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NOMINATION OF CAROLYN N. LERNER

HEARING

BEFORE THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

OF THE

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

NOMINATION OF CAROLYN N. LERNER TO BE SPECIAL COUNSEL, OFFICE OF SPECIAL COUNSEL

MARCH 10, 2011

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NOMINATION OF CAROLYN N. LERNER

THURSDAY, MARCH 10, 2011

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

The Committee met, pursuant to notice, at 10:03 a.m., in room SD–342, Dirksen Senate Office Building, Hon. Daniel K. Akaka, presiding.

Present: Senators Akaka and Johnson.

OPENING STATEMENT OF SENATOR AKAKA

Senator AKAKA. This hearing will come to order.

Aloha and good morning, everyone. This hearing is full of smiling faces, and we are delighted to be here today.

The Committee on Homeland Security and Governmental Affairs meets to consider the nomination of Carolyn Lerner to serve as Special Counsel.

I would like to extend a warm welcome to Ms. Lerner and also welcome her family and her friends who have joined us today for this nomination hearing.

Ms. Lerner attended the University of Michigan, where she was selected to be a Truman Scholar, and studied at the London School of Economics. She received her law degree from New York University, where she was awarded a Root-Tilden-Snow Scholarship. After law school, Ms. Lerner clerked for a Federal judge and then began to practice law. In 1997, she became a founding partner in her law firm here in Washington, DC, where she represents individuals, including Federal employees, in employment matters. Ms. Lerner is also a visiting professor at George Washington University Law School.

Ms. Lerner, I would like to congratulate you on your nomination. It is a pleasure to have such a well-qualified nominee before us today.

I understand that your husband, Dwight, your son, Ben, and daughter, Anna, are here today, and I would like to give you the opportunity to introduce them and any other family members or friends who are here for this hearing. Would you please introduce them to the Committee, Ms. Lerner?

Ms. LERNER. Thank you, Senator. My husband, Dwight Bostwick, is here, and my daughter, Anna, and my son, Ben. My family in Michigan, unfortunately, could not be with me today, but I believe they are watching on the Committee's remote access. My law part-

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ners are here, Rick Salzman, Steve Chertkof, and Doug Heron, and I have many other friends here, as well.

Senator AKAKA. Well, thank you, and all of you are welcome.

We are delighted to have you and look forward to this hearing. But again, I want to say aloha to everyone. I can see that Ms. Lerner has a strong network of supporters here today.

The Office of Special Counsel (OSC) was created in 1978 as part of the Civil Service Reform Act. Although it may not be the most well known Federal agency, the Office of Special Counsel serves a very important purpose, which is to safeguard the merit system by protecting Federal employees and applicants from prohibited personnel practices.

Our dedicated Federal employees are among this country's greatest assets. I believe that civil servants must be able to serve their country without undue influence or fear of discrimination or retaliation. For almost a decade, I have worked to reform the protections for Federal whistleblowers, enacting the Whistleblower Protection Enhancement Act so that Federal employees may report waste, fraud, abuse, or illegal activity without fear of retaliation, and it is one of my top priorities in this Congress. Having a Special Counsel in office who understands the critical importance of Federal employee whistleblowers is a key aspect of restoring faith in whistleblower protections.

In addition, the Office of Special Counsel protects the employment rights of our veterans by enforcing the Uniformed Services Employment and Reemployment Rights Act (USERRA). As a member of the Veterans Affairs and Armed Services Committees and as a veteran of World War II myself, I feel strongly that our service members' rights must be protected as they prepare to enter or return to the civilian workforce. This issue has become even more important in recent years with large numbers of veterans returning from overseas who want to continue their service in a civilian capacity. I understand that this essential office at the OSC is understaffed. I hope you will focus attention on veterans' protections when you are confirmed.

Finally, the Office of Special Counsel is responsible for enforcing and providing advisory opinions on the Hatch Act. Because the presumptive penalty for violating the Hatch Act is removal from Federal employment, the OSC's advisory function is vital to helping employees understand what activity is permitted under the law.

I want to tell you that I am happy that my new partner on the Oversight of Government Management, the Federal Workforce, and the District of Columbia Subcommittee, Senator Johnson, is here today for his first hearing serving as Ranking Member. I would like to take this opportunity to welcome him and to say that I look forward to working with him on these important issues here in the U.S. Senate.

Senator Johnson, would you like to make any statement at this time?

OPENING STATEMENT OF SENATOR JOHNSON

Senator JOHNSON. Yes, and thank you, Senator Akaka. Aloha.

Senator AKAKA. Aloha.

Senator JOHNSON. I would imagine I will be saying that quite a few times, and I will enjoy that. I would rather be doing it in Hawaii, though, I think.

Senator AKAKA. Yes.

Senator JOHNSON. But again, thank you, sir, for your kind introduction. I am really looking forward to working with you over the next couple of years. It is going to be an honor serving with you on this Committee and also on our Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia.

I guess I would like to begin by also welcoming you, Ms. Lerner, and your family and your friends and people who have come here to support you in this hearing. We share rookie status here. This is my first time as a Ranking Member and your first time testifying, so welcome.

Rather than repeating what Senator Akaka talked about in terms of the importance of this office, I will second what he said. It is an extremely important office. I guess I would like to just give a brief opening remark, focus on the waste, fraud, abuse, mismanagement, duplication of service aspects, of how important it is to protect whistleblowers.

I really do not want to turn this into a budget hearing, but as we discussed in my office a week ago, our Federal Government is facing a $1.65 trillion budget deficit this year. Our national debt exceeds $14 trillion. The President's budget lays out another $13 trillion of debt over the next 10 years. My concern is that at some point in time, we are going to face a debt crisis.

So the financial pressure we put on agencies is going to be tremendous, and our Federal Government simply cannot afford to operate ineffectively and inefficiently, and I think the Office of Special Counsel will play a key role in allowing people to come forward—now, I agree with Senator Akaka. I think our Federal workforce is comprised of fine individuals who want to do the right thing, and the Office of Special Counsel gives them that outlet, gives them that assurance that they can step forward, report mismanagement, waste, fraud, and abuse, and I cannot imagine a time in our Nation's history where that is going to be more critical.

As we talked in my office about a very cooperative relationship here, and the same thing that Senator Akaka and I talked about in our committee and subcommittee work, we want to cooperate with the agencies. I do not think negative works. I am not into "gotcha" politics. I want everybody in the Federal Government, at least from this Senator's perspective, to understand that I want to work with the agencies to help them become more effective and more efficient. I want to work with the Federal workforce, with the fine men and women who serve our Federal Government and who want to come forward and say, we can make things a little more effective. We can make things a little more efficient. I think it is just absolutely critical.

So again, I want to thank you for stepping up to the plate. As we discussed earlier, there are going to be long hours. This is going to be hard work. It is a difficult challenge. This office has gone without a leader now for 2 years. So I am really pleased that we

are holding this hearing because it is a very important office, and I am looking forward to your testimony.

Senator AKAKA. Thank you very much, Senator Johnson, for your statement.

The nominee has filed responses to a biographical and financial questionnaire, answered prehearing questions submitted by this Committee, and had her financial statements reviewed by the Office of Government Ethics. Without objection, this information will be made a part of the hearing record, with the exception of the financial data. It is on file and available for public inspection at the Committee offices.

Our Committee rules require that all witnesses at nomination hearings give their testimony under oath. Therefore, I ask the nominee to please stand and raise your right hand to take this oath.

Do you swear that the testimony you are about to give this Committee is the truth, the whole truth, and nothing but the truth, so help you, God?

Ms. LERNER. I do.

Senator AKAKA. Thank you very much. Let it be noted in the record that the witness answered in the affirmative.

Ms. Lerner, will you please proceed with your statement?

TESTIMONY OF CAROLYN N. LERNER[1] TO BE SPECIAL COUNSEL, OFFICE OF SPECIAL COUNSEL

Ms. LERNER. Yes. Chairman Akaka and Ranking Member Johnson, thank you for the opportunity to appear before you today. It is a privilege to be considered for confirmation by this Committee. I am honored and humbled that the President has nominated me to serve as Special Counsel.

I briefly introduced my family before. My husband, Dwight Bostwick, and our two children, Anna and Ben. I am very grateful to them for their unwavering love and support. A number of my friends and colleagues are also in the audience today, and I would like to thank them, as well, for being here.

I also want to acknowledge my family in Michigan, who could not be here today, but who have encouraged me throughout my life. I would not be here but for the two people whose influence led me to pursue a career in the law. My mother and my father would have treasured this day. They were the children of immigrants who came to this country seeking a better life. My grandfather had been jailed in his country for speaking out against the government, and my parents taught me to appreciate the freedoms that we enjoy in the United States. They also impressed upon me the importance of standing up for those who cannot protect themselves.

I began my career in Michigan, where I grew up, as a law clerk to U.S. District Court Chief Judge Julian Abele Cook, Jr. Judge Cook treats all those who appear before him with kindness, dignity, and respect. His approach set the standard I have tried to emulate as I have practiced law in the 20 years since my clerkship.

Since 1991, I have represented both private sector and Federal employees, primarily in employment-related cases. I have advised

[1] The prepared statement of Ms. Lerner appears in the Appendix on page 17.

employers about best workplace practices and employment issues. As a Federal court-appointed independent monitor, I managed and implemented a reform program for a large government agency. I have also served as both a mediator and a professor of mediation.

These experiences have given me a broad perspective on how workplaces function and how best to protect employees from discrimination and retaliation. If confirmed, I would bring this expertise to the Office of Special Counsel.

There are several employees from the Office of Special Counsel who are here today, and they deserve our appreciation for their ongoing commitment to the OSC.

The Office of Special Counsel was created to protect Federal employees who report abuses in government. Employees need to have the courage to blow the whistle on waste, fraud, and abuse, and we need to provide them with the assurance that if they do, their careers and their livelihoods will not be at risk.

Whistleblowers are essential to a well-functioning government. Federal employees have been described as the foot soldiers in the war on waste, fraud, and abuse. They not only protect public health and safety, they are guardians of taxpayer dollars, a role that has become more important than ever.

Whistleblower disclosures under the False Claims Act have accounted for billions of dollars in recoveries for the U.S. Treasury. A recent private sector study found that employee disclosures detected more fraud than auditors, internal compliance officers, and law enforcement officials combined.

To effectively protect the Federal Merit System, the Office of Special Counsel must be a highly functioning agency. I believe that the OSC can best succeed if its own employees are treated fairly and with respect.

It will also take a strong partnership with all of the OSC's stakeholders to move the agency forward in a positive way. If confirmed, I am committed to building collaborative and constructive relationships with the Congress, Federal employee and agency management groups, and good government advocates. In particular, I look forward to working very closely with this Committee as you continue your important efforts to increase effectiveness and efficiency in the government.

Thank you, and I would be very pleased to answer any questions that you may have.

Senator AKAKA. Thank you very much, Ms. Lerner.

I will begin with the standard questions that the Committee asks of all nominees.

First, 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. LERNER. No, there is not.

Senator AKAKA. Second, 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. LERNER. No, I do not.

Senator AKAKA. Third, do you agree, without reservation, to respond to any reasonable summons to appear and testify before any duly constituted committee of Congress if you are confirmed?

