

The background of the cover features a large, light blue watermark of the Inspector General's seal. The seal depicts an eagle with wings spread, perched atop a shield with vertical stripes. Above the eagle is a semi-circle of stars. A banner draped across the eagle's chest reads "EFFICIENCY".

THE INSPECTOR GENERAL HANDBOOK

Fraud, Waste,
Abuse, and Other Constitutional
“Enemies, Foreign and Domestic”

Inspector General **JOSEPH E. SCHMITZ**
of the Department of Defense, 2002-2005

SUB TUTELA
ALTISSIMI SEMPER

Foreword by
LT. GEN. **RICHARD G. TREFRY** (Ret.)
Inspector General of the US Army, 1978-1983

THE INSPECTOR GENERAL HANDBOOK:
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“Enemies, Foreign and Domestic”

JOSEPH E. SCHMITZ
Inspector General of the Department of Defense (2002-05)

*“Whenever you inspectors general root out fraud,
waste, or abuse, you increase the confidence of the
American People in their government.”*

President George W. Bush, on the occasion of the 25th
Anniversary of the Inspector General Act of 1978

NOTE: The views expressed in this book are those of its author, and do not necessarily reflect those of the Department of Defense Office of Inspector General, an “independent and objective unit” within the Department of Defense (Inspector General Act of 1978 as amended, Section 2), or those of the United States of America. See Department of Defense Directive 5230.9, “Clearance of DoD Information for Public Release,” April 9, 1996 (“Certified Current as of November 21, 2003”), Para. 4.5. (“The Inspector General of the Department of Defense, as an independent and objective office in the Department of Defense, is exempt from the policy review provisions of this Directive.”)

<http://www.dtic.mil/whs/directives/corres/pdf/523009p.pdf>

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and Other Constitutional “Enemies, Foreign and Domestic”*

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"For everyone who does evil hates the light,
and does not come to the light, that his deeds
may not be exposed."

—Unattributed quote over the entrance door to the Office of
the Inspector General of the Department of Defense, 2002-2005

DEDICATION

To our American "First Things," including those defining principles that underlie the Declaration of Independence, the Constitution, and the Inspector General Act of 1978.

CREDITS

The author would like to acknowledge and to thank Professor Paul Goldstein of Stanford Law School, who inspired the writing of this handbook by pointing out that, "We read every day in the newspaper about IG reports and testimony, but most of us haven't the faintest idea of what an Inspector General is" (or words to that effect). The author would also like to acknowledge the invaluable assistance of Gregg Bauer in editing the manuscript for this handbook. Finally, the author would like to acknowledge the patience and support of the author's wife of 35 years, Mollie, and of our eight children—Philip James, Joseph William, Nicholas Michael, Thomas Witbeck, Mollie Elizabeth, Patrick Carl, Katherine Theresa, and Matthias Kenneth—each of whom over the years has sacrificed personally one way or another for the production and publication of this handbook.

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FOREWORD

The publication of this book fulfills a need that has existed for several years if not decades. The passage of the Inspector General Act of 1978, and the expanded concept of Inspector General in the various departments and agencies of the government as required by law, exerts an ongoing necessity for the book.

Within the Department of Defense each of the military services had long established positions and organizations of Inspectors General. As a matter of interest, there was no Inspector General at the Department of Defense level until the 1982 Amendment to the Inspector General Act of 1978 created the position.

The services objected to the establishment of such a position for a variety of reasons which resulted in the formation of a study that examined in detail the inspection, audit, and investigative establishments of each of the services. This study was called the Boutée Study. Dave Boutée was an official of Mobil Oil who was made available by that corporation for the purpose of determining how the Inspector, Investigation, and Audit functions of the services were organized and operated. This study remains today the most effective detail that delineates the Inspector General Organizations and functions in the Department of Defense.

Today when a citizen mentions the Inspector General institution, one immediately thinks of General Von Steuben and Valley Forge. This is not altogether a bad way of thinking, because the principal role of Inspector General is to be a teacher. Von Steuben filled that role superbly and probably this is his enduring legacy. In Lafayette Park, across the street from the White House, facing up Connecticut Avenue there is a statue of Von Steuben. On the plaque the tribute to

him ends as follows: “He gave military training and discipline to the citizen soldiers who achieved the independence of the United States.”

Sections 3039 and 5088 of Title 10, United States Code, spell out in law the functions of the service Inspectors General and the service auditors. In the case of the Army the law is brief and clear — “There is an Inspector General and he will determine and report on the economy and efficiency of the Army. He will also determine and report on the morale, discipline and esprit de corps of the Army.”

When the IG Act of 1978 was being considered, the intent of its supporters in Congress was to pursue cases of fraud, waste, and abuse. So — instead of becoming teachers, the inspectors became cops. And so did the auditors! Notwithstanding this legislative history, it is interesting to note that every audit published by any audit agency usually has a statement to the effect that, “This audit was conducted according to generally accepted audit standards.” This begs the question: What exactly are “generally accepted audit standards”?

Joe Schmitz has performed a singular service in writing this book, *The Inspector General Handbook: Fraud, Waste, Abuse, and Other Constitutional ‘Enemies Foreign and Domestic’*. One is reminded of the warning of President John Adams in 1798, “Our Constitution was made only for a religious and moral people. It is wholly inadequate for the government of any other.” The experience of the author as a member of the professional military, as a practicing lawyer in civilian life after his active duty service, and as the Department of Defense Inspector General for almost four years, provides a unique perspective to teach and train military and civilian leaders, inspectors, auditors and investigators to understand better their duties and responsibilities, whether in civilian or military endeavors, through better knowledge and understanding of the following:

- * The “Accountability clause” of the Constitution of the United States, and why all public servants must take an oath to support and defend that Constitution;
- * The differences between and among the military and civilian Inspectors General;
- * Various provisions of the Constitution associated with endeavors by auditors, inspectors, and investigators that re-

quire decisions every day that implicate the statutory oath of office each of those officers has sworn (or affirmed); and

- * The professional ethic that is the epitome of public service, requiring “the satisfaction of a social need” in the words of Professor Samuel Huntington.

This book serves as a wonderful textbook for those who are selected to serve as an Inspector General. It also provides a source of understanding for those who rely on the efforts of Inspectors General to maintain the standards of integrity in both public and private service. There is more to being an Inspector General than being “meaner than a junk yard dog,” the term sometimes used by congressional and other supporters of the Inspector General Act of 1978.

