

Congress of the United States
Washington, DC 20510

June 10, 2016

VIA ELECTRONIC TRANSMISSION

Glenn A. Fine
Acting Inspector General
U.S. Department of Defense
4800 Mark Center Drive
Alexandria, VA 22350

Dear Acting Inspector General Fine:

We have a longstanding interest in whistleblower protections for Department of Defense (DoD) military and civilian personnel, as well as contractors. Among other things, we have requested that the Government Accountability Office (GAO) review the Department of Defense Office of Inspector General's (DoD OIG) whistleblower reprisal programs,¹ supported statutory improvements to those programs, and conducted crucial oversight of the handling of reprisal cases and the treatment of whistleblowers.² These efforts have produced some improvements.³

We also appreciate your willingness to engage with our offices regarding these issues since you assumed your acting role in January of this year. Before you came to the DoD IG, we had expressed concerns regarding the DoD OIG's interpretation of statutory protections for contractors. In 2014, Members of Congress wrote that the DoD OIG's overly narrow reading of 10 U.S.C. § 2409 regarding personnel who could receive protected disclosures was inconsistent with the statute and congressional intent.

¹ U.S. Gov't Accountability Office (GAO), GAO-12-362, *Actions Needed to improve DOD's Military Whistleblower Reprisal Program* (2012) (requested by Senator Grassley) [Hereinafter GAO-12-362]; GAO, GAO-15-477, *DOD Needs to Enhance Oversight of Military Whistleblower Reprisal Investigations* (2015) (requested by Senators Grassley, Gillibrand, and McCaskill) [Hereinafter GAO-15-477]; Letter from Claire McCaskill, Ranking Member, Permanent Subcommittee on Investigations, Senate Homeland Security and Governmental Affairs Committee et al. to Gene Dodaro, Comptroller General, GAO (Mar. 16, 2015) (requesting GAO review of civilian and contractor reprisal cases) [Hereinafter Phase II GAO Request].

² See, e.g., Letter from Senators to Jon T. Rymer, Inspector General, Office of the Inspector General (Sept. 18, 2014) (overly restrictive interpretation of 10 U.S.C. § 2409); Letter from Charles E. Grassley, Ranking Member, U.S. Senate Committee on the Judiciary to John T. Rymer, Inspector General, U.S. Department of Defense Office of the Inspector General (Nov. 17, 2014) (Staff Report regarding *Zero Dark Thirty* Investigation) [Hereinafter Staff Report: *Zero Dark Thirty*].

³ GAO-15-477 at 51.

Recently we received information that caused us to inquire, again, about DoD OIG's application of contractor whistleblower protections to its reprisal cases. In February, Senators Grassley and McCaskill asked you whether the DoD OIG is reviewing contractor reprisal claims involving disclosures of "violations of law, rule, or regulation," but not also, as the statute provides, of "gross mismanagement of a Department of Defense contract or grant, a gross waste of Department funds, [or] an abuse of authority relating to a Department contract or grant."⁴ On April 11, 2016, based on these concerns, you responded that the DoD OIG would reopen two contractor reprisal cases and take "a more expansive approach" in examining complaints arising under Section 2409.⁵ We are encouraged by this initial response and commitment to reviewing contractor reprisal complaints according to the correct legal standard, and we look forward to receiving the remaining requested information.

We believe, however, that there are ongoing challenges, including significant delays in investigations, the lack of a fully implemented, reliable, and comprehensive case management system, ineffective oversight of service branch inspector general (Service IG) reprisal investigations, and allegations of reprisal and misconduct within the DoD OIG itself.⁶ We write to express our concerns regarding what appear to be persistent, systemic issues within the DoD OIG, and our hope that you will work diligently to help resolve them.

First, the most recent GAO report, released in May 2015, found chronic noncompliance with statutory notification requirements and continued delays in reprisal case processing. According to GAO, DoD OIG "did not meet statutory notification requirements to inform service members about delays in investigations for about half of military whistleblower reprisal investigations in fiscal year 2013."⁷ Specifically, DoD OIG's notification letters were late in 53 percent of cases reviewed.⁸

⁴ Letter from Senators Charles E. Grassley and Claire McCaskill to Glenn Fine, Acting Inspector General, U.S. Department of Defense Office of the Inspector General (Feb. 25, 2016) (citing 10 U.S.C. § 2409).

