

Since (and including) your 18<sup>th</sup> birthday, has any of the following happened?

- Have you been issued a summons, citation, or ticket to appear in court in a criminal proceeding against you? (Exclude citations involving traffic infractions where the fine was less than \$300 and did not include alcohol or drugs.)  
NO
- Have you been arrested by any police officer, sheriff, marshal or any other type of law enforcement official?  
NO
- Have you been charged, convicted, or sentenced of a crime in any court?  
NO
- Have you been or are you currently on probation or parole?  
NO

- Are you currently on trial or awaiting a trial on criminal charges?  
NO
- To your knowledge, have you ever been the subject or target of a federal, state or local criminal investigation?  
NO

**If the answer to any of the questions above is yes, please answer the questions below for each criminal event (citation, arrest, investigation, etc.). If the event was an investigation, where the question below asks for information about the offense, please offer information about the offense under investigation (if known).**

- A) Date of offense:
- a. Is this an estimate (Yes/No):  
N/A
- B) Description of the specific nature of the offense:  
N/A
- C) Did the offense involve any of the following?  
 1) Domestic violence or a crime of violence (such as battery or assault) against your child, dependent, cohabitant, spouse, former spouse, or someone with whom you share a child in common: Yes / No  
 2) Firearms or explosives: Yes / No  
 3) Alcohol or drugs: Yes / No  
 N/A
- D) Location where the offense occurred (city, county, state, zip code, country):  
N/A
- E) Were you arrested, summoned, cited or did you receive a ticket to appear as a result of this offense by any police officer, sheriff, marshal or any other type of law enforcement official: Yes / No  
N/A  
 1) Name of the law enforcement agency that arrested/cited/summoned you:  
 2) Location of the law enforcement agency (city, county, state, zip code, country):
- F) As a result of this offense were you charged, convicted, currently awaiting trial, and/or ordered to appear in court in a criminal proceeding against you: Yes / No  
N/A  
 1) If yes, provide the name of the court and the location of the court (city, county, state, zip code, country):  
 2) If yes, provide all the charges brought against you for this offense, and the outcome of each charged offense (such as found guilty, found not-guilty, charge dropped or "nole pros," etc). If you were found guilty of or pleaded guilty to a lesser offense, list separately both the original charge and the lesser offense:  
 3) If no, provide explanation:
- G) Were you sentenced as a result of this offense: Yes / No:  
N/A

- H) Provide a description of the sentence:  
N/A
- I) Were you sentenced to imprisonment for a term exceeding one year: Yes / No  
N/A
- J) Were you incarcerated as a result of that sentence for not less than one year: Yes / No  
N/A
- K) If the conviction resulted in imprisonment, provide the dates that you actually were incarcerated:  
N/A
- L) If conviction resulted in probation or parole, provide the dates of probation or parole:  
N/A
- M) Are you currently on trial, awaiting a trial, or awaiting sentencing on criminal charges for this offense: Yes /  
No  
N/A
- N) Provide explanation:  
N/A

**10. Civil Litigation and Administrative or Legislative Proceedings**

(A) Since (and including) your 18th birthday, have you been a party to any public record civil court action or administrative or legislative proceeding of any kind that resulted in (1) a finding of wrongdoing against you, or (2) a settlement agreement for you, or some other person or entity, to make a payment to settle allegations against you, or for you to take, or refrain from taking, some action. Do NOT include small claims proceedings.

<u>Date Claim/Suit Was Filed or Legislative Proceedings Began</u>	<u>Court Name</u>	<u>Name(s) of Principal Parties Involved in Action/Proceeding</u>	<u>Nature of Action/Proceeding</u>	<u>Results of Action/Proceeding</u>
N/A				

(B) In addition to those listed above, have you or any business of which you were an officer, director or owner ever been involved as a party of interest in any administrative agency proceeding or civil litigation? Please identify and provide details for any proceedings or

civil litigation that involve actions taken or omitted by you, or alleged to have been taken or omitted by you, while serving in your official capacity.

<u>Date Claim/Suit Was Filed</u>	<u>Court Name</u>	<u>Name(s) of Principal Parties Involved in Action/Proceeding</u>	<u>Nature of Action/Proceeding</u>	<u>Results of Action/Proceeding</u>
Est. 2012 -2015 timeframe	Merit Systems Protection Board and the United States Office of Special Counsel	Mr. Thomas F. Day and DHS/USCG	The complainant, an employee within my chain of command at the Coast Guard from 2007-2015, but several levels removed from me. filed numerous complaints on myriad issues naming multiple people throughout the organization, including me and individuals I directly supervised. His claims involved allegations spanning a timeframe prior to my arrival at the Coast Guard in 2007 through approximately 2015. He alleged adverse personnel actions had been taken violating his EEO protected class status (gender, age, whistle blower) and also alleged a hostile workplace.	Claims with the United States Office of Special Counsel (OSC) were closed by the OSC without any action. The Merit Systems Protection Board (MSPB) found for the agency. This decision was upheld on appeal in September 2016. The complainant elected to appeal his decision to the full Board of the MSPB. A new MSPB Chairperson will need to be nominated and confirmed before a decision will be received.



(C) For responses to the previous question, please identify and provide details for any proceedings or civil litigation that involve actions taken or omitted by you, or alleged to have been taken or omitted by you, while serving in your official capacity.

**11. Breach of Professional Ethics**

(A) Have you ever been disciplined or cited for a breach of ethics or unprofessional conduct by, or been the subject of a complaint to, any court, administrative agency, professional association, disciplinary committee, or other professional group? Exclude cases and proceedings already listed.

<u>Name of Agency/Association/Committee/Group</u>	<u>Date Citation/Disciplinary Action/Complaint Issued/Initiated</u>	<u>Describe Citation/Disciplinary Action/Complaint</u>	<u>Results of Disciplinary Action/Complaint</u>
NEA			

(B) Have you ever been fired from a job, quit a job after being told you would be fired, left a job by mutual agreement following charges or allegations of misconduct, left a job by mutual agreement following notice of unsatisfactory performance, or received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as violation of a security policy?  
NO

**12. Tax Compliance**

(This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

**REDACTED**

**REDACTED**

**13. Lobbying**

In the past ten years, have you registered as a lobbyist? If so, please indicate the state, federal, or local bodies with which you have registered (e.g., House, Senate, California Secretary of State).

NO

**14. Outside Positions**

X See OGE Form 278. (If, for your nomination, you have completed an OGE Form 278 Executive Branch Personnel Public Financial Disclosure Report, you may check the box here to complete this section and then proceed to the next section.)

For the preceding ten calendar years and the current calendar year, report any positions held, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities and those solely of an honorary nature.

<u>Name of Organization</u>	<u>Address of Organization</u>	<u>Type of Organization</u> (corporation, firm, partnership, other business enterprise, other non-profit organization, educational institution)	<u>Position Held</u>	<u>Position Held From</u> (month/year)	<u>Position Held To</u> (month/year)


**15. Agreements or Arrangements**

See OGE Form 278. (If, for your nomination, you have completed an OGE Form 278 Executive Branch Personnel Public Financial Disclosure Report, you may check the box here to complete this section and then proceed to the next section.)

As of the date of filing your OGE Form 278, report your agreements or arrangements for: (1) continuing participation in an employee benefit plan (e.g. pension, 401k, deferred compensation); (2) continuation of payment by a former employer (including severance payments); (3) leaves of absence; and (4) future employment.

Provide information regarding any agreements or arrangements you have concerning (1) future employment; (2) a leave of absence during your period of Government service; (3) continuation of payments by a former employer other than the United States Government; and (4) continuing participation in an employee welfare or benefit plan maintained by a former employer other than United States Government retirement benefits.

<u>Status and Terms of Any Agreement or Arrangement</u>	<u>Parties</u>	<u>Date</u> (month/year)

**16. Additional Financial Data**

All information requested under this heading must be provided for yourself, your spouse, and your dependents. (This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

**REDACTED**

REDACTED

SIGNATURE AND DATE

I hereby state that I have read the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

*Clair M. Keagy*

This 25<sup>th</sup> day of May, 2017



25

City/County of Stafford Commonwealth/State of VA  
I hereby certify that the attached document is a true and exact copy of a VADL (1344564), presented before me this 21 day of May, 20 17  
Clair M. Keagy  
Notary Public  
My commission expires 05/31, 20 19

UNITED STATES OFFICE OF  
GOVERNMENT ETHICS

REDACTED



May 24, 2017

The Honorable Ron Johnson  
Chairman  
Committee on Homeland Security  
and Governmental Affairs  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Claire M. Grady, who has been nominated by President Trump for the position of Under Secretary for Management, Department of Homeland Security.

We have reviewed the report and have obtained advice from the agency concerning any possible conflict in light of its functions and the nominee's proposed duties. Also enclosed is an ethics agreement outlining the actions that the nominee will undertake to avoid conflicts of interest. Unless a date for compliance is indicated in the ethics agreement, the nominee must fully comply within three months of confirmation with any action specified in the ethics agreement.

Based thereon, we believe that this nominee is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,

DAVID APOL

Digitally signed by DAVID APOL  
DN: cn=DAVID APOL, o=United States Office of  
Government Ethics, ou=DAVID APOL,  
c=US, email=DAVID.APOL@oge.gov

David J. Apol  
General Counsel

Enclosures

REDACTED



May 19, 2017

Joseph B. Maher  
Designated Agency Ethics Official  
Department of Homeland Security  
Washington, D.C. 20528-0485

Dear Mr. Maher:

The purpose of this letter is to describe the steps that I will take to avoid any actual or apparent conflict of interest in the event that I am confirmed for the position of Under Secretary for Management of the Department of Homeland Security.

As required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter in which I know that I have a financial interest directly and predictably affected by the matter, or in which I know that a person whose interests are imputed to me has a financial interest directly and predictably affected by the matter, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

If I rely on a *de minimis* exemption under 5 C.F.R. § 2640.202 with regard to any of my financial interests in securities, I will monitor the value of those interests. If the aggregate value of interests affected by a particular matter increases and exceeds the *de minimis* threshold, I will not participate personally and substantially in the particular matter that to my knowledge has a direct and predictable effect on the interests, unless I first obtain a written waiver pursuant to 18 U.S.C. § 208(b)(1).

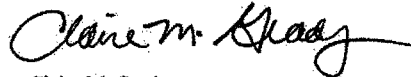
If I have a managed account or otherwise use the services of an investment professional during my appointment, I will ensure that the account manager or investment professional obtains my prior approval on a case-by-case basis for the purchase of any assets other than cash, cash equivalents, investment funds that qualify for the exemption at 5 C.F.R. § 2640.201(a), obligations of the United States, or municipal bonds.

I will meet in person with you during the first week of my service in the position of Under Secretary for Management in order to complete the initial ethics briefing required under 5 C.F.R. § 2638.305.

I understand that as an appointee I will be required to sign the Ethics Pledge (Exec. Order no. 13770) and that I will be bound by the requirements and restrictions therein in addition to the commitments I have made in this ethics agreement.

Finally, I have been advised that this ethics agreement will be posted publicly, consistent with 5 U.S.C. § 552, on the website of the U.S. Office of Government Ethics with ethics agreements of other Presidential nominees who file public financial disclosure reports.

Sincerely,

A handwritten signature in cursive script that reads "Claire M. Grady". The signature is written in black ink and includes a long horizontal flourish extending to the right.

Claire M. Grady



**U.S. Senate Committee on Homeland Security and Governmental Affairs  
Pre-hearing Questionnaire  
For the Nomination of Claire M. Grady to be  
Under Secretary for Management, Department of Homeland Security**

**I. Nomination Process and Conflicts of Interest**

- 1. Did the President or Secretary of the Department of Homeland Security (DHS or “the Department”) give you specific reasons why he nominated you to be the next Under Secretary for Management (USM) of the Department, and if so, what were they?**

The Secretary indicated that the strength and depth of my leadership and my management and acquisition experience in both the Department of Homeland Security (DHS) and the Department of Defense (DoD) were the reasons he recommended my nomination to the President.

- 2. Were any conditions, expressed or implied, attached to your proposed nomination? If so, please explain.**

No.

- 3. Have you made any commitments with respect to the policies and principles you will attempt to implement as USM? If so, what are they, and to whom were the commitments made?**

I made a commitment to the Secretary of Homeland Security to respect and follow the rule of law and to act ethically and with integrity in all matters.

- 4. Are you aware of any business relationship, dealing, or financial transaction that could result in a possible conflict of interest for you or the appearance of a conflict of interest? If so, please explain what procedures you will use to recuse yourself or otherwise address the conflict. And if you will recuse yourself, explain how you will ensure your responsibilities are not affected by your recusal.**

In connection with the nomination process, I have consulted with the Office of Government Ethics and the Department of Homeland Security’s Designated Agency Ethics Official to identify potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of an ethics agreement that I have entered into with the Department’s Designated Agency Ethics Official and that has been provided to this Committee. I am not aware of any other potential conflicts of interest.

## II. Background of the Nominee

### 5. What specific background, experience, and attributes affirmatively qualify you to be USM?

I believe my career as a Federal civil servant, spanning over 25 years, with a proven track record of leadership, management, and quantifiable results qualifies me for this position.

I began my Federal career as a GS-7 intern and progressed through positions of increasing responsibility and scope. I have served in senior positions at the component and headquarters level of two agencies, the DHS and DOD, leading large, diverse, and geographically dispersed workforces to deliver results. I have been a member of the Senior Executive Service (SES) for over a decade and was recognized with the Presidential Rank Award in 2010 for exceptional sustained performance.

Currently, I am the Director of Defense Procurement and Acquisition Policy within DoD. In this position, I act as the principal advisor to the Under Secretary of Defense for Acquisition, Technology and Logistics (USD AT&L) and the Defense Acquisition Board on acquisition and procurement strategies for all major weapon systems programs and major automated information systems programs. I am responsible for over 30,000 procurement professionals throughout the world who, in 2017, obligated \$297 billion in support of the warfighter. In this capacity, I work extensively, both internally and externally, on improving the functions of the acquisition system, including implementing DoD's Better Buying Power (BBP) Initiatives and working with Congress and the White House on contemplated changes.

Previously, I served as the Coast Guard's Deputy Assistant Commandant for Acquisition and Director of Acquisition Services and the Coast Guard's Head of the Contracting Activity. During my tenure at the Coast Guard, I was instrumental in standing up the acquisition directorate and the Coast Guard's modernization, which realigned the organization to maximize the operational effectiveness and value delivered to the nation.

Prior to being reassigned to the Coast Guard, I worked as the Director of Strategic Initiatives in the Office of the Chief Procurement Officer (OCPO) at DHS headquarters. There, I led efforts in the areas of contracting policy, grants policy and oversight, strategic sourcing, competitive sourcing, and acquisition systems. In this capacity, I worked extensively with my headquarters counterparts across business lines and operational components to achieve results. While at DHS headquarters, I was also detailed to work for the Under Secretary for Management (USM), serving as the DHS executive lead for immigration reform. In conjunction with leadership from U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), United States Citizenship and Immigration Services, Federal Law Enforcement Training Center, DHS Office Chief Information Officer (OCIO), DHS Office Chief Financial Officer (OCFO), DHS Chief Human Capital Officer (CHCO), DHS OCPO, the Federal Bureau of Investigation, the Social Security Administration, and the Office of Management and Budget, I developed preliminary implementation plans, including

timelines and budgets, to meet the contemplated immigration reform triggers and the processing of an estimated 12.5 million applications for citizenship in the event legislation was passed.

If confirmed, I would draw on my cumulative business management and leadership experience gained over the course of my career, my collaborative leadership style, my network of professional contacts internal and external to DHS, and my commitment to the mission and the people of the Department to achieve results as the USM.

**6. Please describe:**

**a. Your leadership and management style.**

I have a collaborative leadership style that fosters and builds on a commitment to common goals. By communicating and emphasizing the linkage between each person's efforts in an organization to mission success, I strive for every person to understand the importance of their role and how the organization values and relies on their contributions.

Starting with the mission commitment and goal alignment, I ensure roles, responsibilities, and expectations are clearly understood. Further, I empower people to deliver results within their area of responsibility, and hold people accountable (positively and negatively) for delivering on their commitments.

As a senior leader, I am responsible for:

- ensuring an environment of trust and respect where diverse perspectives are valued;
- demanding and modeling the highest standards of conduct and ethical behavior;
- providing top cover and support;
- clearing obstacles;
- encouraging people to take informed risks and innovate;
- ensuring that we learn from, rather than punish, honest mistakes; and
- being accessible to, and engaged with, the workforce.

**b. Your experience managing personnel.**

I have extensive experience managing military and civilian workforces, as well as managing blended workforces, including: growing and downsizing workforces; employing workforce shaping tools; transforming organizations; moving and merging organizations; recruiting for hard to fill, specialized skill sets; and training, developing and retaining personnel. I have led transitions to new pay systems, ran various performance recognition processes, resolved grievances, took appropriate personnel actions, and served as a member of the Coast Guard labor relations board.

**c. What is the largest number of people that have worked under you?**

Currently, I am the functional leader of a workforce of 30,000 contracting and procurement professionals who are geographically and organizationally dispersed world-wide across three military departments and numerous other defense agencies.

At the Coast Guard, 330-750 (approx.) people reported through their chain of command to me in the various positions that I held.

**7. Please describe your experiences working as Director of Defense Procurement and Acquisition Policy at the Department of Defense, and Deputy Assistant Commandant for Acquisition and Director of Acquisition Services at the Coast Guard. How would these experiences influence your role as USM, if confirmed?**

As the Director of Defense Procurement and Acquisition Policy, I advise senior leadership on acquisition and procurement strategies for all major weapon systems programs and major automated information systems programs. I am the functional lead for the DoD procurement community, responsible for policy, oversight, and results of all procurement activity, as well as the workforce of DoD procurement professionals. I also lead policy for DoD's acquisition of services, which comprises 53% of the DoD's annual spend, as well as domestic, international, and contingency contract policy, including competition, source selection, multiyear contracting, and associated e-business solutions. I work extensively with the Senior Procurement Executives at the Army, Navy, Air Force, Special Operations Command, Missile Defense Agency, and Defense Logistics Agency, among others, on strategic, tactical, and emergent issues. I also work at the interagency level on acquisition policy, and I am one of the three Federal Acquisition Regulations (FAR) signatories. Since assuming this position, I have established or updated policy to improve acquisition processes and outcomes for: the acquisition of services; source selection; other transactions; and contract types and contract incentives.

Previously, I served as the Coast Guard's Deputy Assistant Commandant for Acquisition and Director of Acquisition Services and the Coast Guard's Head of the Contracting Activity. My initial efforts at the Coast Guard focused on: the merger of two organizations into a single acquisition directorate; the disaggregation of the Deepwater lead systems integrator contract into separate acquisition programs; and the rebuilding of an acquisition function that had been allowed to atrophy to the point that shortfalls in staff and experience rendered the government incapable of protecting its interests. With time and sustained attention, the result of our efforts was a unified Acquisition Directorate that is fully capable and proficient in acquiring the goods and services the Coast Guard needs, while ensuring value for the taxpayer. During my time at the Coast Guard, I also re-shaped the procurement workforce to align and enable the Commandant's modernization effort, including: shifting to a product line focus to enhance support to the operational community; improving business deals based on enhanced knowledge of the industry markets that supported our enterprise; and making more effective use of resources (people and time). While at the Coast Guard, I also crafted and oversaw the execution of acquisition strategies for important recapitalization

programs, including the Fast Response Cutter program and the Offshore Patrol Cutter program.

My experience working at both a DHS operational component and DHS headquarters and then working at the headquarters level of another, more established, department provides me unique insights into the value of integration, policy and oversight, and alignment of priorities. Three takeaways I learned were: (1) Cross cutting forums that make decisions rather than merely share information are highly effective; (2) Efficiencies can be achieved by establishing data standards rather than mandating a single system solution; and (3) Headquarters' size should be optimized to achieve results without putting unreasonable burdens on components.

### III. Role and Responsibilities of the DHS USM

**8. If confirmed, what would be the highest priority items you would focus on? What do you hope to accomplish during your tenure?**

It would be premature for me to set priorities. However, from my experiences at DHS, as well as awareness of some of the challenges the Department faces, if confirmed I would want to improve on the areas of: (1) Employee engagement and ensuring an environment where the contributions of the talented professionals of the Department are valued and each individual feels empowered to look for new and improved ways to accomplish the mission; and (2) Unity of Effort through engaging stakeholders from across the Department in strategic decisions and strengthening communications at all levels throughout the Department. If confirmed, by the end of my tenure, my expectation is to have made sustainable progress in these two areas such that DHS becomes an employer of choice and the management and mission support functions are considered assets that enhance the ability of the dedicated men and women of DHS to keep our nation safe.

**9. Please describe your understanding of the role and responsibilities of the USM of DHS, including how you view the role vis-à-vis the Secretary and the Deputy Secretary?**

If confirmed, I anticipate working closely with the Secretary and the Deputy Secretary to align priorities, to ensure that the mission support functions enable and enhance mission execution, and to keep them apprised on matters within my areas of responsibility. I expect to be held responsible and accountable for progress in areas of mission support and for achieving results that contribute to mission success.

**10. How do you think your experience at the Department of Defense will influence your leadership approach at DHS?**

If confirmed, I would look for best practices from DoD that could be scaled to align with DHS mission needs and infrastructure size. I also have a profound appreciation of the challenges different organizational cultures and structures present to effecting change and

would leverage collaborative environments to identify opportunities to deliver meaningful results.

**11. How will you use your experience as the Director of Defense Procurement and Acquisition Policy to improve the procurement and acquisition processes at DHS?**

While at the Coast Guard, I adopted several best practices from DoD's Better Buying Power BBP initiatives, including the use of an independent "peer review" process to ensure that solicitations for large acquisition programs conveyed clearly what was important to the Government and were structured in a way that managed risk and maximized the likelihood of success. If I were confirmed, I would look at the application of additional BBP initiatives to DHS such as should-cost reviews, service requirement review boards, enhanced competition, and the emphasis on data driven decision making. I would also look to employ other innovative DoD approaches, such as the "Hack the Pentagon" effort that leverage industry best practices.

**IV. Policy Questions**

***Management, Accountability, and Oversight***

**12. What actions will you take to ensure better cohesion and cooperation among all DHS components?**

Improving cohesion and cooperation among the DHS components represents a real opportunity to enhance DHS effectiveness. This is an issue I would need to dedicate time to study, but my initial thought would be to leverage the various USM Chiefs and the cross department forums they lead (e.g., OCIO, OCFO, CHCO, OCPO, Security, and Readiness) to identify and pursue opportunities.

**13. The Government Accountability Office (GAO) has identified strengthening and integrating DHS management as a high-risk issue since 2003 and continues to report that considerable work remains in key areas, including financial system modernization and employee morale.**

**a. What do you believe are the most important actions DHS should take to strengthen overall management of the Department?**

The most important action DHS can take is strong leadership commitment and engagement at all levels to sustain the progress that has been made and tackle the hard challenges that remain. Assigning specific executive champions and leads, requiring corrective action plans that are resourced and executed, and a constant drum beat of the importance of the effort will be essential to achieve results.

**b. What do you see as the most viable path forward for DHS to develop real-time, accurate, and comprehensive data on its finances and to use this data to inform budget decisions and resource allocation?**

I am aware of some of the challenges with respect to data and financial systems and appreciate the importance of having current, accurate, and complete data to inform budget and resource allocation decisions. However, I do not have sufficient information to offer an informed opinion on a path ahead and would need to explore this issue further if I were to be confirmed.