It is well to remember that the two principal roles of any Inspector General are to be, first of all, the confidant of the commander (or, in civilian parlance, the agency head); and, second, to be the best teacher in any organization. Those who successfully fulfill these roles become by experience and discipline the best leaders in any military and/or civilian endeavor.

Richard G. Trefry
LTG, US Army Ret.

INTRODUCTION

Every American Inspector General takes an oath of office, whether “in the civil service or uniformed services,” to “support and defend the Constitution of the United States against all enemies, foreign and domestic.”¹ Inspectors General have the opportunity to live this oath every day, whether it be by supporting the “due process of law”² in the course of an investigation, or by supporting through inspections, evaluations, audits, or oversight activities, the constitutional mandate that, “a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”³

This book reflects my experiences as the former head of DoD’s Office of Inspector General – generally considered the most expansive Inspector General organization in the world – from 2002 to 2005. The book is designed not only for teaching and training professionals assigned to Offices of Inspectors General throughout the federal government, but also for the benefit of government and corporate leaders who will need, sooner or later, to deal intelligently with an Inspector General. It is also a primer for students of American government who routinely ask themselves, whenever they hear or read about an Inspector General investigation, inspection, or report: “What in the world is an Inspector General?”

In plain English, this book explains by what authority and for what purpose an Inspector General does what he or she does on behalf of “We the People.”⁴

Appendices further provide ready reference to the legal authorities upon and through which Inspectors General perform their duties. These include the Declaration of Independence, the Constitution, the Inspector General Act of 1978, as amended, the “Quality Standards for Federal Offices of Inspector General” published by the

President's Council of Integrity & Efficiency (PCIE), and the Inspector General Reform Act of 2008.

Someone once suggested that the Inspector General of the Department of Defense should develop an "IG Creed" along the lines of the traditional "Soldiers Creed," which begins and ends with, "I am an American Soldier."⁵ Although never adopted as official policy, here is my best effort to define that creed, and in so doing, answer the question, "What in the world is an Inspector General?":

I am an Inspector General in the United States Department of Defense, serving as an independent extension of the eyes, ears, and conscience of my commander.

I am a paradigm of integrity, efficiency, accountability, and intelligent risk-taking.

Dogged in the pursuit of the truth, I neither dictate to others in authority nor turn a blind eye.

I show in myself a good example of virtue, honor, patriotism, and subordination.

I am vigilant in inspecting the conduct of those placed under me, guarding against and suppressing all dissolute and immoral practices, including but not limited to fraud, waste, and abuse of authority, as I support and defend the Constitution of the United States against all enemies, foreign and domestic. So help me God.

I am an Inspector General in the United States Department of Defense.

The case studies discussed in this book, which are mostly based on published reports, explore how IG professionals within DoD's Office of Inspector General subscribed to this creed, wittingly or unwittingly, when confronting some of the most vexing accountability challenges facing the Department of Defense and America in recent history.

Joseph E. Schmitz

Endnotes

¹ 5 U.S.C. § 3331.

² U.S. Const., Amend. V.

³ U.S. Const., Art. I, § 9.

⁴ U.S. Const., Preamble.

⁵ United States Army, "The Soldiers Creed"

<http://www.west-point.org/academy/malo-wa/inspirations/Creed.pdf>

"I am an American Soldier. I am a warrior and a member of a team. I serve the people of the United States of America and live the Army values. *I will always place the mission first. I will never accept defeat. I will never quit. I will never leave a fallen comrade.* I am disciplined, physically and mentally tough, trained and proficient in my warrior tasks and drills. I always maintain my arms, my equipment and myself. I am an expert and I am a professional. I stand ready to deploy, engage and destroy the enemies of the United States of America in close combat. I am a guardian of freedom and the American way of life. I am an American soldier.")

cf. United States Navy, "Sailors Creed"

<http://www.history.navy.mil/library/online/creed.htm>

"I am a United States Sailor. I will support and defend the Constitution of the United States of America and I will obey the orders of those appointed over me. I represent the fighting spirit of the Navy and all who have gone before me to defend freedom and democracy around the world. I proudly serve my country's Navy combat team with Honor, Courage and Commitment. I am committed to excellence and the fair treatment of all."

PART A.

WHAT IS AN INSPECTOR GENERAL?

In order to understand what an Inspector General is, one must first understand that there are two kinds of Inspectors General: military and civilian. Military Inspectors General typically focus on “discipline, efficiency, economy, morale, training, and readiness.”¹ On the other hand, the 2003 “Quality Standards for Federal Offices of Inspector General” published by the President’s Council of Integrity & Efficiency outline the “fraud, waste, and abuse”-focused statutory mission of each civilian Office of Inspector General (OIG):

OIGs have responsibility to report on current performance and accountability and to foster good program management to ensure effective government operations. The Inspector General Act of 1978 (IG Act), as amended, created the OIGs to:

1. Conduct, supervise, and coordinate audits and investigations relating to the programs and operations of their agencies;
2. Review existing and proposed legislation and regulations to make recommendations concerning the impact of such legislation and regulations on economy and efficiency or the prevention and detection of fraud and abuse;
3. Provide leadership for activities designed to promote economy, efficiency, and effectiveness, and to promote ef-

forts to reduce fraud, waste, and abuse in the programs and operations of their agencies;

4. Coordinate relationships between the agency and other Federal agencies, State and local government agencies, and non-government agencies to promote economy and efficiency, to prevent and detect fraud and abuse, or to identify and prosecute participants engaged in fraud or abuse;

5. Inform their agency heads and Congress of problems in their agencies' programs and operations and the necessity for and progress of corrective actions; and

6. Report to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law.

In addition to audits and investigations referenced in item 1 above, OIGs may conduct, supervise, and coordinate inspections, evaluations, and other reviews related to the programs and operations of their agencies.²

Military Inspectors General share these same "fraud, waste, and abuse" missions with their civilian namesakes in at least two ways: First, they too are often called upon to "conduct, supervise, and coordinate inspections, evaluation, and other reviews related to the programs and operations of their agencies"³; and, second, uniformed military Inspectors General are subject to "policy direction" of the civilian Inspector General of the Department of Defense, who as "the principal adviser to the Secretary of Defense for matters relating to the prevention and detection of fraud, waste, and abuse in the programs and operations of the Department [may] request assistance as needed from other audit, inspection, and investigative units of the Department of Defense (including military departments)."⁴ The military and civilian IG missions thus overlap, as demonstrated by the case studies in this book.⁵