⁵ Letter from Glenn A. Fine, Acting Inspector General, U.S. Department of Defense Office of the Inspector General to Senators Charles E. Grassley and Claire McCaskill (Apr. 11, 2016) (citing 10 U.S.C. § 2409).

⁶ Marisa Taylor, *Is whistleblower advocate for nation's spies under attack?*, McClatchy (Apr. 2, 2014); available at: <http://www.mcclatchydc.com/news/nation-world/national/national-security/article24766012.html>; Letter from Rep. Jackie Speier to Jon T. Rymer, Inspector General, U.S. Department of Defense Office of the Inspector General (Dec. 29, 2014) [Hereinafter Speier Letter], available at: <https://s3.amazonaws.com/s3.documentcloud.org/documents/1386488/ig-letter-re-mike-helms.pdf>; Charles S. Clark, *Former Pentagon IG Official Probed for Destroying Documents*, Government Executive (June 3, 2015), available at: <http://www.govexec.com/defense/2015/06/former-pentagon-ig-officials-probed-destroying-documents/114367/>; Marisa Taylor, *Possible Pentagon destruction of evidence in NSA leak case probed*, McClatchy (June 15, 2015), available at: <http://www.mcclatchydc.com/news/nation-world/national/national-security/article25186123.html>; Letter from Danielle Brian and Mandy Smithberger, Project on Government Oversight to Glenn Fine, Acting Inspector General, U.S. Department of Defense Office of the Inspector General (Mar. 8, 2016) [Hereinafter POGO Letter]; available at: <http://www.pogo.org/our-work/letters/2016/letter-to-pentagon-watchdog.html?referrer=http://www.pogo.org/our-work/letters/2016/letter-to-pentagon-watchdog.html>.

⁷ GAO-15-477 at 11 (emphasis added).

⁸ *Id.* at 51.

Overall, “[t]he average length of an investigation during fiscal years 2013 and 2014 was almost three times the DOD requirement.”⁹

Second, the 2015 report repeatedly notes the shortcomings of DoD OIG’s new case management system. As of 2015, the office did not have “procedures to ensure accurate and complete recording of total case-processing time.”¹⁰ Moreover, the system was still under development and had “limited reporting capabilities.”¹¹ For example, the system cannot aggregate data for each investigative and oversight stage—data that can help identify deficiencies and opportunities for improvement.¹² Additionally, GAO found that investigators were not using the case management system to monitor case information and progress in real time, despite the system’s capability to do so. Rather, investigators were uploading key data and documents after cases were already closed.¹³ Specifically:

For 83 percent of cases closed in fiscal year 2013, DODIG staff made changes to the case variables in the case management system in 2014, at least 3 months after case closure. For cases where DODIG made changes to the data, we estimate that about 68 percent had significant changes, such as changes to the date the servicemember filed the complaint and the organization that conducted the investigation, as well as the result code, which indicates whether the case was fully investigated.¹⁴

DoD OIG explained that the investigators “had not been consistently recording information” and the office had to correct the data.¹⁵ GAO warned that DoD OIG should update internal guidance on the use of the system and its real-time tracking capabilities, or its reporting challenges would continue.¹⁶ Further, many of these “significant changes” were made after DoD OIG was notified of GAO’s audit.¹⁷ Recent allegations disclosed to your office by the Project on Government Oversight (POGO) indicate that DoD OIG managers “advis[ed] staff to add information to files that were specifically within the scope of GAO’s review,” which POGO suggests is evidence of “efforts to improperly influence the GAO’s findings.”¹⁸ We trust that DoD OIG will fully cooperate with GAO in its Phase II review of civilian and contractor reprisal cases, and commit to transparency regarding any continuing practice of modifying data after-the-fact and in advance of that review.¹⁹

⁹ *Id.* at 11 (emphasis added).