**c. What are your plans for modernizing IT systems across DHS?**

While I am aware of the importance of modernizing IT systems, this is an area that I would need to explore in concert with the DHS Chief Information Officer, if I were to be confirmed.

**14. How do you view the relationship between the USM and the GAO?**

The Government Accountability Office (GAO), as the non-partisan independent review agency that supports Congress, and USM share a common goal in ensuring that tax payer dollars are spent wisely. The relationship between USM and GAO needs to be strong, with open and candid communications occurring on a regular basis about on-going work, open recommendations and future opportunities. Additionally, USM needs to ensure timely access to requested information, meaningful input to draft products, and implementation of recommendations.

**15. What steps do you believe DHS can take to ensure federal funds expended by the agency are free from duplication and waste?**

I believe that investment decisions need to be data-driven and risk-informed, but I do not have sufficient insight into the current DHS processes to make recommendations on what specific steps should be taken to ensure that.

**16. Over the past four years, DHS received clean audit opinions on its financial statements. However, according to a recent DHS Office of Inspector General (OIG) report, OIG-17-52, there are material weaknesses in DHS's internal controls over financial reporting. What steps would you take as USM to address these material weaknesses?**

I understand the importance of current, accurate, and complete financial data and appreciate the need to progress on reducing or eliminating material weaknesses. Additionally, the comments and recommendations made by independent auditor contained in OIG-17-52 are beneficial to the Department and its components in improving internal controls and generating efficiencies. If confirmed, I would need to study this further with the stakeholders to determine the appropriate steps to address this important matter.

**17. What is your view of the role of the DHS OIG and its relationship with the USM?**

The DHS Office of Inspector General (OIG) plays an important role as an independent auditor, investigator, and inspector with the responsibility of ensuring integrity and efficiency in DHS operations and programs. Additionally, the DHS OIG provides a valuable mechanism for whistleblowers to raise concerns independent of their chain of command. USM needs to have a strong relationship with the DHS OIG that is built on trust and mutual respect and reinforced with recurring conversations. Additionally, USM needs to ensure timely access to requested information, meaningful comments on draft products, and progress on implementation of open recommendations.

**18. What is your position on the proposed cuts to the DHS OIG budget in the 2018 President's budget?**

I support the important role that the DHS OIG plays in promoting an efficient and effective Department, but I am not knowledgeable about the 2018 budget submission for the organization.

**19. Please describe how you will work with the GAO and the DHS OIG to address open recommendations and improve the Department's performance.**

I respect and support the important efforts of both the GAO and DHS OIG and have benefited from collaborative and professional relationships with both organizations throughout my career. If confirmed, I would prioritize engaging early with leadership of both GAO and DHS OIG to understand and gain insight into their priorities and on-going work. I would also review the status of open recommendations and the plans and associated resources that have been committed to implement those recommendations.

**20. If confirmed, will you commit to reviewing any DHS programs that you believe could be eliminated because they are ineffective, duplicative, wasteful, unnecessary, or have outlived their purpose and report that information to Congress?**

Yes, if confirmed I would seek out programs that do not deliver value commensurate with the investment. I would be committed to obtaining maximum value for every dollar invested in DHS and to working with Congress in a transparent way to achieve that objective.

*Acquisitions*

**21. DHS has faced significant challenges deploying technology and other major acquisition programs to meet mission needs, including schedule delays, cost overruns, and performance problems.**



- a. If confirmed as USM, how would you work to improve the Department's acquisition management functions and deploy systems on schedule, within cost estimates, and that meet mission needs?**

If confirmed, to deliver the capability the end users need, on time and on budget, I would work to ensure: that programs are founded on realistic requirements that reflect prioritized needs and tradeoffs by the end user community; that programs are undertaken with realistic cost, schedule and performance expectations, and baselines; and, to the maximum extent practicable, budget requests include stable and predictable funding for acquisition programs.

- b. What tools, strategies, or data have you found to be most effective in your prior experiences managing large scale procurements, and how would you seek to implement them in managing acquisitions at DHS?**

I have found successful large acquisition programs begin with achievable requirements that reflect the true needs of the end user and have cost and schedule estimates that are informed by the best possible data. The other key to success is to have an empowered, experienced program manager supported by the right personnel with the right skills, experience, and professional capability from the various acquisition disciplines including: contracting, system engineering, testing, and logistics. While each program is somewhat unique, those elements are instrumental to any successful program. If confirmed, my efforts to ensure each program is structured for success would entail enforcing the requirements for high quality and timely requirements documents, acquisition program baselines, and staffing plans.

- c. How do you define good performance when it comes to acquisition programs and how would you use performance metrics?**

The primary measure of success for an acquisition program should be: does it deliver the capability the end user needs, on time, and at a cost that is affordable both for initial procurement and sustainment? This is measured through performance relative to the acquisition program baseline, sustainment strategies that are in place to effectively and efficiently support the program throughout its operational life, and operational test and evaluation results.

- d. How do you plan to increase the role that testing and evaluation and standards play into current and future DHS acquisitions?**

Testing and Evaluation (T&E) plays an important role in acquisition programs; milestones and major acquisition decisions should be informed by test plans and results.

- e. **What plans to do you have for reviewing large scale legacy procurements, like USCIS Electronic Immigration System (or ELIS), at DHS that have consistently been over budget and over schedule?**

I am not currently familiar with many of the DHS large acquisitions and if confirmed, would need to seek out information on the program's status, performance and the root cause analysis of the issues prior to formulating a plan.

22. **If confirmed, how will you assess the health of the Department's major acquisitions?**

If confirmed, I would review the Department's Comprehensive Acquisition Status Report (CASR), which I understand may have some data issues. I would also meet with the Director of Program Accountability and Risk Management, the Director of Test and Evaluation, and the Component Acquisition Executives on the status of the programs in their portfolios.

23. **Are you supportive of requiring cost benefit analyses for future Level 1 acquisitions?**

Yes.

- a. **How have you used cost benefit analyses in your prior positions to inform acquisition decisions?**

I have used cost benefit analysis and analysis of alternatives (AOA) to inform acquisition decisions and believe that tradeoffs of alternate solutions for acquisitions are beneficial.

24. **How will you increase transparency and collaboration with industry to ensure that future large acquisition programs are competed fairly?**

Industry engagement is a valuable part of the acquisition process and leads to enhanced competition, more robust and innovative industry solutions, and better acquisition outcomes. If confirmed, I would emphasize industry engagement as a way to enhance transparency and equity in the acquisition process and ensure that industry engagement is addressed in the acquisition strategies for future large acquisition programs.

25. **What actions will you take to ensure that adequate time is provided for requirements development within the components?**

Adequate time for requirements development is essential to a successful acquisition. If confirmed, I would review current policy to ensure it instills adequate discipline in the process to prevent acquisitions from beginning prematurely with respect to requirements development.

**26. What is your experience at DoD with the use and development of consensus standards for the procurement of equipment and technology?**

I have experience working with common standards within DoD at the requirements stage by the Joint Staff through the Joint Capabilities Integration and Development System (JCIDS) (e.g., replacement helicopters) and in execution of acquisitions through joint program offices or lead services, acquisition strategies and life cycle support plans (e.g., joint strike fighter, electronic health records).

**a. Are you supportive of the DHS funded development of standards for first responder equipment and technology that would not otherwise be funded without support of DHS?**

I support efficient and effective mission performance and understand the importance of interoperability, but I am not currently familiar with this particular effort and would seek to gain more insight from the DHS subject matter experts if confirmed.

**27. Please explain how Test and Evaluation (T&E) could be better integrated into the procurement process across the Department?**

**a. Do you believe that DHS is effectively using T&E capabilities within the Science and Technology directorate for major acquisitions of equipment and technology?**

I am not sufficiently current on the state of DHS T&E efforts to make an informed comment, but would make reviewing this a high priority if confirmed.

**b. What is your position on integrating Test and Evaluation at the beginning of the procurement process for equipment and technology at DHS?**

Engagement of both the developmental and operational test communities in the early stages of, and throughout, an acquisition program is important to achieve program outcomes, manage risk, and inform acquisition and investment decisions.

**28. What is the appropriate balance in dividing management and oversight of acquisition programs between individual program managers, component-level leadership, the Program Accountability and Risk Management office (PARM), and the USM?**

Management and oversight of acquisition programs should align with accountability. The proper balance of that function would depend on the dollar value, risk, and importance of a specific acquisition program, and the acquisition capability of the acquiring component. If confirmed, this is an area that I would assess.

- a. **What steps will you take to ensure that PARM and the senior leadership of the Department have sound data to use to make decisions on the Department's investments?**

Acquisition decisions should be data driven and, if confirmed, I would engage the operational and headquarter components to ensure that the reporting is based on current and accurate data.

29. **What efforts would you take to better understand the true cost of contracting for services?**

The Federal Government spends more money on services than products, making services spend an important area for management attention. If confirmed, I would explore opportunities to review services requirements to ensure that the Department received a fair value for the services procured.

30. **What plans will you develop and execute to ensure that the contracting workforce across the department is able to effectively compete and manage the large procurements on the Southwest Border proposed by the President's budget?**

My knowledge of the plans for the Southwest Border is currently limited to publically available information. If confirmed, I would work with CBP, ICE, any other components engaged, and the Chief Procurement Officer to understand the specific forecasted needs, current capabilities, and plans to fill any gaps to ensure there are a sufficient number of trained and experienced contracting professionals and contracting officer representatives available internally or through other government agencies, such as the Army Corps of Engineers, to plan or, award, administer and close out the necessary procurements.

*Workforce*

31. **The Office of Personnel Management's 2016 Federal Employee Viewpoint Survey data showed that DHS ranked last among 37 large federal agencies in job satisfaction, leadership and knowledge management, results-oriented performance culture, and talent management.**

- a. **What do you consider to be the principal challenges in the area of human capital management at DHS?**

Based on my past observations, the principal challenges are in attracting a pool of high quality candidates and retaining them, particularly for career fields that are in high demand, such as cyber. Additionally, there are still legacy effects of the rapid stand-up of the Department where, by necessity, strategic planning and integration efforts were deferred due to the urgency of the mission.

**b. What steps would you take, if confirmed, to identify and address the root causes of low morale?**

If confirmed, I would ensure that the Federal Employee Viewpoint Survey data is being used, not in aggregate, but with sufficient granularity to identify the real challenges specific components or work groups are experiencing. A roll-up of data masks both the challenges and the strengths of DHS. Additionally, employees at all levels need to be engaged in the development of the action plans to ensure that the actual root cause is being addressed and that positive change will be enduring.

**c. What experience from your past positions best equips you to address workforce challenges at DHS?**

Following the very public failures of the USCG Deepwater program, I rebuilt a workforce that had suffered from low morale and insufficient numbers of skilled workers, and helped create an acquisition directorate that functions as a motivated, high performing team. In addition, I currently manage a large, geographically distributed workforce with diverse needs and challenges. I believe that my cumulative experience prepares me well to build on the positive progress that is already underway under Secretary Kelly's and Deputy Secretary Duke's leadership.

**d. Will you commit to doing an analysis of the current Federal and contractor workforce at DHS to determine which contracts are being used for long term staff augmentation?**

If confirmed, I commit to reviewing DHS workforce planning, including the composition of the total force (civilian, military, and contractor), and assessing the best way forward.

**32. Protecting whistleblower confidentiality is of the utmost importance to this Committee:**

**a. In your career, how have you addressed whistleblower complaints? What steps did you take to ensure those individuals did not face retaliation and that their claims were thoroughly investigated?**

I have always addressed whistleblower complaints in accordance with the law, ensuring each complaint was taken seriously, handled promptly and appropriately, and that any individual raising a whistle blower complaint did not face retaliation. Additionally, I believe in creating an environment where each person has a feeling of personal empowerment and recognizes his or her personal responsibility to act with ethics and integrity and treat every person with respect.

- b. How do you plan to work with the DHS OIG and other components to implement policy within the agency to encourage employees to bring constructive suggestions forward without the fear of reprisal?**

If confirmed, I would reach out to the DHS OIG to identify what policies and practices are currently in place and if there are proven best practices in government or industry that should be implemented.

- c. Do you commit without reservation to work to ensure that any whistleblower within DHS does not face retaliation?**

Yes.

- d. Do you commit without reservation to take all appropriate action if notified about potential whistleblower retaliation?**

Yes.

***DHS Consolidation***

- 33. The St. Elizabeths campus was envisioned as the headquarters for DHS; however, the project is now over budget and behind schedule. How important do you believe the consolidation of DHS headquarters is to improving operations and efficiency?**

I believe that collocated leadership builds unity of effort by creating strong relationships, enhancing communication and collaboration, and speeding decision making, all of which enhance operational effectiveness and efficiency.

**V. Relations with Congress**

- 34. Do you agree without reservation to comply with any request or summons to appear and testify before any duly constituted committee of Congress if you are confirmed?**

Yes.

- 35. Do you agree without reservation to make any subordinate official or employee available to appear and testify before, or provide information to, any duly constituted committee of Congress if you are confirmed?**

Yes.

36. **Do you agree without reservation to comply fully, completely, and promptly to any request for documents, communications, or any other agency material or information from any duly constituted committee of the Congress if you are confirmed?**

Yes.

**VI. Assistance**

37. **Are these answers your own? Have you consulted with DHS, or any other interested parties? If so, please indicate which entities.**

Yes, these answers are my own. DHS Office of Legislative affairs provided guidance to ensure the answers were responsive and met the intent, but the substance of the responses is mine.

**Minority  
Supplemental Pre-hearing Questionnaire  
For the Nomination of Claire M. Grady to be  
Under Secretary for Management, Department of Homeland Security**

**I. Background of the Nominee**

**1. Do you seek out dissenting views and how do you encourage constructive critical dialogue with subordinates?**

Dissenting perspectives are an essential element of any healthy organization. I actively seek out alternate viewpoints and diverse stakeholders when tackling challenges and making decisions. The discussion and constructive tension leads to: exploration of an expanded range of options; more informed trade-off discussions with an understanding of the second and third order effects; and better decisions leading to better results and fewer unmitigated and/or unanticipated consequences. With my leadership team and my workforce, I regularly reinforce the importance of diverse perspectives and I actively seek out disruptive thinkers for my team. Each person knows it is their obligation to contribute their thoughts and ideas, especially if they have different views or perspectives. Additionally, I actively seek input from individuals (government and industry) on ways we can improve and best practices that should be employed more broadly to enhance our ability to generate the best possible outcomes.

**2. If confirmed, what experiences and lessons learned since leaving DHS will you bring to the position of Under Secretary of Management?**

My experiences working at both an operational component within DHS and headquarters and then working at the headquarter level of another more established department, provided me unique insights into the value of integration, policy, and oversight and alignment of priorities. Three lessons I took away are: (1) Cross cutting forums that make decisions rather than merely share information are highly effective; (2) Efficiencies can be achieved by establishing data standards rather than mandating a single system solution; and (3) Headquarters' size should be optimized to achieve results without putting an unreasonable burden on components. Additionally, I learned the importance of clear alignment of responsibility with accountability and the value of intra and inter agency collaboration.

**3. Please give examples of times in your career when you disagreed with your superiors and aggressively advocated your position. Give us a few examples of when you were successful and when you were not.**

In the very early pre-acquisition stages of the Offshore Patrol Cutter (OPC), there was a push to accelerate schedule to deliver needed capability to the fleet by reducing the time allotted to refine requirements and engage with industry. The belief was that based on the maturity of the ship requirements and the existing knowledge of the industrial base that the quality of the acquisition would not suffer. Highlighting the time and administrative effort that would be



saved by ensuring the requirements were clearly understood and making any needed corrections early in the process, I successfully persuaded leadership to include sufficient time in the schedule to release the draft ship specification for comment and receive and incorporate feedback from industry during the pre-solicitation process. This led to a very robust and effective industry engagement strategy, reduced military unique items, and attracted a non-traditional federal contractor to the competition, with the net effect of increasing the affordability of the program and enhancing competition.

An instance where I was unsuccessful was during the regulatory rulemaking process to implement a new requirement. I argued in favor of relying on government records that would be available in the future, rather than compelling individual firms to disclose government enforcement actions taken against the firm. However, the time to establish the government capability necessary to provide the data did not align with desire to have the regulation to take effect quickly and make a more immediate impact. After repeated escalations of the issue, where I cited the long standing policy that each regulation must be tailored to impose "the least burden on society" and we explored any alternative data sources, a final decision was made by a senior administration official. The regulation was issued with the requirement for industry to disclose the data on government enforcement actions. Prior to the regulation becoming effective, it was challenged in court and enjoined based on a number of factors, including the court finding the regulation to be "complex, cumbersome and costly...and which hamper the efficiency without quantifiable benefits."

**4. Please list and describe unclassified examples of when you made politically difficult choices that you thought were in the best interest of the country.**

As a career civil servant, I have been politically agnostic in my decision making and have always been committed to making decisions that were in the best interests of the nation. While any number of source selection decisions I have been involved with had strong political interest, the politics never impacted the conduct or the outcome of the procurement.

**5. What would you consider your greatest successes as a leader?**

The people I have trained and mentored that have already advanced, or will in the future advance, to leadership positions throughout the Federal Government.

## II. Policy Questions

**6. What efforts will you take to ensure that DHS does not contract for services for inherently governmental work?**

I will ensure compliance with the FAR 7.503(e) mandate that requirements packages must contain a determination that none of the functions to be performed are inherently governmental and that trained contracting officer representatives monitor contracts to ensure no inherently governmental work is performed.

- 7. What experience from your past positions will help with determining which work should be performed by Federal employees and which require the use of service contracts?**

I have extensive experience leading organizations with blended workforces and with workforce planning to meet current and future mission requirements. I am currently in charge of the policy for the acquisition of services across DoD, including advanced review of future requirements, approval of services acquisition strategies that exceed \$250 million, and post award peer reviews of major services contracts. I have previously participated in reviewing service contracts to ensure that the composition of the workforce aligned with the balanced workforce policies and the strategic needs of the organization. Additionally, I was responsible for the A-76 program when I was assigned to DHS headquarters in the 2006/2007 timeframe.

### **III. Relations with Congress and the Public**

- 8. If confirmed, how will you make certain that you will respond in a timely manner to Member requests for information?**

If confirmed, I would clearly communicate the importance and prioritization that requests for information from Members will receive and would review current tracking systems to ensure requests are received, acted upon, and completed in a timely manner.

- 9. If confirmed, do you agree without reservation to reply to any reasonable request for information from the Ranking Member of any duly constituted committee of the Congress?**

Yes.

- 10. If confirmed, do you agree without reservation to reply to any reasonable request for information from members of Congress?**

Yes.

- 11. If confirmed, do you commit to take all reasonable steps to ensure that you and your agency complies with deadlines established for requested information?**

Yes.

- 12. If confirmed, do you commit to protect subordinate officials or employees from reprisal or retaliation for any testimony, briefings or communications with members of Congress?**

Yes.

**13. If confirmed, will you ensure that your staff will fully and promptly provide information and access to appropriate documents and officials in response to requests made by the Government Accountability Office (GAO) and the Congressional Research Service?**

Yes.

**14. If confirmed, will you agree to work with representatives from this Committee and the GAO to promptly implement recommendations for improving DHS's operations and effectiveness?**

Yes.

**15. If confirmed, will you direct your staff to fully and promptly respond to Freedom of Information Act requests submitted by the American people?**

Yes.

**16. If confirmed, will you direct your staff to adopt a presumption of openness where practical, including identifying documents that can and should be proactively released to the public without requiring a Freedom of Information Act request?**

Yes. I would be committed to transparency whenever practicable.

**17. If confirmed, will you keep this Committee apprised of new information if it materially impacts the accuracy of information your agency's officials have provided us?**

Yes.

I, Claire M. Gray, hereby state that I have read the foregoing Pre-Hearing Questionnaire and Supplemental Questionnaire that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

Claire M. Gray  
(Signature)

This 9<sup>th</sup> day of June, 2017

County/City of Fairfax  
Commonwealth/State of VA  
This foregoing instrument was acknowledged before  
me this 9<sup>th</sup> day of June, 2017  
by Claire M. Gray  
(name of person seeking acknowledgement)  
E. Malloy  
Notary Public  
My commission expires: 01/31/19



**Senator John McCain**  
**Post-Hearing Questions for the Record**  
**Submitted to Claire Grady**  
**Nomination of Claire M. Grady to be Under Secretary for Management,**  
**U.S. Department of Homeland Security**  
**Wednesday, June 28, 2017**

1. This committee may consider several bills on DHS acquisitions reform. I am concerned that many of these bills merely codify current DHS acquisition policies that have been in place since 2008. Under current DHS acquisition policies, DHS continues to experience billions in cost overruns and delays. For example, an April 22, 2015 GAO report (GAO-15-17SP) found that only two of the 22 DHS programs it reviewed were on track to meet the initial schedule and cost parameters established after DHS's current acquisition policy went into effect in November 2008.

Given the billions in cost overruns and schedule slips identified by GAO, do you believe codifying current DHS acquisition policies that have been in place since 2008 will remedy how DHS procures goods, services, and major acquisition programs efficiently and minimize cost overruns?

I have not personally had the opportunity to review the programs that comprise the DHS major acquisition portfolio, but the findings and recommendations in this GAO report are consistent with my experience of elements that are essential for acquisition success:

- Well defined and stable requirements;
- Sufficient numbers of trained and experienced acquisition professionals of various disciplines; and
- Baselines for cost, schedule and performance that are accurate and documented.

Codifying the requirements of acquisition processes into law would legally restrict the potential for programs to proceed prematurely or without sufficient rigor. But given the complexity of acquisition policies, this could result in unintended consequences, such as creating a rigid compliance system that focuses on process, not outcomes, and restricted flexibility to tailor acquisition processes appropriately for a particular type of acquisition, for example to take advantage of commercial technology innovation or to deploy a commercial off the shelf (COTS) capability.

2. Do you agree that DHS, instead of procuring major systems that potentially have substantial development and integration risks associated with them, should focus

primarily on using commercial off-the-shelf (COTS) items, which shortens development time and minimizes costly and duplicative research by the government?

Yes, commercial items and COTS should be the preferred approach for solutions to mission gaps and agency needs. Private industry investment in research and development is spurring innovation at an ever accelerating pace and DHS should capitalize on these developments wherever possible.

3. If confirmed, will you support the use of cost-type contracts at DHS when developing, procuring, and deploying Major Acquisition Programs? If yes, please explain.

I believe the full range of contract types should be available for use, but the use of cost-type contracts is, and should be, the least preferred approach. Cost-type contracts may be appropriate in limited circumstances, such as research and development, early prototyping, modeling and simulation, developmental activities, and cost sharing efforts. The emphasis should be on generating clear requirements, informed by market intelligence and risk reduction activities, such that industry can reasonably propose solutions and corresponding prices without inflating prices to account for numerous unknowns, mitigating the need for cost-type contracts.

4. What specific policies should DHS implement to protect the American taxpayer from cost overruns when using cost-type contracts for Major Acquisition Programs?

Cost-type contracts: should contain objective incentives to motivate the contractor to be cost conscious; meaningful cost, schedule, and performance metrics should be included in the contract; and a skilled contracting officer's representative should be assigned to closely monitor contractor performance. Additionally, to the maximum extent practicable, DHS should preserve the flexibility to select or move to an alternate solution; competition or the threat of competition is a powerful motivator for performance. Finally, cost performance should be accurately reflected in the contractor's past performance rating to influence (positively or negatively) future source selection decisions.