Ms. LERNER. Yes, I do.

Senator AKAKA. Thank you very much.

Ms. Lerner, the Special Counsel position has been vacant for over 2 years. In light of the extended vacancy, what do you believe are the major challenges facing the OSC and what will you do to address them if you are confirmed?

Ms. LERNER. This agency, as you know, has been without permanent leadership for 2 years, and I do want to recognize the fact that the career employees of this agency have very honorably taken over the roles that are usually filled by people who are in the office of the immediate Special Counsel, and so they have been doing double-duty and they deserve our appreciation for having done that.

In terms of the challenges facing the agency, obviously, if I am confirmed and I am in the agency, I will have a much better sense. But as of now, we know that without leadership, some long-term planning probably needs to be done. We need to look at the bottom line and how the agency is using its resources and whether it is using resources in the most efficient and effective way.

I also think a challenge is going to be increasing communication. As you mentioned, I think it is very important that the Office of Special Counsel have good communication with the Senate and in particular with this Committee. Communications should not be limited to hearings, but there should be an ongoing dialogue. There also needs to be communication with all of the other stakeholders of the agency, including agencies and the good government advocates. So I think that those would certainly be priorities for me if I am confirmed.

Senator AKAKA. Thank you. Ms. Lerner, you have spent your career working in the private sector representing individuals, including Federal employees. How do you believe your experience has prepared you for this position, both in terms of managing the OSC and its employees and enforcing Federal Merit System principles?

Ms. LERNER. In the 22 years since I graduated from law school, I have been privileged to have a very wide range of experiences. In addition to representing individuals in employment cases, I have also worked with organizations and small businesses on best employment practices and developing policies and procedures for them. I have represented organizations who were the subject of complaints from employees, both in mediation and in litigation.

I have served as a court-appointed Special Inspector for the D.C. Department of Corrections, an agency with over 1,000 employees, and managed a program there where I was responsible for recruiting, hiring, training, and supervising a team of lawyers, trainers, and mediators. I set up systems within the Department of Corrections, such as an Employee Advisory Committee, an ombudsman, and certainly representing individuals in employment cases has given me a lot of insight into what good management can do and the effect of both good and bad management.

So I would bring those collective experiences to the Office of Special Counsel if I were confirmed.

Senator AKAKA. Ms. Lerner, I understand that employee morale in the OSC is low and that some employees complained of possible illegal retaliation in the past. If confirmed, what are your plans to improve the workplace environment?

Ms. LERNER. As I mentioned, I do have experience with troubled workplaces, large and small, and I have counseled businesses on how to deal with troubled workplaces.

The first thing that I think would be really important to do is to meet with people myself and determine if steps need to be taken to improve morale, and if so, what are they. I would like to learn by talking to people. I think I am a good listener. And that would be the first thing I would do if I am confirmed, is to listen to the people who are working there at the Office of Special Counsel.

I also have a lot of experience doing mediation, and those skills as a mediator, I think, would stand me in good stead in trying to bring the agency forward, and I would assure you that I will take whatever steps are appropriate, including things like setting up or reinvigorating an Employee Advisory Committee, which I believe this agency may have had in the past. I am not sure what the status is now of that committee.

But I think all those steps are things that can really help morale, and I would be prepared to do those things.

Senator AKAKA. Thank you, Ms. Lerner. Federal employees may lack confidence in the whistleblower protections because of weak enforcement of the Whistleblower Protection Act. Federal whistleblowers have told this Committee that they feel that they have no place to turn to disclose information without suffering retaliation. What steps will you take to restore confidence in the Office of Special Counsel and specifically to protect Federal whistleblowers?

Ms. LERNER. Thank you for that question. I think you raise a really important issue, and I am very happy to be able to address it. I, too, have heard that advice is often given to people that the last place you want to go is the Office of Special Counsel. If I am confirmed, I would like to find out why that is and if that actually is the case.

My goal, if I am confirmed as Special Counsel, is to have it be an agency where you feel comfortable referring your constituents. If they come to your offices with a problem, someone has a whistleblower complaint or a USERRA complaint or a disclosure or feels that they are being discriminated against because of a prohibited personnel practice, I want you to feel very confident in referring them to the Office of Special Counsel. I want the good government advocates and groups to feel like the Office of Special Counsel is the first place they would recommend that people come. And restoring the reputation, improving the reputation of the office will be a very important goal for me, if I am confirmed.

Senator AKAKA. Thank you very much. We will continue with questions. I would like to now call on my partner, Senator Johnson, for his questions.

Senator JOHNSON. Thank you, Mr. Chairman.

Let us continue that one vein of questioning. There was a study in 2010, an Office of Personnel Management Federal Employee Viewpoint Survey. It says 63 percent of the respondents felt they could disclose a suspected violation of law, which means that 37

percent thought they would not. What would be your theory in terms of your understanding of the office? Why would it be that low?

Ms. LERNER. Well, first of all, I think it is very common for people to feel hesitant about coming forward. In my experience as a lawyer representing individuals with claims, and certainly as a Special Inspector for the D.C. Department of Corrections, I can tell you, it takes a lot of courage to come forward. If people are going to come forward, there has to be a safe and secure place for them to go where they feel like they will be listened to, respected, taken seriously, and if they request confidentiality, that confidentiality will be respected to the extent possible.

So improving the perception of the Office of Special Counsel is going to be really important so that people feel comfortable coming there with a claim.

Senator JOHNSON. Can you walk me through—again, I am new in town—the process of a whistleblower approaching the office and exactly what steps are taken for the four different areas that the office has responsibility for?

Ms. LERNER. Sure. There are four different areas. There are people who have actual disclosures that they want to make of waste, fraud, and abuse or a health and safety problem, and those complaints would go to the Disclosure Unit.

For individuals who have a complaint about a prohibited personnel practice, which includes retaliation for having been a whistleblower as well as any other prohibited personnel practice, their complaint would first go to the Complaint Examining Unit, and that unit does an initial screen to determine if there is enough there to have it referred to the Investigation and Prosecution Unit.

For USERRA complaints, generally those come from the Department of Labor initially, and the Office of Special Counsel has the ability to bring a USERRA case to the Merit Systems Protection Board (MSPB) for prosecution.

And the last category or last bucket of cases that the Office of Special Counsel gets are Hatch Act claims, and those claims or those complaints come in either directly from individuals who have a complaint to make about something or through an agency. Also, individuals may send an email or leave a voice mail message on the hotline with a question for clarification about how the Hatch Act actually works.

So that gives you a little bit of an overview.

Senator JOHNSON. So those are the complaints coming in. When a complaint comes into the Disclosure Office, what does the Disclosure Office do with that and how does the process continue?

Ms. LERNER. I would like to be able to give you a full and complete answer to that question, and until I am actually in the agency, I am not sure I have all the right information to provide to you at this point.

Senator JOHNSON. Fair enough. Do not worry about it.

Ms. LERNER. I just do not want to misspeak on that issue.

Senator JOHNSON. Sure. Let me ask you, how much time have you been able to spend inside the office talking to some of the managers who are there currently?

Ms. LERNER. I have actually not been inside the agency yet. I have talked to the heads of some of the various units of the Office of Special Counsel to try to get a sense of what they are doing, what they think is working well, where improvements may need to be made. But these have just been introductory meetings.

If confirmed, I would anticipate having much longer and more thorough conversations about the workings of each of those units.

Senator JOHNSON. Do you have any sense right now, and this is not derogatory to any individual in the office, of some weaknesses there that need to be filled and do you have any game plan in terms of what you may want to do in terms of first actions?

Ms. LERNER. I think that is going to be a tough question to answer until I am actually confirmed.

One area that I do have some concerns about kind of prospectively is in the USERRA Unit because this unit is getting a second demonstration project. There was a demonstration project a few years ago where cases were divided between the Department of Labor and the Office of Special Counsel from the very beginning of a case so that odd-numbered cases go to the Department of Labor, or vice-versa, and even-numbered go to one of the agencies. And the expectation is that there are going to be between 400 and 500 new matters for the USERRA Unit, and right now, that unit only has three full-time employees. So I am not exactly sure how that is going to work at this point.

That is an area that I want to look at and figure out how we can effectively service those complaints because as you mentioned, Senator Akaka, under USERRA, we really need to protect our returning service members. It is a law that was enacted to make sure that there was not discrimination against people who want to serve in the military or who have served in the military, so that needs to be a very high priority.

Senator JOHNSON. You bring up the issue of resourcing, and again, going back to a $1.65 trillion a year deficit, there is certainly talk of some fixes where you do across-the-board cuts in agencies. If presented with that situation, how would you handle something like that?

Ms. LERNER. Obviously, every agency in the government right now is being asked to do more with less. This particular agency right now has an $18.5 million budget, which is kind of a speck of dust on the overall budget, and my view is that I think this is an agency that can save the government money. Just like you would not fire Internal Revenue Service auditors to do fewer audits of tax returns, I think cutting back on this particular agency would be ill-advised.

There are studies that have been done, and I mentioned a couple briefly in my opening statement that show that whistleblowers can save the government money. I would like to pursue that a little bit more and perhaps have the Government Accountability Office (GAO) do a study about whether OSC whistleblowers are saving the government money, as well.

So I think it is an investment that is well worth it for this government. If there have to be cutbacks, we will deal with them, and I am prepared to make the tough choices that may need to be

made. But without actually being there, it is hard for me to tell you exactly how.

Senator JOHNSON. Thanks.

Senator AKAKA. Thank you very much, Senator Johnson.

Ms. Lerner, as you know, I have fought for veterans' protections, and I believe that enforcing the Uniformed Services Employment and Reemployment Rights Act is one of the OSC's most important responsibilities. I understand that this office in the OSC has only three full-time staff members. Under a three-year demonstration project, as you mentioned, the OSC will investigate most USERRA claims from the outset, as well as prosecuting them before the MSPB. How will you handle this heavy load with only three staff members at this time?

Ms. LERNER. I believe the plan under this demonstration project is to have half of the cases still initially looked at by the Department of Labor and half of them will go to the Office of Special Counsel. But it is going to be a massive increase in workload for this unit.

I understand that there is a request to increase the resources for this unit so that they can hire additional lawyers and investigators, as they were able to do with the last demonstration project, I believe. So I think, realistically, it is going to be really tough for three people to handle the expected number of claims—between 400 and 500. Now, it may be less than that, but we need to be prepared, and so as I mentioned earlier, that is going to be a very high priority for me if I am confirmed. I think protecting our service members is a vital responsibility of the Office of Special Counsel.

Senator AKAKA. The OSC also has an important responsibility to train Federal agencies on their responsibilities under this statute. Investing in this training may ultimately reduce the number of USERRA claims that are filed, we hope. How will you make sure agencies receive adequate training so they understand their responsibilities under the law?

Ms. LERNER. I completely agree that training is a crucial part of getting enforcement of the law. My view is agencies want to be in compliance with the law, but they also need the training to know how to be in compliance. They need to be familiar with their responsibilities under USERRA.

There are a few ways that the Office of Special Counsel can support the agencies in that effort. One is through the certification program. Right now, the Office of Special Counsel has a certification program that helps the agencies know what their responsibilities are. It is a very minor or limited process that the agencies need to go through to become certified, but my understanding is that not a lot of agencies have gone through it and are certified. But if they are, I think that will be one mechanism to increase outreach, and certainly USERRA would be an important part of that outreach.