¹⁰ *Id.* at 20.

¹¹ *Id.* at 21.

¹² *Id.* at 22-23. DoD OIG also does not have the ability to track data on each investigative and oversight stage for Service IG cases. DoD OIG reported that it had planned to complete the last phase of development by the end of fiscal year 2015.

¹³ *Id.* at 24.

¹⁴ *Id.* at 25.

¹⁵ *Id.* at 25.

¹⁶ *Id.* at 26.

¹⁷ *Id.* at 84.

¹⁸ POGO Letter.

¹⁹ See Phase II GAO Request.

Third, the GAO report revealed significant challenges in tracking and monitoring Service IG reprisal investigations. The Service IGs use separate systems,²⁰ and the DoD OIG has expressed that it will not incorporate all of the Service IGs' key concerns as it expands its system to include the Service IGs.²¹ GAO also noted important differences in the way the DoD OIG and the Service IGs address case intakes. Apparently, as a result, "DODIG investigators had incorrectly coded some cases in the case management system as fully investigated when the service IG had dismissed the case prior to a full investigation."²² Notably, in many of these preliminary investigations, the Service IG had not even interviewed the complainant,²³ although DoD OIG guidance requires such interviews at the DoD OIG intake stage.²⁴

Fourth, the GAO has notified us that, although DoD OIG concurred with key GAO recommendations related to congressional oversight, it has declined to implement them. According to GAO, DoD OIG disagrees with GAO's recommendation to "[r]egularly report to Congress on the timeliness of military whistleblower reprisal investigations, including the number of cases exceeding the 180 days provided by law."²⁵ As GAO notes in its 2012 report, "the absence of timeliness information in these reports limits congressional decision makers' ability to thoroughly evaluate and identify whether delays continue to exist within DOD's whistleblower reprisal investigative process."²⁶ According to GAO, DoD OIG's purported reasoning for declining to provide regular data to Congress regarding the timeliness of its investigations is the fact that the agency responds to ad hoc congressional requests. In our experience, however, regular reporting is far more efficient and effective. Further, the need for such data does not necessarily arise in a predictable or scheduled manner, and staff and members frequently must make informed decisions quickly. Their ability to do so is significantly impaired when they must wait for agencies to compile, analyze, review, and approve responses to ad hoc requests.

Further, GAO has informed us that DoD OIG also disagrees with GAO regarding its recommendation to "[r]egularly report to Congress on the frequency and type of corrective action taken in response to substantiated reprisal claims."²⁷ According to GAO, DoD OIG reports corrective actions in its semi-annual reports to Congress, but those reports do not disclose instances where the services declined to take DoD OIG's recommended actions. Without this information, Congress cannot effectively evaluate whether the whistleblower protection laws are working as intended. Congress must be

²⁰ GAO-15-477 at 20.

²¹ *Id.* at 30.

²² *Id.* at 24.

²³ *Id.* at 40-41. Overall, GAO estimated that "59 percent of service preliminary inquiry case files compared to 10 percent of service full investigation case files were missing evidence of a servicemember interview."

²⁴ *Id.* at 9, 41; *see also id.* at 16-17 (GAO also could not include data on cases dismissed at intake in its "overall timeliness calculations" because Service IGs do not track that information or report it to DoD OIG.).

²⁵ GAO-12-362 at 76-78.

²⁶ *Id.* at 23.

²⁷ *Id.* at 76-78.

able to determine the extent to which whistleblowers are actually made whole and retaliators are held accountable.