**Senator Rand Paul**  
**Post-Hearing Questions for the Record**  
**Submitted to Claire Grady**  
**Nomination of Claire M. Grady to be Under Secretary for Management,**  
**U.S. Department of Homeland Security**  
**Wednesday, June 28, 2017**

1. Reflecting upon your experience in both the DHS and the Department of Defense (DoD), what ideas and aspirations do you have to improve the DHS, and make the areas under your control, or which you can influence, more efficient and effective?

From my experiences at DHS and DoD, if confirmed I would want to immediately focus on two priority areas. First, I would focus on employee engagement and ensuring an environment where the contributions of the talented professionals of the Department are valued and each individual feels empowered to look for new and improved ways to accomplish the mission. Employee engagement is not just essential to recruiting and retaining a high caliber, high performing workforce, it is also a tremendous force multiplier for mission execution. Second, I would focus on Unity of Effort through engaging stakeholders from across the Department in strategic decisions and strengthening communications at all levels throughout the Department. If confirmed, by the end of my tenure, my goal is to have made sustainable progress in these two areas such that DHS becomes an employer of choice and the management and mission support functions are considered assets that enhance the ability of the dedicated men and women of DHS to keep our nation safe.

2. My Federal Spending Oversight subcommittee is charged with examining all federal expenditures to ensure the taxpayer is getting the highest value for their dollar. To fulfil this objective, my subcommittee seeks to identify and eliminate waste, fraud, and abuse in the federal government, no matter how small, and to proactively pursue mechanisms to prevent waste of taxpayer dollars. I take this charge very seriously. One of the ways I execute these duties is by regularly issuing a "Waste Report" to highlight concerning activities and wasteful expenditures of federal dollars. One such early report was to highlight whistleblower disclosures regarding waste in DHS's U.S. Coast Guard (USCG).<sup>1</sup>

In that instance, it was determined that USCG members were spending more than \$1 million per year, wastefully travelling from Alaska to distant major tourist destinations (such as Orlando, Florida or Savannah, Georgia), instead of the nearest major city (such as Seattle, Washington), for medical treatment, while the taxpayer foot the bill for not just their expenses, but that of their family as well. Worse, the Inspector General found that in 94 percent of instances, the records were missing the most basic documentation, ranging in everything from travel requests and approvals to cost estimates or even

medical documentation to certify the needed medical treatments. This instance highlights a range of issue areas from deficient policy to lack of internal controls.

- a. What has DHS done since my and the IG's findings in 2015?

I value the important role that the Inspector General plays in promoting an efficient and effective Department and take all findings of potential for fraud, waste and abuse very seriously. But I am not familiar with this particular matter nor with the progress that has been made to address the deficiencies in internal controls since the report was issued.

- b. Do you believe matters have been completely remedied? If not, what will you do to address such matters both at the USCG, and throughout the DHS?

I am not familiar with the status of implementation of the DHS Inspector General's recommendations for this particular matter, but if confirmed, I would review the status of all outstanding DHS IG recommendations to ensure they are being addressed with corrective action plans and appropriate resources. Additionally, if confirmed, I would prioritize engaging early with leadership of both GAO and DHS OIG to understand and gain insight into their priorities and on-going work and to avail myself of their insights and priorities.



**Ranking Member McCaskill**  
**Post-Hearing Questions for the Record**  
**Submitted to Claire Grady**  
**Nomination of Claire M. Grady to be Under Secretary for Management,**  
**U.S. Department of Homeland Security**  
**Wednesday, June 28, 2017**

1. On March 6, 2017, CBP issued a solicitation for the design and build of several prototype walls for the United States border with Mexico.

- a. Do you agree that a cost benefit analysis and an analysis of alternatives should take place prior to implementing a project like building a border wall along the entire U.S. Mexico border?

I concur that after a preliminary mission need has been identified, a study (analysis of alternatives or cost benefit analysis) analyzing various alternatives that could meet that need should be assessed based on cost, schedule, risk and capability before a program begins to develop or obtain the solution determined to be the best option. Some early acquisition activity may occur before completion of the analysis of alternatives and can help inform the analysis, such as exploration of various concepts of operation, studies, experimentation and prototyping.

- b. Are there any circumstances under which you would support a project that went ahead without such reviews?

There are limited circumstances in which I would support a project proceeding ahead of such reviews, such as when an urgent operational need emerges/is identified and threat necessitates a rapid response. However, I do not believe that the immediate response necessitated by an emergent threat would raise to the level of a major program and an appropriate streamlined analysis of possible alternatives should be performed before proceeding, even in response to urgent operational needs.

- c. If you are confirmed, will you commit to conducting such reviews to determine what we actually need in terms of a wall structure prior to awarding any contracts?

If confirmed, I would commit to only awarding contracts appropriate to early acquisition activities, such as exploration of various concepts of operation, studies, experimentation and prototyping, before completion of an analysis of alternatives.

- d. Will you commit to requiring a cost benefit analysis be conducted by CBP for the building of a border wall?

If confirmed, yes I will.

- 2. Good acquisition planning requires not only a focus on the present costs of a contract but the future life cycle costs of the effort, and it is DHS policy to conduct Life Cycle Cost Estimates on large procurements.

- a. Are you aware of any life cycle cost estimate that was conducted prior to the pre-solicitation notice for the border wall prototype acquisition?

I have not yet been engaged in the specifics of the contemplated border wall acquisition, but if confirmed, I would review the status and progress of this effort with CBP, Program Accountability and Risk Management (PARM), and the Deputy Undersecretary for Management to understand how life cycle costs are being considered as part of the acquisition planning process.

- b. Will you commit to requiring the accurate completion of a life cycle cost estimate for the border wall?

Yes, if confirmed, I would require a life cycle cost estimate for the border wall.

- 3. The DHS FY18 budget requested a \$3.1 million or 2.3% decrease in the budget for the DHS OIG from the FY2017 annualized continuing resolution. This decrease also represents a \$27 million or 17% decrease from the DHS OIG FY16 budget.

- a. What is your position on the proposed cuts to the DHS OIG budget?

I support the important role that the DHS OIG plays in promoting an efficient and effective Department, but I am not knowledgeable about the President's FY 18 budget request for the organization.

- b. Given the checkered history at DHS in regards to large acquisitions do you feel that decreasing the budget of the OIG is appropriate at this time?

I do not have any insight into the development of the President's FY 18 budget request for the DHS OIG, but I do support the importance of independent oversight of major acquisitions and in the valuable work that the GAO and the DHS OIG provide in this area.

4. GAO published a report in March 2016 on the budget shortfalls that are projected at DHS for its major acquisition programs. The review found that 10 of the major acquisition programs had funding gaps of 10% or more.

- a. How would you address these shortfalls?

I concur with GAO's recommendations, as did DHS, regarding the steps DHS should take to address these shortfalls including requiring components to address funding gaps and make tradeoffs to fit within budget constraints and certify to the affordability before gaining approval for a major acquisition milestone decision. Additionally, there should be annual reviews of cost estimates to align resource needs with resource requests sequenced to support the budget development process. If confirmed, I would review the status of implementation of these GAO recommendations.

- b. What acquisition strategies would you use to ensure that new programs don't fall into this trap?

To avoid these challenges in the future, if confirmed, I would require programs to develop, mature, and refine cost estimates for acquisition programs throughout the lifecycle for the program. These actions provide two benefits. First, they identify funding challenges as early as possible to allow trade-offs to be made and to inform future budget requests. Second, they provide for better decision making as leadership will have access to the best estimate of the cost of delivering, operating, and sustaining a capability.

5. You have stressed the importance of having a strong acquisitions workforce. In 2016, GAO recommended that DHS develop and implement a plan to fill key gaps in acquisition personnel. As DHS plans for reorganization, it will have to prioritize hiring and retention of certain positions and mission areas over others.

- a. As Under Secretary for Management, how will you evaluate which positions within your directorate to prioritize?

Rather than taking an approach of prioritizing positions, I would assess what are the highest priority functions that the Management Directorate performs and look for opportunities to gain efficiencies in execution of those functions and to reduce lower/non-value added functions and activities.

- b. If confirmed, what would you do to improve the acquisition workforce at DHS to avoid poor pre-acquisition planning?

To enhance and mature pre-acquisition planning, if confirmed, I would build on the initial success of the Joint Requirements Council and the emphasis on strategic decision making earlier in the acquisition and investment life cycle. The requirements process for acquisitions, regardless of dollar value, should be informed by the requirements community, who typically identify themselves as

operators who need the capability for mission execution, rather than as part of the acquisition workforce. Additionally, I would continue to emphasize to the entire acquisition workforce the importance of market research and market intelligence regarding the state of current and emerging technology to inform and shape acquisition programs.

- c. If confirmed how will you convey the importance of improving the acquisition workforce to reduce wasteful spending?

The importance of a skilled, experienced, and trained acquisition workforce to deliver maximum value for every dollar would be a constant communication theme. Unfortunately, the return on investment for appropriately staffing acquisition programs is well established, but not quantified. So to convey the importance of improving and sustaining the acquisition workforce, I would point to cost and delays of prior programs that were victims of inadequate acquisition staffing and examples of successful acquisition programs that were appropriately staffed.

6. The DHS *Unity of Effort* initiative has led to stronger management systems and oversight of major acquisition programs that leverage the experience of the components. This effort includes the Departments revitalization of the Joint Requirements Council and the Acquisition Review Board processes.

- a. As Under Secretary for Management, how will you continue these efforts to ensure greater management and accountability in the acquisitions program?

If confirmed, to continue these efforts, I would work with Secretary who sets strategic priorities, the Deputy Secretary who chairs the Deputy's Management Action Group, the Under Secretary for Strategy, Policy, and Plans who has responsibility for the Integrated Planning Guidance, the Under Secretary for Science and Technology who has insights into emerging technologies and threats, and component leadership that provide critical insight into mission and requirements to ensure a cohesive strategy for future acquisitions and to inform current acquisition resource decisions.

- b. If confirmed, how will you leverage the experience of the components to inform major acquisitions program?

The most important aspect of acquisition to leverage the experience of components is in the requirements definition process and operational testing. The individuals that will be accomplishing the mission are in the best position to inform what gaps currently exist in capabilities today and are forecasted for the future and how best to close those gaps. This operational insight is essential for requirements development and major acquisition programs to ensure needed capability is delivered to the field operators.

- c. If confirmed, what additional steps will you take to create accountability and oversight of smaller acquisition programs at the Department and component levels?

Responsibility and accountability should be in alignment. If confirmed, I would review delegation of acquisition approval authorities for small dollar value acquisition programs to ensure alignment with the component's proven ability to apply appropriate processes, resources, and component leadership engagement to deliver successful results through acquisition programs.

7. One of the many critical roles of the Under Secretary for Management is Strategic human capital planning and workforce structuring is critical to the Department effectively meeting the many different missions of the components and the overall mission of the Department.

- a. If confirmed, what would be your top priorities in addressing the many human capital challenges at the Department?

If confirmed, my two top priorities in the human capital area would be reviewing the progress made on the components' employee engagement plans and assessing with the Chief Human Capital Officer at headquarters and the components hiring plans for vacant positions that need to be filled.

- b. If confirmed, how will you solicit input, ensure consistency, and hold accountable the components when developing and implementing workforce strategies and policies at the Department?

If confirmed, I would work in conjunction with component leadership, the chief human capital officers and the leads for the functional communities (procurement, information technology, etc.) to understand the current status of the workforce strategies and seek to harmonize the various strategies. Alternate pay structures and various incentives are valuable tools to assist in creating a successful strategy to address challenging assignments, scarce skill sets, and difficult to fill positions, but should not create a disparity in pay and benefits that is not based on sound rationale.

- c. If confirmed, what do you believe is necessary to help the Department determine the appropriate mix of federal employees and service contractors and what steps will you take to improve the cost—benefit analysis of creating the right mix for smarter contracting decisions?

I believe that a balanced workforce comprised of civilian, military, and contractor personnel is necessary to successfully execute the myriad of missions that comprise the Department. The most important factor in achieving an efficient and effective strategy is a human capital plan that is forward looking, takes into

account opportunities and threats when forecasting future needs and reflects component specific needs. While no planning document is ever perfect, planning for current and future requirements allows an agency to make informed decisions and set a strategic direction, rather than making potentially sub-optimal decisions based on unanticipated needs.

8. Since its creation, the Department has struggled to unify the various components into a singular entity with a common focus and mission. As Under Secretary for Management, you play a critical role in building the management structures to help drive jointness and build a common culture.
  - a. If confirmed, what will be your approach to addressing the issue of jointness and driving a common culture at the Department?

My approach, if confirmed, would be to build on areas where there are established commonalities to seek additional opportunities to build in and reinforce jointness. I believe the various functional chiefs and the communities they lead represent a tremendous opportunity to enhance alignment and to strengthen the Department. Through the various functional chiefs, I would seek to further or establish Centers of Excellence and/or lead components on initiatives of value across multiple components. Additionally, I would seek opportunities to strengthen and mature the Joint Requirements Council.

**Senator Heidi Heitkamp**  
**Post-Hearing Questions for the Record**  
**Submitted to Claire Grady**  
**Nomination of Claire M. Grady to be Under Secretary for Management,**  
**U.S. Department of Homeland Security**  
**Wednesday, June 28, 2017**

1. Cybersecurity is one of the most challenging emerging threats our country faces. As our communities are increasingly interwoven online, we have to be increasingly careful about cybersecurity threats to businesses and families. I recognize that your background in acquisitions has given you a holistic understanding of the many components within DHS.
  - a. Could you briefly elaborate on how you will leverage your background to address cybersecurity and IT modernization issues?

I believe cybersecurity must be considered up-front as part of the requirements process, taking into consideration the risks associated with current and future threats. Cybersecurity should be built into the test plans throughout the acquisition process, including protection of any sensitive information stored in contractor's systems during the conduct of the procurement, and a capability should be tested to ensure it meets appropriate cybersecurity standards before fielding.

- b. As you address cybersecurity and IT modernization efforts, what will be your top priorities?

I have not yet had an opportunity to review DHS' cybersecurity and IT modernization efforts, but if confirmed, would in concert with the DHS Chief Information Officer, make it a priority to understand the current status of the Department's IT modernization efforts and seek opportunities to achieve efficiencies where practicable through commonality and elimination of costly legacy systems.

2. In your questionnaire and during your staff interview and hearing, you recognized the recruitment, retention, and morale challenges facing DHS. One of my top priorities since joining the Senate has been to address CBP staffing challenges along the Northern Border, where it has been difficult to recruit and retain folks in remote locations.
  - a. What strategies will you employ to address recruitment and retention issues in rural areas?

Recruitment and retention will be a top priority for me, if I were to be confirmed, as instability in the workforce not only puts mission execution at risk, it creates

tremendous strain on the hardworking homeland security professionals who are serving in undermanned locations, which further exacerbates the situation. I understand that this is a long-standing challenge and would first work with the DHS Chief Human Capital Officer, Angela Bailey, and the impacted components on what have been identified as the impediments to recruitment and retention. I believe the solutions must be data driven and that the perspective of and input from the employees must be factored in to ensure that the root causes are being addressed and that improvements will result in sustainable progress.

b. What steps can Congress take to help you achieve this goal?

As part of the efforts to address this important priority, if confirmed, I would be committed to exploring all possible solutions to this challenge and to working with Congress to ensure DHS has the tools and flexibilities it needs, including exploring statutory authorities provided to other Departments for potential applicability at DHS.

3. Managers play a vital role in the culture of an agency, and are responsible for giving employees the tools they need to succeed and thrive in the workplace. Ensuring that managers are adequately trained and have the leadership qualities necessary to effectively manage, lead, and empower the DHS workforce is critical to the agency's effectiveness in protecting the homeland. During your staff interview, you recognized the importance of making sure supervisors are well-trained and qualified for leadership positions.
  - a. As Under Secretary for Management, what strategies will you employ to ensure that supervisors are well trained and qualified for leadership positions?

If I were to be confirmed, to ensure that supervisors are both trained and qualified for the critical leadership positions they hold, I would work with the Department's human resources and learning professionals to ensure the Department's mandatory supervisor training addresses the skills necessary to be a successful supervisor and to identify and correct any gaps in training. Working with component leadership, I would seek to identify best practices from high performing locations/entities to replicate more broadly and also identify under-performing organizations and locations and work with the components to offer remedial training to better equip existing supervisors for the positions they hold. I would also seek opportunities to develop the next generation of leaders by offering training and experiential opportunities for individuals to enable them to develop and practice management and leadership skills before becoming supervisors.





June 23, 2017

The Honorable Ron Johnson  
Chairman  
Homeland Security & Governmental Affairs  
Committee  
U.S. Senate  
340 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Claire McCaskill  
Ranking Member  
Homeland Security & Governmental Affairs  
Committee  
U.S. Senate  
340 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairman Johnson and Ranking Member McCaskill:

On behalf of the members of the Information Technology Alliance for Public Sector (ITAPS),<sup>1</sup> I write today to endorse the nomination and confirmation of Claire Grady to be the next Undersecretary for Management at the Department of Homeland Security (DHS).

ITAPS has had the pleasure to work with Claire Grady in her term as the Director of Defense Procurement and Acquisition Policy, where she has consistently been open to hearing industry perspectives on the array of topics and issues her office addressed. Her willingness to engage with stakeholders on issues that drive how the Department of Defense acquires and manages the mission capabilities it needs in today's complex national security environment has been a real asset to the American taxpayer. For the information and communications technology sector, these issues include sustaining and gaining access to some of the latest innovations available and understanding the shifting reliance the department has had on commercial items, as they are increasingly called upon to deliver mission capabilities. We have sincerely appreciated her engagement and willingness to work with ITAPS and our members.

Leadership in the role of Undersecretary for Management will be critical at DHS as Congress and the administration move forward to improve the acquisition workforce and modernize information technology networks and systems. For these reasons, we believe Ms. Grady is an excellent nominee for this role and would urge you to consider her nomination favorably and vote to swiftly confirm her as the next Undersecretary for Management at DHS. Thank you for your consideration of our endorsement and, should you have any questions, please feel free to contact me at 202-626-5758 or at [thodgkins@itic.org](mailto:thodgkins@itic.org).

Sincerely,

A.R. "Trey" Hodgkins, III  
Senior Vice President, Public Sector

<sup>1</sup> **About ITAPS.** ITAPS, a division of the Information Technology Industry Council (ITI), is an alliance of leading technology companies building and integrating the latest innovative technologies for the public sector market. With a focus on the federal, state, and local levels of government, as well as on educational institutions, ITAPS advocates for improved procurement policies and practices, while identifying business development opportunities and sharing market intelligence with our industry participants. Visit [itaps.itic.org](http://itaps.itic.org) to learn more. Follow us on Twitter @ITAlliancePS.

**OPENING STATEMENT OF HENRY KERNER, NOMINEE FOR SPECIAL COUNSEL, OFFICE OF  
SPECIAL COUNSEL, BEFORE THE SENATE HOMELAND SECURITY AND GOVERNMENTAL  
AFFAIRS COMMITTEE**

Chairman Johnson, Ranking Member McCaskill, and distinguished members of the Committee: Thank you for the honor to appear before you today, and for the privilege of your consideration of my confirmation. I am humbled and honored to have been nominated by the President to lead this important office that protects the whistleblowers vital to holding our government accountable.

I would like to start by thanking a few people: First and foremost, a big thank you to my family in California who are watching online. They have been incredibly supportive and I appreciate their encouragement and steadfastness. I would also like to thank Katherine and Nick Rossi, who have been tremendous friends. I am also terrifically grateful to Senator John McCain, who gave me the opportunity to serve as his staff director on this Committee's Permanent Subcommittee on Investigations during the 113<sup>th</sup> Congress – making this something of a homecoming for me. Additionally, I am heartened by the attendance of so many current and former colleagues of mine. I have learned so much from all of them and appreciate their continued support and affection. And a special thank you to John Vecchione and Julie Smith of Cause of Action Institute for being so accommodating with my time during the confirmation process.

Lastly, I would be remiss, if I failed to express my appreciation for the outgoing OSC leadership. Special Counsel Carolyn Lerner, Acting Special Counsel Adam Miles, and the career staff at OSC should be commended for restoring confidence in the agency and significantly advancing protections for whistleblowers. I am especially grateful that Mr. Miles decided to bring on new Principal Deputy Special Counsel Tristan Leavitt early to assist with the transition process. Mr. Leavitt, an eight-year Hill veteran with whom I've worked previously, is exceptionally talented and committed to the mission of the agency. I am thrilled he chose to join OSC last week, and I look forward to working with him again, should I be confirmed.

As for my own background, I have been a government lawyer and counsel for nearly my whole professional life. I served as a prosecutor in Los Angeles County for nearly two decades, most of which I spent in the city of Compton, California. That experience taught me how crucial it is for citizens to have confidence in the law and the legal system – to trust, and be given tangible reasons to believe, that government officials with integrity are striving to apply the law fairly to each and every person. I also found satisfaction in searching for the truth based on evidence and facts, not preconceptions or assumptions. As a frontline prosecutor, it doesn't matter what you *think* someone did. You have to prove it beyond a reasonable doubt, and you have an ethical obligation only to bring a case if you honestly believe it is valid.

Among other roles, I spent several years in the complaints section, which required me to review cases as they came into the office and decide what, if any, charges to file. This experience taught me valuable skills in how to assess credibility and make timely judgments about the merits of cases.

Once I transitioned to the Hill, I was one of the primary congressional investigators of the “Fast and Furious” scandal, which involved allegations of “gunwalking” made by whistleblowers to Congress. My work with whistleblowers continued when I became the minority staff director on PSI, and when I returned to the House Oversight and Government Reform Committee in a leadership role. Through my interactions with the whistleblowers, I have learned about what animates people to speak out when others may not, and what a vital impact such brave civil servants can have on our country’s policies.

I believe my professional experiences have given me a better understanding of how whistleblowers might feel when they want to do the right thing, but their supervisors ignore their concerns. For example, during my time in Los Angeles, I was once ordered to proceed to trial with a case that I felt did not meet the legal requirements or ethical obligations incumbent upon me as a prosecutor and a member of the Bar. Despite my protestations, the prosecutor’s office would not reverse its theory of the case and ordered me to proceed to trial.

In order to resolve my significant ethical concerns, I chose to go outside of the traditional channels for recourse. I took it upon myself to conduct additional investigation of the crime scene and to interview additional witnesses. These witnesses provided information that contradicted my supervisor’s original theory of the case. I took my findings back to the office and managed to convince my bosses that we should not proceed with the case. While this was an isolated case, the experience – combined with my decades of work with numerous crime victims and government whistleblowers – has allowed me to gain a better understanding of the challenges and self-doubt many whistleblowers experience while trying to do the right thing.

To that end, I am particularly pleased that the Committee has done so much work to advance legislation to protect whistleblowers. Just last month, the Senate passed this Committee’s Dr. Chris Kirkpatrick Whistleblower Protection Act. It was developed in response to this Committee’s work with Department of Veterans Affairs whistleblowers, but it will help federal employees government-wide once enacted.

Chairman Johnson and Ranking Member McCaskill, I know that you have also put an immense amount of work into the Office of Special Counsel Reauthorization Act, which was reported to the Senate floor last month. I have already heard from staff at OSC about how beneficial that legislation is in clarifying Congress’s longstanding intent to provide OSC with access to all materials necessary to carry out the responsibilities assigned to it in 1978.

Two weeks ago, the President signed the Follow the Rules Act, and I want to thank this Committee for working so swiftly to develop S. 1083 and get it to the President’s desk. That key bill remedies OSC’s inability to obtain extensions of personnel stays when the Merit Systems Protection Board is without a quorum, as it is presently. As the Committee knows, this straightforward fix has a very direct impact for whistleblowers, including in cases currently under investigation by OSC.