The other way to do it is to do online computer programs. That is a technology that exists that I think could be very useful. Increasing the access to information through written materials that go out, training materials, improving—I have not actually looked in detail at the Web site for USERRA, but the Office of Special Coun-

sel could certainly provide a lot of information on its Web site for both employees and managers on USERRA.

So I think that there are a wide range of avenues that are available, and I would be very interested in exploring it and also hearing from this Committee about any ideas that you may have to improve awareness about USERRA.

Senator AKAKA. Ms. Lerner, the Hatch Act was last amended by Congress in 1993. Since that time, there have been many changes in the workplace, including significant technological advances. Do you believe the Hatch Act should be reviewed in light of these developments?

Ms. LERNER. Yes, Senator, I do believe it should be reviewed, just like the Whistleblower Protection Act has gone through reviews since it was initially enacted. Now that the Whistleblower Protection Enhancement Act is hopefully on its way to being enacted at some point, there should be changes, or at least a review of how effective the Hatch Act is or if changes need to be made given recent technologies. Things like BlackBerrys and laptop computers, telecommuting, and teleworking from home were not very common when the Hatch Act was first enacted. So while I do not know right now what recommendations I might want to make, I think it is worth a review, and I would again want to work with this Committee on that.

Senator AKAKA. Thank you. As you know, the Office of Special Counsel must work closely with the Merit Systems Protection Board, the Office of Personnel Management, and the Equal Employment Opportunity Commission (EEOC) to protect Federal employees' rights and ensure that the Federal civil service is free of prohibited personnel practices. What will you do to ensure cooperation between the OSC and these agencies?

Ms. LERNER. I think communication and collaboration with these agencies will be very important. Starting with the MSPB, the relationship of the Office of Special Counsel to the MSPB is a little bit like a prosecutor to a judge because the OSC brings cases to the MSPB. So there is a limit to how much collaboration there can be, certainly on individual cases, with the MSPB. However, the MSPB does have the ability to do studies and outreach and education, and that is an area of overlap with the OSC, and that would be an area that I would be very interested in exploring.

Similarly, the Office of Personnel Management has the ability to do outreach and education for the Federal workforce and develop policies and procedures, and so I think that there should be collaboration in those areas with the Office of Personnel Management.

The EEOC handles prohibited personnel practices as well as the OSC, and generally, the types of prohibited personnel practices that go to the EEOC are things like race, sex, age, and national origin discrimination. And the Office of Special Counsel has to make sure that there is clear communication with both complainants and with the EEOC because those cases have to go to the EEOC, and there is no tolling arrangement so that the time that Federal employees have to bring a case does not stop if they come to the OSC first. So there needs to be communication in that area.

Also, in terms of outreach and education, I think that the OSC and the EEOC should collaborate in terms of educating the work-

force and trying to do whatever they can to make sure that agencies are in compliance with the law.

Senator AKAKA. Thank you very much for your responses.

Let me call on Senator Johnson for his further questions.

Senator JOHNSON. Well, Senator Akaka, you did a great job asking questions. I have been ticking off the same ones I was going to ask, but let me go back a little bit and talk about how tight the budget is. My follow-up was really going to be, so what case would you make in terms of securing your budget or possibly even increasing it, because this is an important area, and you answered that very well, quite honestly.

Ms. LERNER. Thank you.

Senator JOHNSON. You did mention studies that had been made.

Ms. LERNER. Yes.

Senator JOHNSON. Have you seen any dollar estimates of savings from whistleblowing?

Ms. LERNER. The only studies I have been able to find that specifically address the dollar, bottom-line numbers are in the private sector and with the Federal False Claims Act. There have not been any studies that look at the OSC and what savings there might be. I would very much like to pursue that, and perhaps in partnership with the GAO, which does those types of studies. The MSPB also has a way to do those types of studies, and I am not sure right now which is the appropriate agency, but certainly GAO, I think, would be one possibility.

We know that in the private sector, whistleblowers save a lot of money. As I mentioned in my opening statement, they save more than internal compliance officers, Federal law enforcement, and inspector generals combined. So I think the potential is really there.

There is also a preventative effect. By having an agency like the Office of Special Counsel, it is hard to quantify how much we are saving just having an enforcement body there to prevent these kinds of things from happening. I think if we did not have this agency for enforcement and for whistleblowers to come to with waste, fraud, and abuse, there would not be any check on it. And that will be hard to quantify, but it is something to keep in mind.

Senator JOHNSON. Let me just add, I would be happy to work with you in terms of developing that case and trying to get those studies out of GAO. I think that is extremely important.

This is not a "gotcha" question, but in your answer to question 10 in the pre-hearing questionnaire, you were talking about respect for the OSC. Can you tell me what you were talking about, what you sensed, or what you know about respect or lack of respect for the OSC currently?

Ms. LERNER. The kinds of things that I have heard are the sorts of things that Senator Akaka referred to in his opening statement, or perhaps it was one of your questions, Senator, that people are very hesitant to come to the Office of Special Counsel right now. And as I mentioned, there is often a hesitancy to come forward with a complaint anyway. People do not want to be viewed as complainers or whiners, and they know that if they do, there is often retaliation in the workplace. It is just a fact of life. And so we have to do everything we can to make sure that the Office of Special Counsel is a safe and secure place for people to come with whistle-

blower complaints, disclosures, and prohibited personnel practice complaints.

Outreach to the agencies, outreach to the good government groups, outreach to the unions, all of those things, I think, will be important. I think strong leadership will help. If people see that the agency is willing to bring cases to the MSPB, if they feel like it is a vigorous law enforcement agency, I think that will certainly help its reputation. I am sure there are other steps, as well.

Senator JOHNSON. You are kind of swerving into my next question here because when you were answering Senator Akaka's question on awareness for USERRA, what was going through my mind again is proactive versus reactive.

Ms. LERNER. Yes.

Senator JOHNSON. My guess is this agency is generally reactive. People come and they lodge a complaint and then they start acting on it. What steps could we take to make this office far more proactive? You were kind of addressing some of those, but do you have further comments on that?

Ms. LERNER. One mechanism that is in place right now is the certification program, and I do not know how active it is right now. My sense is that—certainly not all the agencies are part of it. We might want to think about whether it makes sense to make that certification program mandatory because right now, it is a voluntary program. Agencies can choose to participate or not. And it is not really a very cumbersome program. I mean, it is really just about making sure that the agencies are getting the word out to their employees, that they are providing materials on the rights, how to file a complaint, doing education, and I think that is an area that would very easily lend itself to being proactive.

I am sure that there are others, as well. More communication with the Federal employees. We send information out to Federal employees about the Thrift Savings Plan by mail. When people are hired, they get, I am sure, a packet of material about personnel issues. We should probably think about including in the packet of materials that employees get information on the Office of Special Counsel. I do not think a lot of employees know that the Office of Special Counsel even exists right now. So education and communication are going to be really important.

Senator JOHNSON. Well, I am sure both Senator Akaka and I would love to work with you on that, which brings me, I guess, to my last question, which is you certainly expressed a desire to work with us cooperatively. Do you have some concept in your mind what type of regimen that would be, what that type of cooperation would look like?

Ms. LERNER. Well, informal cooperation is always good. I do not think it should necessarily have to be through a hearing. I am happy to come back and testify if you feel the need to have hearings. That is certainly an important role for this Committee. But I would like there to be a more informal back and forth, and I am happy to communicate with the staff. I am happy to communicate directly with the Members of this Committee in any form or in any way that you believe would be appropriate.

Senator JOHNSON. I appreciate that.

Senator AKAKA. Thank you very much, Senator Johnson, for your questions. I thank you for being so thorough with your questions.

And thank you for your responses, Ms. Lerner. At this time, there are no further questions. There may be additional questions, however, from Members for the record, and we will submit them to you in writing.

Ms. LERNER. Thank you.

Senator AKAKA. The hearing record will remain open until noon tomorrow for Members of this Committee to submit additional statements or questions.

I want to thank you very much, and your family and your friends, Ms. Lerner, for being here. I am very pleased to be able to hold a hearing for such a well-qualified nominee.

Ms. LERNER. Thank you.

Senator AKAKA. It is my hope that the Committee will vote soon and that your nomination will be considered by the full Senate very shortly. So thank you very much. I want to wish you well in your future work.

This hearing is adjourned.

[Whereupon, at 10:52 a.m., the Committee was adjourned.]

APPENDIX

STATEMENT OF CHAIRMAN DANIEL K. AKAKA

Nomination Hearing for Carolyn Lerner to serve as Special Counsel at the Office of Special Counsel

Senate Committee on Homeland Security and Governmental Affairs

Aloha and good morning. Today, the Committee on Homeland Security and Governmental Affairs meets to consider the nomination of Carolyn Lerner to serve as Special Counsel. I would like to extend a warm welcome to Ms. Lerner, and also welcome her family and friends who have joined us today for this nomination hearing.

Ms. Lerner attended the University of Michigan, where she was selected to be a Truman Scholar, and studied at the London School of Economics. She received her law degree from New York University, where she was awarded a Root-Tilden-Snow Scholarship.

After law school, Ms. Lerner clerked for a Federal judge and then began to practice law. In 1997, she became a founding partner at her law firm here in Washington, D.C., where she represents individuals, including Federal employees, in employment matters. Ms. Lerner is also a visiting professor at the George Washington University Law School. Ms. Lerner, I would like to congratulate you on your nomination. It is a pleasure to have such a well-qualified nominee before us today.

The Office of Special Counsel was created in 1978 as part of the Civil Service Reform Act. Although it may not be the most well known Federal agency, the Office of Special Counsel (OSC) serves a very important purpose, which is to safeguard the merit system by protecting Federal employees and applicants from prohibited personnel practices.

Our dedicated Federal employees are among this country's greatest assets. I believe that civil servants must be able to serve their country without undue influence or fear of discrimination or retaliation.

For almost a decade, I have worked to reform the protections for Federal whistleblowers. Enacting the Whistleblower Protection Enhancement Act – so that Federal employees may report waste, fraud, abuse, or illegal activity without fear of retaliation – is one of my top priorities this Congress.

Having a Special Counsel in office who understands the critical importance of Federal employee whistleblowers is a key aspect of restoring faith in whistleblower protections.

In addition, the Office of Special Counsel protects the employment rights of our veterans by enforcing the Uniformed Services Employment and Reemployment Act.

As a member of the Veterans' Affairs and Armed Services Committees - and as a veteran of World War II myself – I feel strongly that our service members' rights must be protected as they prepare to enter or return to the civilian workforce. This issue has become even more important in recent years with large numbers of veterans returning from overseas who want to continue their service in a civilian capacity. I understand that this essential office at OSC is understaffed. I hope you will focus attention on veterans' protections if you are confirmed.

Finally, the Office of Special Counsel is responsible for enforcing and providing advisory opinions on the Hatch Act. Because the presumptive penalty for violating the Hatch Act is removal from federal employment, OSC's advisory function is vital to helping employees understand what activity is permitted under the law.