Fifth, as POGO notes in its recent letter, the DoD OIG substantiates very few reprisal cases, and “has dismissed 84.6 percent of the cases it has received since pledging to make reforms in 2012.”²⁸ The low substantiation rate is likely due to multiple factors. The POGO letter alleges that DoD OIG may be hastily closing cases to improve its timeliness and, at times, “based on the unsubstantiated belief that the official would have taken the same action regardless of a protected disclosure.”²⁹ We also understand that DoD OIG investigators may be dismissing reprisal cases at the intake stage without interviewing the complainant. Finally, multiple whistleblowers have alleged that DoD OIG officials frequently, and improperly, issue instructions to alter investigative findings from substantiated to unsubstantiated.³⁰

Sixth, POGO’s letter alleges an environment within DoD OIG that is “toxic” to whistleblowers and that condones misconduct.³¹ As GAO noted in its 2015 report, “within the [DoD OIG], a quarter of employees surveyed in 2014 did not feel they could disclose a suspected violation of any law, rule, or regulation without fear of reprisal.”³² The press has reported that “[o]fficials who’ve raised the concerns about reprisal investigations have alleged that they’ve been retaliated against themselves.”³³ As legislators who have worked with our colleagues from both sides of the aisle for many years to protect whistleblowers, we are baffled by the painful irony that an office responsible for investigating reprisal is charged with committing it.

Lastly, and perhaps even more troubling, are allegations of misconduct involving senior DoD OIG officials. On March 18, 2016, the Office of Special Counsel (OSC) referred to the Department of Justice Office of the Inspector General (DOJ OIG) allegations that current and former DoD OIG officials improperly destroyed documents at issue in the criminal prosecution of a National Security Agency (NSA)

²⁸ POGO Letter.

²⁹ *Id.* (citing GAO-15-477 at 40).

³⁰ Marisa Taylor, *Intelligence, defense whistleblowers remain mired in broken system*, McClatchy (Dec. 30, 2014) (“At the Pentagon inspector general’s office, its own investigators accused the office of improperly dismissing, watering down or stalling conclusions in retaliation inquiries, according to five federal officials who are familiar with the allegations and spoke only on the condition of anonymity because of the matter’s sensitivity. Cases that are controversial, complicated or involve high-level officials are especially prone to being altered in a way that’s unfavorable to whistleblowers, the federal officials said.”), available at: <http://www.mcclatchydc.com/news/nation-world/national/national-security/article24777871.html>; Speier Letter; Marisa Taylor, *For whistleblower vet, winning is a long-elusive quest*, McClatchy (Dec. 30, 2014), available at: <http://www.mcclatchydc.com/news/nation-world/national/national-security/article24777874.html>.

³¹ POGO Letter.

³² GAO-15-477 at 1 (citing Office of Personnel Management, *Department of Defense Office of Inspector General 2014 Employee Viewpoint Survey* (Aug. 4, 2014)).

³³ Marisa Taylor, *Intelligence, defense whistleblowers remain mired in broken system*.

whistleblower.³⁴ The whistleblower's advocates had sought the documents to demonstrate that the whistleblower cooperated with a DoD OIG probe.³⁵ We are pleased that the DoD OIG has agreed to the referral and supports an independent inquiry.³⁶ Unfortunately, as you know, this referral follows multiple inquiries into DoD OIG conduct in audits, investigations of wrongdoing, and the treatment of whistleblowers.³⁷

Against the backdrop of these troubling allegations and findings, it has been suggested that the culture within DoD OIG is harmful to its mission to investigate whistleblower reprisal, and that the Inspector General should carefully consider whether key responsibilities have been placed in the right hands.³⁸

We believe that in your new role as Acting Inspector General, you have an important opportunity to further advance the progress already made, and to set a new tone and direction within the DoD OIG. To those ends, we request that you respond to the following questions:

1. Please provide an update on DoD OIG's progress in implementing GAO recommendations, including specific steps DoD OIG has taken to:
 - a. Improve the overall timeliness of its investigations;
 - b. Update its investigations manual and the current procedures for conducting intakes, investigations, and oversight;
 - c. Ensure investigators record information in the case management system in a timely fashion, prior to case closure;
 - d. Standardize investigations across the service branches;
 - e. Correct investigators' practice of marking cases as fully investigated by Service IGs, when they were not; and
 - f. Incorporate Service IGs into the case management system.
2. Please provide a full, written explanation regarding DoD OIG's position on GAO recommendations 10 and 18 from its 2012 report.

