

Project On Government Oversight

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May 1, 2008

The Hon. Carl Levin
Chairman
Committee on Armed Services
United States Senate
Washington, D.C. 20510

Dear Chairman Levin:

As you know, legislation has now passed in both the House (H.R. 928) and the Senate (S.2324) that would enhance the independence of federal Inspectors General and improve other aspects of the IG system. The Project on Government Oversight (POGO) has been supportive of the efforts of Members on both sides of the Hill who have worked so hard on these bills. At the same time, POGO has been conducting an in-depth review of the entire IG system and has already issued one report based on our findings (*Inspectors General: Many Lack Essential Tools for Independence*, February 29, 2008; <http://www.pogo.org/p/government/go-080228-ig.html>).

One of the major findings in that report was the necessity for all IGs to have access to independent legal advice, free and clear of their agencies' general counsels. We were particularly disturbed to learn that the Inspector General at the Department of Defense (DOD/OIG) is apparently the only one of the presidentially-appointed Inspectors General who does not have his own unencumbered legal counsel. We are pleased that S.2324 addresses this situation, for all IGs, by requiring they all obtain counsel from either their own in-house lawyers, from another IG's office, or from the Council of IGs (Sec. 6. Separate Counsel to Support Inspectors General). We believe there will always be a basic conflict of interest between the agency general counsel, whose job is to protect and defend the interests of the agency, and that of the inspector general, who must expose waste, fraud, abuse and other misconduct committed within that agency.

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The situation at present at DOD is as follows. The Department's General Counsel wears two hats; he is in charge of both the Office of General Counsel and the Defense Legal Services Agency (DLSA). All non-military lawyers in the department are organized under the DLSA, including those at the OIG. The person serving as General Counsel to the IG (GC/OIG) also works for DLSA and ultimately the Department General Counsel. Although the September 2004 Action Memo from then-Deputy Defense Secretary Paul Wolfowitz to then-IG Joseph Schmitz states that the IG is the appointing authority for the GC/OIG, and the IG signs the attorneys' evaluations, the OGC/OIG staff are organized under the DLSA, and it is the department's General Counsel who rates the IG's General Counsel. Accordingly, it is not clear that the IG is the client of his attorneys. The point remains that the OIG of DOD does not have legal counsel solely dedicated to the work of the OIG, reporting solely to the IG, and beholden to no other office.

The case of Army engineer David Tenenbaum, which recently came to our attention, vividly underscores why it is so important for the DOD/OIG to have its own dedicated in-house legal adviser. POGO believes Tenenbaum's situation presents a case study of the problems that can arise when an IG does not have legal counsel solely dedicated to the work of his office. The facts supporting that point are as follows.

1. David Tenenbaum is a civilian mechanical engineer with the US Army Tank Automotive and Armaments Command (TACOM) in Warren, Michigan. In the early 1990s, some of his colleagues and supervisors suspected that he was a spy for Israel. Tenenbaum was suspended without pay and his security clearance was revoked. The FBI began an 18-month investigation of him. However, in 1998 the case was closed and the US Attorney's Office declined prosecution "because there is insufficient evidence to sustain an indictment or to meet our burden of proof at trial." [Attachment A] Tenenbaum returned to TACOM, but not in his previous position.

2. Subsequently, Mr. Tenenbaum filed a lawsuit alleging discrimination on the basis of his religion, but the case was dismissed when the “state secrets privilege” was asserted as to evidence Tenenbaum wished to submit. It is important to note that the memorandum recommending that the Army approve the assertion of the state secrets privilege was written and signed by Uldric L. Fiore, Jr., Col., JA, Chief, Litigation Division, of the Army’s Judge Advocate General.

3. In 2006, at the request of Sen. Levin, the Deputy Inspector General for Investigations was asked to examine the following question: “Did Department of Defense have a reasonable basis for and follow proper procedures in revoking Mr. Tenenbaum’s security clearance and, in the decision-making to determine that clearance, was he discriminated against because of his religion?” [Attachment B]

4. The Finding reached by the Deputy IG/Investigations was: “Mr. Tenenbaum experienced religious discrimination when his Judaism was weighed as a significant factor in the decision to submit him for an increase in his security clearance.” [Attachment B]

5. By 2006, the attorney serving as the General Counsel to the DOD/OIG, was the same Uldric Fiore, now retired from the Army. Again, it was Fiore who had previously served in the litigation branch of the Army, and had recommended the assertion of state secrets privilege which resulted in the dismissal of Tenenbaum’s lawsuit. [Attachment C] Fiore had further been involved in briefing the Secretary of the Army on the case.

6. However, when Fiore, as General Counsel to the IG, drafted a reply to Sen. Levin, he did not reveal his prior involvement in the case to the Deputy IG/Investigations who had investigated the matter. When his prior involvement became known, Fiore resisted recusal. [Attachment B] Once his recusal had been forced, the review of the investigation’s findings fell to two of his subordinates: Deputy

General Counsel Henry Shelley and Associate General Counsel Brian Yonish.

7. Shelley and Yonish objected to the findings made by the Deputy IG/Investigations. Yonish opened his own investigation, conducting at least one interview of a witness without informing the Deputy IG's investigative team.

8. When Shelley and Yonish were asked to render an opinion on the legal sufficiency of the Deputy IG/Investigation team's findings, their "objections centered on undermining evidence presented above as either 'opinion' or circumstantial (indirect) evidence." As of late October 2007, the OGC/OIG had failed to sign off on the report. [Attachment B]

9. According to e-mail sent April 16, 2008, exchanged to set up a "Tenenbaum meeting," Yonish [Bryan, sic] was expected to report on what he had done with the investigators' report: ***"Bryan will be spotlighted for a progress account of his re-tooling of the report based upon Army input and changing the discrimination finding."*** [Attachment D, emphasis added.]

POGO is deeply troubled that lawyers who are clearly conflicted, and who may not understand that the Inspector General is their client, would be involved in changing the findings reached by independent investigators. We do not presume to assign motivation to Mr. Fiore or his deputies. They may genuinely believe the investigators' report was flawed. However, the point is the existence of an institutional relationship in which the IG's counsel ultimately works for the agency's general counsel, creating at least the appearance of a conflict of interest. The OIG must have counsel wholly dedicated to the needs and interests of the Inspector General himself.

In the case of Mr. Tenenbaum, we hope and trust that you will intervene and ensure that such a profound injustice as changing the finding of religious discrimination will not occur. POGO urges you to

immediately obtain the investigators' original report and ensure that there is no improper alteration or interference with the original findings.

More broadly, POGO urges that you ensure that the provision in S.2324 requiring an independent DOD/OIG/GC be preserved and codified in law.

Very truly yours,

A handwritten signature in cursive script that reads "Danielle Brian".

Danielle Brian
Executive Director

cc: The Hon. Joe Lieberman
The Hon. Susan Collins
The Hon. Claire McCaskill
The Hon. Chuck Grassley
The Hon. Henry Waxman
The Hon. Jim Cooper

Attachments A-D