These provisions will greatly strengthen my capacity to protect whistleblowers should I be confirmed as Special Counsel. For that I am grateful.

In closing, I would just like to highlight a few of my goals for OSC, should I be confirmed, based on my discussions to date with members and staff in Congress, stakeholders, and OSC employees. First, as I already mentioned, I want to continue the good job Ms. Lerner has done and build on her successes at OSC. Second, I want to continue to implement the information technology system upgrades currently in progress, while paying special attention to cybersecurity and caseload efficiency gains. Third, I want to address how to optimize intake of an ever-expanding caseload in order to provide appropriate response times to whistleblowers. Fourth, I want to increase education and outreach with agency and congressional staff, especially with regard to the Hatch Act and whistleblowers' rights. And finally, I want to place an increased emphasis on litigation to promote accountability, deter future violations, and strengthen OSC's bargaining position when negotiating settlement agreements for whistleblowers.

If confirmed, I look forward to the opportunity to work collaboratively with this Committee and other stakeholders to protect one of the federal government's most important assets – dedicated federal employees who are willing to “blow the whistle” on misconduct and violations of the public trust.

Thank you, and I would be happy to answer any questions the Committee may have.

**REDACTED**

**HSGAC BIOGRAPHICAL QUESTIONS FOR EXECUTIVE NOMINEES**

**1. Basic Biographical Information**

Please provide the following information.

<i>Position to Which You Have Been Nominated</i>	
<u>Name of Position</u>	<u>Date of Nomination</u>
Office of Special Counsel	June 5, 2016

<i>Current Legal Name</i>			
<u>First Name</u>	<u>Middle Name</u>	<u>Last Name</u>	<u>Suffix</u>
HENRY	JOHN	KERNER	

<i>Addresses</i>					
<u>Residential Address</u> (do not include street address)			<u>Office Address</u> (include street address)		
			Street: 1875 EYE STREET, NW SUITE 80		
City: ARLINGTON	State: VA	Zip: 22201	City: WASHINGTON	State: D.C.	Zip: 20006

<i>Other Names Used</i>						
<u>First Name</u>	<u>Middle Name</u>	<u>Last Name</u>	<u>Suffix</u>	<u>Check if Maiden Name</u>	<u>Name Used From</u> (Month/Year) (Check box if estimate)	<u>Name Used To</u> (Month/Year) (Check box if estimate)
N/A					Est <input type="checkbox"/>	Est <input type="checkbox"/>
					Est <input type="checkbox"/>	Est <input type="checkbox"/>

<i>Birth Year and Place</i>	
<b>Year of Birth</b> (Do not include month and day.)	<b>Place of Birth</b>
1966	NEW YORK, NY

<i>Marital Status</i>						
Check All That Describe Your Current Situation:						
<b>Never Married</b>	<b>Married</b>	<b>Separated</b>	<b>Annulled</b>	<b>Divorced</b>	<b>Widowed</b>	
<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

<i>Spouse's Name</i> (current spouse only)			
<b>Spouse's First Name</b>	<b>Spouse's Middle Name</b>	<b>Spouse's Last Name</b>	<b>Spouse's Suffix</b>
N/A			

<i>Spouse's Other Names Used</i> (current spouse only)						
<b>First Name</b>	<b>Middle Name</b>	<b>Last Name</b>	<b>Suffix</b>	<b>Check if Maiden Name</b>	<b>Name Used From</b> (Month/Year) (Check box if estimate)	<b>Name Used To</b> (Month/Year) (Check box if estimate)
N/A					Est <input type="checkbox"/>	Est <input type="checkbox"/>
					Est <input type="checkbox"/>	Est <input type="checkbox"/>

<i>Children's Names (if over 18)</i>			
First Name	Middle Name	Last Name	Suffix
N/A			

**2. Education**

List all post-secondary schools attended.

<u>Name of School</u>	<u>Type of School</u> (vocational/technical/trade school, college/university/military college, correspondence/distance/extension/online school)	<u>Date Began School</u> (month/year) (check box if estimate)	<u>Date Ended School</u> (month/year) (check box if estimate) (check "present" box if still in school)	<u>Degree</u>	<u>Date Awarded</u>
HARVARD	LAW SCHOOL	09/1989 <input type="checkbox"/> Est <input type="checkbox"/>	05/1992 <input type="checkbox"/> Est <input type="checkbox"/> Present <input type="checkbox"/>	J.D.	5/92
UCLA	UNIVERSITY	09/1984 <input type="checkbox"/> Est <input type="checkbox"/>	06/1989 <input type="checkbox"/> Est <input type="checkbox"/> Present <input type="checkbox"/>	M.A.	6/89
UCLA	UNIVERSITY	09/1984 <input type="checkbox"/> Est <input type="checkbox"/>	06/89 <input type="checkbox"/> Est <input type="checkbox"/> Present <input type="checkbox"/>	B.A.	6/89
		<input type="checkbox"/> Est <input type="checkbox"/>	<input type="checkbox"/> Est <input type="checkbox"/> Present <input type="checkbox"/>		

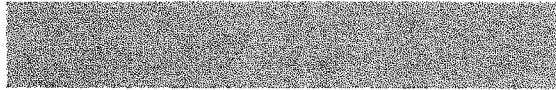
**3. Employment**

(A) List all of your employment activities, including unemployment and self-employment. If the employment activity was military duty, list separate employment activity periods to show each change of military duty station. Do not list employment before your 18th birthday unless to provide a minimum of two years of employment history.

<b>Type of Employment</b> (Active Military Duty Station, National Guard/Reserve, USPHS Commissioned Corps, Other Federal employment, State Government (Non-Federal Employment), Self-employment, Unemployment, Federal Contractor, Non-Government Employment (excluding self-employment), Other	<b>Name of Your Employer/Assigned Duty Station</b>	<b>Most Recent Position Title/Rank</b>	<b>Location</b> (City and State only)	<b>Date Employment Began</b> (month/year) (check box if estimate)	<b>Date Employment Ended</b> (month/year) (check box if estimate) (check "present" box if still employed)
FEDERAL GOVERNMENT	U.S. DISTRICT COURT	LAW CLERK	LOS ANGELES, CA	09/1992 <input type="checkbox"/> Est	01/93 <input type="checkbox"/> Est
COUNTY GOVERNMENT	L.A. COUNTY DISTRICT ATTORNEY'S OFFICE	DEPUTY DA	COMPTON, CA	01/93 <input type="checkbox"/> Est	01/2011 <input type="checkbox"/> Est
FEDERAL GOVERNMENT	US HOUSE COMMITTEE ON OVERSIGHT AND GOV'T REFORM	SENIOR COUNSEL	WASHINGTON, D.C.	01/11 <input type="checkbox"/> Est	02/13 <input type="checkbox"/> Est
FEDERAL GOVERNMENT	HSGAC	STAFF DIRECTOR AND CHIEF COUNSEL AT PSI	D.C.	02/13 <input type="checkbox"/> Est	01/15 <input type="checkbox"/> Est
FEDERAL GOVERNMENT	HOUSE OVERSIGHT COMMITTEE	DEPUTY DIRECTOR, INVESTIGATIONS	D.C.	01/15 <input type="checkbox"/> Est	03/16 <input type="checkbox"/> Est



PRIVATE EMPLOYER	KELLY LEGAL MANAGED SERVICES	CONTRACT LAWYER	D.C.	04/16	05/16
PRIVATE NON-PROFIT EMPLOYER	CAUSE OF ACTION INSTITUTE	ASST. VP OF INVESTIGATIO NS	D.C.	05/16	PRESENT



(B) List any advisory, consultative, honorary or other part-time service or positions with federal, state, or local governments, not listed elsewhere.

Name of Government Entity	Name of Position	Date Service Began (month/year) (check box if estimate)	Date Service Ended (month/year) (check box if estimate) (check "present" box if still serving)
N/A		Est <input type="checkbox"/>	Est Present <input type="checkbox"/> <input type="checkbox"/>
		Est <input type="checkbox"/>	Est Present <input type="checkbox"/> <input type="checkbox"/>
		Est <input type="checkbox"/>	Est Present <input type="checkbox"/> <input type="checkbox"/>

**4. Potential Conflict of Interest**

(A) Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.

NONE

(B) Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any

legislation or affecting the administration or execution of law or public policy, other than while in a federal government capacity.

NONE

**5. Honors and Awards**

List all scholarships, fellowships, honorary degrees, civilian service citations, military medals, academic or professional honors, honorary society memberships and any other special recognition for outstanding service or achievement.

DEPARTMENTAL SCHOLAR (HISTORY-UCLA); PHI BETA KAPPA; CITATION FOR OUTSTANDING SERVICE, CITY OF COMPTON, JANUARY 2011

**6. Memberships**

List all memberships that you have held in professional, social, business, fraternal, scholarly, civic, or charitable organizations in the last 10 years.

Unless relevant to your nomination, you do NOT need to include memberships in charitable organizations available to the public as a result of a tax deductible donation of \$1,000 or less, Parent-Teacher Associations or other organizations connected to schools attended by your children, athletic clubs or teams, automobile support organizations (such as AAA), discounts clubs (such as Groupon or Sam's Club), or affinity memberships/consumer clubs (such as frequent flyer memberships).

<b>Name of Organization</b>	<b>Dates of Your Membership (You may approximate.)</b>	<b>Position(s) Held</b>
CALIFORNIA BAR	12/92-PRESENT	MEMBER
D.C. BAR	1/2017-PRESENT	MEMBER
FEDERALIST SOCIETY	INTERMITTENTLY	MEMBER
WOODEN ATHLETIC FUND (UCLA SPORTS BOOSTER GROUP)	2004-PRESENT	MEMBER


**7. Political Activity**

(A) Have you ever been a candidate for or been elected or appointed to a political office?

<u>Name of Office</u>	<u>Elected/Appointed/ Candidate Only</u>	<u>Year(s) Election Held or Appointment Made</u>	<u>Term of Service (if applicable)</u>
N/A			

(B) List any offices held in or services rendered to a political party or election committee during the last ten years that you have not listed elsewhere.

<u>Name of Party/Election Committee</u>	<u>Office/Services Rendered</u>	<u>Responsibilities</u>	<u>Dates of Service</u>
N/A			

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(C) Itemize all individual political contributions of \$200 or more that you have made in the past five years to any individual, campaign organization, political party, political action committee, or similar entity. Please list each individual contribution and not the total amount contributed to the person or entity during the year.

Name of Recipient	Amount	Year of Contribution
N/A		

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**8. Publications and Speeches**

(A) List the titles, publishers and dates of books, articles, reports or other published materials that you have written, including articles published on the Internet. Please provide the Committee with copies of all listed publications. In lieu of hard copies, electronic copies can be provided via e-mail or other digital format.

Title	Publisher	Date(s) of Publication
N/A		

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**(B) List any formal speeches you have delivered during the last five years and provide the Committee with copies of those speeches relevant to the position for which you have been nominated. Include any testimony to Congress or any other legislative or administrative body. These items can be provided electronically via e-mail or other digital format.**

<u>Title/Topic</u>	<u>Place/Audience</u>	<u>Date(s) of Speech</u>
N/A		

(C) List all speeches and testimony you have delivered in the past ten years, except for those the text of which you are providing to the Committee.

Title	Place/Audience	Date(s) of Speech
N/A		

**9. Criminal History**

Since (and including) your 18<sup>th</sup> birthday, has any of the following happened?  
**NO TO ALL**

- Have you been issued a summons, citation, or ticket to appear in court in a criminal proceeding against you? (Exclude citations involving traffic infractions where the fine was less than \$300 and did not include alcohol or drugs.)
- Have you been arrested by any police officer, sheriff, marshal or any other type of law enforcement official?
- Have you been charged, convicted, or sentenced of a crime in any court?
- Have you been or are you currently on probation or parole?
- Are you currently on trial or awaiting a trial on criminal charges?
- To your knowledge, have you ever been the subject or target of a federal, state or local criminal investigation?

**If the answer to any of the questions above is yes, please answer the questions below for each criminal event (citation, arrest, investigation, etc.). If the event was an investigation, where the question below asks for information about the offense, please offer information about the offense under investigation (if known).**

N/A

A) Date of offense:

- a. Is this an estimate (Yes/No):

B) Description of the specific nature of the offense:

C) Did the offense involve any of the following?

- 1) Domestic violence or a crime of violence (such as battery or assault) against your child, dependent, cohabitant, spouse, former spouse, or someone with whom you share a child in common: Yes / No
- 2) Firearms or explosives: Yes / No
- 3) Alcohol or drugs: Yes / No

D) Location where the offense occurred (city, county, state, zip code, country):

E) Were you arrested, summoned, cited or did you receive a ticket to appear as a result of this offense by any police officer, sheriff, marshal or any other type of law enforcement official: Yes / No

- 1) Name of the law enforcement agency that arrested/cited/summoned you:
- 2) Location of the law enforcement agency (city, county, state, zip code, country):

F) As a result of this offense were you charged, convicted, currently awaiting trial, and/or ordered to appear in court in a criminal proceeding against you: Yes / No

- 1) If yes, provide the name of the court and the location of the court (city, county, state, zip code, country):
- 2) If yes, provide all the charges brought against you for this offense, and the outcome of each charged offense (such as found guilty, found not-guilty, charge dropped or "nolle pros," etc). If you were found



guilty of or pleaded guilty to a lesser offense, list separately both the original charge and the lesser offense:

3) If no, provide explanation:

G) Were you sentenced as a result of this offense: Yes / No

H) Provide a description of the sentence:

I) Were you sentenced to imprisonment for a term exceeding one year: Yes / No

J) Were you incarcerated as a result of that sentence for not less than one year: Yes / No

K) If the conviction resulted in imprisonment, provide the dates that you actually were incarcerated:

L) If conviction resulted in probation or parole, provide the dates of probation or parole:

M) Are you currently on trial, awaiting a trial, or awaiting sentencing on criminal charges for this offense: Yes / No

N) Provide explanation:

**10. Civil Litigation and Administrative or Legislative Proceedings**

(A) Since (and including) your 18th birthday, have you been a party to any public record civil court action or administrative or legislative proceeding of any kind that resulted in (1) a finding of wrongdoing against you, or (2) a settlement agreement for you, or some other person or entity, to make a payment to settle allegations against you, or for you to take, or refrain from taking, some action. Do NOT include small claims proceedings. NO

<u>Date Claim/Suit Was Filed or Legislative Proceedings Began</u>	<u>Court Name</u>	<u>Name(s) of Principal Parties Involved in Action/Proceeding</u>	<u>Nature of Action/Proceeding</u>	<u>Results of Action/Proceeding</u>
N/A				

(B) In addition to those listed above, have you or any business of which you were an officer, director or owner ever been involved as a party of interest in any administrative agency proceeding or civil litigation? Please identify and provide details for any proceedings or civil litigation that involve actions taken or omitted by you, or alleged to have been taken or omitted by you, while serving in your official capacity. NO

<u>Date Claim/Suit Was Filed</u>	<u>Court Name</u>	<u>Name(s) of Principal Parties Involved in Action/Proceeding</u>	<u>Nature of Action/Proceeding</u>	<u>Results of Action/Proceeding</u>
N/A				

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(C) For responses to the previous question, please identify and provide details for any proceedings or civil litigation that involve actions taken or omitted by you, or alleged to have been taken or omitted by you, while serving in your official capacity.

**11. Breach of Professional Ethics**

(A) Have you ever been disciplined or cited for a breach of ethics or unprofessional conduct by, or been the subject of a complaint to, any court, administrative agency, professional association, disciplinary committee, or other professional group? Exclude cases and proceedings already listed. NO

<u>Name of Agency/Association/Committee/Group</u>	<u>Date Citation/Disciplinary Action/Complaint Issued/Initiated</u>	<u>Describe Citation/Disciplinary Action/Complaint</u>	<u>Results of Disciplinary Action/Complaint</u>
N/A			

(C) Have you ever been fired from a job, quit a job after being told you would be fired, left a job by mutual agreement following charges or allegations of misconduct, left a job by mutual agreement following notice of unsatisfactory performance, or received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as violation of a security policy?

NO

**12. Tax Compliance**

(This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

**REDACTED**

**REDACTED**

**13. Lobbying**

In the past ten years, have you registered as a lobbyist? If so, please indicate the state, federal, or local bodies with which you have registered (e.g., House, Senate, California Secretary of State).

NO

**14. Outside Positions**

See OGE Form 278. (If, for your nomination, you have completed an OGE Form 278 Executive Branch Personnel Public Financial Disclosure Report, you may check the box here to complete this section and then proceed to the next section.)

For the preceding ten calendar years and the current calendar year, report any positions held, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities and those solely of an honorary nature.

<u>Name of Organization</u>	<u>Address of Organization</u>	<u>Type of Organization</u> (corporation, firm, partnership, other business enterprise, other non-profit organization, educational institution)	<u>Position Held</u>	<u>Position Held From</u> (month/year)	<u>Position Held To</u> (month/year)
N/A					

**15. Agreements or Arrangements**

See OGE Form 278. (If, for your nomination, you have completed an OGE Form 278 Executive Branch Personnel Public Financial Disclosure Report, you may check the box here to complete this section and then proceed to the next section.)

As of the date of filing your OGE Form 278, report your agreements or arrangements for: (1) continuing participation in an employee benefit plan (e.g. pension, 401k, deferred compensation); (2) continuation of payment by a former employer (including severance payments); (3) leaves of absence; and (4) future employment.

Provide information regarding any agreements or arrangements you have concerning (1) future employment; (2) a leave of absence during your period of Government service; (3) continuation of payments by a former employer other than the United States Government; and (4) continuing participation in an employee welfare or benefit plan maintained by a former employer other than United States Government retirement benefits.

<u>Status and Terms of Any Agreement or Arrangement</u>	<u>Parties</u>	<u>Date</u> (month/year)
NONE		


**16. Additional Financial Data**

All information requested under this heading must be provided for yourself, your spouse, and your dependents. (This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

**REDACTED**

**REDACTED**

**SIGNATURE AND DATE**

107

**I hereby state that I have read the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.**

**HENRY KERNER**

**This 6th day of June, 2017**

UNITED STATES OFFICE OF  
GOVERNMENT ETHICS

REDACTED



June 15, 2017

The Honorable Ron Johnson  
Chairman  
Committee on Homeland Security  
and Governmental Affairs  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Henry Kettner, who has been nominated by President Trump for the position of Special Counsel, Office of Special Counsel.

We have reviewed the report and have obtained advice from the agency concerning any possible conflict in light of its functions and the nominee's proposed duties. Also enclosed is an ethics agreement outlining the actions that the nominee will undertake to avoid conflicts of interest. Unless a date for compliance is indicated in the ethics agreement, the nominee must fully comply within three months of confirmation with any action specified in the ethics agreement.

Based thereon, we believe that this nominee is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,

DAVID APOL

Digitally signed by DAVID APOL,  
DN: c=US, o=U.S. Government, ou=Office of  
Government Ethics, cn=DAVID APOL,  
c=US, o=U.S. Government, ou=Office of  
Government Ethics, cn=DAVID APOL,  
Date: 2017.06.15 12:16:55 -0400

David J. Apol  
General Counsel

Enclosures **REDACTED**





May 08, 2017

Susan Ullman  
Designated Agency Ethics Official  
Office of the Special Counsel  
1730 M Street, N.W.  
Washington, D.C. 20036

Dear Ms. Ullman:

The purpose of this letter is to describe the steps that I will take to avoid any actual or apparent conflict of interest in the event that I am confirmed for the position of Special Counsel, Office of the Special Counsel.

As required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter in which I know that I have a financial interest directly and predictably affected by the matter, or in which I know that a person whose interests are imputed to me has a financial interest directly and predictably affected by the matter, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

Upon confirmation, I will resign from my position with the Cause of Action Institute. For a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know the Cause of Action Institute is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

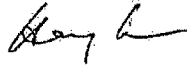
I will meet in person with you during the first week of my service in the position of Special Counsel in order to complete the initial ethics briefing required under 5 C.F.R. § 2638.305. Within 90 days of my confirmation, I will also document my compliance with this ethics agreement by notifying you in writing when I have completed the steps described in this ethics agreement.

If I have a managed account or otherwise use the services of an investment professional during my appointment, I will ensure that the account manager or investment professional obtains my prior approval on a case-by-case basis for the purchase of any assets other than cash, cash equivalents, investment funds that qualify for the exemption at 5 C.F.R. § 2640.201(a), or obligations of the United States.

I understand that as an appointee I will be required to sign the Ethics Pledge (Exec. Order no. 13770) and that I will be bound by the requirements and restrictions therein in addition to the commitments I have made in this ethics agreement.

I have been advised that this ethics agreement will be posted publicly, consistent with 5 U.S.C. § 552, on the website of the U.S. Office of Government Ethics with ethics agreements of other Presidential nominees who file public financial disclosure reports.

Sincerely,

A handwritten signature in black ink, appearing to read "Henry Kerner", written in a cursive style.

Henry Kerner

**U.S. Senate Committee on Homeland Security and Governmental Affairs  
Pre-hearing Questionnaire  
For the Nomination of Henry Kerner to be  
Special Counsel, Office of Special Counsel**

**I. Nomination Process and Conflicts of Interest**

- 1. Did the President give you specific reasons why he nominated you to be the next Special Counsel for the Office of Special Counsel (OSC)? Why do you believe you were nominated?**

While the President did not provide specific reasons for selecting me, I believe I was chosen for my commitment to good government, for my experience as a long-time prosecutor and bicameral Hill oversight staffer, and for my integrity.

- 2. Were any conditions, expressed or implied, attached to your nomination? If so, please explain.**

No conditions, expressed or implied, were attached to my nomination.

- 3. Have you made any commitments with respect to the policies and principles you will attempt to implement as Special Counsel? If so, what are they, and to whom were the commitments made?**

Apart from the commitments made herein, such as those regarding cooperation with Congress and protecting OSC employees from retaliation, I have made no commitments about the policies and principles I will attempt to implement, if confirmed as Special Counsel.

- 4. Are you aware of any business relationship, dealing, or financial transaction that could result in a possible conflict of interest for you or the appearance of a conflict of interest? If so, please explain what procedures you will use to recuse yourself or otherwise address the conflict. And if you will recuse yourself, explain how you will ensure your responsibilities are not affected by your recusal.**

I cannot think of any such conflicts of interest. If confirmed, I will obtain an ethics waiver from my current employer, Cause of Action Institute, as a precaution. Should any issues present themselves during my tenure, I will consult with appropriate ethics officers to determine whether recusal is required. If recusal becomes necessary, I will rely on the Deputy Special Counsel and professional staff of the OSC to ensure the responsibilities of the office are not affected by my recusal.

## II. Background of the Nominee

### 5. What specific background, experience, and attributes qualify you to be Special Counsel?

I have been a government lawyer and counsel for 24 of the past 25 years. As a prosecutor in Los Angeles, I handled over 50 trials to jury verdict, thousands of preliminary hearings, bench trials, and adjudications. I also negotiated hundreds of case settlements. My experience includes successfully prosecuting a number of “life” cases (i.e., major offenses with sentences up to life in prison), including two murder convictions, and obtaining a then-novel gang injunction against a notorious street gang, which reduced homicides in the affected neighborhood to zero.