According to the official biography for the Inspector General of the Department of Defense as of September 2005, “The statutorily ‘independent and objective’ Office of Inspector General employs approximately 1,300 civilian and military officers and employees, and provides oversight for another 60-80,000, primarily auditors, inspectors, and investigators, with an annual budget of more than \$200 million. It includes as subcomponents the Defense Criminal Investigative Service (DCIS) and the Defense Financial Auditing Service (DFS). Based on post-Enron independence standards, the Inspector General is the only DoD Officer qualified to issue opinions on the financial statements of the DoD, the annual budget for which exceeds \$500 billion. As the sole DoD representative on the President’s Council on Integrity & Efficiency (PCIE) and, by law, ‘the principal adviser to the Secretary of Defense for matters relating to the prevention of fraud, waste, and abuse in the programs and operations of the Department,’ the Inspector General chairs the Defense Council on Integrity & Efficiency (DCIE), the members of which include component heads of the Audit, Inspection, and Investigative units of the military departments, and the Inspectors General of the other DoD agencies and major components.”

Here is how the Department of Defense Office of Inspector General was organized in 2005, ⁶demonstrating graphically how the DoD Office of Inspector General was designed to satisfy the Inspector General’s statutory duty, among other duties, to “give particular regard to the activities of the internal audit, inspection, and investigative units of the military departments with a view toward avoiding duplication and insuring effective coordination and cooperation”⁷:

Part A Endnotes

¹ United States Department of the Army, Office of The Inspector General (OTIG) (http://wwwpublic.ignet.army.mil/IG_systems.htm) (last accessed August 30, 2010).

² President's Council on Integrity & Efficiency, "Quality Standards for Federal Offices of Inspector General," pp. 4-5 (October 2003) (footnotes omitted) (<http://www.ignet.gov/pande/standards/igstds.pdf>) (last accessed August 30, 2010); *see* United States Army, "Inspector General Systems" ("The mission of the [Office of The Inspector General] and [U.S. Army Inspector General Agency] is to inquire into, and periodically report on the discipline, efficiency, economy, morale, training, and readiness throughout the Army, to the Secretary of the Army and the Chief of Staff, Army.") (last accessed August 30, 2010); United States Air Force, Biography of The Inspector General (<http://www.af.mil/information/bios/bio.asp?bioID=6956>) (last accessed August 30, 2010) ("The Inspector General reports to the Secretary and Chief of Staff of the Air Force on matters concerning Air Force effectiveness, efficiency, and the military discipline of active duty, Air Force Reserve and Air National Guard forces."); United States Navy, "About the Naval IG" (http://www.ig.navy.mil/About_NAVINSGEN/Mission.htm) (last accessed August 30, 2010) ("Guiding Principles: To support the Department of the Navy in maintaining the highest level of integrity and public confidence we will: . . . Emphasize integrity, ethics, efficiency, discipline and readiness -- afloat and ashore."); United States Marine Corps, "Inspector General of the Marine Corps" (<http://hqinet001.hqmc.usmc.mil/ig/>) (last accessed August 30, 2010) ("Inspector General of the Marine Corps . . . mission is to promote Marine Corps combat readiness, integrity, efficiency, effectiveness, and credibility through impartial and independent inspections, assessments, inquiries, and investigations.").

³ PCIE, "Quality Standards for Federal Offices of Inspector General," *supra*, p. 5; *see, e.g.*, United States Air Force, Biography of The Inspector Gen-

eral, *supra* (“The Inspector General provides inspection policy, and oversees the inspection and evaluation system for all Air Force nuclear and conventional forces; oversees counterintelligence operations and chairs the Air Force Intelligence Oversight Panel; investigates fraud, waste and abuse; oversees criminal investigations; and provides oversight of complaints resolution programs. He also performs any other duties directed by the Secretary or the Chief of Staff. The Inspector General is responsible for two field operating agencies: the Air Force Inspection Agency and the Air Force Office of Special Investigations.”).

⁴ Inspector General Act of 1978, as amended, § 8(c)(1)&(8).

⁵ *Compare* Lieutenant Colonel Stephen Rusiecki, “Washington and von Steuben: Defining the Role of the Inspector General,” *The Journal of Public Inquiry*, p. 35 (Fall/Winter 2003) (<http://www.ignet.gov/randp/fw03jpi.pdf>) (last accessed August 30, 2010), *with* Joseph E. Schmitz, “The Enduring Legacy of Inspector General von Steuben,” *The Journal of Public Inquiry*, p. 23 (Fall/Winter 2002) (<http://www.ignet.gov/randp/fw02text.pdf>) (last accessed August 30, 2010).

⁶ <http://www.dodig.mil/IGInformation/IGPolicy/Superpolicy12-27Print.pdf>

⁷ Inspector General Act of 1978, as amended, § 8(c)(9).

CHAPTER 1. TRADITIONAL ROLES OF AN AMERICAN
INSPECTOR GENERAL: THE OTHER FOUNDING FATHER

“He gave military training and discipline to the citizen soldiers who achieved the independence of the United States.”

United States Congress, “Proceedings Upon the Unveiling of the Statue of Baron von Steuben, Major General and Inspector General in the Continental Army During the Revolutionary War” (1912)

Inspectors General, whether civilian or military, serve by tradition as an extension of their respective Commander’s Conscience, guarding a Revolutionary War legacy of integrity, training and discipline; preventing and detecting fraud, waste, and abuses of power; and ensuring constitutional accountability ultimately to “We the People of the United States.”¹ Leaders in both government and business, who may in their professional capacities need to interact with an Inspector General, should strive to become familiar with both the Inspector General’s function and historical legacy.