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STATEMENT OF SENATOR RON JOHNSON

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

"The Nomination of Carolyn Lerner to be Special Counsel, Office of Special Counsel"

March 10, 2011

I want to begin by welcoming Ms. Lerner, who I had the pleasure of meeting a few weeks ago, and the family members she brought with her today. The Office of Special Counsel has been without a permanent leader for more than two years now so I am glad we are moving forward on this nomination.

The primary mission of the Office of Special Counsel is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices. These include, but are not limited to discrimination, nepotism, deception or obstruction of an individual from competing for employment, and threatening or taking personnel action because of whistleblowing. The Office also is responsible for enforcing the Hatch Act, the law that regulates the political activities of federal employees and some state and local government workers.

One of the most important aspects of the Office of Special Counsel is its Disclosure Unit. This serves as a safe conduit for the receipt and evaluation of whistleblower disclosures from federal employees, former employees and applicants for federal employment. Through this secure channel, federal workers are able to disclose information regarding violations of the law, gross mismanagement and the waste of funds.

I want to focus for a moment on mismanagement and waste. We are facing a $1.6 trillion deficit and addressing waste and mismanagement will be an important step in closing this gap. There is a lengthy GAO report just issued that chronicles vast duplication and inefficiencies across the federal government.

I bring this up because I am willing to bet there are many federal employees aware of waste in their agencies and I want them to feel they can report this without fear of reprisal. To paraphrase the new "If you see something, say something" Department of Homeland Security campaign, if federal workers see waste and mismanagement, I want them to be able to report it.

Ms. Lerner, if confirmed, you will certainly face challenges and I look forward to hearing your vision for the Office of Special Counsel and the steps you will take to implement it.

OPENING STATEMENT OF CAROLYN N. LERNER, NOMINEE FOR SPECIAL COUNSEL, OFFICE OF SPECIAL COUNSEL, BEFORE THE SENATE HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS COMMITTEE:

Chairman Akaka, Ranking Member Johnson, and members of the Committee, thank you for the opportunity to appear before you today. It is a privilege to be considered for confirmation by your Committee. I am honored and humbled that the President has nominated me to serve as Special Counsel.

I would like to introduce you to my family, my husband, Dwight Bostwick, and our two children, Ben and Anna. I am grateful to them for their unwavering love and support. A number of my friends and colleagues are in the audience today and I would like to thank them as well.

I also want to acknowledge my family in Michigan who could not be here today, but who has encouraged me throughout my life.

I would not be here but for the two people whose influence led me to choose a career in the law. My mother and my father would have treasured this moment. They were the children of immigrants who came to this country seeking a better life. My grandfather had been jailed in his country for speaking out against the government, and my parents taught me to appreciate the freedoms we enjoy in the United States. They also impressed upon me the importance of standing up for those who cannot protect themselves.

I began my career in Michigan, where I grew up, as a law clerk to Chief United States District Judge Julian Abele Cook, Jr. Judge Cook treats all those who appear before him with kindness, dignity and respect. His approach set the standard I have tried to emulate as I have practiced law in the 20 years since my clerkship.

Since 1991, I have represented both private sector and federal employees primarily in employment-related cases. I've advised employers about best workplace practices and employment issues. As a federal court-appointed, independent monitor, I managed and implemented a reform program for a large government agency. I have also served both as a mediator and professor of mediation.

These experiences have given me a broad perspective on how workplaces function and how best to protect employees from retaliation and discrimination. If confirmed, I would bring this expertise to the Office of Special Counsel.

There are several employees from the Office of Special Counsel who are here, and they deserve our appreciation for their ongoing commitment to the OSC.

The Office of Special Counsel was created to protect federal employees who report abuses in government. Employees need to have the courage to blow the whistle on fraud, waste and abuse -- and we need to provide them with the assurance that if they do, their careers and livelihoods will not be at risk.

Whistle blowers are essential to a well-functioning government. Federal employees have been described as the "foot soldiers" in the war on waste, fraud and abuse. They not only protect public health and safety, they are guardians of taxpayer dollars, a role that has become more important than ever.

Whistleblower disclosures under the False Claims Act have accounted for billions of dollars in recoveries for the U.S. Treasury. A recent private sector study found that employee disclosures detected more fraud than auditors, internal compliance officers, and law enforcement combined.

To effectively protect the federal merit system, the Office of Special Counsel must be a highly functioning agency. I believe that the OSC can best succeed if its own employees are treated fairly and with respect.

It will also take a strong partnership with all of OSC's stakeholders to move the agency forward in a positive way. If confirmed, I am committed to building collaborative and constructive relationships with the Congress, federal employee and agency management groups, and good government advocates. If confirmed, I very much look forward to working with each one of them.

In particular, I look forward to working closely with this Committee as you continue your important efforts to increase the effectiveness and efficiency of government.

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

BIOGRAPHICAL AND FINANCIAL INFORMATION REQUESTED OF NOMINEE

A. BIOGRAPHICAL INFORMATION

1. **Name:** (Include any former names used.)

   Carolyn Nancy Lerner

2. **Position to which nominated:**

   Special Counsel, U.S. Office of Special Counsel

3. **Date of nomination:**

   January 5, 2011

4. **Address:** (List current place of residence and office addresses.)

   Residence: REDACTED

   Business: Heller, Huron, Chertkof, Lerner, Simon & Salzman, 1730 M Street, N.W. Suite 412, Washington, D.C. 20036

5. **Date and place of birth:**

   January 13, 1965 Detroit, Michigan

6. **Marital status:** (Include maiden name of wife or husband's name.)

   Married to Dwight P. Bostwick

7. **Names and ages of children:**

   REDACTED

8. **Education:** List secondary and higher education institutions, dates attended, degree received and date degree granted.

   Southfield High School, September 1979-June 1982, diploma June 1982

   University of Michigan, January 1983-May 1986, B.G.S. with honors, May 1986

   London School of Economics, September 1984-June 1985, non-degree program

   New York University School of Law, September 1986-May 1989, J.D. May 1989

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9. **Employment record:** List all jobs held since college, and any relevant or significant jobs held prior to that time, including the title or description of job, name of employer, location of work, and dates of employment. (Please use separate attachment, if necessary.)

Legal Intern, NAACP Legal Defense Fund, Washington, D.C. June-August 1987

Free Speech and Due Process Committee Staff, American Civil Liberties Union, New York, NY September1987- June 1988

Summer Associate, Sutherland, Asbill & Brennan, Washington, D.C., June-August 1988

Judicial Law Clerk, Chief United States District Court Judge Julian A. Cook, Jr., Detroit, MI, September 1989-August 1991

Associate Attorney, Kator, Scott, Heller & Huron, Washington, D.C., November 1991-February 1997

Partner, Heller, Huron, Chertkof, Lerner, Simon & Salzman, Washington, D.C. March 1997-Present

Adjunct Law Professor, George Washington University Law School, January 2007-Present

10. **Government experience:** List any advisory, consultative, honorary or other part-time service or positions with federal, State, or local governments, other than those listed above.

Court appointed Special Inspector for Sexual Harassment and Retaliation for the District of Columbia Department of Corrections, February 2003-May 2005.

Consultant to the city of Oakland, California, 2007.

Consultant to the District of Columbia Department of Parks and Recreation, 2005.

11. **Business relationships:** List all positions currently or formerly held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business enterprise, educational or other institution.

Heller, Huron, Chertkof, Lerner, Simon & Salzman – partner, March 1997-present

Africare – Attorney, 1996-present

Alliance for Justice – Consultant, November 2008-March 29

Earth Day Network – Attorney, 2006-present

George Washington University Law School – Adjunct Professor, January 2007- present

Levine School of Music – Attorney, 2004-present

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National Alliance for Community Economic Development – Attorney, 2009-2010

Search for Common Ground – Attorney, 2010-present

Social Investment Forum – Attorney, 2010-present

Personal Representative for deceased family member's Last Will and Testament, August 2010 - Present

Trustee for Testamentary Trust Under Will of deceased family member, August 2010-Present

12. **Memberships:** List all memberships, affiliations, or and offices currently or formerly held in professional, business, fraternal, scholarly, civic, public, charitable or other organizations.

Advancement Project – Member of Dinner Committee, 2009

Center for WorkLife Law – Board Chair, 2006-present

Constitution Project – Member of Dinner Committee, 2008-present

Council for Court Excellence – Board Member, 2005-present

District of Columbia Bar Association – Member of the Bar 1990-present; Appointed Member of the Pro Bono Committee (2006-present); Appointed member of the Nominations Committee (2004-2005)

District of Columbia Women's Bar Association – Member, 2006-present

Lawyers Coordinating Committee (LCC) of the AFL-CIO – Member, 2007-2008

Metropolitan Washington Employment Lawyers Association (MWELA) – Member, 1997-present

National Employment Lawyers Association (NELA) – Member, 2006-present

Pennsylvania Bar – Member, 1989 – present (currently inactive)

Southern Center for Human Rights – Member of Dinner Committee, 1999-present

WAGE Project – Member of Advisory Board, 2007-present

Washington Council of Lawyers – Board member, 1995-present; President (2000-2001) and Vice President (1999-2000, 2008-2009)

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13. **Political affiliations and activities:**

(a) List all offices with a political party which you have held or any public office for which you have been a candidate None.

(b) List all memberships and offices held in and services rendered to any political party or election committee during the last 10 years.

Co-hosted fundraising receptions for Tom Perez for Maryland State Attorney General, 2006; Ben Cardin for United States Senate, 2006; and Jeanne Shaheen for United States Senate, 2007.

Volunteer for the 2008 Obama election campaign. Provided research and advice on employment and policy issues to the Department of Justice and EEOC transition teams. Participated in voter outreach activities throughout Virginia and voter protection activities on election day.

(b) Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of $50 or more during the past 5 years.

I have reviewed my records and to the best of my recollection and belief, I made the following donations during the past five years:

Shirley Brandman for Montgomery County, Maryland Board of Education, 2006 - $100

Ben Cardin Election Committee, 2006 - $1000

Al Carr, Maryland State Representative Candidate, 2008 - $100

Obama for America 2008 - $500

Tom Perez, Maryland State Attorney General Candidate, 2006 - $1000

Jeanne Shaheen Election Committee, 2007 - $1100

Campaign for Ohio Healthy Families Act, 2008 - $100

14. **Honors and awards:** List all scholarships, fellowships, honorary degrees, honorary society memberships, military medals and any other special recognitions for outstanding service or achievements.

University of Michigan Honors College and graduated with Highest Honors; Harry S.Truman Scholar (national merit-based tuition scholarship for outstanding academic achievement and commitment to public service); *James B. Angel Scholar* (recognition for academic achievement at the University of Michigan); *Root-Tilden-Snow* scholarship (merit-based tuition scholarship for

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public interest commitment and academic achievement at New York University School of Law); *American Jurisprudence Award in Labor Law; Best Lawyers in America* for Civil Rights Law; *Washingtonian Magazine's* Top Employment Lawyer; Invited to become *Fellow of the American Bar Association Foundation*. My law firm, Heller, Huron, Chertkof, Lerner, Simon & Salzman, has received several awards including recognition from the *Washington Lawyers' Committee for Civil Rights Under Law* for outstanding achievement in 2002 and 2006, and the *Washington Council of Lawyers* for exceptional public interest service in 2002.