While in the L.A. District Attorney’s Office, I served in a number of supervisory roles in the most diverse “law firm” in the country. In addition, I also served as a so-called “complaint deputy” for several years, which required me to review cases as they came into the office and decide which, if any, charges to bring. I expect this experience to be useful in my new position, should I be confirmed, as it taught me valuable skills in how to assess credibility and make timely judgments about the merits of a case. While I understand that some cases require a much deeper dive before such an assessment can be made, I believe the experience I gained from having dealt with thousands of witnesses and victims of crimes over the course of my career will translate into a better understanding and appreciation of whistleblowers.

I began my career on Capitol Hill as one of the primary investigators into the “Fast and Furious” scandal on the House Oversight and Government Reform Committee. In this capacity, I co-wrote five staff reports, participated in over 26 transcribed interviews of front line and high-level ATF and DOJ officials, including whistleblowers, and organized six congressional hearings.

Following my tenure at House Oversight, I took on the position of staff director and chief counsel for Ranking Member John McCain on the Senate’s Permanent Subcommittee on Investigations (PSI) under HSGAC. While there, I successfully maintained the strong bipartisan working relationship between Senator McCain and Senator Carl Levin, then-Chairman of PSI, as well as among the respective staffs, while still promoting Senator McCain’s priorities. I also had the opportunity to manage a diverse staff and institute new and innovative management methods including the creation of a “buddy” system and new editing methods. When I left PSI, I returned to House Oversight as the full committee’s deputy director for investigations.

I am now a member of the management team of a nonpartisan transparency/watchdog group, where I regularly have input into decisions involving recruitment, budget and organizational goals.

**6. Please describe:****a. Your leadership and management style.**

I would describe my management style as a cross between “visionary” and “coaching” styles. I like to set a clear and compelling vision for the team and then permit the team members to execute it. With a motivated and experienced group, this style works well as it allows the employees to enjoy the work and take pride in the outcome. In addition, I like to augment this primary “visionary” style with a “coaching” component, where I try to motivate employees to develop their strengths and provide opportunities for growth. I find that this combination creates a positive work environment and excellent work product.

**b. Your experience managing personnel.**

I have been a supervisor intermittently for the past ten years and, continuously, for the past five. When I was with the District Attorney’s Office in Los Angeles County, I held the position of Deputy-in-Charge on several occasions. Those positions usually required me to supervise younger prosecutors and allowed me to hone my training and mentoring skills. On the Hill, as staff director of PSI, I supervised six permanent staff, augmented by between four to seven additional law clerks, detailees and interns. During my tenure, I instituted a number of innovative editing methods that maximized staff collaboration and peer mentoring. I also engaged in recruiting efforts to find and develop outstanding candidates. Finally, most of the work on PSI included close bipartisan collaboration with the majority, which required me to assign and manage my personnel with an eye towards maximizing our contribution to the full subcommittee, which I believe we accomplished during an especially productive time for the subcommittee.

Following my tenure as staff director, I accepted a position as deputy director for investigations on the House Oversight Committee, where I supervised about 11 employees, mostly lawyers, and additional law clerks, and worked closely with the Director on the best ways to utilize personnel and implement the Chairman’s vision for the Committee. In that capacity, I also gained experience interacting with a varied and large intra-Committee leadership team on finding ways to obtain consensus and bridge disagreements. I also had the opportunity to work collaboratively with members of the Minority in propelling investigations forward.

Most recently, at Cause of Action Institute, I developed the strategic investigations division by recruiting members from the Hill, identifying and hiring young lawyers, and adding a special focus on collaborative efforts with relevant Hill committees, while safeguarding the organization’s nonpartisan approach to oversight.

**c. What is the largest number of people that have worked under you?**

Approximately 20.

7. **As a congressional staff member, approximately how many whistleblower matters did you personally handle? In any of those cases, please indicate whether you had occasion to work with: federal employees; contractor or subcontractor employees; grantee or subgrantee employees; military service members; and non-federal whistleblowers.**

During my first stint with the House Oversight Committee, I handled the second-level review of whistleblowers who had contacted the Committee's hotline. I personally spoke with about two dozen whistleblowers, including a number of federal employees, contractors and non-federal whistleblowers.

My primary assignment for the roughly two years I was on the House Oversight Committee involved investigating the Fast and Furious scandal, which came to our attention after ATF agents contacted Senator Grassley's office to complain about the practice of "gunwalking" (i.e., where firearms were sold to straw buyers as part of an ill-conceived sting operation that ultimately allowed many of the weapons to fall into the possession of criminals). In addition, I spoke with whistleblowers who alleged misconduct in the Justice Department, FBI, CIA, Department of Education and a host of other federal agencies.

While at PSI, I dealt with five whistleblowers, including two private citizens. Upon my return to the Oversight Committee I handled referrals from the whistleblower hotline, which included about a dozen people, mostly federal workers, private citizens and one contractor.

8. **As a congressional staff member, did you ever have occasion to prepare whistleblower referrals to an Office of Inspector General or the Office of Special Counsel?**

Yes, as part of the Fast and Furious team, we referred the Fast and Furious whistleblowers' complaints to both the Office of Inspector General (OIG) of the Department of Justice and to OSC.

9. **As a congressional staff member, did you ever have occasion to handle a whistleblower matter that was not resolved in the whistleblower's favor? If so, without providing details of the matter, can you describe how you dealt with that matter?**

Yes. On several occasions, primarily during my time at the House Oversight Committee, we tried to point such whistleblowers in the right direction and endeavored to see that their cases could be taken up by more appropriate bodies. These efforts were not always successful, but in such instances, I have always believed that communicating as much information as possible to the whistleblower and acting transparently engender good will and demonstrate the respect that such individuals deserve.

### III. Role of the Special Counsel

#### 10. What is your view of the role of the Special Counsel and the OSC?

The Special Counsel and OSC exist to maintain the integrity of the merit system. According to its mission statement, OSC performs six primary functions: (1) protecting federal employees from improper personnel actions, including retaliation for whistleblowing; (2) providing a safe channel for federal employees to disclose wrongdoing; (3) enforcing the Hatch Act; (4) protecting the employment and reemployment rights of veterans, guardsmen and reservists; (5) offering mediation to complainants and agencies in selected cases; and (6) offering speakers, educational materials and trainings to agencies.

I view it as the job of the Special Counsel to set a clear vision and manage the operations of the agency in a way that promotes a positive work environment and creates an atmosphere where people want to succeed in protecting the merit system. One of the most important functions includes strengthening the relationship with Congress and stakeholders in the whistleblower communities.

#### 11. What do you believe is the role of the Special Counsel in ensuring that each agency robustly protects whistleblowers?

Through both OSC's enforcement and educational roles, the Special Counsel sets the tone for the entire Executive Branch in how it protects whistleblowers. The Special Counsel's chief statutory role is to investigate and prosecute prohibited personnel practices. If OSC fulfills this role vigorously, it can help to not only protect whistleblowers after the fact through corrective action, but also to have a deterrent effect where agencies know the consequences of retaliating and thus work to robustly protect whistleblowers. OSC's educational role can supplement these efforts, helping to establish a culture in each agency where whistleblowing is understood, protected, and respected.

#### 12. How would you describe and distinguish the respective roles of the OSC, Merit Systems Protection Board, Equal Employment Opportunity Commission, and the Office of Personnel Management in dealing with prohibited personnel practices?

OSC, the Merit Systems Protection Board (MSPB), and the Office of Personnel Management (OPM) were all established by the Civil Service Reform Act of 1978 (CSRA) to replace the Civil Service Commission. The CSRA also assigned some of the Commission's functions to the Equal Employment Opportunity Commission (EEOC), which had been in existence since 1965. All four agencies work to uphold the merit system principles and prevent prohibited personnel practices to some extent.

The primary role assigned to OSC by the CSRA and maintained through the Whistleblower Protection Act of 1989 (WPA), which made OSC an independent agency, is to investigate potential prohibited personnel practices and, where appropriate,

prosecute them. The EEOC has overlapping jurisdiction that is narrower than OSC's in that the EEOC only investigates and prosecutes workplace discrimination or retaliation for reporting discrimination, but deeper than OSC's in that the EEOC may act on a broader set of facts than the personnel actions to which OSC is limited. Given the EEOC's adjudicative capabilities, it is my understanding that OSC will defer to the EEOC where a complaint is already pending with that agency.

The MSPB also has responsibility for ensuring compliance with merit system principles and dealing with prohibited personnel practices. However, unlike OSC and the EEOC, the MSPB has a purely adjudicative role, not an investigative one. Where OSC finds evidence of prohibited personnel practices, it plays a prosecutorial role in bringing them before the MSPB. If OSC declines a whistleblower retaliation case, it may be brought to the MSPB for a fact-finding hearing. Additionally, the MSPB may hear retaliation allegations without OSC having declined a case to the extent the allegations are an affirmative defense in an otherwise-appealable personnel action.

Finally, as the manager of the federal workforce, OPM can play a significant role in ensuring that employees are trained regarding prohibited personnel practices and that agencies cooperate with OSC and the EEOC.

**a. Are there any recommendations you would make to streamline and reduce duplication within the whistleblower/appeal processes without sacrificing protections for whistleblowers?**

I received input from current staff at OSC who informed me that, by most statistical measures, OSC is fulfilling its mission more effectively than ever before. According to its recent annual reports and Congressional Budget Justification, OSC has achieved five times the number of favorable actions in whistleblower retaliation complaints than in any prior two-year period in agency history. OSC also achieved these results more efficiently: the average cost of resolving a case at OSC fell by 45 percent from FY 2010 through FY 2016.

OSC staff indicate that the office has achieved these efficiencies through agency initiatives designed to consolidate and streamline processes for resolving prohibited personnel practice complaints as well as disclosures. These initiatives include, for example, the establishment of a new program unit in which related whistleblower retaliation and disclosure cases are handled jointly by a single OSC attorney; expansion of efforts to achieve favorable resolutions early in the case process in cases that might not otherwise merit extensive investigation; increased use of mediation to more quickly and efficiently resolve complaints; and improvements to OSC's case filing forms and procedures. OSC's strategic plan also outlines the creation of a working group to improve efficiency of case handling, with a broad mandate to look at internal processes and establish metrics for measuring performance.

Given these ongoing efforts, if confirmed, I intend to listen to OSC staff to better understand what is working well, and where there are areas for improvement.



Additionally, this Committee and the House Committee on Oversight and Government Reform have already advanced legislation to streamline the statutory requirements for closing cases in certain circumstances to reduce the cost and administrative burden of doing so. Cases that might be appropriate for streamlined closure include cases where OSC does not have jurisdiction over the allegations, cases involving allegations OSC has considered previously, cases before another judicial or administrative forum, and cases involving very old personnel actions. This change would allow OSC to reduce duplicative consideration of repetitive claims and improve efficiency, effectiveness, and customer service in its handling of other cases.

If confirmed, I intend to evaluate the results of these initiatives and explore their continued use as tools to maximize efficiencies while achieving OSC's mission and safeguarding whistleblower protections.

**13. In recent years, the Special Counsel has worked closely with the Council of Inspectors General on Integrity and Efficiency (CIGIE) and individual inspectors general. What is your view of the role of inspectors general as it relates to the OSC?**

OSC and inspectors general have complementary missions of promoting accountability and investigating wrongdoing within federal agencies. I am informed that OSC has enjoyed an increasingly collaborative relationship with the inspector general community. Increased cooperation allows OSC and inspectors general to share best practices for investigation techniques and training, and to identify and resolve issues quickly and effectively.

The Whistleblower Protection Enhancement Act of 2012 (WPEA) requires each agency inspector general to designate a whistleblower protection ombudsman. The ombudsmen work with employees to explain the processes for working with OSC to file a whistleblower disclosure, to responsibly make a confidential communication of wrongdoing, or to submit a retaliation claim. The ombudsmen may also serve as intermediaries between employees and managers and recommend resolutions before retaliation occurs. This program has resulted in an increased focus on whistleblower protection within many inspector general offices. The ombudsman provision of the WPEA is subject to a five-year sunset provision and is set to expire in late 2017. I understand this Committee is working with the Senate Whistleblower Protection Caucus and with the House Oversight Committee to develop legislation permanently authorizing this program, and, based on my current understanding, I would support such legislation.

The passage of the Inspector General Empowerment Act of 2016 created additional shared responsibilities between OSC and CIGIE's Integrity Committee. Where allegations of wrongdoing involve an inspector general or a designated staff member, the Empowerment Act created a framework for collaborative review of the allegations by the Department of Justice, OSC, and the Integrity Committee to determine the appropriate

office to review or investigate the allegations. If confirmed, I look forward to working with these sister agencies to ensure that these types of allegations are properly addressed.

I understand the Committee is currently considering whether to encourage more OIGs to conduct their own investigations of whistleblower retaliation. These investigations can be very helpful to OSC by providing a completed investigative report, which OSC can then use to pursue corrective or disciplinary action.

**a. As a congressional staffer did you ever have occasion to work with the Integrity Committee of CIGIE?**

I have not worked directly with CIGIE.

**b. If confirmed, what kind of relationship do you anticipate having with the inspector general community?**

As I outlined in the answer to question 13, I view the relationship between OSC and the OIG community as essential to promoting whistleblower protections and, if confirmed, will do everything I can to strengthen our working partnership. In fact, when I worked on the Hill, the various committees benefitted greatly from the work of a number of OIGs, and I personally worked closely with staff from a number of OIGs, including DOJ, the Department of Education, the Department of Energy and TIGTA.

**c. Do you think that the self-policing model for the oversight community that includes CIGIE, Offices of Inspectors General, and the OSC is sufficient?**

Oversight structures to ensure accountability are important in any context. The process established by the Inspector General Empowerment Act expands accountability to ensure multiple entities within the oversight community review allegations. If confirmed, I will monitor and evaluate the newly established coordination process and recommend improvements as appropriate.

**d. Should there be more communication or coordination between Inspectors General and the Office of Special Counsel?**

As I noted in response to question 13, my understanding is that OSC has increased communication and coordination with inspectors general considerably over the past five years, in part due to Congress's creation of the whistleblower protection ombudsman program. If confirmed, I will continue and seek to extend these important relationships. I will also consider revising our Privacy Act regulation to allow for greater communication and collaboration with OIGs in appropriate circumstances.

**14. What do you believe are the biggest challenges that Congress faces in working with whistleblowers?** One of the biggest challenges many offices face is the lack of understanding regarding how to work with whistleblowers. This can run the gamut from not knowing what precisely constitutes a whistleblower, how to encourage whistleblowers to contact an office, what to do with whistleblower disclosures, what statutory protections exist for whistleblowers, how to ensure those statutory protections are maximized in actual practice, and what role OSC, OIGs, and others can play.

Similarly, whistleblowers also often have a lack of understanding of these same issues. Few federal workers just wake up one morning and decide to become a whistleblower; thus, they are often very uncertain about what protections exist and what Congress can do to help them. Some may be uncertain whether they will have control over the protection of their identity or whether their reception will depend on whether an individual office agrees with the disclosure made by the individual or what its implications may be.

**a. Do you have any proposals to address those challenges?** The creation of the Senate Whistleblower Protection Caucus and its House counterpart have been important steps. They have allowed congressional offices to identify other offices interested in these issues and allowed staff to learn from one another. Caucus events have also played an educational role. As an added benefit, these caucuses send the message that Congress expects the Executive Branch to develop a culture of understanding and respecting the right to blow the whistle, and that participating offices are committed to protecting whistleblowers who come to them regardless of the ideological upshot of a whistleblower's disclosure. Maximizing the potential of those organizations can likely provide further added benefits.

Recognizing unique occasions related to whistleblowing (such as the April 10 anniversary of the Whistleblower Protection Act, or National Whistleblower Day on July 30) and taking opportunities to speak about the importance of protecting whistleblowers, such as through floor statements and newspaper opinion pieces, can also help send a message, educate colleagues, and alleviate concerns potential whistleblowers may have.

**b. How do you believe OSC can assist Congress in working with whistleblowers?**

OSC is very willing to dedicate its expertise and resources to training congressional staff on working with whistleblowers. If confirmed, I hope to help OSC do more of this training for Congress than ever before. Additionally, OSC's primary role of investigating and prosecuting whistleblower retaliation makes it an important avenue for Congress to direct whistleblowers to, regardless of whether Congress is also conducting a parallel investigation into whistleblower retaliation or a whistleblower's underlying disclosures. OSC can apply for stays of personnel actions (pending legislation, thanks to this Committee, may hopefully soon permit stays even when the MSPB lacks a quorum) and see immediate results in freezing retaliation against federal employee whistleblowers. Congress may also find useful OSC's ability to ensure the investigation of whistleblower disclosures.

**IV. Policy Questions****15. What do you believe are the highest priority challenges facing the OSC?**

I have received input from current OSC staff on this question and am informed that reducing OSC's rising backlog and keeping pace with sustained, high caseloads are considerable challenges for OSC. The backlog is due in part to appropriations and staffing that have not kept pace with the growth in OSC's caseload. OSC received a modest budget increase in FY 2017 appropriations, and OSC is slated to receive another increase under the President's FY 2018 budget request. These investments will contribute to helping OSC reduce its backlog by filling positions that had remained unfilled under the FY 2017 Continuing Resolution and increasing OSC's overall staff level by 9 FTE to 144 total FTE.

Adequately and systemically addressing the flood of complaints OSC receives from the Department of Veterans Affairs (VA) is a related tremendous challenge OSC is facing, with important implications for how our nation fulfills its promises to our military veterans. In recent years, over one-third of OSC complaints were filed by VA employees, more than any other agency, despite being far smaller than agencies such as the Department of Defense.

Finally, I believe addressing OSC's information technology (IT) needs is also one of the most critical challenges facing OSC, even if often overlooked. I understand OSC has long operated on extremely outdated IT infrastructure. OSC has thankfully not had any breaches that I am aware of, yet outdated systems always create some vulnerabilities for infiltration and exploitation. The agency is currently in the process of making a number of IT updates, including adopting a new electronic case management system. Such projects often involve significant costs and have many opportunities for error.

If confirmed, I will more fully evaluate the challenges that OSC is facing as well as the appropriate steps to address those challenges.

**a. What steps might you take to address those challenges?**

Initially, if confirmed, I will evaluate all aspects of OSC's operations to seek efficiencies that will allow OSC to manage its high caseload within existing resource constraints. This will include evaluating OSC's case processing and workflow, including its implementation of an electronic case management system. In addition to seeking additional efficiencies, I will comprehensively evaluate OSC's budget to eliminate any waste and, if necessary, seek additional resources.

Regarding the VA, if confirmed, I will continue and expand OSC's efforts to work with the VA as well as with congressional oversight committees to improve cooperation with OSC reviews, quickly and effectively address whistleblower

retaliation and substantiated whistleblower disclosures, and create the internal mechanisms and awareness necessary to promote accountability within the VA.

Finally, if confirmed, I will vigilantly monitor OSC's transition to new IT infrastructure. Helping to successfully bring OSC into the 21st century with a competitive IT system would not only address potential vulnerabilities, it would also help identify further opportunities for efficiencies in addressing caseloads and making OSC's processes more user-friendly for federal workers seeking OSC's assistance.

**b. If confirmed, what longer-term goals would you like to achieve as Special Counsel?**

It is clear that OSC is in a much better place today than it was when my predecessor, Ms. Lerner, took over. I hope to continue to build OSC's reputation as an agency that effectively achieves results for whistleblowers. Given my own background as an experienced prosecutor, I also hope to help OSC develop a reputation as a formidable litigating agency. In addition, I want to make sure that OSC is viewed as non-partisan and respected for its good work regardless of political interests.

**16. What measurements would you use to determine whether your office is successful?**

I am told OSC currently monitors a number of data points that provide a good starting place for evaluating the agency's effectiveness and efficiency. These include the number of cases resolved per year, the backlog, the cost per case resolved, the number and percentage of corrective actions achieved, and the number of disciplinary actions achieved.

If confirmed, I will evaluate the measurements currently in place to ensure that they are aligned with OSC's Strategic Plan and adequate to measure OSC's progress and efficiency across all program and administrative activities.

**17. If confirmed as Special Counsel, do you anticipate making any changes to OSC's existing organizational structure to improve OSC's ability to carry out its mission?**

I have had discussions with current OSC staff about potential changes and would anticipate possibly making some, but will hold off on recommending any specific changes until I get a fuller sense of whether the current organizational structure meets the needs of the agency.

**18. Do you believe OSC has the appropriate resources and tools to litigate cases when a settlement is not reached? Under what conditions do you think that litigation is an appropriate tool for OSC to use? Please explain.**

I am committed to increasing OSC's ability and willingness to use litigation in appropriate cases. I am informed that, as a small agency, OSC does not have the same resources as larger agencies, which means that its litigation decisions are impacted by

resource constraints. Nonetheless, I think it's essential that OSC stand ready and prepared to assist whistleblowers, in appropriate cases, with its full powers, including litigation to vindicate their claims, punish retaliators and eliminate wasteful or abusive government practices.

As a former prosecutor, I believe that litigating strong cases will help to deter inappropriate conduct in the federal workforce and prevent retaliation. If confirmed, I will work with the OSC staff to identify the appropriate circumstances for such litigation.

**19. Settlement is often a good conclusion for parties involved in a whistleblower complaint; however the lack of an admission of wrongdoing can lead to retaliators not being held accountable. Do you have ideas on how to address this issue?**

I strongly believe that managers who retaliate against whistleblowers need to be held accountable. Much like the thief who enters a store and gets caught, he or she will only be deterred from further illegal action if, in addition to returning the items, he or she also faces other consequences. Officials who retaliate should be held accountable, and the agency involved should set conditions to make sure it does not happen again.

To facilitate that goal, if confirmed, I would use OSC's enforcement authority, as well as its educational function, to partner with agencies to educate the federal workforce. I am also informed that OSC has a robust training program. If confirmed, I would continue and further develop that program. I would reach out to agencies as appropriate to make systemic improvements in their own policies, procedures, and practices. I would continue to provide public education—which is a key function of the Special Counsel—by sharing OSC's findings through a variety of mediums, including press releases and publication of reports. But, let there be no mistake, I strongly believe there are times when discipline is necessary for accountability. If confirmed, I will review OSC's use of disciplinary authority and ensure that OSC is strategically and appropriately using its disciplinary enforcement authority.

**20. Whistleblowers are often disadvantaged in pursuing their rights because federal agencies have more resources to defend themselves than whistleblowers have to make their case. Have you given thought to how this disparity could be addressed?**

Whistleblowers often lack the resources to engage in protracted conflict with government agencies. Time delay can disadvantage the whistleblower. If confirmed, I would use available tools to keep OSC's investigations efficient and effective. Right now, OSC has broad regulatory authority to get information in its investigations. Most agencies provide documents appropriately in response to OSC's information requests, but some assert privileges to withhold materials. I would use available tools to ensure that OSC has timely access to all information relevant to its investigations. Investigators need insight into why the agency took action. The government and the agency's interest is best served by allowing a free flow of information in investigations. If the agency acted for legitimate reasons, OSC wants to know that as soon as possible. Withholding information and reviewing documents for claimed privileges obscures this reasoning,

burns agency resources, and takes time away from the agency's primary work. It also slows OSC's ability to identify and interview witnesses, and ultimately slows OSC's ability to complete its investigation. So, prompt responses to OSC help level the playing field.

The other way to address the resource disparity between whistleblowers and agencies is to continue to aggressively seek stays of personnel actions in appropriate cases. If a whistleblower is attempting to fight an agency without a paycheck, it is truly a one-sided affair. OSC can even the playing field by reinstating an employee during the course of an OSC investigation. With greater access to agency records, and aggressive use of OSC's stay authority, the existing disparity can be effectively countered in many cases.