According to tradition as well as to modern Army doctrine, an Inspector General serves as “an extension of the eyes, ears, and conscience of the Commander.”² This tradition is closely associated with the traditional “teach & train” role of American military inspectors general. The U.S. Military Academy Inspector General website explains that an Inspector General must “*teach and train* at every opportunity.”³ This “teach & train” role is pounded into every student of the Army Inspector General School. General George Washington delegated this role to the first effective American Inspector General, Baron Frederick Wilhelm von Steuben.⁴

The Enduring Legacy of Inspector General von Steuben

According to one 20th Century Army historian, “the military services of two men, and of two men alone, can be regarded as indispensable to the achievement of American Independence. These two men were Washington and Steuben... Washington was the indispensable commander. Steuben was his indispensable staff officer.”⁵

The Steuben Monument graces Lafayette Park across from the White House in Washington, DC, along with monuments to Generals Lafayette, Rochambeau, and Kosciuszko. All four “testify to the gratitude of the American people to those from France, from Poland, and from Prussia who aided them in their struggle for national independence and existence.”⁶ Steuben’s monument proclaims an artful, albeit understated, synopsis of Inspector General von Steuben’s role in the birth of our nation: “He gave military training and discipline to the citizen soldiers who achieved the independence of the United States.” These words bespeak not only our history, but also our present and future “first things” -- principles that define who we are.

In 1942, British author C.S. Lewis outlined what he called the Principle of First and Second Things: “You can’t get second things by putting them first,” Lewis wrote, “You can get second things only by putting first things first.”⁷ Another contemporary expert explained the principle of first and second things more bluntly, using the most basic of all “second things” to make the point: “The society that believes in nothing worth surviving for -- beyond mere survival -- will not survive.”⁸

Inspector General von Steuben stood for -- and still stands for -- principles worth dying for. While “Training and Discipline” *per se* may not be “first things” for most Americans, Steuben also stood for public accountability, a “first things” American principle codified into Article I of the U.S. Constitution, which mandates that, “a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”⁹ The U.S. Congress codified this, along with the principles of “Integrity & Efficiency,” into the Inspector General Act of 1978. This is the statutory foundation for the Inspector General System, of which Steuben is the founding father.

Benjamin Franklin recruited Baron von Steuben in 1777 from the latter’s post-Prussian Army position as “Hofmarschall” (Lord Chamberlain) of a small Hohenzollern principality in what is now Southern Germany. The Steuben family motto, *Sub Tutela Altissimi*

*Semper*¹⁰ (translated, Under the Protection of the Almighty Always), might have foreshadowed the legacy of this German-American patriot: “integrity, knowledge, and loyalty to conscience.”¹¹

Ever since the Revolutionary War, America’s military Inspector General has served as *an independent extension of the eyes, ears, and conscience of the Commander*.¹² Today, all Inspectors General in the Department of Defense, including the uniformed services, serve this role; as such, the military Inspector General is a paradigm of military leadership—the only issue is whether he or she is a good paradigm.

Today’s Army Inspector General is the modern day personification of the enduring legacy of General von Steuben. The first lesson plan of the Army Inspector General School is devoted to General von Steuben and the entire three-week course is permeated with the “Von Steuben Model.” Von Steuben is the role model for every one of the 239 principal Army Inspectors General. This is a veritable “IG-Network” of senior officers serving full time in assistance, inspection, non-criminal investigation, and “teach & train” functions at every major command around the world.

Modern day military Inspectors General serve in a variety of uniforms: the 239 principal Army IGs mentioned above; 150 senior Air Force IGs and an additional 2,000 counterintelligence and criminal investigative professionals report to the Air Force Inspector General; the Navy and Marine Corps together deploy more than 70 IGs in similar functions. All three service Inspectors General are three-star flag and general officers; the Marine Corps IG has two-stars. By statute, however, “No member of the Armed Forces, active or reserve, shall be appointed Inspector General of the Department of Defense.”¹³ This Senate-confirmed civilian officer is responsible for approximately 1,250 professional auditors, inspectors, and investigators, including 30 uniformed military officers.

Steuben is also a role model for the 69 Presidentially-appointed civilian Inspectors General throughout the federal agencies, roughly half of whom are Senate-confirmed. The Inspector General Reform Act of 2008 amended the Inspector General Act of 1978 to create the Council of the Inspectors General on Integrity and Efficiency (CIGIE), combining what were formerly known as the President’s Council on Integrity and Efficiency (PCIE) and the Executive Council on Integrity and Efficiency (ECIE).¹⁴ According to the CIGIE *Progress*

Report to the President for FY 2008, this community of, “more than 12,300 employees and 69 OIGs conducted audits, inspections, evaluations, and investigations, which resulted in:

- * \$14.2 billion in potential savings from audit recommendations;
- * \$4.4 billion in potential savings from investigative receivables and recoveries;
- * 6,647 indictments and criminal informations;
- * 6,866 successful prosecutions;
- * 1,206 successful civil actions;
- * 4,986 suspensions or debarments;
- * 5,712 personnel actions;
- * 337,916 hotline complaints processed;
- * 6,935 audit, inspection, and evaluation reports issued; and
- * 32,143 investigations closed.¹⁵

In addition to the Federal CIGIE community, a robust non-governmental “Association of Inspectors General” caters to a multitude of “Inspectors General at all levels of government [who] are entrusted with fostering and promoting accountability and integrity in government.”¹⁶

General von Steuben is best known for military training, discipline, and accountability. But he was also a man of integrity, and he had a deep aversion to fraud and waste: “Prolonged study of his official correspondence and other military papers shows them to be models of veracity and scientific precision.”¹⁷ As a result, this historical paradigm of military leadership has also become a role model for civilian IGs.

According to the official history of the Army Inspectors General, “Steuben, beginning work as an advisor to [General George] Washington, proclaimed the money department ‘a mere farce,’ and said that paying quartermaster agents a commission according to what they spent was a prescription for waste.”¹⁸

Integrity & Efficiency

“Although Maj. Gen. Friedrich W. A. von Steuben was preceded briefly by three Inspectors General, he is credited with establishing the high standards desired by Washington—integrity, knowledge, and loyalty to conscience—that have been the measure of the inspection system ever since.”¹⁹

Von Steuben served Prince Joseph Wilhelm von Hohenzollern-Hechingen for 13 years before being recruited by Benjamin Franklin. According to Henning-Hubertus Baron von Steuben, the current head of the Von Steuben Family in Germany, those years serving the Prince “were the most difficult times of his life,” and profoundly impacted his attitudes.²⁰ The modern day Baron explained, “Because the Prince was a spendthrift, Steuben tried everything financially to save the principality. . . . This experience shaped his understanding of honesty, probity, efficiency and truthfulness. These principles he later brought to the American Army, above all to his training of its military commanders.”²¹

Inspector General von Steuben wrote “invariable rules for the order and discipline of the troops,”²² into a military drill manual approved by Congress in March 29, 1779. In this manual he admonished that “the commanding officer of a regiment must preserve the strictest discipline and order in his corps, obliging every officer to a strict performance of his duty, without relaxing in the smallest point; punishing impartially the faults that are committed, without distinction of rank or service.”²³

Training

Inspector General von Steuben’s most well known legacy, “Military Instruction,” is enshrined on his monument in Lafayette Park. Upon arrival at Valley Forge in 1778, he confronted an American Army in disarray. His first task was to train General Washington’s own guard.