15. **Published writings:** Provide the Committee with two copies of any books, articles, reports, or other published materials which you have written.

None.

16. **Speeches:**

(a) Provide the Committee with two copies of any formal speeches you have delivered during the last 5 years which you have copies of and are on topics relevant to the position for which you have been nominated. Provide copies of any testimony to Congress, or to any other legislative or administrative body.

None.

(b) Provide a list of all speeches and testimony you have delivered in the past 10 years, except for those the text of which you are providing to the Committee. Please provide a short description of the speech or testimony, its date of delivery, and the audience to whom you delivered it.

On July 10, 2007, I testified before the Montgomery County (Maryland) Council in support of the Council allowing a referendum on the issue of incorporation for the community in which I live.

I have not made any formal speeches in the past 10 years. However, I have participated on panels as either a moderator or speaker. I spoke extemporaneously from notes and do not have copies of my remarks. I have reviewed my records and to the best of my recollection I participated in the following programs: Center for WorkLife Law program on the "Emerging Law on Family Responsibility Discrimination" to the Center's Attorney Network (May 4, 2010); National Association of Legal Career Professional's (NALP) Public Service Conference, panel on public interest lawyering (2009); Harvard Law School Office of Career Services and the Office of Public Interest Advising program "Practice Perspectives: Small & Midsize Law Firms program (November 2, 2007); American Bar Association, Labor and Employment Section continuing legal education course on "WorkLife Initiatives and Family Responsibility Discrimination" (July 18, 2007); Metropolitan Washington Employment Lawyers Association (MWELA) program "Using Employment & Civil Rights Laws to Protect Family Caregivers in the Workplace" (2006); Georgetown University Law Center's Continuing Legal Education Program, "Litigating Employment Cases: Views from the Bench" (October 2-3, 2003); American University's Washington College of Law's forum "The New Glass Ceiling: Litigating Bias Against Parents at Work" (January 24, 2003); Washington Council of Lawyers' forums on "The Wal-Mart Class Action" (December 2004) and "D.C. Statehood" (February 2002), and numerous panels on practicing public interest law at the Council's annual summer forums for law firm associates.

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17. **Selection:**

(a) Do you know why you were chosen for this nomination by the President?

I believe I was chosen because I am highly qualified to fill this position. See answer to Part (b) below.

(b) Why do you believe in your background or employment experience affirmatively qualifies you for this particular appointment?

I am highly qualified for appointment as Special Counsel based on nearly 20 years of experience practicing law in several capacities: representing both private sector and federal employees in employment and civil rights cases; advising employers about best workplace practices and employment issues; managing and implementing a reform program for a government agency; and serving as both a mediator and professor of mediation. The qualities that make me an effective mediator are especially critical to heading the Office of Special Counsel -- excellent communication and consensus building skills, and being an effective listener while also being fair and decisive. Finally, it is important for the Special Counsel to be independent and viewed as a legitimate advocate for the federal merit system and not for any one particular constituency. In my experience as an independent, court appointed Special Inspector for the District of Columbia Department of Corrections, I had credibility with all the various stakeholders - - legal advocates for both the plaintiffs and the government, individual employees, managers, the Department administration, the Court, and the union.

EMPLOYMENT RELATIONSHIPS

18. Will you sever all connections with your present employers, business firms, business associations or business organizations if you are confirmed by the Senate?

Yes.

19. Do you have any plans, commitments or agreements to pursue outside employment, with or without compensation, during your service with the government? If so, explain.

No.

20. Do you have any plans, commitments or agreements after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization, or to start employment with any other entity?

No.

21. Has anybody made a commitment to employ your services in any capacity after you leave

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government service?

No.

22. If confirmed, do you expect to serve out your full term or until the next Presidential election, whichever is applicable?

Yes.

23. Have you ever been asked by an employer to leave a job or otherwise left a job on a non-voluntary basis? If so, please explain.

No.

C. POTENTIAL CONFLICTS OF INTEREST

24. 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 Office of Special Counsel'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 Office of Special Counsel's designated agency ethics official. I am not aware of any other potential conflicts of interest.

25. 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.

In my capacity as Board Chair for the Center for WorkLife Law, in 2007 I accompanied the Center's Director, Professor Joan Williams, to meetings with staff members of Congressional committees to introduce them to the Center's work and during those meetings pending legislation related to the Center's goals was discussed. In 2009, Professor Williams and I met with members of the Equal Employment Opportunity Commission. In 2008, as a consultant to the Alliance for Justice I worked on developing recommendations for filling federal judicial vacancies. I assisted with a briefing for Senate staffers on the judicial nominations process, and attended meetings with White House and Senate Judiciary Committee staff at which procedures for filling judicial vacancies were discussed.

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I have also been involved in events designed to draw attention to public policy objectives. For example, as a Board member of the Council for Court Excellence (CCE) and a member of CCE's Court Improvements Committee, I helped plan a 2007 program titled, "Toward a Civil Gideon? Improving Access to Justice in the District of Columbia." I participated in a 2007 program on work family issues at Barnard College, and signed on to a letter in support of family friendly public policies.

26. Do you agree to have written opinions provided to the Committee by the designated agency ethics officer of the agency to which you are nominated and by the Office of Government Ethics concerning potential conflicts of interest or any legal impediments to your serving in this position?

Yes.

D. LEGAL MATTERS

27. Have you ever been disciplined or cited for a breach of ethics for unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee, or other professional group? If so, provide details.

No.

28. Have you ever been investigated, arrested, charged or convicted (including pleas of guilty or nolo contendere) by any federal, State, or other law enforcement authority for violation of any federal, State, county or municipal law, other than a minor traffic offense? If so, provide details.

No.

29. Have you or any business of which you are or were an officer, director or owner ever been involved as a party in interest in any administrative agency proceeding or civil litigation? If so, provide details.

Yes. In 1989 I was the defendant in a civil action for damages stemming from a car accident in which I was the driver. The plaintiff made a demand for damages which my car insurance company refused to pay. Therefore, the case went to trial in Montgomery County Maryland Circuit Court. There was a modest jury verdict for the plaintiff. The case was Civil Action #41466.

30. For responses to question 30, 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.

None.

31. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be considered in connection with your nomination.

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None

E. FINANCIAL DATA – REDACTED

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.)

AFFIDAVIT

Carolyn Lerner being duly sworn, hereby states that he/she has read and signed the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of his/her knowledge, current, accurate, and complete.

Carolyn Lerner

Subscribed and sworn before me this 15 day of February 2011 2011.

Jeffrey R Miller

Notary Public, District of Columbia
My Commission Expires 3/31/2014

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U.S. Senate Committee on Homeland Security and Governmental Affairs
Pre-hearing Questionnaire for the
Nomination of Carolyn N. Lerner to be
Special Counsel, Office of Special Counsel

I. Nomination Process and Conflicts of Interest

I. Nomination Process and Conflicts of Interest

1. Why do you believe the President nominated you to serve as Special Counsel and head the Office of Special Counsel (OSC)?

I believe the President nominated me based on my background and experience and because he believed me to be highly qualified to perform the duties of the position. (See answer to Question 3 below)

2. Were any conditions, expressed or implied, attached to your nomination as Special Counsel? If so, please explain.

There were no conditions, expressed or implied, attached to my nomination.

3. What specific background and experience affirmatively qualifies you to be Special Counsel?

Over the past 22 years, I have practiced law in a wide range of capacities. After law school, I was a judicial law clerk for a United States District Court Judge. After my clerkship, I joined an employment firm in Washington, D.C. and fourteen years ago, I co-founded the civil rights and employment firm Heller, Huron, Chertkof, Lerner, Simon & Salzman. While at the firm, I have represented both private sector and federal employees in employment and civil rights cases; advised employers, including government agencies, about best workplace practices and employment issues; managed and implemented a Court-monitored reform program for a government agency; and served as both a mediator and professor of mediation. I believe that the qualities that make an effective mediator are especially critical to heading the Office of Special Counsel -- excellent communication and consensus building skills, and being an effective listener while also being fair and decisive. It is also important for the Special Counsel to be independent and viewed as an advocate for the federal merit system and not for any one particular constituency. In my experience as an independent, court-appointed Special Inspector for the District of Columbia Department of Corrections, I earned the trust of, and established credibility with, all the various stakeholders - - legal advocates for both the plaintiffs and the government, individual employees, managers, the Department administration, the union, as well as the Court. Finally, I am an active member of my community and serve in leadership positions for several non-profit organizations and bar committees. These cumulative experiences give me a broad perspective on how workplaces function and how best to protect employee rights. If confirmed, I would bring this understanding to the Office of Special Counsel, as well as a strong commitment to the OSC's mission.

4. 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 have the commitments been made?

I have not made any commitments with respect to the policies and principles I will attempt to implement as Special Counsel.

5. If confirmed as Special Counsel, are there any issues from which you may have to recuse or disqualify yourself because of a conflict of interest or the appearance of a conflict of interest? If so, please explain what procedures you will use to carry out such a recusal or disqualification.

In connection with the nomination process, I have consulted with the Office of Government Ethics and the Office of Special Counsel'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 Office's Designated Agency Ethics Official and that has been provided to the Committee. I am not aware of any other potential conflicts of interest.

II. Role and Responsibilities of the Special Counsel

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

The OSC's role is to ensure the integrity of the merit system. In particular, the OSC has four main functions: It should serve as a safe and secure channel for federal workers to disclose violations of law, gross misconduct or waste of funds, abuse of authority, or a specific danger to public health and safety; it protects federal employees from retaliation for whistleblowing and other prohibited personnel practices; it enforces the Hatch Act; and it protects federal employee military veterans and reservists under the Uniformed Services Employment and Reemployment Rights Act (USERRA). OSC should also provide education and training to federal agencies to assist them in complying with the law, and encourage agencies' participation in the OSC's § 2302(c) Certification Program ("Certification Program"). [See answer to Question 20]

The role of the Special Counsel within the OSC is to provide leadership and motivation to the agency's staff so that the OSC is able to effectively accomplish its mission and defend the merit system. The Special Counsel must identify priorities, make strategic decisions about how best to accomplish those priorities, and be accountable to Congress and the public for these decisions. The Special Counsel must also be able to inspire trust from the various communities that the Office serves, including Congress. Through frequent and open communication, as well as vigorous enforcement of the law, it is my hope that the OSC will earn respect and confidence from its stakeholders and the public at large.

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7. With respect to the management and administration of the OSC, what are your views of the responsibilities of the Special Counsel?

I believe the Special Counsel is responsible for setting an unwavering standard of fair, principled, objective, and effective enforcement of all the laws that OSC is required to enforce – including the merit system and employment laws in Title 5, the Hatch Act, and USERRA. As a manager and agency head, the Special Counsel is responsible for ensuring that staff have the resources and support to effectively perform their functions, and to promote effective implementation and enforcement of the laws that OSC is tasked with upholding. It is also important that employees feel respected and supported, and are free to identify and address any problems that may interfere with efficient and effective enforcement of OSC's mission. The Special Counsel must ensure that a fair and transparent mechanism is in place for making complaints about workplace issues that may arise, and encourage employees to utilize the system. OSC should be a model agency in appropriately responding to dissent and employee concerns.