**21. What short term and long term challenges do you believe the OSC faces regarding recruitment, retention and management of the workforce needed to achieve its mission and how do you intend to meet those challenges if confirmed as Special Counsel?**

I am cognizant that committed, high-performing employees are OSC's most valuable asset and the most critical element of its success. OSC staff have informed me OSC's rising caseloads and backlog have put strain on OSC's employees, and during the first half of FY 2017, OSC was unable to fill existing vacancies. OSC currently is in the process of recruiting new employees for several mission-critical positions, including three attorneys in the Investigations and Prosecution Division (one in headquarters and two in the field), one attorney in the Disclosure Unit, one attorney in the Complaints Examining Unit, and one Hatch Act attorney. I am told OSC receives strong responses to advertised vacancies, and is well-positioned as an employer of choice in the federal government.

I understand OSC also has taken recent steps to enhance performance management and maximize employee performance. These include issuing new policies on employee performance and on employee conduct; creating a Performance Improvement Plan Guide for managers; compiling a repository of online training for managers focused on employee performance; developing and obtaining approval from OPM for OSC's Senior Executive Service Performance Plan; and establishing a Manager Support Board.

If confirmed, I will review and work with the OSC Human Capital Office and managers agency-wide to ensure they have the tools needed to recruit and retain highly skilled and motivated employees, and to effectively manage employee performance.

**22. According to former Special Counsel Carolyn Lerner's testimony last Congress, OSC's caseload went up 50 percent since she took office in 2011, resulting in a significant backlog. Do you believe that the OSC has the necessary resources to effectively carry out its mission? Do you think the President's FY 2018 budget request is sufficient?**

I have been advised that OSC's heavy involvement in protecting whistleblowers at the VA, as well as the corresponding increase across the federal government of awareness of OSC's role, has resulted in a significant increase in caseloads. From FY 2010 through FY 2016, OSC's caseload grew by 53 percent. In the same time period, its appropriations grew by only 23 percent. The modest budget increases OSC received in FY 2017 appropriations and the President's FY 2018 budget request will help allow OSC to reduce its backlog by filling positions that had remained unfilled and slightly increasing staffing levels to 144 total FTE. Meanwhile, OSC has apparently been able to make some strides with its past appropriations, reducing its costs per case by 45 percent and increasing the number of cases per staff member. This appears to demonstrate good stewardship of taxpayer dollars.

That said, as more and more employees continue to become aware of OSC and the value of its work, it is not likely that this caseload trend will reverse. If confirmed, I will critically evaluate whether OSC's resources are sufficient to allow OSC to effectively carry out its mission, as well as reviewing all of OSC's administrative and program areas to ensure OSC is maximizing cost-saving opportunities. History has shown that appropriations to OSC result in a large return on investment in taxpayer dollars saved for the federal government, and I believe investing in OSC will continue to be a cost-effective method of preventing and addressing government waste and mismanagement.

**23. Do you believe that the OSC has the statutory authority necessary to effectively carry out its mission? If not, please explain what statutory authority you believe is lacking.**

The WPEA strengthened whistleblower protections, indirectly enhancing OSC's ability to enforce them. It also directly strengthened OSC's authorities, for example, encouraging OSC to pursue disciplinary actions for prohibited personnel practices through a provision clarifying that OSC cannot be held responsible for a respondent's attorney's fees, as well as expressly recognizing OSC's authority to contribute to the development of the law through *amicus* briefs.

Despite the WPEA, OSC has not been formally reauthorized since 2007. Reauthorization provides Congress with an opportunity to evaluate OSC's authorities and responsibilities, and to make any adjustments that are needed. I support and appreciate this Committee's efforts to reauthorize OSC.

I am also mindful of the work on this Committee and the House Oversight Committee to clarify Congress's clear longstanding intent that OSC have access to the documents it needs to carry out its mission. I believe this intent has been clear since the CSRA, but appreciate Congress's efforts to clarify the authority and to ensure that agencies don't unlawfully withhold information from OSC and prevent it from fulfilling its statutory duties. If confirmed, I will review what, if any, other specific changes in statutory authority may be necessary.



**24. Other than any statutory authorities identified above, what, if anything, do you believe Congress can do to assist the OSC and ensure it can effectively carry out its mission?**

Another area Congress can assist relates to OSC's 2302(c) Certification Program, described below in the answer to question 27. However, despite the past Administration encouraging agencies to make plans to complete this program, I understand that many agencies have yet to complete it. As Congress conducts oversight, regularly following up on agencies' progress in participating in this program could go a long way to ensuring certification across the Executive Branch.

**25. Over the last several years, Congress made several legislative changes to whistleblower protection statutes to strengthen protections and provide greater coverage. Are there any gaps in protections that you have identified that Congress should consider?**

The WPEA filled critical gaps in statutory whistleblower protections. However, two WPEA provisions are set to expire at the end of this year.

The WPEA required each agency OIG to designate a Whistleblower Protection Ombudsman. The Ombudsmen provide employees information about submitting whistleblower disclosures and retaliation claims to OSC, and they serve as intermediaries to help prevent whistleblower retaliation within agencies. This program has also enhanced focus on whistleblowers within many inspector general offices and has increased collaboration and information sharing among OIGs and with OSC. I understand this Committee is collaborating with the House Oversight Committee and the Senate Whistleblower Protection Caucus to permanently authorize and perhaps even expand this program, a move which I applaud.

The WPEA also expanded the appellate review of whistleblower retaliation cases beyond the U.S. Court of Appeals for the Federal Circuit. More specifically, the WPEA provided for a two-year pilot project, subsequently extended to five years, in which whistleblower retaliation cases may be appealed to any U.S. Court of Appeals of competent jurisdiction. All-circuit review creates the potential for circuit splits, which encourage peer review of cases by sister circuits, as well as accountability for judges through possible Supreme Court review of circuit splits. Allowing all-circuit review of whistleblower retaliation cases is consistent with how other whistleblower laws (for example, Sarbanes-Oxley and the False Claims Act) operate. The House Oversight Committee has voted a bill out of committee that would make all-circuit review permanent, and I encourage this Committee to swiftly consider this bill.

In addition to addressing these two successful, expiring provisions, there are three gaps in current protections that, following consultation with the staff of the OSC, I recommend Congress consider addressing.

First, federal employees may be asked or required to cooperate in a government investigation, but can be vulnerable to retaliation for providing testimony. Current law protects employees for cooperating with an OSC or OIG investigation. Agencies, however, commonly initiate formal and informal investigations that do not involve OSC or an inspector general. For example, the Department of Veterans Affairs makes frequent use of Administrative Investigation Boards (AIBs), and OSC has received complaints of retaliation against employees for cooperating with these Boards. Employees should be encouraged to provide truthful, accurate testimony and information in these proceedings, and not fear potential retaliation for doing so. A recent MSPB decision (*Graves v. Dep't of Veterans Affairs*) held that the current whistleblower statutes do not protect employees for cooperating in an internal government investigation. I recommend that Congress review this gap in coverage and consider specifically protecting disclosures provided to an internal federal government investigative body.

Second, the WPEA overturned previous precedent that had held certain disclosures made in the normal course of an employee's duties to be unprotected. Before the WPEA, the touchstone for whether a disclosure was made in the "normal course of duties" was whether the employee was specifically tasked with regularly investigating and reporting wrongdoing as an integral function of his or her job. Congress overturned this exclusion from protection, but in doing so it sought to protect managers' ability to oversee employee performance by adding an additional burden to a narrow group of employees who regularly investigate and report wrongdoing as a part of their jobs. For those employees, an additional evidentiary burden is required in whistleblower claims relating to disclosures made in the normal course of their duties. However, the MSPB's decision in *Benton-Flores v. Dep't of Defense*, as well as several subsequent decisions that rely on it, threaten to impose this additional burden on virtually all federal employees who blow the whistle through their chain of command or about matters that relate to their job duties. In effect, *Benton-Flores* held that Congress narrowed rather than expanded whistleblower protections with the "normal course of duties" provision, which clearly was not Congress's intent. I recommend that Congress review this issue and clarify when and how the "normal course of duties" provision is to apply.

Third, recent decisions of the MSPB, relying on *dicta* from Federal Circuit decisions, have held that whistleblowers do not exhaust their administrative remedies before OSC if they fail to provide OSC the "precise details" of every element of their potential whistleblower claims, including every protected disclosure they may have made. This is contrary to Congress's intent of providing a broad Individual Right of Action in whistleblower cases, encourages inefficient repetitive OSC filings, and fails to recognize that most complainants before OSC are laymen not represented by attorneys. I recommend that Congress review and clarify the appropriate standard for administrative exhaustion.

**26. There have been concerns about the OSC's access to information in the intelligence community space and whether there needs to be a legislative change to ensure that access is not impeded without good cause. Do you have any proposals to address the delicate balance of protecting information while ensuring the OSC can carry out its mission?**

OSC is not authorized to consider whistleblower retaliation claims from intelligence entities as defined in 5 U.S.C. § 2302(c)(ii). However, OSC is authorized to receive classified disclosures, and, I have been told, it has the capacity and safeguards in place to do so. I believe this authority is an important safeguard for the American people. The House Oversight Committee has also recently advanced legislation that would clarify OSC's authority to protect whistleblowers who make classified disclosures to supervisors within their chain of command.

That said, I understand that current legislative proposals, including this Committee's OSC reauthorization bill, would not include intelligence entities in the statutory provision clarifying OSC's access to information. If confirmed, I look forward to fully reviewing this issue, and to working with this Committee and other congressional committees, as well as intelligence officials, to craft that delicate balance in legislation and more broadly.

**27. Do you believe federal employees receive sufficient training and information regarding their rights as a whistleblower? If not, do you have any recommendations for improving this outreach?**

Federal employees should definitely receive more training and information from their agencies regarding federal whistleblower protections, including managers' responsibilities to prevent whistleblower retaliation. OSC has been expanding its own training for agencies in recent years, and I understand from OSC staff that they believe this has resulted in greater awareness by federal employees.

Section 2302(c) of Title 5 requires agency heads to ensure, in consultation with OSC, that employees are informed of the rights and remedies afforded by the WPA and related laws. In 2002, OSC established its "2302(c) Certification Program" to provide agencies with a user-friendly, efficient process to fulfill this statutory obligation

**a. The OSC has used its 2303(c) Certification Program to assist agencies and components in meeting the statutory obligation to inform employees of their whistleblower rights. If confirmed, how would you approach the consultation role of the Special Counsel to ensure that agencies are in compliance?**

Pursuant to a 2014 White House directive, agencies have been required to establish a plan to complete OSC's Certification Program. However, OSC does not have any authority to enforce that requirement, and thus far only three cabinet-level Departments, 16 component agencies, 17 additional agencies, and 16 Offices of Inspector General have completed their plans to finish the program. As described

above, this is an area where any assistance from Congress in encouraging agencies to complete this process would be greatly appreciated.

**b. Are there new or innovative methods the OSC could use for training and outreach purposes?**

I understand OSC places a premium on in-person training where possible, but I have heard good feedback from the whistleblower community regarding OSC's innovative efforts with electronic training modules. If confirmed, I will review OSC's current methods for training and outreach to ensure that they are effective and efficient, and hope to continue that trend of incorporating new or innovative methods where useful to enhance current training.

**28. Do you have any concerns that the use of confidentiality or non-disclosure agreements by federal agencies and contractors could infringe on whistleblower protections?**

Yes, I do think this is a concern. The WPEA's codification in 5 U.S.C. § 2302(b)(13) of the so-called "Grassley anti-gag" provision, included as a restriction in annual government-wide appropriations since FY 1988, was a significant step in providing some measure of protection against these types of agreements. According to a January 2017 OSC press release, OSC has obtained 33 corrective actions addressing violations of the statutory anti-gag provision. If confirmed, I intend to closely monitor enforcement of this provision. Since the original appropriations rider is also still in effect, I believe OSC should notify the appropriate entities (including Congress) of violations of (b)(13). This would facilitate a review of whether the underlying action also violated appropriations restrictions, resulting in an unauthorized use or payment of funds, which could potentially violate the Anti-Deficiencies Act, if left unaddressed.

**29. How would you handle employee disciplinary issues within the OSC?**

From what I understand, there has been very little need for disciplinary action by OSC's management. Nonetheless, I am a big believer in promptly and directly confronting issues that may arise with an employee, and setting up a corrective plan. It is also important that employees feel they are treated fairly and have avenues to bring concerns forward without fearing retaliation. I intend to provide such channels and urge employees to take advantage of them.

**a. How would you respond to underperforming employees within the OSC?**

From what I understand, this has, to date, not been a big problem at OSC. Should I find myself having to confront this problem, I will do so directly and aggressively. Underperforming employees are bad for morale in the agency, especially one that has a relatively small workforce and as big a caseload as OSC does.

- b. Please explain your views on putting an employee on paid administrative leave pending an investigation or disciplinary action. Under what circumstances, if any, do you believe that might be appropriate?**

The Administrative Leave Act of 2016, included in the National Defense Authorization Act for Fiscal Year 2017, significantly clarified Congress's view on this issue. I concur with the vision of administrative leave outlined in that law, and applaud this Committee's support for the legislation. I believe paid administrative leave is an option only to be used in extremely rare circumstances. Federal employees are paid by the American taxpayers to work, and excessive paid administrative leave is inconsistent with that. In most circumstances in which paid administrative leave has historically been used, such as when an employee is the subject of an internal administrative investigation, they could be put to work with different duties that allow them to still provide some benefit to the taxpayer. Only if an employee absolutely must be kept out of the office do I think investigative leave or notice leave are the appropriate avenue.

- 30. Protecting whistleblower confidentiality is of the utmost importance to this Committee. This principle is just as important across the federal government as it is within the OSC.**

- a. How do you plan to implement policies within the agency to encourage employees to bring constructive suggestions forward without the fear of reprisal?**

I strongly believe in the "challenge" process where any employee can bring concerns to their supervisor or anybody in senior leadership. If confirmed, I will make it very clear right from the start that there will be no reprisals against employees for sharing concerns with me or any of my senior staff.

- b. If confirmed, what avenues will be available to employees to report waste, fraud, or abuse within OSC? Do you believe the OSC's current memorandum of understanding with the National Science Foundation Office of Inspector General provides adequate protection for OSC whistleblowers? Why or why not?**

OSC's mission requires that it have a robust system for ensuring oversight of its own operations and accountability for shortcomings. Anything short of that is incongruous with the purpose for which Congress created OSC and with the message OSC seeks to promote within the Executive Branch.

Under current OSC procedures, complaints alleging wrongdoing against senior OSC officials are referred to the Integrity Committee if the allegations pertain to the Special Counsel or the Principal Deputy Special Counsel. The memorandum of understanding (MOU) with the National Science Foundation (NSF) OIG allows OSC to contract with the NSF OIG to receive and independently investigate other prohibited personnel practice complaints or whistleblower disclosures.

While the MOU with the NSF OIG offers OSC employees an option outside of OSC to report wrongdoing, this arrangement is not ideal. This is in part because the MOU requires that an OSC employee first receive the complaint or disclosure and then forward it to the NSF OIG. Although this can be done confidentially, the requirement of submitting a complaint through an OSC employee could chill complaints or disclosures. If this arrangement with the NSF OIG is maintained, I believe the MOU should be reexamined to allow OSC employees to contact the NSF OIG directly and confidentially, as employees at almost all other federal agencies are able to. This would also be in keeping with the OSC reauthorization legislation this Committee has advanced.

I understand OSC is also investigating other options, including the creation of a shared inspector general with other small agencies. If confirmed, evaluating this issue more fully will be a top priority for me.

- c. Do you commit without reservation to work to ensure that any whistleblower within OSC does not face retaliation?**

Yes.

- d. Do you commit without reservation to take all appropriate action if notified about potential whistleblower retaliation?**

Yes.

**31. The Government Accountability Office is conducting an audit of the OSC's processes for case management, whistleblower protection, and internal oversight.**

- a. Will you commit to cooperating fully with this audit?**

Yes. This audit is an invaluable opportunity to get an independent perspective on OSC's operations, and I welcome it as a useful tool for helping identify issues OSC may be experiencing.

- b. Will you commit to implementing any findings or addressing any problems identified by this audit?**

I very much look forward to seeing the results of the audit, and if confirmed will absolutely commit to addressing any problems identified by it.

**32. Do you believe federal employees receive sufficient training and information regarding their rights under the Hatch Act? If not, do you have any recommendations for improving this outreach?**

OSC provides Hatch Act training and guidance through presentations at agencies. Also, OSC has telephone and email hotlines dedicated to issuing Hatch Act advisory opinions. Lastly, OSC's website provides information to assist employees and the public in understanding the Hatch Act, including previously issued advisory opinions, publications, PowerPoint presentations, and frequently asked questions.

As to the Hatch Act training federal agencies provide their employees, OSC has found that the quality and breadth of the information varies from agency to agency, and even sometimes within the same agency.

I believe the Hatch Act regulations have not been updated since 1995 and, if confirmed, I will work to revise them to reflect the digital age and its impact on how federal employees communicate and participate in political campaigns. Such updates would provide employees with more current examples of permitted and prohibited activity and better inform them of how the Hatch Act impacts their political activity today.

**33. The OSC is responsible for representing veterans and reservists who believe their Federal employment or reemployment rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) have been violated before the Merit Systems Protection Board and the U.S. Court of Appeals for the Federal Circuit. With significant numbers of veterans still returning home from overseas, how will you ensure USERRA rights are adequately enforced?**

It is imperative that OSC do its part to help returning veterans transition back to civilian life by enforcing their rights under USERRA. OSC works closely with the Department of Labor, which investigates USERRA complaints, to identify and prosecute violations by federal agencies, and to secure relief for service members, including through MSPB and Federal Circuit litigation if necessary. OSC also provides education, training, and technical assistance to federal employers to increase compliance and prevent violations. Through these efforts, it strives to make the federal government a model employer under USERRA, as Congress intended when it passed the law. If confirmed, I will evaluate OSC's role and activities under USERRA and make any adjustments or recommendations that are merited.

**V. Relations with Congress**

**34. Do you agree without reservation to comply with any request or summons to appear and testify before any duly constituted committee of Congress if you are confirmed?**

Yes.

**35. Do you agree without reservation to make any subordinate official or employee available to appear and testify before, or provide information to, any duly constituted committee of Congress if you are confirmed?**

Should I be fortunate to be confirmed, I will be charged with the responsibility for everything the agency does. As such, I will consult with senior staff to identify, and agree to make available to the Committee, the best person with knowledge of the issues to meet its informational needs.

**36. Do you agree without reservation to comply fully, completely, and promptly to any request for documents, communications, or any other agency material or information from any duly constituted committee of the Congress if you are confirmed?**

Yes.

**VI. Assistance**

**37. Are these answers your own? Have you consulted with OSC or any other interested parties? If so, please indicate which entities.**

The answers are my own. I have spoken to, and received input from, staff at OSC, which has informed my responses.



**Minority  
Supplemental Pre-hearing Questionnaire  
For the Nomination of Henry Kerner to be  
Special Counsel, Office of Special Counsel**

**I. Nomination Process and Conflicts of Interest**

- 1. Has the President or his staff asked you to sign a confidentiality or non-disclosure agreement?**

No.

**II. Background of Nominee**

- 2. Do you seek out dissenting views and how do you encourage constructive critical dialogue with subordinates?**

Yes. I strongly believe in the “challenge” process where employees are encouraged to raise objections and concerns about proposed policies or ideas. I have always encouraged this process and think it is invaluable in reaching the best possible policy outcome.

- 3. Please give examples of times in your career when you disagreed with your superiors and aggressively advocated your position. Were you ever successful?**

While working as a line prosecutor in Compton, CA, I was ordered to proceed to trial with a case I felt did not meet the legal requirements or ethical obligations incumbent upon me as a prosecutor and member of the Bar. Although initially ordered to proceed anyway, I conducted further investigation by going to the crime scene and obtaining additional witness interviews, which contradicted my office’s theory of the case. Based on these efforts, I was able to convince my superiors to permit me to drop the case.

On another occasion, I went against the powerful police department by exposing the false statements in a sworn search warrant application of one of its members, which resulted in the dismissal of a potential life-in-prison case and discipline for the officer. This decision also resulted in retaliation against me for highlighting the wrongdoing of the office’s law enforcement partners. Nevertheless, I persisted and stuck by my guns, and the offending police officer was ultimately fired.

- 4. Please list and describe examples of when you made politically difficult choices that you thought were in the best interest of the country.**

While on PSI and in the minority, we supported our majority in a number of bipartisan investigations that did not always curry favor with the Republican conference. For example, we signed on to a report that questioned the arrangement pursued by the Apple Corporation in creating for itself a tax haven in Ireland and paying an effective tax rate of nearly zero on its profits overseas. This bipartisan report – and the subcommittee’s work

on the issue – was criticized by some of our fellow Republicans, but our staff (and ultimately Senator McCain) believed it was the right choice.

In addition, we also supported the PSI Majority in a number of cases involving banks that created excessive risks for the economy. Although a very powerful constituency, we stuck together with our Democratic colleagues in diverse cases ranging from the Whale Trade losses matter to basket options arrangements.

In my work as a prosecutor, I often argued for outcomes I thought were ethically required, including for the dismissal of a potential life case based on police misconduct as noted above.

**5. What would you consider your greatest successes as a leader?**

Rather than point to a single accomplishment, I would point to the process of leading a team or organization itself. I believe I have learned how to effectively motivate people to buy into a shared vision for the organizations I have led and to take pride in their efforts – resulting in excellent work. I strongly believe that recruiting good people and providing clear communication are the keys to a happy and productive workforce. In addition to instituting innovative means for accomplishing tasks, and truly listening to the input of everyone from the most junior employee to the most senior manager, I believe I have learned how to walk the fine line between creating a positive work environment while still holding employees personally accountable.

**6. What would you consider your greatest career success overall? What would you consider your greatest success while serving as a congressional staff member?**

My greatest success on the Hill involves my tenure as staff director and chief counsel at PSI. When Senator McCain's team began our tenure in February 2013, the Majority staff was already a well-oiled machine. Senator Levin had been at PSI for years and had a tremendously competent and able staff. They were just wrapping up a year-long investigation into JP Morgan's multi-billion dollar losses in the so-called Whale Trades. I had to act very quickly to hire a competent staff, immerse myself in the details of the report, negotiate appropriate edits to the content and recommendations, and brief the Senator on the details and gain his approval to sign on to the report and prepare him to fully participate in the hearing and associated press availabilities. Navigating this early challenge successfully led to numerous other bipartisan investigations where we were able to preserve the collaborative relationship between the members and among staff, even against considerable political headwinds.

While I am proud of many of my accomplishments as a prosecutor – notably, obtaining one of the first civil injunctions against a violent street gang that dramatically improved the safety of the neighborhood they terrorized – I would say that my greatest career success has been the transition from long-term California prosecutor to Hill staffer. After 18 productive years as a California prosecutor, I decided to make a mid-life correction (not a crisis) and picked up and moved across the country to make a difference for the

American people. I was very fortunate to land on the House Oversight Committee and work on the Fast and Furious investigation. Apart from its obvious relevance to the position I have been nominated for, I strongly believe that permanently discrediting the practice of "gunwalking," supporting the ATF whistleblowers, and holding more senior government officials accountable, all within a relatively short time of my arrival in DC, was a meaningful achievement.

### III. Policy Questions

**7. In 2011, the Office of Special Counsel issued a report titled "Investigation of Political Activities by White House and Federal Agency Officials during the 2006 Midterm Elections."**

**a. Are you aware of the recommendations in this report, and do you agree with them?**

Yes, I have reviewed the recommendations and agree with them.