Having proved his value as a military trainer to Washington, Steuben’s acumen for training was soon applied to the entire army. According to the U.S. Army’s official history of the Inspectors General, “Steuben shocked American officers by personally teaching men the manual of arms and drill, but his success helped to convince them. . . .

With Washington's support, Steuben set out to involve officers in training, making the subordinate inspectors—a body of officers drilled by Steuben—his agents."²⁴

Steuben's success as a drillmaster was ambitiously adapted to the immediate task at hand, unconventionally pragmatic, and so impressive that, "Even stodgy, conservative [Continental Army General Horatio] Gates approved wholeheartedly. 'Considering the few Moments that is left us for this necessary Work,' he told Steuben, 'I should rather recommend the Discipline of the Leggs, than the Firelocks, or the hands; the preservation of Order at all Times is essentially necessary. It leads to Victory, it Secures Retreat, it saves a Country'."²⁵

According to President William Howard Taft, "The effect of Steuben's instruction in the American Army teaches us a lesson that is well for us all to keep in mind, and that is that no people, however warlike in spirit and ambition, in natural courage and self-confidence, can be made at once, by uniforms and guns, a military force. Until they learn drill and discipline, they are a mob, and the theory that they can be made an army overnight has cost this Nation billions of dollars and thousands of lives."²⁶

Discipline

According to the 1902 Proceedings in Congress, "[General von Steuben] made the patriotic army a disciplined and effective force—the drilled corps that ultimately won the war for freedom. He worked incessantly to do this under the greatest difficulties and the credit for it is all his own."²⁷ When the Pentagon commissioned its "Soldier-Signers of the Constitution Corridor" in 1986, the following signage accompanied the central oil painting of Washington at Valley Forge, surrounded by his mounted staff and tattered soldiers:

During the coming months they would suffer from shortages of food and clothing, and from the cold, but under the tutelage of Washington and Major General Frederick Steuben would gain the professional training necessary to become the equal of the British and Hessians in open battle.

Accountability

Parallel with his emphasis on training and drilling the troops, General von Steuben maintained that his inspectors “must depart from purely military inspection and must also examine financial accounts.”²⁸ Steuben described what he encountered on arrival at Valley Forge in 1778, and how he established a system to eliminate wasteful losses of muskets, bayonets, and other Revolutionary War “accouterments”:

General Knox assured me that, previous to the establishment of my department, there never was a campaign in which the military magazines did not furnish from five thousand to eight thousand muskets to replace those which were lost The loss of bayonets was still greater. The American soldier, never having used this arm, had no faith in it, and never used it but to roast his beefsteak, and indeed often left it at home. This is not astonishing when it is considered that the majority of the States engaged their soldiers for from six to nine months. Each man who went away took his musket with him, and his successor received another from the public store. No captain kept a book. Accounts were never furnished nor required. As our army is, thank God, little subject to desertion, I venture to say that during an entire campaign there have not been twenty muskets lost since my system came into force. It was the same with the pouches and other accouterments, and I do not believe that I exaggerate when I state that my arrangements have saved the United States at least eight hundred thousand French livres a year.²⁹

The state of affairs upon his arrival at Valley Forge, according to a Congressional publication, indicated “[t]here were 5,000 muskets more on paper than were required, yet many soldiers were without them. Steuben’s first task was, therefore, to inaugurate a system of control over the needs and supply of arms, and, in course of time, he succeeded in carrying this control to such perfection that, on his last inspection before he left the Army, there were but three muskets missing, and even those were accounted for.”³⁰

The Constitution ratified by Congress after the successful conclusion of the Revolutionary War still requires that “a regular Statement and Account of the Receipts and Expenditure of all public Money shall be published from time to time.”³¹ This requirement of public accountability is consistent with the subsequently enacted checks on abuses of power by the national government enacted in the Bill of Rights. As explained in the 1789 Preamble to that Bill of Rights, the first ten Amendments were designed “to prevent misconstructions or abuse of its power.”³² As codified in the final article of the Bill of Rights, now known as the Tenth Amendment, the purpose of the Bill of Rights was to prevent abuses of “powers... delegated to the United States by the Constitution.”³³

Congress subsequently codified these same constitutional principles—200 years after confirming Baron von Steuben as George Washington’s Inspector General—in the Inspector General Act of 1978, which created “independent and objective units” in most major federal agencies “to provide leadership and coordination and recommend policies for activities designed (A) to promote economy, efficiency, and effectiveness in the administration of; and (B) to prevent and detect fraud and abuse.”³⁴

Steuben’s Revolutionary War legacy is exemplified in the following divisions within the modern Army Inspector General system:

Assistance Division: conducts, oversees, or assigns the responsibility for investigations and inquiries into misconduct of non-senior Army officials (Army personnel in the grade of COL/GM 15 and below) in response to allegations of impropriety, issues of systems deficiency, complaints, grievances, and matters of concern or requests for assistance received from, or presented by, soldiers, family members, retirees, former soldiers, Department of the Army (DA) Civilians, or other individuals concerned with the activities of the Army.

Inspections Division: inspect, teach, assess, report, and follow up matters affecting mission performance and the discipline, efficiency, economy, morale, training and readiness throughout the Army.

Investigations Division: conduct investigations concerning allegations made against Active and Reserve Component general officers and SES civilians and other ranks as directed.