³⁴ Marisa Taylor, *Probe launched into Pentagon handling of NSA whistleblower evidence*, McClatchy (Mar. 21, 2016), available at: <http://www.mcclatchydc.com/news/nation-world/national/national-security/article67392097.html>.

³⁵ *Id.*; Clark, *Former Pentagon IG Official Probed for Destroying Documents* (A federal judge also has requested the "cooperation" of the Department of Justice in investigating the matter.).

³⁶ Marisa Taylor, *Probe launched into Pentagon handling of NSA whistleblower evidence*.

³⁷ Letter from Charles E. Grassley, Chairman, U.S. Senate Committee on the Judiciary to Jon T. Rymer, Inspector General, U.S. Department of Defense Office of the Inspector General (Jan. 7, 2016) (concerns regarding independence of DoD OIG in DoD response to SIGAR); GAO, GAO-15-198, *DOD Financial Management: Actions are Needed on Audit Issues Related to the marine Corps' 2012 Schedule of Budgetary Activity* (2015); Floor Speech of Senator Charles E. Grassley, 161 Cong. Rec. S6254-56 (daily ed. Aug. 4, 2015) (statement of Sen. Grassley); Staff Report: *Zero Dark Thirty*.

³⁸ POGO Letter; Letter from Claire McCaskill, Ranking Member, Permanent Subcommittee on Investigations, Senate Homeland Security and Governmental Affairs Committee et al. to Jon T. Rymer, Inspector General, U.S. Department of Defense Office of the Inspector General (Apr. 21, 2015).

3. In the last 5 years, how many reprisal cases have investigators' findings of "substantiated" reprisal been altered to "unsubstantiated" prior to publication? In each case, what individual changed those findings and what individual instructed that they be changed? Why were they changed? Please include any and all cases originally deemed substantiated, regardless of the level of review.
4. In the last 5 years, how many reprisal cases has DoD OIG dismissed at intake without contacting and interviewing the complainant?
5. What efforts have been and are being made to correct or alter data in the case management system prior to the start of the next GAO review? What types of data have been corrected or modified? How many reprisal cases have been modified or corrected to date since the GAO 2015 report was issued? Please list the cases updated and explain the purpose for such updates.
6. What specific steps have you taken and do you plan to take to foster a culture that is responsive and hospitable to internal whistleblowers?
7. Please provide a briefing on the case management system as it functions today.

Please contact us to schedule a briefing on the case management system as soon as possible. Please also provide a response to each of the remaining above questions by June 30, 2016, and number your responses according to their corresponding questions. Finally, please contact Charlie Murphy or DeLisa Lay of Senator Grassley's staff at 202-224-5225, Margaret Daum of Senator McCaskill's staff at 202-224-3721, Brooke Jamison of Senator Gillibrand's staff at 202-224-4451, Tristan Leavitt of Representative Chaffetz's staff at 202-225-5074, or Krista Boyd of Representative Cummings' staff at 202-225-9493, if you have any questions.

Sincerely,



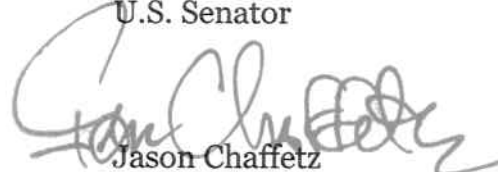
Charles E. Grassley
U.S. Senator



Claire McCaskill
U.S. Senator



Kirsten Gillibrand
U.S. Senator



Jason Chaffetz
Member of Congress



Elijah E. Cummings
Member of Congress

cc: The Honorable Ron Johnson
Chairman
Committee on Homeland Security
and Governmental Affairs

The Honorable Tom Carper
Ranking Member
Committee on Homeland Security
and Governmental Affairs

The Honorable John McCain
Chairman
Committee on Armed Services

The Honorable Jack Reed
Ranking Member
Committee on Armed Services

The Honorable Gene L. Dodaro
Comptroller General
U.S. Government Accountability Office

The Honorable Michael E. Horowitz
Chairman
Council of the Inspectors General
on Integrity and Efficiency

The Honorable Carolyn Lerner
Special Counsel
Office of Special Counsel