

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

**U.S. Senate
Committee on the Judiciary**

Accountability and Oversight of Juvenile Justice Grants

April 21, 2015, 10:00 A.M.

Chairman Grassley, Ranking Member Leahy, and Members of the Committee:

Thank you for the opportunity to testify today about the U.S. Office of Special Counsel (OSC). OSC is an independent federal investigative and prosecutorial agency. Our primary mission is to safeguard the merit system by protecting employees from prohibited personnel practices (PPPs), especially reprisal for whistleblowing. OSC also provides federal employees with a secure channel for disclosing wrongdoing in government agencies. My testimony today will focus on our process for receiving and evaluating whistleblower disclosures, and the critical role that these disclosures play in promoting government accountability.

As stated, OSC provides a safe channel through which federal employees may allege violations of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. Unlike its role in retaliation and other PPP cases, OSC does not have investigative authority in disclosure cases. Rather, OSC evaluates disclosures of information to determine whether there is a “substantial likelihood” that wrongdoing has been disclosed. In making this determination, OSC reviews the information, interviews the whistleblower, and assesses their credibility and the reliability of their information, among other factors. If, based on this review, OSC makes a “substantial likelihood” determination, I transmit the information to the head of the appropriate agency. The agency head, or their designee, is required to conduct an investigation and submit a written report on the investigative findings to my office.

Upon receipt of the agency’s report, I am required by law to determine whether the report contains the information required by the statute and whether the findings of the agency head appear reasonable. I will determine the agency’s investigative findings and conclusions appear reasonable if they are credible, consistent, and complete based upon the facts in the disclosure, the agency report, and the whistleblower’s comments on the report. I then transmit the report with my office’s determination and the whistleblower’s comments to the President and the congressional committees with oversight responsibility for the agency involved. OSC is also required to place the report and whistleblower comments in a public file.

Through this process, Congress has tasked OSC with a critical oversight role in reviewing allegations of potential government misconduct. The system is beneficial to improving government operations in three key ways. First, if an agency is reluctant to investigate possible wrongdoing raised internally by a whistleblower, OSC can compel the agency to conduct an investigation. Second, OSC provides an important accountability and quality control function in the investigative process. The whistleblowers, who are commonly the experts on the subject

matter of the allegations, are allowed to comment on the quality of the investigation and corrective actions. OSC also maintains a dialogue with the investigating agency throughout the process to make sure that the actions taken are reasonable and address the concerns raised by the whistleblowers. Finally, the process is transparent. At the conclusion, OSC posts the results on our website, creating a public record of all cases which have been referred for investigation.

In recent years, the OSC disclosure process has prompted significant changes in government operations. Our cases have saved lives and millions of taxpayer dollars. For example, whistleblowers at the Air Force's Port Mortuary in Dover, Delaware disclosed misconduct regarding the improper handling of human remains of fallen service members. After OSC reviewed the allegations and made recommendations, the Air Force took important, wide-scale corrective action. OSC's work helped to ensure that problems were identified and corrected, and the Air Force is now better able to uphold its sacred mission on behalf of fallen service members and their families.

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

Finally, in a report to the President and Congress last year, OSC documented severe shortcomings in Department of Veterans Affairs' (VA) investigations of threats to patient care at VA hospitals. This work with VA whistleblowers led to an overhaul of the VA's internal medical oversight office, drastically improving the reports now issued in response to OSC referrals. Just recently, a VA report confirmed an egregious threat to the health and safety of veterans at a medical center in Beckley, West Virginia. In order to meet budget goals, the facility altered prescriptions for veterans over the objections of their mental health providers, with no medical reason for the substituted drugs, in violation of VA policies. The VA investigated, determined that the substitutions created medical risks for the impacted veterans, and recommended both corrective steps to be taken and disciplinary actions for those responsible. It is this type of accountability that the OSC disclosure process promotes.

The number of whistleblower disclosures received by OSC has increased tremendously. The number of disclosures received by OSC has more than doubled in the last five years, and more than quadrupled in the last ten. OSC carefully reviews each disclosure received, and refers only a small percentage for investigation. The number of formal referrals to agency heads for investigation varies by year, and is generally between 40 and 60 cases, or approximately five percent of disclosures received.

In 2014 and 2015, OSC referred two cases involving the Office of Juvenile Justice and Delinquency Prevention (OJJDP) to the Attorney General for investigation under the provisions of 5 U.S.C. § 1213. The cases generally involve allegations that OJJDP failed to properly ensure that states and localities complied with the requirements of the Juvenile Justice and Delinquency Prevention Act of 1974. Notwithstanding documented noncompliance, states continue to receive grants, in further violation of the Act.

OSC referred the cases to the Justice Department on September 16, 2014 and January 13, 2015, respectively. The Justice Department's Office of Inspector General (OIG) is conducting the investigations on behalf of the Department. The reports are due to OSC on May 12, 2015. However, based on our communications with the OIG, we anticipate that the OIG will likely request an extension. OSC will grant an extension request where an agency demonstrates that it is conducting a good faith investigation that will require more time to successfully complete.

OSC is concurrently reviewing allegations that an employee was retaliated against for reporting related concerns about OJJDP.

Because these cases are ongoing, I cannot say more about them at this time, without compromising the ongoing investigation, my oversight of the OIG investigation and Department response, or prejudicing our determinations in the reprisal case. I acknowledge and appreciate the efforts of Committee staff, who I understand have communicated these limitations to the Members of the Committee.

I thank you for the opportunity to testify.

Special Counsel Carolyn N. Lerner

The Honorable Carolyn N. Lerner heads the United States Office of Special Counsel. Her five-year term began in June 2011. Prior to her appointment as Special Counsel, Ms. Lerner was a partner in the Washington, D.C., civil rights and employment law firm Heller, Huron, Chertkof, Lerner, Simon & Salzman, where she represented individuals in discrimination and employment matters, as well as non-profit organizations on a wide variety of issues. She previously served as the federal court appointed monitor of the consent decree in *Neal v. D.C. Department of Corrections*, a sexual harassment and retaliation class action.

Prior to becoming Special Counsel, Ms. Lerner taught mediation as an adjunct professor at George Washington University School of Law, and was a mediator for the United States District Court for the District of Columbia and the D.C. Office of Human Rights.

Ms. Lerner earned her undergraduate degree from the University of Michigan, where she was selected to be a Truman Scholar, and her law degree from New York University (NYU) School of Law, where she was a Root-Tilden-Snow public interest scholar. After law school, she served two years as a law clerk to the Honorable Julian Abele Cook, Jr., Chief U.S. District Court Judge for the Eastern District of Michigan.