Intelligence Oversight Division: conduct inspections and non-criminal investigations of Army sensitive activities which include Special Access Programs and other activities as prescribed in AR 380-381.³⁵

The Naval, Marine Corps, and Air Force Inspectors General have slightly different albeit similar roles and organizations.³⁶ Each of the three military service Inspectors General identify “independence” as a guiding principle:

[Army] IGs operate within an environment consisting of the commander, the commander's soldiers, family members, DA civilian employees, retirees, and other civilians needing assistance with an Army matter and the IG system. They must be sufficiently independent so that those requesting IG assistance will continue to do so, even when the complainant feels that the commander may be the problem. Therefore, IGs must maintain a clear distinction between being an extension of the commander and their sworn duty to serve as fair and impartial fact finders and problem solvers. Commanders must also understand this clear distinction for their IGs to be effective.³⁷

[Naval IG] Policy:] All inquiries into matters affecting the readiness, integrity, discipline, and efficiency of the [Department of the Navy] shall be conducted in an independent and professional manner, without command influence, pressure, or fear of reprisal from any level within [the Department of the Navy].³⁸

[The Marine Corps IG official] mission is to promote Marine Corps combat readiness, integrity, efficiency, effectiveness, and credibility through impartial and independ-

ent inspections, assessments, inquiries, and investigations.³⁹

All [Air Force] IGs must maintain a clear distinction between being an extension of the commander and their sworn duty to serve as fair, impartial and objective fact-finders and problem solvers. They must be sufficiently independent so that those complainants requesting IG help will continue to do so, even when they feel that the commander may be the problem. Commanders must support this clear distinction for their IGs to be effective.⁴⁰

Especially in military organizations, the principle of independence so fundamental to any Office of Inspector General,⁴¹ must be tethered to the Commander for whose eyes, ears, and conscience the IG serves as an extension. This tethered independence, which is discussed more fully later in this book, is fully consistent with the Inspector General Act's requirement that an Inspector General report both to the head of his or her establishment and to the Congress, in that order.⁴²

CASE STUDY: LIBERTY DAY PROJECT

Among the duties of the Deputy Senior Inspector (aka Inspector General) of the Naval Reserve Intelligence Command (NRIC), the position in which the author of this book served until being nominated to be the Inspector General of the Department of Defense, are periodic "Intelligence Oversight" inspections of 13 Reserve Intelligence Areas across the country. During Intelligence Oversight inspections, starting in October 1999, as NRIC Inspector General I routinely conducted *ad hoc* training that would address questions about not only what the Intelligence Oversight laws prohibit but, more fundamentally, why those laws allow naval reserve intelligence professionals -- and other federal officials -- to "collect, retain or disseminate information concerning United States persons only in accordance with procedures established by the head of the agency concerned and approved by the Attorney General."⁴³

Answers to the “why” questions about Intelligence Oversight laws often turned on the Bill of Rights, and led to admonitions to remember that naval reserve officers serve as officers of a national government that by design is limited in power. Many of the abuses of power that led to the modern Intelligence Oversight laws are reminiscent of the abuses enumerated in the Declaration of Independence.

That is why, even today, state officers serving in our national guard units, at least while serving as state officer, retain state “police powers” unless proscribed; the opposite presumption applies for the Army, Naval, and Air Forces reserve units, which by constitutional design have no police powers except those that have been “delegated” to the national government in the Constitution itself. The final article of the Bill of Rights reminds us, “The Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People.”⁴⁴

On account of my experience teaching and training naval reserve intelligence professionals about the Intelligence Oversight laws, I regularly carried around with me a pocket-sized compilation of both the Declaration of Independence and the United States Constitution. At one point, I started buying in bulk the Cato Institute pocket-sized compilation, for \$1 each, and giving them away to naval reserve intelligence professionals who showed an interest in learning about the Declaration of Independence and the Constitution.

Shortly after my Senate confirmation as Inspector General of the Department of Defense, I asked my new Office of Inspector General staff to price out a pocket-sized version of an official DoD electronic compilation that the Secretary of Defense had approved while I was waiting for Senate confirmation (which as of the drafting of this book was still posted at <http://www.defenselink.mil/pubs/liberty.pdf>). I provided the DoD Office of Inspector General staff with the \$1 Cato Institute version as an example of what I had in mind.

The first price estimate for the DoD OIG to contract out an official pocket-sized version of the official DoD electronic compilation (already posted on the DoD website) came in at \$12 a piece. Needless to say, I did not authorize such a blatantly excessive cost, which would have been a waste of public funds. I did, however, persist in researching precisely why the OIG staff would have been given such an outrageous price—reminiscent of the proverbial \$200 toilet seat.

In the end, with a little coaching, the DoD OIG staff found a government printing contractor who could produce the pocket-sized booklet, emblazoned with the official seal of the Department of Defense on the front as well as the 800 number for the DoD Inspector General "Hotline" on the last page, for about 75 cents per "Liberty Day" booklet.

For my entire tenure as Inspector General, I utilized the pocket-sized Liberty Day booklet as an Inspector General "teach and train" handout -- in lieu of the traditional military command "challenge coin." The final page of the booklet was an "Inspector General Reference Guide," which explains the modern Inspector General's statutory duties in the context of the traditional role of an American Inspector General. It also promoted the "chain of command" as the primary avenue to report apparent violations of ethical standards and/or the law. Only if an impediment prevents utilizing the chain of command should one report allegations to the Inspector General.

Following is the text of the official Department of Defense announcement of the Liberty Day project:



U.S. Department of Defense
Office of the Assistant Secretary of Defense (Public Affairs)

News Release

On the Web:

<http://www.defense.gov/Releases/Release.aspx?ReleaseID=3275>
Media contact: +1 (703) 697-5131/697-5132

Public contact:

<http://www.defense.gov/landing/comment.aspx>
or +1 (703) 428-0711 +1

IMMEDIATE RELEASE

**No. 133-02
March 19, 2002**

SECRETARY OF DEFENSE RUMSFELD HONORS LIBERTY DAY

To recognize Liberty Day, Secretary of Defense Donald H. Rumsfeld today issued a compilation of key U.S. documents -- the Declaration of Independence and the Constitution -- for use by servicemembers and employees of the Department of Defense. This collection also includes excerpts from significant legislation calling for exemplary conduct by all military leaders and avoidance of fraud, waste and abuse of authority within the Department.

In his statement, Rumsfeld indicated the document is to encourage all who serve in the Department of Defense to examine these words "which together form the basis for our freedom and prosperity."