8. As Special Counsel, how will you work with the Merit Systems Protection Board (MSPB) on matters relating to prohibited personnel practices? What do you believe are the respective roles of both OSC and MSPB with respect to prohibited personnel practices?

As a result of the Whistleblower Protection Act of 1989, the Office of Special Counsel is a separate statutory entity. It is responsible for investigating allegations by employees of reprisal and other prohibited personnel practices and prosecuting such cases by seeking corrective and/or disciplinary action before the Board. OSC thus serves as a party litigant in Board proceedings. The MSPB has analogized the relationship of the OSC to that of a prosecuting attorney to a court. But OSC can be more than a prosecuting attorney. It can work with MSPB to facilitate expedited relief for whistleblowers who have been subjected to retaliation. OSC can also seek stays of adverse personnel actions through the MSPB and may request that the Board enforce subpoenas, where warranted. If confirmed, I am interested in exploring ways in which the OSC and MSPB can collaborate on outreach and education to the federal workforce about prohibited personnel practices. Finally, the MSPB has the statutory authority to conduct studies to determine "whether the public interest in a civil service free of prohibited personnel practices is being adequately protected." 5 U.S.C. §1204(b)(3). OSC should be responsive to any information and recommendations put forth by these studies.

9. What do you believe are the respective roles of the OSC, the Equal Employment Opportunity Commission (EEOC), and the Office of Personnel Management (OPM) in dealing with prohibited personnel practices? How will you work to coordinate the OSC's efforts with the EEOC and OPM, when applicable?

The Office of Personnel Management (OPM) issues regulations governing federal personnel matters. It also provides advice to agencies on how to comply with their legal obligations to employees, and it is responsible for issuing regulations under the Hatch Act. OPM

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issues regulations that the OSC has to enforce. Thus, it is important that OSC and OPM communicate to determine common areas of concern and any need for changes in policy.

The OSC is statutorily authorized to investigate allegations of discrimination based on race, color, religion, sex, national origin, age, or handicapping condition. However, long-standing procedures for investigating such complaints have been established in federal agencies and the Equal Employment Opportunity Commission (EEOC). Therefore, to avoid duplicating those investigative processes, the OSC defers complaints involving discrimination to those agencies' procedures. If confirmed, I would work to make certain that clear communication channels between the EEOC and OSC exist. Proper coordination is necessary to minimize delay in the adjudication of discrimination claims, particularly since the statute of limitations for filing a complaint with the EEOC is not tolled if an employee first files with the OSC. If confirmed, I would work to ensure that the complaint process is transparent and clearly communicated to complainants and agencies.

10. There has not been a Special Counsel since October 2008, when former Special Counsel Scott Bloch resigned. In light of this extended vacancy, what are the major internal and external challenges facing the OSC? What, specifically, do you plan to do if confirmed as Special Counsel to address these challenges?

a. Internal Challenges

Without being at the OSC and observing the actual workplace, I cannot presume to know all the internal challenges facing the OSC. However, since 2008 the career staff at the Office of Special Counsel has been required to serve in positions designated for political appointees while also performing their regular duties. These vacancies have put an extra burden on the staff at a time when the OSC is being asked to expand its caseload without a corresponding increase in funding. Similar to other federal agencies, the OSC has more work to do with fewer resources, and this puts a premium on reviewing internal systems and procedures to make sure that efficiency is at a high level. In addition, during this period without political leadership I believe it has been difficult for the agency to make long-term, strategic decisions. If confirmed, it will be important to define measurable goals and devise strategies for achieving them.

If confirmed, it will be a top priority to work with OSC staff to address these challenges with the resources that are available. I would actively solicit the views of OSC employees about the current challenges facing the agency, as well as the areas where they believe the agency is already performing strongly. I understand that there was formerly an Employee Advisory Committee at the agency, and I would hope to revive that Committee as one outlet for concerns and suggestions. I have had positive experiences creating and working with Employee Advisory Committees in the past and believe they have the potential to be useful.

b. External Challenges

As addressed in prior hearings of this Committee focused on the OSC, one of the long-term external challenges facing the OSC has been to increase respect and confidence in the

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agency. OSC should be viewed as a legitimate resource for federal employees, managers, and agencies. OSC should not only increase enforcement, it must work with agencies to educate and encourage compliance with the law. This can be achieved, in part, by expanding participation in the Certification Program. For individual complainants, OSC must address negative perceptions that currently exist. As reported in the agency's 2009 Annual Report to Congress, the majority of individuals who had contact with agency were not satisfied with the way they were treated. It will be important to determine why these survey results were negative and work with OSC staff to improve communication with complainants.

Finally, if confirmed, I will increase outreach to and communication with stakeholders of the Office – federal agencies, employees, management, employee and good government organizations, Congress and the Inspector General community – and affirmatively ask for suggestions and feedback. The ideas and input from those both inside and outside the agency will be necessary, and if confirmed, I would look forward to working with all these stakeholders in moving the OSC forward.

11. What management experience have you obtained during your time in the legal profession? How would you describe your general philosophy and style of management, and how do you anticipate you would apply them in your role as Special Counsel?

I have gained management experience in several capacities. Since 1997, I have managed my law firm. In that role I have recruited, trained, and supervised attorneys and support staff. I also manage the accounting functions, employee benefits and retirement programs at my firm. During my term as Special Inspector for Sexual Harassment and Retaliation at the District of Columbia Department of Corrections, I managed a team of lawyers, investigators, trainers and mediators. In that capacity, I recruited, trained, and supervised numerous professionals. I was also responsible for supervising the Ombudsman and the Employee Advisory Committee.

I have also learned how to effectively manage by advising employers and government agencies about best workplace practices and procedures; creating employee handbooks and Codes of Ethics; investigating employee allegations of discrimination and wrongdoing; and representing employers in mediation and litigation when confronted with formal complaints. Finally, through my representation of employees, I am keenly aware of the impact that both effective and poor managers can have on productivity and morale.

I believe that successful workplaces have managers who treat employees with respect, actively seek input and recommendations, and when possible, make meaningful efforts to implement those suggestions. I also believe that sharing information, both good and bad, leads to more invested employees. Managers should set clear expectations and goals, and measure accomplishments accordingly. Finally, should performance problems arise, it is crucial to inform the employee of the issue, provide training and support where possible, and give a meaningful opportunity to improve. If confirmed, I expect to apply these principles in my role as Special Counsel.

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12. A key mission of OSC is to safeguard the merit system by protecting Federal employees and applicants from prohibited personnel practices. In the past, OSC employees have alleged being retaliated against for disclosing violations of law. If confirmed, how will you ensure that OSC employees are protected from prohibited personnel practices in the same manner as other Federal employees?

I have a long history of working to protect employees from discrimination and retaliation. I have designed, implemented and enforced discrimination policies and procedures for both government agencies and private sector employers, and provided training on discrimination and retaliation to hundreds of managers and employees.

Although I have been informed that there is an Agency Directive in place at the OSC regarding internal complaints, I have not seen the Directive. If confirmed, I will review this Directive and determine whether revisions are appropriate. In addition, I would explore the possibility of mediation with an independent mediator to address conflicts that may arise Finally, I have created and worked with employee advisory committees in the past and, if confirmed, am open to the possibility of re-establishing such a committee at OSC, which I believe can be helpful in averting employee complaints.

For complaints against the Special Counsel or Deputy Special Counsel, there is a framework already in place for an independent investigation. Specifically, the Inspector General Reform Act of 2008 codified a process to bring complaints against the Special Counsel and Deputy Special Counsel. According to the Act, "[a]n allegation of wrongdoing against the Special Counsel or the Deputy Special Counsel may be received, reviewed, and referred for investigation by the Integrity Committee to the same extent and in the same manner as in the case of an allegation against an Inspector General (or a member of the staff of an Office of Inspector General), subject to the requirement that the Special Counsel recuse himself or herself from the consideration of any allegation brought under this Act."

13. If confirmed as Special Counsel, how would you plan to communicate with OSC staff on efforts to address relevant issues?

If confirmed, I anticipate meeting with all the agency's employees, either individually or in small groups. I would expect to communicate frequently with OSC staff through one-on-one conversations, group discussions with each unit, and the continuation of already established weekly meetings with senior staff. As noted, if confirmed, I would be interested in re-establishing an Employee Advisory Committee which can also be a useful method of communication.

14. 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 as Special Counsel?

In the short-term, and based on information I have received from management officials at the OSC, recruitment and retention of employees does not seem to be one of the major

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challenges facing the agency. There are few vacancies in the agency now, other than the vacancies for political appointees in the Immediate Office of the Special Counsel. There has been little recent turnover, and the agency has received hundreds of applications for recent openings. Longer term, I believe it will be easier to retain and recruit talented staff if the OSC is perceived as independent, vigorous and effective, as well as a congenial place to work. If confirmed, I would make concerted efforts to improve the workplace environment. As noted, I am prepared to implement programs, such as an Employee Advisory Committee and enhanced workplace flexibility, to address employee satisfaction issues. To the extent that there are resources to do so, I would also try to provide training opportunities for employees. With regard to management of the workforce, I understand that increasing workload and sufficient staffing issues are ongoing challenges. If confirmed, I will assess these and any other challenges that may exist and implement specific strategies for improvement.

III. Policy Questions

General

15. If confirmed as Special Counsel, would you consider making any changes to OSC's existing organizational structure in order to improve OSC's ability to effectively carry out its mission?

The OSC's organizational structure is closely tied to the way in which it carries out its mission. If confirmed, and after gaining an understanding of the effectiveness of OSC's current structure, I will be able to determine whether changes can or should be made to improve the effectiveness of the agency. Potential areas to explore may include strengthening collaboration and cooperation among the various units and increasing the role of the OSC's Alternative Dispute Resolution Program.

16. Do you believe that the Office of Special Counsel has the statutory authority necessary to effectively carry out its mission?

I support the changes approved with strong bi-partisan support by the Senate last year in the WhistleBlower Protection Enhancement Act (WPEA), S. 372, 111th Cong. (2010). If confirmed, I would also review what, if any, other specific changes would benefit the OSC and make recommendations to Congress, as appropriate.

Prohibited Personnel Practices and Whistleblower Protection

17. At the disclosure stage, the employee making the disclosure has the right to remain anonymous, pursuant to 5 U.S.C. 1213(h). What protections do you believe should be included in the process to protect this anonymity without compromising the ability of the agency to conduct a thorough investigation?

The OSC does not investigate whistleblower disclosures. Rather, the statute provides for OSC oversight, and referring disclosures to the relevant agencies for investigation and reporting

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after OSC has made a threshold substantial likelihood determination that wrongdoing has occurred. Protecting the anonymity of a whistleblower while reviewing an agency's investigation into their claims requires the OSC to perform somewhat of a balancing act. 5 U.S.C. §1213(h) provides that the identity of any individual who makes a disclosure may not be disclosed by the Special Counsel without the individual's consent unless the Special Counsel determines that the disclosure of the individual's identity is necessary because of an imminent danger to public health or safety, or imminent violation of any criminal law. I have been advised by the OSC's Disclosure Unit that its process ensures that a whistleblower's confidentiality is preserved, unless and until the whistleblower consents to the release of his/her name to the agency. The Disclosure Unit works with other OSC units to ensure that information is appropriately shared within the OSC, as disclosure complaints are often included in complaints of prohibited personnel practices. In cases where disclosures received by the Disclosure Unit are the basis for a reprisal action that is received by the Complaints Examining Unit, there should be coordination between these units so that there is consistency in how the case is handled.