**b. If confirmed, what steps will you take to ensure that officials in President Trump's Office of Political Affairs and administration abide by the recommendations included in OSC's 2011 report?**

It is my understanding that OSC officials have met with lawyers from the White House Counsel's Office to provide Hatch Act guidance and since that meeting OSC has maintained a solid working relationship with that office. More specifically, OSC, through its Hatch Act Unit, has agreed to provide advice on the White House's endeavor to establish a framework to assist the Office of Political Affairs with Hatch Act compliance. If confirmed, I will work to ensure that OSC continues to provide sound and timely advice/guidance to the White House and other administration officials.

**c. What steps will you take if your office finds that officials in President Trump's Office of Political Affairs and administration fail to abide by the recommendations included in OSC's 2011 report titled "Investigation of Political Activities by White House and Federal Agency Officials during the 2006 Midterm Elections"? Will you commit to reporting such findings to this Committee?**

I believe that many Hatch Act violations may occur due to a lack of knowledge and I therefore commit to increasing the education of officials in the White House and across the federal workforce. Should people nonetheless flout those rules, I will initiate an investigation and report any findings to this Committee.

**8. How would you approach Hatch Act enforcement if confirmed as Special Counsel? Will you work with the White House to ensure that Trump administration officials abide by the Hatch Act?**

Hatch Act enforcement must be fair, principled, objective, and vigorous to help ensure the integrity of the merit system. It has been represented to me that OSC, primarily through its Hatch Act Unit, already has established a strong working relationship with the White House Counsel's Office. OSC briefed that office on the Hatch Act and some of its more complex issues in February 2017 and has since been in regular communication with its attorneys as questions and issues have arisen.

OSC also has long-standing relationships with ethics officials from many federal agencies and has made itself available to provide Hatch Act briefings to members of the new Administration. In fact, the Hatch Act Unit's Chief and Deputy will be briefing a cabinet member and other political appointees at one department in the coming month.

I take enforcement of the Hatch Act very seriously and so has OSC under Ms. Lerner. In fact, there is already a dedicated staff led by a career supervisor in place to handle Hatch Act complaints. I will work with these career professionals to put together trainings to educate members of the White House to prevent Hatch Act violations.

**9. What do you believe is the role of the Special Counsel in ensuring that whistleblower protection is prioritized at the highest levels of the administration?**

Senator Chuck Grassley is well known for saying there ought to be an annual Rose Garden ceremony to recognize the contributions made by whistleblowers. I believe the Special Counsel's role is to encourage just that type of mindset. OSC already has a Public Servant of the Year award, and if confirmed, I hope to identify further ways to help ensure whistleblowers receive recognition for their contributions and hear the message from the very top that they have performed an invaluable service.

**10. At least since 1980, OSC has viewed 5 U.S.C. § 2302(b)(10) as prohibiting discrimination against employees on the basis of sexual orientation. Former Special Counsel Lerner reaffirmed this policy after her predecessor reversed the stance of OSC. What is your view of § 2302(b)(10)? If confirmed, would you commit to investigating and enforcing claims of discrimination on the basis of sexual orientation or gender identity under (b)(10)?**

I believe that § 2302(b)(10) protects against discrimination on the basis of sexual orientation and, in the event I am confirmed, will investigate and enforce claims of discrimination on the basis of sexual orientation and gender identity under (b)(10).

- 11. There has been a lot of focus on individuals that leak sensitive information to entities outside the federal government. This discussion can conflate leaking with whistleblowing. How would you approach this issue to ensure that people are held responsible, but also to ensure that legal whistleblowers are protected?**

I don't believe the term "leaking" has been useful in the context of this public policy dialogue, as it is an ambiguous word that has been used both to describe the public release of classified information as well as whistleblowing involving non-classified information. While "whistleblowing" can also be very broadly defined in theory, the WPA clearly outlines what constitutes protected whistleblowing activity, and serves to provide a benchmark definition of whistleblowing for OSC.

Where a whistleblower disclosure is "required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs," such as disclosures involving classified information, federal employees under OSC's jurisdiction are protected in making disclosures to OSC, their OIG, or other employees designated by the head of the agency. The House Oversight Committee has also recently advanced legislation that would expand the list of protected recipients to mirror those protected at intelligence community elements under Presidential Policy Directive 19, namely, a supervisor in the employee's chain of command up to and including the head of the agency, the Director of National Intelligence, or the Inspector General of the Intelligence Community. I support this expansion.

Unless known by a federal employee to regard "policy decisions that lawfully exercise discretionary authority," all other non-classified whistleblower disclosures fall under 5 U.S.C. § 2302(b)(8)(A). I believe it is significant that the WPA does not define where these disclosures must be made. As was made clear in the 2015 Supreme Court case *DHS v. MacLean*, even disclosures to the press can help bring attention to decision-makers in a position to address problems at issue in a disclosure. Thus, I believe it is important to convey the message to federal agencies that when it comes to whistleblower disclosures, media engagement policies do not override the WPA.

#### **IV. Relations with Congress and the Public**

- 12. If confirmed, how will you make certain that you will respond in a timely manner to Member requests for information?**

Relations with Congress will be a top priority for OSC under my leadership. We will have at least one employee dedicated to legislative affairs and make sure we respond as promptly and fully as we can to congressional requests from both sides of the aisle.

**13. If confirmed, do you agree without reservation to reply to any reasonable request for information from the Ranking Member of any duly constituted committee of the Congress?**

Yes.

**14. If confirmed, do you agree without reservation to reply to any reasonable request for information from members of Congress?**

Yes.

**15. If confirmed, do you commit to take all reasonable steps to ensure that you and your agency comply with deadlines established for requested information?**

Yes.

**16. On May 1, 2017, the Department of Justice Office of Legal Counsel (OLC) issued an opinion regarding how executive branch agencies should respond to requests from ranking members of congressional committees. The OLC opinion states that agencies have the “discretion” to respond to oversight requests from ranking members or individual members of Congress. The OLC opinion identifies that “the Executive Branch has historically exercised its discretion in determining whether and how to respond.” Do you believe this opinion to control the Office of Special Counsel in its communication with Congress? If so, please describe the factors you would weigh in evaluating the circumstances that warrant a response to a request by the Ranking Member of any duly constituted committee of Congress.**

All Members of Congress are constitutional officers who vote on matters before their respective bodies, and thus have a duty to gather information and conduct oversight regarding those matters. Thus, as Senator Grassley and others have publicly noted, there are some serious flaws with the legal reasoning of this recent OLC opinion.

I saw the effects of this kind of policy firsthand during Operation Fast and Furious, when the committee for which I worked only became involved because the Department of Justice refused to provide accurate answers to Senator Grassley, then Ranking Member of the Senate Committee on the Judiciary. Even when Senator Grassley partnered with the House Oversight Committee, the Justice Department purported to limit Senator Grassley’s involvement in such activities as transcribed interviews.

Regardless, the OLC opinion appears to allow individual agencies to make their own decisions regarding so-called “discretionary responses.” As an independent agency created by Congress to contribute to oversight and accountability within the federal government, I believe it is in OSC’s best interests to promote transparency wherever possible.

**17. If confirmed, do you commit to protect subordinate officials or employees from reprisal or retaliation for any testimony, briefings or communications with members of Congress?**

Yes.

**18. If confirmed, will you ensure that your staff will fully and promptly provide information and access to appropriate documents and officials in response to requests made by the Government Accountability Office (GAO) and the Congressional Research Service?**

Yes.

**19. If confirmed, will you agree to work with representatives from this Committee and the GAO to promptly implement recommendations for improving OSC's operations and effectiveness?**

I am reluctant to commit to specific recommendations prior to their issuance, but I pledge to cooperate fully with GAO and this Committee and work with both to help improve the functioning of the agency.

**20. If confirmed, will you direct your staff to fully and promptly respond to Freedom of Information Act requests submitted by the American people?**

Yes.

I, Henry Kerner, hereby state that I have read the foregoing Pre-Hearing Questionnaire and Supplemental Questionnaires and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

/s/ Henry Kerner  
(Signature)

This 19<sup>th</sup> day of June 2017

**Senator Rand Paul  
Post-Hearing Questions for the Record  
Submitted to Henry Kerner  
Nomination of Henry Kerner to be Special Counsel,  
Office of Special Counsel  
Wednesday, June 28, 2017**

1. The Freedom of Information Act (FOIA) is a critical law to allow the citizenry to gain insight into the operations and activities of the U.S. government.
  - a. Government accountability organizations, like the one you have worked with, often use the FOIA to shine a light on fraud, waste, abuse and mismanagement in government. Because of this, such organizations have met with stiff, and often unlawful, resistance to their FOIA requests. As non-governmental organizations, they often have to sue to overcome unlawful resistance. By contrast, government employees have the courts and governmental routes, like yours.
    - i. If confirmed, will you ensure that OSC upholds its responsibilities and authorities regarding the FOIA, and ensures that federal agencies are not misusing FOIA to cover agency fraud, waste, abuse or mismanagement?

**Yes.**
  - b. During your Committee staff briefing, our colleagues brought up a concerning practice: Agency supervisors using the FOIA to gain access to emails or other information regarding their own employees, and potentially, their own whistleblowers.
    - i. Please explain how you will ensure that federal agencies and staff do not misuse the FOIA (or other authorities) as a tool to discern the identity of, retaliate against, or obstruct justice regarding whistleblowers or their disclosures against the agencies.

**Such activity would have a chilling effect on individuals exercising their right to blow the whistle, and I will strive to discourage any activity that will have such an impact. If confirmed, I would work with OSC staff to identify what specific actions could be taken under OSC's legal authorities.**

**I also believe education and outreach is an important part of the role of the Special Counsel. If I were confirmed and this practice became a trend OSC observed, I would strive to proactively educate agencies about its inappropriateness.**

- ii. If you find out that such practices have been occurring in government, please advise what type of actions you would take to stop them, provide for corrective and disciplinary action, and prevent them in the future.



**As described above, I would need to work with OSC staff to understand what specific actions could be taken under OSC's legal authorities. I do believe constant vigilance as well as education and outreach could help to prevent this from occurring more in the future. Moreover, to the extent such efforts are undertaken as part of a scheme to retaliate against a whistleblower, aggressively pursuing those responsible for the retaliation should have a deterrent effect on others who may contemplate similar action.**

2. After several years under the previous administration, confidential surveys by the U.S. Office of Personnel Management (OPM) revealed last year that by 2015, almost 40% of OSC's own employees reported they could not reveal a suspected violation of any law, rule or regulation, without fear of reprisal. In response, OSC explained it was taking the unusual step of evaluating its own managers on their adherence to proper procedures for handling whistleblowers, by incorporating whistleblower protection requirements as elements of supervisors' performance plans. Near the end of the previous Special Counsel's term, OSC stated it was now taking these steps as a method to require OSC supervisors, "to foster an environment that promotes disclosures and prevents retaliation."<sup>1</sup>

- a. Why would OSC employ supervisors who are willing to unlawfully mishandle their own employee's whistleblower disclosures, let alone those of the federal employees who come to them for protection? Why would OSC employ retaliators?

**Thank you for raising this important point. In short, OSC should not permit conduct it specifically fights against in other agencies to exist in its own ranks and if confirmed, I will make sure it doesn't happen.**

Will you?

**No.**

- b. If confirmed, will you tolerate, hire, or employ supervisors who fail, or have failed, to foster an environment that promotes disclosures and prevents retaliation, either at the OSC, or government-wide?

**No.**

3. A far too often overlooked and less prioritized function of the OSC is its responsibilities to ensure that disclosures of fraud, waste and abuse in government are referred for

<sup>1</sup> <http://www.govexec.com/oversight/2016/04/whistleblower-protection-agency-looks-clean-its-own-backyard/127189/>

investigation by agency heads, the Attorney General, the Intelligence Community, the President, or the Congress. The work of my subcommittee specifically includes a charge to identify and eliminate waste, fraud, and abuse in the federal government, and to proactively pursue mechanisms to prevent waste of taxpayer dollars, so such activities are of urgent concern to me.

- a. Do you agree that a critical function of the OSC is to assist and ensure that federal employees have easy and protected routes by which to report fraud, waste and abuse in government?

**Yes.**

- b. If confirmed, will you ensure that all disclosures to OSC are handled in accordance with the law, as Congress intended?

**Yes.**

4. There is bipartisan concern regarding OSC's practice of negotiating settlements for whistleblowers without even pursuing a full investigation, despite that it was Congress's intent for OSC to investigate retaliation claims. In contrast to the intention of Congress, OSC's practices allow the agency and responsible management officials off without admitting wrongdoing, let alone holding them accountable.<sup>2</sup> This chills whistleblowing and encourages retaliation. By contrast, when other governmental prosecutors negotiate with the subjects of investigation, the law enforcement investigation has already been fully completed, and the settlement generally includes provisions to hold perpetrators accountable.

- a. Do you believe it is appropriate to pursue settlements before conducting a full investigation? If you do, please explain how and why.

**As a former prosecutor, I think it is vitally important that wrongdoers be held accountable in addition to protecting whistleblowers. If confirmed, I will take a close look at the issue you outline in this question to see whether OSC needs to alter its settlement practices.**

- b. Do you believe it is appropriate to find evidence of illegal activities, and not ensure the responsible violators are held accountable?

**As stated above, I think it is vitally important to hold wrongdoers accountable, because it appropriately punishes illegal behavior and because**

<sup>2</sup> <https://www.nytimes.com/2016/12/22/us/politics/claire-mccaskill-senator-whistle-blowers.html>

**it serves to deter other would-be violators. It also sends an important message to whistleblowers that their complaints will be taken seriously.**

- c. If confirmed, do you pledge to ensure that OSC conducts proper, full and thorough investigations, follows and upholds the law, and ensures responsible violators are held accountable?

**Yes.**

5. Earlier this year, the House Oversight and Government Reform Committee's Subcommittee on Government Operations held a hearing which raised concerns that the Whistleblower Protection Enhancement Act (WPEA) should be recognized with a dual purpose: a shield for those who have seen the wrongdoing and corruption which they have reported, and a sword to stop the wrongdoing and enforce what needs to be done.<sup>3</sup>

- a. Please explain your understanding of the WPEA, and how, if confirmed, you will use it as both a sword and a shield.

**Whistleblower protections under the Whistleblower Protection Act as amended by the WPEA are a critical shield protecting federal employees who blow the whistle on government wrongdoing, and an equally critical sword for accountability. Protecting whistleblowers promotes accountability by increasing the likelihood that wrongdoing will come to light and be stopped. Further, as a former prosecutor, I strongly believe there are times when discipline is necessary for accountability and deterrence. If confirmed, I will review OSC's use of disciplinary authority and ensure that OSC is strategically and appropriately using its disciplinary enforcement authority.**

6. In a House Oversight and Government Reform Committee hearing, concerns were raised that after whistleblowers make disclosures, instead of being shielded, the sword is turned back on the whistleblowers, and they have been made subject to retaliatory investigations by the agency or offenders who they blew the whistle on. OSC's witness seemed unable to provide much reassurance as to their practices or capabilities to prevent these.<sup>4</sup>

- a. Please explain what you believe should be done, and if confirmed, what you will do, to protect whistleblowers from retaliatory investigations.

**I am informed by OSC staff that, under current law, an agency investigation is generally not itself a personnel action, although the WPEA provided that corrective action may include damages, fees, and costs reasonably incurred due to an agency investigation that was started or expanded in retaliation for whistleblowing (5 U.S.C. § 1214(h)). Additionally, if a retaliatory**

<sup>3</sup> <https://oversight.house.gov/hearing/five-years-later-review-whistleblower-protection-enhancement-act/>

<sup>4</sup> <https://oversight.house.gov/hearing/five-years-later-review-whistleblower-protection-enhancement-act/>

**investigation leads to a personnel action, OSC considers the origins of the investigation, and will seek corrective action if the agency cannot show by clear and convincing evidence that the investigation would have occurred absent the whistleblower disclosure.**

**S. 582, the Office of Special Counsel Reauthorization Act introduced by Chairman Johnson, Ranking Member McCaskill, and Senate Judiciary Committee Chairman Chuck Grassley, would allow OSC to petition the Merit Systems Protection Board to order corrective action for any retaliatory investigation, regardless of whether the agency has taken a formal personnel action. If confirmed, I will further review the statutory framework for preventing and correcting retaliatory investigations and make any further legislative recommendations that are merited.**

7. During that House Oversight and Government Reform Committee hearing, the Chairman questioned whether there were actually any consequences to those that partake in retaliation. Other members similarly expressed concerns that not only did it appear that violators are never disciplined, but that they are instead promoted and otherwise rewarded.
  - a. Please explain your feelings on this problem, how seriously you take it, and what you will do to fix it, if confirmed.

**I take the issue of accountability for retaliators very seriously. I believe discipline for those who retaliate has a significant deterrent effect. It sends the message that not only will the government not tolerate retaliation, but that there are real consequences for those who engage in it. If confirmed, I will work vigorously to identify situations appropriate for disciplinary action and to work to ensure such discipline is imposed.**

8. Repeatedly during that hearing, OSC's leadership representative proclaimed OSC as highly successful by using extravagant sounding statistics. Specifically, while asserting that, "disciplinary actions play an important deterrence role in the federal government; they have a ripple effect; they show that management can be held accountable," OSC's representative proclaimed that under the previous administration, and since the WPEA became law, OSC had increased the number of disciplinary actions by 117%. When asked to quantify what the 117% actually meant, OSC's witness responded that in total for the preceding (4+) years since the WPEA became law, OSC had only disciplined 50 responsible management officials (up from 23 just before that). The OSC representative also failed to correct the Committee's misunderstanding that this 50 was out of only 2,000 cases (while testimony and agency documents reflect that it was out of many thousands more).

- a. Do you believe it is acceptable performance for OSC to have only pursued disciplinary action in 50 instances out of many thousands of cases, over four or more years?

**Those numbers strike me as rather low, but without further context and not having been at OSC, it is difficult for me to make further judgments about them.**

- b. Given witness's claims that OSC provided favorable outcomes for whistleblowers in about 10% of cases, aside from that this may still be too little, it indicates OSC had reason to believe unlawful actions occurred in several hundred cases during this time period, yet still, discipline was only pursued in a fraction of them. How do you feel about this, and what you will do to change it, if confirmed?

**One of my top priorities at OSC, in the event of my confirmation, will be to seek greater accountability and penalties for wrongdoing. I intend to avail myself aggressively of OSC's prosecutorial function and will place increased emphasis on obtaining outcomes that discourage retaliation.**

- c. If confirmed, do you pledge to ensure that you and any other OSC employee always provides honest testimony and information to Congress?

**Yes.**

9. Do you believe that disciplinary action should be taken against any employee who is liable for committing a Prohibited Personnel Practice, or for violating any other statute within the jurisdiction of the OSC? If not, why not?

**I am committed to ensuring greater accountability for employees who violate PPPs and making sure that there is an understanding among supervisors throughout the federal government that OSC will aggressively protect federal workers from PPPs by pursuing disciplinary actions.**

10. While retaliation against whistleblowers is a critical problem, and the enforcement of those laws, rules and regulations are similarly critical, they only represent a fraction of the laws, rules, or regulations which OSC is charged with upholding and enforcing. According to OSC, only about one-third of the complaints that come to OSC allege retaliation, while the other two-thirds regard other matters within OSC's jurisdiction.<sup>5</sup>

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<sup>5</sup> <https://oversight.house.gov/hearing/five-years-later-review-whistleblower-protection-enhancement-act/>

- a. If confirmed, do you pledge to enforce all laws, rules and regulations within OSC's jurisdiction, or your authority or ability?

**Yes.**

- b. If confirmed, do you pledge to follow all laws, rules and regulations, as Congress intended, ensure your staff does the same, and hold accountable those who violate these?

**Yes.**

11. In your pre-hearing questionnaire, you were asked, "How would you handle employee disciplinary issues within the OSC?" You responded, "From what I understand, there has been very little need for disciplinary action by OSC's management. Nonetheless, I am a big believer in promptly and directly confronting issues that may arise with an employee, and setting up a corrective plan." OPM surveys, and OSC's own revelation that it needed to tell its managers to follow employee protection laws within OSC, seem to suggest that it is not the line-staff that need discipline, so much as some of the management.

- a. Are you willing, and do you believe you are able, to take any and all disciplinary action appropriate against OSC management who have or will discriminate or retaliate against OSC staff or complainants, or commit other misconduct?

**If confirmed, I will have conversations with current OSC managers to make sure they follow all the rules and refrain from misconduct. If I observe any violations, I will not hesitate to take all appropriate disciplinary actions.**

- b. Would you limit yourself to "corrective plans", in the case of management who discriminates, retaliates or commits other misconduct, or do you believe they should be disciplined and held to an even higher standard than their subordinates?

**I would not limit myself to "corrective plans" and I do believe managers should be held to a higher standard than subordinates. As described above, if confirmed, I will take all appropriate disciplinary actions to make sure there is no misconduct.**

12. Implicated agencies or violators will often attempt to discredit a whistleblower to protect themselves and harm the whistleblowers. In addition to those, as a former congressional

staffer and criminal prosecutor, you know that not all witnesses have the purest backgrounds or motives, but it does not mean that their allegations are not valid or true. During your staff briefing, you referenced “credible” allegations or whistleblowers.

- a. What did you mean by “credible” in this context, and what do you intend with the application of this characterization in OSC’s cases, with OSC’s complainants, and in the complaints or disclosures that the OSC receives?

**When I worked as a prosecutor, I spent several years in the complaints division, which required me to review new cases as they came into the office and decide what, if any, charges to file. This experience taught me valuable skills in how to assess the credibility of complainants and other witnesses and to make timely judgments about the merits of cases.**

**Some factors that may pertain to credibility assessments are the internal consistency of information a witness provides, whether the information is inherently plausible, whether other witness accounts and documentary evidence corroborate or conflict with the information, and other factors. As with any other type of investigation, if confirmed, I would seek to ensure that any assessment of the credibility of a complainant, subject official, and other witness is appropriately taken into account in determining the appropriate course of action in all OSC cases. As you’ve noted in your question, even those with less than perfect motives, may be perfectly able to impart credible, trustworthy, and important information that merits action.**

13. Despite that Congress intended for the OSC to protect the privacy of complainants and whistleblowers, akin to an attorney-client privilege, OSC has had problems violating the privacy rights of those who file complaints or disclosures since its inception. These have required enhancements in law to prevent misconduct or abuse by the OSC itself. Privacy from government intrusion or misuse is a matter of urgent concern to me, and one of my overarching legislative priorities. In your prehearing questionnaire, you stated that you were considering revising OSC’s Privacy Act regulation, and implied doing so to permit more sharing of private information with others. Such affects could likely only be actioned by Congress, and it was Congress that specifically passed laws to ensure that OSC observed the strictest adherence to rights of privacy.

- a. Do you believe that U.S. Citizens’ Constitutional Rights must be protected, and that OSC must strictly adhere to the law and vigorously protect the privacy rights

of the federal employees who file complaints with OSC or disclose fraud, waste, abuse and mismanagement in government?

**Yes.**

- b. If not, please explain what provisions of law you are considering to request be revised, and elaborate as to why you believe Congress should undo the protections that we put in place to prevent OSC from causing harm to whistleblowers and chilling whistleblowing.

**To be clear, I definitely do not believe that Congress should undo any protections put in place to protect the privacy of government whistleblowers. I begin from the presumption that any guidance promulgated by OSC must be consistent with – and advance the purposes of – the laws enacted by Congress. The comments in my prehearing questionnaire were only intended to suggest a willingness to explore ways to ensure that OSC is effectively helping Inspectors General better pursue allegations of waste, fraud, and abuse over which they have jurisdiction, but I certainly agree with you that OSC must vigorously protect the privacy rights of such whistleblowers.**

- c. Do you believe it proper or permissible to share information regarding whistleblowers, complainants, or their complaints or disclosures, to those implicated within the Executive Agencies?