The Secretary expressed his hope this compilation will serve as a constant reminder of the sacred oath required by Congress for every individual elected or appointed to office in the civil or uniformed services:

"that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God."

Rumsfeld's Liberty Day proclamation and the combined Declaration of Independence/U.S. Constitution document are on the worldwide web at <http://www.defenselink.mil/pubs/liberty.pdf>.

The U.S. Congress designated March 16 as Liberty Day, the birthday of James Madison, fourth president of the United States. According to the October 2000 Congressional Joint Resolution, Madison was the major author of the Virginia Plan, "model and the basis for that United States Constitution that emerged from the Constitutional Convention in 1787."

Chapter Review Questions:

- 1** What are the essential differences between the military and civilian Inspectors General? In what ways are they similar?
- 2** By what authority would any Inspector General authorize the expenditure of public money to purchase pocket-sized compilations of the Declaration of Independence and the Constitution?
- 3** By what authority and for what purpose would a whistleblower ever bypass the “chain-of-command” and report alleged waste, fraud, or abuse, directly to the Inspector General?

Chapter 1 Endnotes

¹ U.S. Constitution, Preamble.

² Army Regulation 20-1, Inspector General Activities and Procedures 5 (Department of the Army, 2002); Army Inspector General Website, "THE IG AND THE COMMANDER RELATIONSHIP" ("IGs serve as extensions of their commander in the following three ways: [1] IGs extend the commander's eyes and ears[; 2] IGs extend the commander's voice[; and 3] IGs extend the conscience of the commander.") (http://wwwpublic.ignet.army.mil/IG_systems.htm) (last accessed August 30, 2010).

³ Office of the Inspector General, United States Military Academy, "Inspector General Mission Essential Task List (METL)" (emphasis in original) (<http://www.usma.edu/ig/metl/default.htm>) (last accessed August 30, 2010).

⁴ See Army Inspector General Website, "History of the U.S. Army Inspector General" (http://wwwpublic.ignet.army.mil/History_of_the_IG.htm) (last accessed August 30, 2010); Joseph Whitehorne, "Von Steuben's Legacy," *The Inspectors General of the United States Army, 1903-1939*, at 4 (Office of the Inspector General & Center of Military History, United States Army, 1998); Lieutenant Colonel Stephen M. Rusiecki, "Washington and von Steuben: Defining the Role of the Inspector General," *The Journal of Public Inquiry*, p. 35 (Fall/Winter 2003) (<http://www.ignet.gov/randp/fw03jpi.pdf>) (last accessed August 30, 2010); Joseph Schmitz, "The Enduring Legacy of Inspector General von Steuben," *The Journal of Public Inquiry*, p. 23 (Fall/Winter 2002) (<http://www.ignet.gov/randp/fw02text.pdf>) (last accessed August 30, 2010).

⁵ John Palmer, *General von Steuben 1* (Yale University Press, 1937).

⁶ William Howard Taft, "Address of the President of the United States," reprinted in *Proceedings Upon the Unveiling of the Statue of Baron von Steuben, Major General and Inspector General in the Continental Army During the Revolutionary War 49* (Joint Committee on Printing, 1912).

⁷ C.S. Lewis, "Time and Tide," reprinted in *GOD IN THE DOCK* (1942) ("You can't get second things by putting them first; you can get second things only by putting first things first. . . . Civilizations have pursued a host of

different values in the past: God's Will, honour, virtues, empire, ritual, glory, mysticism, knowledge. The first and most practical question for ours is to raise the question, to care about the *summum bonum*, to have something to live for and to die for, lest we die.”).

⁸ Peter Kreeft, *A Refutation of Moral Relativism: Interviews With An Absolutist* 133 (1999).

⁹ U.S. Const. art. I, sec. 9.

¹⁰ Henning-Hubertus Baron von Steuben, *Chronik der Familie von Steuben* 4 (1998).

¹¹ Joseph Whitehorne, “Von Steuben’s Legacy,” *The Inspectors General of the United States Army, 1903-1939*, at 4 (Office of the Inspector General & Center of Military History, United States Army, 1998).

¹² Army Regulation 20-1, *Inspector General Activities and Procedures* 5 (Department of the Army, 2002).

¹³ Inspector General Act of 1978, as amended, Section 8.

¹⁴ See Homepage, Council of the Inspectors General on Integrity and Efficiency (www.ignet.gov) (last accessed August 30, 2010).

¹⁵ CIGIE, “A Progress Report to the President: Fiscal Year 2008” (<http://www.ignet.gov/randp/fy08apr.pdf>) (last accessed August 30, 2010).

¹⁶ Association of Inspectors General, *Principles and Standards for Officers of Inspector General 3* (May 2001) (<http://www.inspectorsgeneral.org>) (last accessed August 30, 2010).

¹⁷ Palmer, *General von Steuben*, *supra*, at 5.

¹⁸ David Clary and Joseph Whitehorne, *The Inspectors General of the United States Army, 1777-1903*, 37 (U.S. Government Printing Office, 1987).

¹⁹ Whitehorne, “Von Steuben’s Legacy,” *The Inspectors General, 1903-1939*, *supra*, at 4.

²⁰ Henning-Hubertus Baron von Steuben, *Chronik der Familie von Steuben*, *supra*, at 73.

²¹ Henning von Steuben, Translated E-mail to Joseph E. Schmitz, December 1, 2002.

²² “In Congress, 29th March, 1779,” reprinted in Baron von Steuben’s Revolutionary War Drill Manual: A Facsimile Reprint of the 1794 Edition A2 (New York, Dover Publications, 1985).

²³ Frederick William Baron von Steuben, Revolutionary War Drill Manual: A Facsimile Reprint of the 1794 Edition, *supra*, at 128.

²⁴ Clary and Whitehorne, The Inspectors General, 1777-1903, *supra*, at 40.

²⁵ Horatio Gates to Steuben, March 25, 1778, in Edith von Zemenszky, ed., *The Papers of General Friedrich von Steuben, 1777-1794*, Microfilm, 7 reels, Millwood, NY, 1976-94, 1:77, quoted in Paul Lockhart, *THE DRILLMASTER OF VALLEY FORGE: THE BARON DE STEUBEN AND THE MAKING OF THE AMERICAN ARMY*, pp. 109-10 (2008).