Whistleblowers are advised by the assigned Disclosure Unit attorney of the difficulties associated with investigating a disclosure when the source is an anonymous employee. The whistleblower is also cautioned that anonymity can be compromised by the factual information supplied, particularly if the unit or department in which the whistleblower is employed is small, or where the whistleblower's position is specialized. Notwithstanding these challenges, OSC records reflect that in the 83 disclosure referrals from FY2009 to the present, 12 of the disclosures were anonymous. Of these 12, only one was ultimately unsubstantiated. Thus, based on this data, it does not appear that anonymity compromises an investigation.

18. If the Office of Special Counsel determines that there is "a substantial likelihood that that the [whistleblower's] information discloses a violation of any law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health and safety," the Office of Special Counsel must transmit the information to the agency head pursuant to 5 U.S.C. §1213 (c).

1. Under what circumstances, if any, do you think it would be desirable for the Special Counsel to send the information to the agency's Inspector General rather than to the agency head?

If the OSC does not have sufficient information to determine whether there has been a violation, but there is enough information to know that there is a problem warranting further investigation, an informal referral to an IG may be preferable to closing a case without taking any action. Indeed, I have been informed that the Disclosure Unit currently refers disclosures, with the whistleblower's consent, to the appropriate IG under an informal process when it is unclear whether the disclosure meets the "substantial likelihood" standard or the disclosure is of a less egregious nature not warranting the attention of the agency head. However, this process is limited to IGs who have agreed to accept these referrals.

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2. Do you think the current statute gives the Special Counsel sufficient flexibility to adequately make that decision?

At this time, I have no basis for recommending changes to the statute. If confirmed, I will work with the agency's Disclosure Unit to determine if the statute provides sufficient flexibility to make certain that all disclosures are properly evaluated and investigated when necessary. If experience leads me to believe that a statutory change would be beneficial, I will advocate for changes.

19. Do you believe that the Office of Special Counsel's current process for handling whistleblower complaints effectively protects an employee, former employee, or applicant's rights? If not, what changes do you believe might be necessary?

In Disclosure cases, and with respect to confidentiality, OSC's process appears to ensure that the whistleblower's confidentiality is preserved, unless and until the whistleblower consents to the release of his/her name to the agency. (See answer to Question 17) However, there is a limit to the impact that OSC can have in these cases because the OSC does not have independent investigative authority. OSC's role in disclosure cases is limited to referrals to the agency for investigation, reviewing the agency's findings, analyzing agency efforts to address the allegations, reviewing any comments by the whistleblower, and reporting to Congress and the President on these efforts. Despite these statutory limitations, I believe the Special Counsel can be an effective advocate for better and more accountable government. If confirmed, I am committed to using all available tools to ensure that agencies take necessary corrective actions to eliminate any waste, fraud, or abuse, or danger to public health and safety that is raised in a disclosure to the OSC.

With regard to prohibited personnel practices, the OSC's role, in part, is to seek corrective actions at the MSPB where warranted. However, OSC files very few corrective or disciplinary actions and obtains only a limited number of stays each year from the MPSB. It is true that corrective or disciplinary action before the MSPB is not necessary for cases in which the OSC is able to achieve appropriate relief or remedies from the agency. Similarly, strong cases which might otherwise be litigated often get resolved through informal settlement or mediation, and I am a proponent of mediation as a way to more quickly and effectively resolve cases. However, if confirmed as Special Counsel I would want to fully understand the agency's alternative dispute resolution program, how decisions are made to bring cases that do not settle to the MSPB, and whether it would be appropriate to pursue a more active litigation strategy.

20. OSC has developed a program that allows federal agencies to certify that they meet the statutory obligation under 5 U.S.C. §2302(c) to inform their workforces about the rights and remedies available to them under the Whistleblower Protection Act, and related civil service laws. Under the §2302(c) Certification Program, OSC will certify an agency's compliance with 5 U.S.C. §2302(c) if the agency meets certain requirements. This is largely a program where agencies self-certify that they meet requirements. In your view, is self-certification sufficient or do you believe that OSC should play a role in assessing compliance?

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The goal of OSC's Certification Program is to assist agencies in meeting their responsibility to educate employees about their rights and protections. Self-certification assumes that agencies will act in good faith to achieve compliance. Currently, under the Whistleblower Protection Act the burden is on each agency to voluntarily participate in the program and demonstrate that they meet the certification requirements. It would seem appropriate for the OSC to play a role in assessing compliance. However, I am not currently familiar with the rate of participation and compliance by the agencies. If confirmed, I will assess the effectiveness of the program and determine what changes to the certification process can be implemented. Among the possible options to consider are: ensuring that OSC's expectations about requirements for certification are clearly communicated; providing assistance to agencies to help them comply with the requirements; taking steps to identify noncompliant agencies and publicize this list to the Congress, OPM and the President; and advocating for regulations that would make the program mandatory and provide OSC with an enforcement mechanism.

21. Section 2302(b)(10) of title 5 prohibits any federal employee who has the authority to take or direct others to take personnel action from discriminating for or against any employee or applicant on the basis of conduct which does not adversely impact the individual's performance. This section has been interpreted by agencies as prohibiting discrimination against federal employees and applicants on the basis of sexual orientation.

1. Do you agree that 5 USC §2302(b)(10) prohibits discrimination against federal employees and applicants on the basis of sexual orientation?

Yes, I agree that sexual orientation discrimination is prohibited by 5 USC §2302 (b)(10), which states that it is a prohibited personnel practice to discriminate against an employee based on conduct that does not affect their performance or the performance of others. In addition, the White House, the Office of Personnel Management and the Department of Justice have all affirmed that federal employees have statutory rights protecting them from discrimination based on sexual orientation.

2. If so, how will you ensure that this protection is effectively enforced?

If confirmed, I will make certain that allegations of sexual orientation discrimination are fully enforced to the same extent as any other prohibited personnel practices complaint. I would also anticipate including this issue in training and outreach provided by OSC to agencies and employees. Finally, the OSC web site currently states: "Allegations of discrimination based on sexual orientation, marital status, and political affiliation are not within the jurisdiction of the EEOC. Such allegations, however, may be prohibited personnel practices or other violations of law subject to investigation by the OSC." If I am confirmed, I intend to ensure that employees and agencies are clearly informed about this and all other OSC enforcement provisions.

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22. Transportation Security Administration (TSA) employees are not provided whistleblower protections under 5 U.S.C. § 2302(b)(8). However, the OSC and TSA have agreed upon a process for providing whistleblower protection to these employees. Under the current agreement between TSA and OSC, how will you ensure that OSC is as effective as possible in protecting TSA whistleblowers?

The vast majority of TSA employees (those who are security screeners or "Transportation Security Officers") are not covered by statutory whistleblower protections. However, under a 2002 Memorandum of Understanding (MOU) between OSC and TSA, TSA may bring whistleblower retaliation complaints to the OSC. Upon receipt of the complaint, OSC reviews and, if appropriate, investigates the complaint. If OSC determines that corrective action is warranted, it will then make non-binding, advisory recommendations to the TSA for what action, if any, is warranted. In Fiscal Year 2010, OSC received 45 screener complaints, and the Complaint Examining Unit referred two of these cases to the Investigation and Prosecution Division for a full investigation.

Unlike non-TSA cases, OSC cannot bring an action on behalf of a TSA security screener to the MSPB. Thus, under current law there is a limit to how effective the OSC can be to protect TSA whistleblowers. The Whistleblower Protection Enhancement Act (WPEA), S. 372, 111th Cong. (2010) would extend whistleblower rights to TSA employees. Short of changing the law, OSC can work within its MOU with TSA to actively investigate retaliation complaints brought by TSA employees, pursue appropriate settlement options, and advocate on their behalf with the TSA.

23. The Disclosure Unit of OSC is responsible for reviewing disclosures from whistleblowers and recommending the appropriate disposition of the disclosures. The Office of Special Counsel reported a 37 percent increase in disclosures received by the Disclosure Unit during Fiscal Year 2009. How do you plan to manage this increase to ensure that the Disclosure Unit provides a timely and effective channel for whistleblowers to make disclosures and revelations?

OSC's Disclosure Unit plays a critical role in promoting government accountability by providing a safe and secure venue for federal employees to bring forth evidence of government waste, fraud, and abuse, or danger to public health or safety. The recent increase in disclosures reinforces the need to ensure that the Unit is adequately staffed, that it is effectively tracking and managing disclosures, and is capable of responding in a timely manner. If confirmed, I plan to work with the Chief of the Disclosure Unit and all of the other unit Chiefs to review the systems and procedures that are currently in place to ensure that resources are used most effectively and that all of the Office's functions are managed in the most efficient and cost-effective way possible. At a minimum, there must be open and transparent systems in place so that whistleblowers and other complainants are fully aware of, and can communicate with OSC staff about the status of their disclosure or complaint.

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Hatch Act

24. The Hatch Act was last amended in 1993. In Fiscal Year 2009, the Hatch Act Unit received 496 complaints of Hatch Act violations by federal employees, the highest number on record.

a. According to the Office of Special Counsel's 2009 Report to Congress, many of these complaints involved allegations of inappropriate use of email by Federal employees at the workplace and during working hours. As you know, email and certain other technologies were not common features of the workplace in 1993. Do you believe any changes to the Hatch Act are needed to account for technological advances made since 1993?

Changes to the law may be appropriate in light of significant technological changes since 1993. The Hatch Act needs to keep pace with these changes. For example, there are a number of issues that arise in the context of teleworking or government issued equipment. The OSC should continue to ensure that the Hatch Act is applied in a way that gives clear guidance to employees as new technologies arise and considers appropriate changes in response to developments in the way we work. Amending the Hatch Act to account for these changes and/or working with OPM to update the regulations may also be useful in the future.

b. In 2007, OSC rescinded an advisory regarding "water cooler" political emails. Do you believe there is a "water cooler" exception to the Hatch Act and if so, what is the scope of that exception? Do you believe it differs for email versus oral conversation?

I have been informed that in 2002, the Office of Special Counsel issued an advisory opinion on the use of e-mail to engage in political activity while on duty or in the federal workplace. In that advisory opinion OSC cautioned employees against using e-mail to engage in political activity but explained that the Hatch Act does not prohibit "water-cooler" type discussions and exchanges of opinion among co-workers concerning the events of the day, including political subjects. Apparently, this advisory caused confusion, and in 2007 the OSC rescinded it.

The Hatch Act does not provide for a "water cooler" or any other exception and, as far as I am aware, the regulations and caselaw have not interpreted the law as providing for such exceptions. The only relevant issue is whether conduct constitutes activity directed at the success or failure of a candidate for partisan office, political party, or partisan group. These are fact specific questions and require a case-by-case analysis.