**Not without the whistleblower or complainant's consent.**

- d. Do you pledge to do everything in your power to ensure that nobody in OSC commits any sorts of obstructions of justice, that no whistleblower identities are revealed or disclosures shared with those implicated or conflicted, and that all appropriate actions are taken to address any cases where such has occurred?

**Yes, if confirmed, I will absolutely do everything in my power to ensure no one in OSC obstructs justice or reveals identities or disclosures without a whistleblower or complainant's consent, and will take all appropriate disciplinary actions, should that occur during my term.**



14. In your hearings and briefings you seemed to express your understanding that legislative changes are required to facilitate OSC's desire to close down investigations quicker or with less, or without any, investigation. These appear to be impressions formed from speaking with existing/prior OSC officials, or based upon information provided by same. In contrast, OSC's own whistleblowers have apparently disclosed to Congress that throughout the past administration, OSC was actually encouraging staff to close down cases far too quickly and without the investigation required by law. Those patriots disclosed these matters at great peril given the environment, and culture of fear and retaliation that OPM found at the OSC.<sup>6</sup> Wasteful operations, abuse and mismanagement at the OSC, or regarding the mishandling of disclosures of such occurring throughout government, would be of urgent concern to me as the Chairman of the Subcommittee on Federal Spending Oversight.

- a. Explain how and why you propose to prioritize and evaluate cases to determine which ones you intend to close without a full investigation.

**OSC's statutory duty to investigate extends primarily to allegations of prohibited personnel practices (5 U.S.C. § 1214), Hatch Act (5 U.S.C. §§ 1212 and 1216) violations, and violations of USERRA in the federal government. OSC staff informs me OSC receives over 4,000 PPP complaints each year.**

**I have been given to understand that approximately 5-8% of these cases are closed upon initial review for the following reasons: (1) the complainant has elected another forum such as the Merit Systems Protection Board from which to obtain a remedy, thus precluding OSC jurisdiction under 5 U.S.C. 7121(g); (2) the complaint alleges unlawful discrimination that, while a PPP, is deferred to the EEOC for reasons of judicial economy; and (3) OSC lacks jurisdiction because the complainant is not a federal employee, the agency is not subject to OSC jurisdiction (for example, the CIA), or Congress limited OSC's jurisdiction to certain PPPs (for example, TSA).**

**Like you, I want to ensure that OSC is addressing the complaints of those who have taken personal risks to blow the whistle. Additionally, I recognize that lengthy delays in investigating meritorious complaints can also have a chilling effect on the willingness of whistleblowers to step forward. Accordingly, I simply hope to examine – in collaboration with OSC staff, this Committee, and independent reviewers like GAO – whether OSC can find**

<sup>6</sup> <http://www.govexec.com/oversight/2016/04/whistleblower-protection-agency-looks-clean-its-own-backyard/127189/>

**ways to more efficiently dispose of those cases that do not fit within the agency's jurisdiction or advance the goals Congress has established for OSC.**

15. The previous administration at OSC served beyond an entire term of office without ever having their operations and claims substantively reviewed by the GAO. To address that lapse, this Committee requested that GAO thoroughly review the OSC, regarding everything from how it handles cases to how it handles its own internal whistleblowers.<sup>7</sup>

a. Do you believe such oversight reviews to be of value and encourage their usage?

**Yes.**

b. If confirmed, do you pledge to ensure that all OSC employees fully support and facilitate GAO's endeavors, and will you ensure that any employee may provide information or other support to GAO for its Congressional Inquiry, without restriction or fear of retaliation for doing so?

**Yes.**

c. Do you believe it proper or lawful for anyone to take actions which obstruct or impair such reviews, or participation thereof?

**No.**

16. In our briefing and your pre-hearing questionnaire, you mentioned assisting whistleblowers in "appropriate" cases, and pursuing or prosecuting "strong" cases. When Congress established and empowered the OSC or the laws it enforces, it did so with the intention that the OSC not just pursue the strongest or most winnable cases, but that the OSC be willing to pursue cases where was a reasonable likelihood that a prohibited personnel practice had occurred. If a prosecutor were to second guess cases of merit in consideration for their success rate, or if whistleblowers were to get the impression the OSC would only help them if they brought an ironclad case vice simply a case with reasonable merit, it could have a chilling effect on whistleblowing in government.

a. If confirmed, do you pledge to pursue every reasonable case to the best of your ability, and do everything in your power to ensure that those who have a reasonably

<sup>7</sup> <http://www.govexec.com/management/2016/05/key-senator-asks-gao-look-office-special-counsel/128061/>

valid claim feel they can and should file with the OSC, and feel confident that OSC will protect them and stop prohibited practices in government?

**Yes.**

**Ranking Member Claire McCaskill  
Post-Hearing Questions for the Record  
Submitted to Henry Kerner  
Nomination of Henry Kerner to be Special Counsel,  
Office of Special Counsel  
Wednesday, June 28, 2017**

**Background of Nominee**

1. You have managed small offices, such as the minority staff of the Permanent Subcommittee on Investigations (PSI). How are you preparing yourself to manage an agency of over 100 employees, an over \$26 million budget and a major IT project?

**It is true that I have managed primarily smaller offices. Nonetheless, I have also worked closely with the leadership of, or as part of the management team for, considerably larger government offices, both in the District Attorney's office as well as at the House Oversight and Government Reform Committee. These experiences have provided me with important lessons about the best ways to utilize personnel, motivate employees and hold supervisors accountable for the work performance of their direct reports. I also learned valuable skills in conflict resolution and ways to build consensus and obtain buy-in from affected employees. In my experience, when an agency is operating effectively, delegating appropriately, and empowering employees at all levels to do their jobs, the relationship between the agency head and his or her immediate subordinates is not dramatically different from that between the leader of a smaller office and his or her direct reports.**

**Perhaps most valuable in my current situation is the fact that OSC already has a strong and very experienced leadership structure of dedicated and highly productive career supervisors in place. I intend to learn from them where the challenges lie and adjust my management decisions based on the information I glean from them. Also, former Special Counsel Carolyn Lerner and current Acting Special Counsel Adam Miles have been extremely generous with their time and insights. I intend to continue my conversations with them, which will also help prepare me for the management of this important agency and to further its vital mission of protecting the federal merit system and the federal workforce, if I am confirmed.**

**Non-Disclosure Agreements**

2. The use of non-disclosure or confidential agreements can be problematic in the federal workplace and they must be carefully worded so as not to infringe on any protected whistleblower activity. In the policy questionnaire, you stated that you will closely monitor enforcement of Whistleblower Protection Enhancement Act's anti-gag provisions [5 USC § 2302(b)(13)] regarding the use of such agreements.

- a. Can you elaborate on how you would do so?

**The non-disclosure agreement requirements of the Whistleblower Protection Enhancement Act (WPEA), as well as the so-called Grassley anti-gag appropriations rider upon which the requirements are based, require that non-disclosure policies, forms, or agreements include specific text specifying the provisions do not supersede statutes regarding whistleblower protections and communications to Congress.**

**I believe it is key to provide as much training as possible on these provisions, and if confirmed, will conduct an educational campaign to bring awareness to them. I will also prioritize the development of further regular training for agencies on these provisions, and will work closely with designated ethics officials in each agency to assist in ensuring compliance with the provisions. Finally, I will certainly rely on whistleblowers to bring non-compliant agreements to my attention, and in those situations, will aggressively pursue compliance as well as disciplinary action where warranted.**

- b. What authorities does the executive branch have to legally limit employee communications? What about communications with Congress?

**Courts have recognized the Executive Branch's right to promulgate general housekeeping regulations, including who can officially speak on behalf of the agency. To that end, most agencies have policies limiting communications with the media or identifying the role of legislative affairs officials in coordinating official responses to Congress. However, the Civil Service Reform Act of 1978 (CSRA) represented a deliberate policy decision to protect federal employee communications which involve disclosure of certain information in the public interest, and the CSRA as amended outlines the parameters of such protections.**

**Communications to Congress have long-established additional protections that stem from the right in the First Amendment of the U.S. Constitution to "petition the Government for a redress of grievances." In response to Executive Branch attempts to limit federal employee communications, Congress passed the Lloyd-La Follette Act of 1912, recodified by the CSRA at 5 U.S.C. § 7211. A further Lloyd-La Follette anti-gag rider received government-wide application in fiscal year 1998.**

**I believe Executive Branch housekeeping policies purporting to limit employee communications with Congress are among the policies, forms, or agreements the WPEA's non-disclosure agreement requirements and the Grassley anti-gag appropriations rider are understood to apply to, and if confirmed, I will be vigilant in ensuring such communications are protected.**

- c. How would you counsel executive branch leadership on the need for employees to have avenues to raise concerns?

**I would take every opportunity to reinforce this issue in meetings with Executive Branch leadership. As described above, if confirmed, I would also conduct an educational campaign and prioritize agency training on these requirements.**

#### **Prohibited Personnel Practices**

3. Former Special Counsel Lerner reaffirmed as OSC's policy that discrimination on the basis of an employee's sexual orientation or gender identity is a prohibited personnel practice. Would you commit to investigating and enforcing claims of discrimination on these grounds under 5 USC § 2302(b)(10)?

**Yes, I will.**

#### **Hatch Act Enforcement**

4. In the policy questionnaire you stated that you would look at the current Hatch Act regulations to determine areas that need to be updated. Can you speak to specific areas you are interested in addressing?

**The regulations, which the Office Personnel Management is responsible for promulgating, have not been significantly updated since 1995. In the intervening years, technology has revolutionized the federal workplace, political campaign outreach, and more broadly how we communicate and share ideas with others. In part, the regulations need to reflect the changes brought about by the digital age and its impact on how federal employees communicate and how individuals participate in political campaigns today.**

5. The ubiquity of access to social media accounts at all times has made it easier for federal employees to violate the law with tweets or Facebook posts, as we have seen recently in the case of the White House social media director. On June 5, 2017, the Office of Special Counsel notified complainants that it had issued a warning letter to Dan Scavino, Jr., for a Hatch Act violation. The violation stemmed from his posting a tweet calling for the political defeat of a Member of Congress while invoking his official position. OSC noted that Mr. Scavino had been counseled previously about the Hatch Act. Do you agree with OSC's finding in the case of Mr. Scavino? Would you have approached it differently?

**I feel comfortable with the decision reached by OSC's career professionals regarding this decision. The only thing I would have considered approaching differently is ensuring that any communications to outside parties regarding OSC's finding more fully explained the legal analysis behind it. I believe this might help to provide further education and deter similar behavior by others.**

6. If confirmed, how will you prepare OSC for increased political participation among federal employees and political appointees in the 2018 midterm elections and beyond?

**It is important to me that, if confirmed, I ensure there are sufficient resources for OSC's Hatch Act Unit to do its job. I would review its operations to assess any needs and to ensure it is ready to respond to the anticipated increase in political participation.**

7. How would you balance the interests of a nonpartisan government with the interest and right of federal employees to participate in the political process?

**I believe the Hatch Act does a good job of striking this balance. The 1993 amendments to the Hatch Act reflect the importance in balancing the interests of a nonpartisan government with the right of federal employees to participate in political activity. These amendments established a bright-line rule where no political activity is permitted at work or on duty, but off duty most federal employees are permitted to engage in a broad range of political activity. This bright line recognizes the importance of protecting the civil service system from political influences by ensuring that federal employees are recognized for their accomplishments and not their political affiliations. It also recognizes the need for citizens to trust federal institutions through the nonpartisan administration of government programs and services.**

#### **Whistleblower Case Management**

8. Legislation to allow the Merit Systems Protection Board to issue stays in the absence of a quorum was recently signed into law. If confirmed, what will be the role of formal stays at OSC?

**OSC has the authority to request stays of personnel actions from the Merit Systems Protection Board where there are reasonable grounds to determine the personnel action was taken as a result of a prohibited personnel practice. These stays are an important tool that gives OSC time to investigate allegations. I applaud the passage of S. 1083, which allows the Board to issue stay renewals in the absence of a quorum. This new statute fills a significant gap in the law, which had detrimental consequences for federal employees.**

**Stays play a key role in shifting the burden of resources away from the agencies, and thus if confirmed and where appropriate, I intend to use stays as much as reasonably possible. Whistleblowers who are terminated as a means of retaliation are at a significant disadvantage without a formal stay, as the agency with its significant resources can simply wear down a whistleblower without a source of income. By contrast, where OSC obtains stays, they help ensure agencies prioritize OSC's requests for documents and other materials and make witnesses available in a timely manner.**

**OSC informs me that an additional advantage of formal stays is that the agency has the right to submit a response to OSC's request for an extension of the stays. The agency's response can provide OSC with an opportunity to more fully evaluate the complainant's case during the early stages of an investigation.**

9. Would you propose any changes to how OSC communicates with complainants? How will you ensure that individuals who reach out to OSC feel that they are heard?

**OSC staff inform me that OSC's Disclosure Unit (DU) procedures require that DU staff contact whistleblowers who have filed with OSC to obtain a more complete understanding of the allegations and to request any supporting documentation. I expect to reiterate the importance of these communications with whistleblowers, and their timely initiation and follow-through, to OSC if confirmed. I will also consider outreach to whistleblowers who have previously interacted with OSC to evaluate whether any changes to the way OSC communicates with complainants are needed.**

10. By statute OSC has fifteen days to act on disclosures. Is this timeframe meaningful? Would you propose any changes to this to allow for meaningful oversight of OSC's timeliness?

**Based on information in OSC's annual report for fiscal year 2015, approximately 42% of DU cases are completed in the 15-day timeframe. OSC staff informs me the 15-day timeframe is generally not sufficient for the complete review and resolution of the majority of DU's cases, especially those that are complex or technical in nature, or those where a referral for investigation is recommended. I understand S. 582, the Office of Special Counsel Reauthorization Act you have cosponsored with Chairman Johnson, would allow for 45 days to respond. OSC staff informs me this may be based on an OSC analysis conducted in 2005, and that given the significant increase in DU case intake 15 days may no longer be the most appropriate timeframe. If confirmed, I would direct that OSC reassess this number once it has completed implementation of its new case management system, which I understand will allow for much better tracking of this type of data.**

11. Do you believe OSC currently has enough legislative authority to oversee implementation of agency corrective actions? If no, what additional authority is needed?

**For disclosures, I am hopeful the authority proposed in S. 582 will help OSC have the authority it needs to oversee implementation of agency corrective actions. If confirmed, I would monitor the implementation of this provision to see if additional authority is needed.**

**For prohibited personnel practices, OSC can secure corrective action through informal agreement or formally through a Board order. If the Board orders the action, including entering a settlement agreement into the record, the Board retains jurisdiction over enforcement. In practice, I have been told, OSC will attempt to facilitate disputes between the complainant and the agency about performance of the**



**informal agreement. Where appropriate, OSC may reopen its investigation. While these current mechanisms are generally sufficient to address implementation of corrective action, OSC officials have told me it is the practice of OSC to dedicate additional resources to particular cases, including cases where an agency has not timely performed on a corrective action agreement.**

**Senator Tom Carper  
Post-Hearing Questions for the Record  
Submitted to Henry Kerner  
Nomination of Henry Kerner to be Special Counsel,  
Office of Special Counsel  
Wednesday, June 28, 2017**

- 1. Mr. Kerner, will you ensure that the Hatch Act is applied impartially to all officers and employees in the Executive Branch irrespective of political affiliation, including officers and employees in the Executive Office of the President?**

Yes, I will.

**Senator Heidi Heitkamp  
Post-Hearing Questions for the Record  
Submitted to Henry Kerner  
Nomination of Henry Kerner to be Special Counsel,  
Office of Special Counsel  
Wednesday, June 28, 2017**

1. As former Attorney General of the state of North Dakota, I know how important it is to gather facts and evidence to uncover the truth and ultimately ensure that justice is served. I also know how difficult it is to gather that information from people who are traumatized, who do not trust the system, or who do not want to admit to wrongdoing.

- a. As a former prosecutor, have you experienced similar situations?

**Yes, as a prosecutor, I worked with thousands of victims and witnesses of crime, many of whom struggled with participating in prosecutions due to distrust or trauma. Over many years as a prosecutor, I worked to refine my skills at obtaining the needed information while treating victims and witnesses with the sensitivity and respect they deserve. The reputation that OSC has built as an effective advocate for whistleblowers should help considerably in addressing these situations.**

- b. What concrete steps will you take to keep OSC independent so that it may do its job to figure out the truth and hold people accountable?

**As a former prosecutor, I understand that an unwavering, unbiased commitment to the law is essential to maintaining credibility and achieving results. If confirmed, I would make clear to everyone within OSC, Congress, federal agencies, and OSC's other stakeholders that OSC will remain an independent, non-partisan agency that follows the law regardless of political interests.**

2. Something that will be a central part of your work is supervisor training. Supervisor training is incredibly important for creating an effective and efficient work environment that fosters communication and collaboration—that is why I introduced my Supervisor Training legislation at the end of last Congress. Managers play a vital role in the culture of an agency, and are responsible for giving employees the tools they need to succeed and thrive in the workplace. If confirmed, you will not only be responsible for training your own employees at OSC, but you will also play a large role in training other agency supervisors about whistleblower protection and the Hatch Act, which is a daunting task given the size of the federal workforce.

- a. Given the limited resources and personnel at the OSC, what strategies do you intend to use to thoroughly educate supervisors about whistleblower rights and the

Hatch Act?

**In response to reports of limited understanding in the federal workforce concerning employees' right to be free from prohibited personnel practices (PPPs), especially retaliation for whistleblowing, Congress enacted 5 U.S.C. § 2302(c). Section 2302(c) requires that agency heads ensure, in consultation with OSC, that employees are informed of their rights and responsibilities under the Civil Service Reform Act (CSRA), the Whistleblower Protection Act (WPA), the Whistleblower Protection Enhancement Act (WPEA), the Hatch Act, USERRA and related laws. OSC staff inform me that, in 2002, OSC established a "2302(c) Certification Program" to provide agencies and agency components with a process for meeting this statutory requirement. Additionally, in 2015, OSC established a new unit specifically devoted to outreach and training, such as that required under the 2302(c) Certification Program. I believe OSC is strongly committed to assisting all federal agencies in meeting the requirements of 5 U.S.C. § 2302(c).**

**If confirmed, I intend to build upon the success of the 2302(c) Certification Program. I also intend to devote additional resources to assisting with training and looking for creative new ways to expand the training opportunities OSC has with other agencies.**

- b. How do you plan to communicate to supervisors that listening to their employees is in their best interest as an organization when their employees come forward with concerns or comments?

**I understand from OSC staff that they actively promote the message that listening to employees' concerns and comments is in the agency's best interest by emphasizing instances where doing so saved taxpayers millions of dollars or averted serious threats to public health and safety. If confirmed, I intend to further communicate that message in every way that I can, including by seeking to meet with agency leadership from as many agencies as possible to communicate this message. I believe that supervisors will take their cues from their agency leadership in fostering a culture of trust and I will look to hold them accountable should they fail to do so.**

3. OSC is just one of several offices dedicated to responding to federal employee concerns about their jobs. When someone makes the difficult decision to blow the whistle on an agency practice, their decision is going to depend on who will listen to his or her concern and take that concern seriously.
- a. If I were a federal employee, how would you explain to me what OSC does?

OSC is an independent agency that safeguards federal employee rights and holds government accountable. OSC does this by investigating and prosecuting employment-related activities that are banned in the federal workforce because they violate the merit system through some form of employment discrimination, retaliation, improper hiring practices, or failure to adhere to laws, rules, or regulations that directly concern the merit system principles. These improper employment-related activities are known as prohibited personnel practices (PPPs). There are 13 PPPs. OSC can obtain corrective action for employees and disciplinary action against those found to have committed a PPP.

In addition, OSC serves as a safe channel for federal employees to report fraud; serious waste, mismanagement, or abuse; and dangers to public health and safety. OSC's process is intended to guarantee the confidentiality of the whistleblower and ensure that wrongdoing is investigated and corrected.

OSC also enforces the Hatch Act, a federal law passed in 1939 that limits certain political activities of federal employees, as well as some state, D.C., and local government employees who work in connection with federally-funded programs. The law's purposes are to ensure that federal programs are administered in a nonpartisan fashion, to protect federal employees from political coercion in the workplace, and to ensure that federal employees are advanced based on merit and not based on political affiliation.

Finally, OSC enforces the Uniformed Services Employment and Reemployment Rights Act (USERRA). USERRA was passed in 1994 and protects military service members and veterans from employment discrimination on the basis of their service. It also allows them to regain their civilian jobs following a period of uniformed service.

- b. How would you explain the difference between OSC's role and the Offices of Inspector General (OIG), the Equal Employment Opportunity Commission (EEOC), or the Office of Personnel Management (OPM)?

While both OPM and OSC have a role in upholding the merit system and preventing PPPs, OPM plays a managerial role, while OSC is an investigative and prosecutorial agency.

The EEOC has overlapping jurisdiction that is narrower than OSC's in that the EEOC only investigates and prosecutes workplace discrimination or retaliation for reporting discrimination, but deeper than OSC's in that the EEOC may act on a broader set of facts than the personnel actions to which OSC is limited. Given the EEOC's adjudicative capabilities, it is my

understanding that OSC will defer to the EEOC where a complaint is already pending with that agency.

Offices of inspector general (OIGs) have no formal personnel authority, and can only make recommendations for personnel action; by contrast, OSC has the authority to not only investigate prohibited personnel practices but to prosecute individuals who engage in them. Thus, OIGs occasionally refer PPPs to OSC, whether before or after an investigation. On the other hand, OIGs have some authorities OSC does not have: They can conduct investigations of waste, fraud, and abuse in the entities within their jurisdiction, while OSC's authority to receive disclosures of such matters requires it to refer the disclosures to the head of the agency for investigation. (Agency heads often delegate such referrals to OIGs to perform the required investigation.)

Finally, OSC is also different from each of these organizations because of its independence; once appointed by the President, the Special Counsel serves a five-year term and may only be removed for inefficiency, neglect of duty, or malfeasance in office.

- c. Does the recent increase in the number of cases brought to the OSC hinder its ability to find recourse for federal employees in any way?

According to its published reports to Congress, despite limited resources, OSC is fulfilling its mission more effectively than ever before. OSC gained 276 favorable actions for whistleblowers and other victims of PPPs this past year, more than double the annual average. In the last two years, OSC has achieved five times the number of favorable actions in whistleblower retaliation complaints than in any prior two-year period in agency history.

However, in FY 2016, for the second straight year, OSC received upwards of 6,000 new matters, a 25 percent increase over the prior two-year period. Due to its increased caseload, in FY 2016 OSC's backlog rose 20 percent to over 2,000 cases for the first time in agency history. Over the last four years, OSC's case backlog has increased 62 percent.

OSC staff informs me that, without additional resources, OSC will fall further behind, impairing the agency's effectiveness in addressing PPPs, Hatch Act and USERRA violations, as well as its ability to prevent fraud, waste, and abuse within the Federal Government. With longer case-processing times, employees may stop trusting that OSC can make a difference in tackling waste, fraud, abuse, and dangers, and might well be reluctant to come forward to report these abuses, to the detriment of taxpayers and the public.

**If confirmed, I am committed to tackling this challenge, finding further efficiencies in OSC's processes and also identifying where further resources may be necessary.**

