

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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