With regard to email versus oral conversation, I do not believe that the mode of communication is particularly relevant. The Hatch Act provides that most federal employees may not engage in political activity while on duty, in a federal building, while wearing an official uniform, or using a government vehicle. Because of the fact specific nature of what constitutes political activity, regardless of whether an employee is sending an e-mail or having an oral conversation the inquiry should be the same: does the conduct constitute political activity within

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the meaning of the Hatch Act? Whether or not the content of the email or conversation reasonably conveys an attempt to bring success or failure to a candidate or party would determine whether it is a violation of the prohibition on political activity.

c. Do you believe federal employees receive sufficient training and information about the Hatch Act and how to comply with it?

Although I am not aware of the type or amount of training that federal employees generally receive about the Hatch Act, I have been informed that the OSC provides Hatch Act training and guidance through presentations at agencies. OSC also has telephone and e-mail hotlines dedicated to issuing Hatch Act advisory opinions. Finally, 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 answers to frequently asked questions. If confirmed, I will explore with the Hatch Act Unit ways in which the OSC can assist agencies in educating the federal workforce so that the Act's requirements are more clearly and consistently communicated.

25. In its most recent Report to Congress, OSC reported that "continuing surges in both complaints and advisory opinion activity" have made the Hatch Act Unit's workload "nearly overwhelming." How do you plan to manage this caseload to ensure timely and effective resolution of complaints and advisory opinions?

I have been informed by OSC Hatch Act Unit staff that they are currently attempting to manage the caseload by prioritizing cases, assigning two attorneys to complex cases, setting clear goals and holding staff accountable for meeting those goals, using the OSC's website to help with advisory requests, and maximizing unpaid summer internships. Similar to other units at the OSC, the Hatch Act Unit has been required to stretch its resources to appropriately handle its caseload. If I am confirmed as Special Counsel, I will work with the Hatch Act unit to devise strategies for caseload management.

26. In its 2009 Report to Congress, OSC states that even with increased staffing, greater efficiency, and increased outputs, Hatch Act cases pending at the end of FY2009 rose by 33 percent. The report further states that "continuing surges in both complaints and advisory opinion activity" have made the Hatch Act Unit's workload "nearly overwhelming." What steps do you believe can be taken to address this backlog while still ensuring the quality of investigations and legal analyses?

Given the limited resources available to the OSC, there will always be a need to balance the quick and efficient processing of complaints with the need for thorough and thoughtful investigations. If confirmed, I will review the procedures that the Hatch Act unit has already implemented to address its high caseload (as discussed in response to Question 25), and work with them to devise new strategies, as well.

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Uniformed Services Employment and Reemployment Rights Act

27. The Office of Special Counsel 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 recent increases in the number of veterans returning home from military service overseas, how will you ensure that USERRA rights are adequately enforced?

Currently, USERRA complaints against federal agencies must first be filed with the Department of Labor, Veterans' Employment and Training Service (VETS), for investigation and attempted resolution. If VETS is unable to resolve the complaint, the claimant may request a referral to OSC for possible representation before the Merit Systems Protection Board (MSPB). Under the Veterans Benefits Act of 2010, Congress established a new, three-year Demonstration Project under which OSC will not only have authority to prosecute cases before the MSPB, but will also receive and investigate from the outset more than half of all filed USERRA complaints involving federal agencies, including those with a related Prohibited Personnel Practice (PPP) allegation.

Under the Demonstration Project, USERRA complaints will be handled by OSC from the start (bypassing the VETS investigative process), in order to determine whether service members benefit from having OSC handle their claims from beginning to end. With OSC's upcoming expanded role under USERRA, this unit will require additional resources. Currently the OSC's USERRA unit has only three full-time employees and the number of complaints is expected to increase significantly when the Demonstration Project begins in spring 2011. During the last USERRA Demonstration Project in 2005-2007, the USERRA unit received approximately 450 additional cases. A similar volume of cases is expected during the course of the new project, and could be more given the high rate of returning veterans. In addition to the expected increased caseload, the new Demonstration Project includes several other requirements that were not part of the prior project, including shorter timelines. Accordingly, if confirmed, I will assess how best to maximize this unit's resources, including exploring the use of early mediation as a way to expedite the handling of these claims.

In addition to direct representation of individual employees with USERRA claims, it is my understanding that OSC has some ongoing efforts to educate federal agencies and employees about their rights and obligations under USERRA in order to encourage compliance and prevent future violations. In response to specific inquiries, the USERRA unit also provides information and helps agencies with compliance questions by phone and email. If confirmed, I would review those efforts and assess how it might be possible to fortify them. Under USERRA, Congress intended the Federal government to be a "model employer" for our veterans as they return home and reenter the civilian workforce. If confirmed, I will work to make that intention a reality.

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IV. Relations with Congress

28. Do you agree without reservation to respond to any reasonable summons to appear and testify before any duly constituted committee of the Congress if you are confirmed as Special Counsel?

Yes.

29. Do you agree without reservation to reply to any reasonable request for information from any duly constituted committee of the Congress if you are confirmed as Special Counsel?

Yes.

V. Assistance

30. Are these answers your own? Have you consulted with the OSC or any interested parties? If so, please indicate which entities.

These answers are my own. I have consulted with staff from the OSC on a number of questions.

AFFIDAVIT

I, Carolyn Lerner, being duly sworn, hereby state that I have read and signed the foregoing Statement on Pre-hearing Questions and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

Carolyn Lerner

Subscribed and sworn before me this 3rd day of March, 2011.

Grethen Waller

Notary Public

Grethen R. Waller
Notary Public, District of Columbia
My Commission Expires 6/31/2014

1 U.S. Senate. Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia of the Homeland Security and Governmental Affairs Committee. Safeguarding the Merit System: A Review of the U.S. Office of Special Counsel (S. Hrg. 109-68). May 24, 2005. pgs. 4-5.

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United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

DEC 2 0 2010

The Honorable Joseph I. Lieberman
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 Carolyn N. Lerner, who has been nominated by President Obama for the position of Special Counsel, Office of Special Counsel.

We have reviewed the report and have also 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,

Don W. Fox
General Counsel

Enclosures – REDACTED

December 15, 2010

Ms. Erin M. McDonnell
Associate Special Counsel and
Designated Agency Ethics Official
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 218
Washington, DC 20036-4505

Re: Ethics Undertaking

Dear Ms. McDonnell:

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.

As required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter that has a direct and predictable effect on my financial interests or those of any person whose interests are imputed to me, 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.

I am a partner of the law firm of Heller, Huron, Chertkof, Lerner, Simon & Salzman, PLLC. Upon confirmation, I will withdraw from the partnership, and the firm will change its name to "Heller, Huron, Chertkof, Simon & Salzman." Within 30 days of my withdrawal from the firm, I will receive a refund of my capital account, an amount that is my share of the value of the partnership for services performed through the date of my withdrawal from the partnership. This payment will be based solely on the firm's earnings through the date of my withdrawal. I will not participate personally and substantially in any particular matter that has a direct and predictable effect on the ability or willingness of the firm to make this payment to me, unless I first obtain a written waiver pursuant to 18 U.S.C. § 208(b)(1).

For a period of one year after my resignation from Heller, Huron, Chertkof, Lerner, Simon & Salzman, I will not participate personally and substantially in any particular matter involving specific parties in which the firm is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, I will not participate personally and substantially in any particular matter involving specific parties in which a former client of mine is a party or represents a party for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

Upon confirmation, I will resign from my positions with the following entities: Member, Board of Directors, Council for Court Excellence; Board Member, Washington Council of

Lawyers; and adjunct professor, George Washington University School of Law. For a period of one year after my resignation from these positions, I will not participate personally and substantially in any particular matter involving specific parties in which the Council for Court Excellence, the Washington Council of Lawyers or the George Washington University School of Law is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

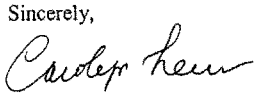
Upon confirmation, I will resign from my advisory board positions with The Center for WorkLife Law and the WAGE Project. Upon confirmation, I will also resign from my position as a member of the Pro Bono Committee of the D.C. Bar Association. Upon confirmation, I will terminate my status as available to serve as a pro bono mediator on any cases before the U.S. District Court for the District of Columbia and any cases before the D.C. Human Relations Commission.

Following confirmation I will continue to function as Personal Representative under my late mother's will, and as Trustee of a trust that was established under my late mother's will. I will not at any time receive compensation for services I perform as Personal Representative or Trustee during my government appointment. I will not participate personally and substantially in any particular matter that has a direct and predictable effect on the financial interests of the trust described above 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. §108(b)(2).

My spouse currently works at the law firm of Zuckerman Spaeder, LLP and receives a bonus based, in part, on the profitability of the firm. I will not participate personally and substantially in any particular matter that will have a direct and predictable effect on the financial interests of Zuckerman Spaeder, LLP, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1). I also will not participate personally and substantially in any particular matter involving specific parties in which a client of my spouse is a party or represents a party, unless I have been authorized pursuant to 5 C.F.R. § 2635.502(d). In addition, for the duration of my appointment to the position of Special Counsel, my spouse has agreed not to communicate with the Office of Special Counsel on behalf of the firm or any client.

I understand that as an appointee I am required to sign the Ethics Pledge (Executive Order No. 13490) and that I will be bound by the requirements and restrictions therein in addition to the commitments I have made in this and any other ethics agreement.

Sincerely,



Carolyn N. Lerner

Senator Daniel K. Akaka
Additional Questions for the Record
Confirmation Hearing of Carolyn N. Lerner
March 10, 2011

1. Merit Systems Protection Board has a statutory duty to conduct studies to determine whether the public interest in a civil service free of prohibited personnel practices is being protected. 5 U.S.C. § 1204(a)(3). How can the Office of Special Counsel work in conjunction with the Merit Systems Protection Board to help it fulfill this statutory duty and also be responsive to its reports on this issue?

The Merit Systems Protection Board (MSPB) has recently published two studies that are directly relevant to the Office of Special Counsel's (OSC's) work in guarding against prohibited personnel practices, a June 2010 Report, *Prohibited Personnel Practices – a Study Retrospective*, and a September 2010 Report, *Whistleblower Protections for Federal Employees*. As explained in these reports, one of the MSPB's missions is to report to the President and Congress on whether the public's interest in a Government free from prohibited personnel practices is being adequately protected. The June 2010 Report also notes that the MSPB intends to begin issuing a series of reports that will explore protections for whistleblowers, as well as fair and equitable treatment in the Federal Government.

The Office of Special Counsel does not have a similar statutory duty to conduct studies. However, the OSC can work collaboratively with the MSPB by providing information to the MSPB when it conducts studies. For example, the OSC can provide both statistical and anecdotal evidence regarding the whistleblower disclosures and prohibited personnel practices complaints that it receives. The OSC can also suggest potential study topics for consideration by the MSPB.

The OSC can be responsive to the MSPB's reports by reviewing any relevant findings and recommendations and implementing them to the extent possible. The OSC can also work with the MSPB to disseminate the findings and assist agencies in complying with recommendations. For example, the MSPB's June 2010 Report on prohibited personnel practices found that there is a continuing gap between minority and non-minority employees' perceptions of the fairness of personnel policies and decisions, and the prevalence of discrimination and other prohibited personnel practices. The same Report found that the percentage of employees who engage in protected activity mirrors the percentage who report retaliation for having engaged in that activity. Educating agencies about these findings is vital. The OSC's outreach and training functions, including its §2302(c) Certification Program, can potentially play a role in doing so.

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