²⁶ Proceedings Upon the Unveiling of the Statue of Baron von Steuben, *supra*, at 50.

²⁷ United States Congress, “Proceedings in Congress Relating to Baron Steuben,” July 1, 1902, reprinted in Proceedings Upon the Unveiling of the Statue of Baron von Steuben, *supra*, at 154.

²⁸ Clary and Whitehorne, The Inspectors General, 1777-1903, *supra*, at 37.

²⁹ Friedrich Kapp, *The Life of Frederick William von Steuben, Major General in the Revolutionary Army 117* (New York, Mason Brothers, 1859) (quoting “Steuben, MS. Papers, vol. xi.”).

³⁰ “Address of Hon. Richard Bartholdt” (“Author of the Steuben Statue Legislation”), reprinted in Proceedings Upon the Unveiling of the Statue of Baron von Steuben, *supra*, at 22-23.

³¹ U.S. Constitution, Article I, Section 9.

³² Bill of Rights, Preamble.

³³ U.S. Constitution, Amendment X.

³⁴ Inspector General Act of 1978, as amended, Section 2.

³⁵ United States Army, “The U.S. Army Inspector General Agency” (http://wwwpublic.ignet.army.mil/IG_systems.htm) (last accessed August 30, 2010).

³⁶ See “About the Naval IG”

http://www.ig.navy.mil/About_NAVINSGEN/About_NAVINSGEN.htm (“The Office of the Naval Inspector General is located at the Washington Navy Yard and is comprised of the following offices and divisions: . . . Investigations & Assistance[;] Inspections/Command Climate/Area Visits[;] Intelligence Oversight/ Security[;] Installations/Environment/OSH[;] Audit[;] Legal[; and] Medical and Dental.”); United States Marine Corps, “Inspector General of the Marine Corps” (<http://hqinet001.hqmc.usmc.mil/ig/>) (last accessed August 30, 2010); United States Air Force, Air Force Instruction (AFI) 90-301, “Inspector General Complaints Resolution,” August 23, 2011, incorporating Change 1 of June 6, 2012 (<http://www.af.mil/shared/media/document/AFD-120228-072.pdf>)

³⁷ United States Army, Office of the Inspector General, “Welcome” (<http://wwwpublic.ignet.army.mil/Welc.htm>)

³⁸ SECNAV INSTRUCTION 5430.57G, “Mission and Functions of the Naval Inspector General,” ¶5, Dec.29, 2005 (<http://doni.daps.dla.mil/Directives/05000%20General%20Management%20Security%20and%20Safety%20Services/05-400%20Organization%20and%20Functional%20Support%20Services/5430.57G.pdf>) (last accessed August 30, 2010).

³⁹ United States Marine Corps, “Inspector General of the Marine Corps” (<http://hqinet001.hqmc.usmc.mil/ig/>) (last accessed August 30, 2010).

⁴⁰ AFI 90-301, “Inspector General Complaints Resolution,” ¶1.2.3, August 23, 2011 (<http://www.af.mil/shared/media/document/AFD-120228-072.pdf>) (last accessed November 25, 2012).

⁴¹ See PCIE, “Quality Standards for Federal Offices of Inspector General,” *supra*, p. 6 (“*Independence* is a critical element of objectivity. Without independence, both in fact and in appearance, objectivity is impaired.”).

⁴² See Inspector General Act of 1978, as amended, § 5 (“Semiannual Reports”); see generally Lieutenant Colonel Stephen M. Rusiecki, “Washington and von Steuben: Defining the Role of the Inspector General,” *The Journal of Public Inquiry*, p. 35 (Fall/Winter 2003) (<http://www.ignet.gov/randp/fw03jpi.pdf>) (last accessed August 30, 2010).

⁴³ Executive Order 12333 of December 4, 1981, “United States Intelligence Activities,” ¶ 2.3.

⁴⁴ U.S. Const., Amend. X.

CHAPTER 2. INSPECTOR GENERAL ACT OF 1978: STRADDLING THE SEPARATION OF POWERS

*“Whenever you inspectors general root out fraud,
waste, or abuse, you increase the confidence of the American
People in their government.”*

President George W. Bush, on the occasion of the 25th Anniversary of the Inspector General Act of 1978 (2003).

The first thing any Senate-confirmed nominee must do, after confirmation and prior to assuming his or her office, is to swear (or affirm) the statutory oath of office. This is no mere formality, as the Constitution itself requires that, “all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution.”¹ In implementing this constitutional mandate, Congress has prescribed the following text for every “individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services”:

I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.²

As every Inspector General serves in “an office of honor,” all IGs take the same oath.

IG Independence

Inspector General principles require that, “The Inspector General and OIG staff must be free both in fact and appearance from personal, external, and organizational impairments to independence.”³ Such independence is inherent to the “value added” by an Inspector General within any organization.

As explained in the previous chapter, all of the uniformed military Inspectors General identify “independence” as a guiding principle. This independence principle, which is discussed throughout this book, is fully consistent with the constitutional separation-of-powers and with the Inspector General Act’s duty that an Inspector General report both to the head of his or her establishment and to the Congress, in that order.⁴

Whether the head of an organization is a cabinet officer, a military commander, or a chief executive officer, the operational leader should never have to question the independence and objectivity of factual findings and recommendations by the Inspector General.

How Inspectors General Fit Within the Constitutional Separation of Powers

Most American Inspectors General serving in the federal government, whether military or civilian, are appointed by the President as officers of the Executive Branch. To the extent an Inspector General is obligated by law to report to Congress, it is only after he or she has already reported to the head of the Executive Branch establishment to which he or she is assigned.

In order to understand how Inspectors General fit within the constitutional separation-of-powers, it is fundamental to understand that the separation-of-powers is part of the Founders’ master plan to avoid abuses of power by government officials. Because Inspectors General are in the business of holding other people accountable, all Inspectors General, whether military or civilian, must be vigilant in avoiding any abuses of power within their own respective Offices, including but not limited to those “independent and objective units” of

the Executive Branch establishments identified in the Inspector General Act of 1978, as amended.

The constitutional “separation-of-powers” is not mentioned by name in the Constitution. It is manifest in the structure of the Constitution itself, wherein Legislative powers and restrictions are addressed in Article I, Executive powers and restrictions are addressed in Article II, and Judicial powers and restrictions are addressed in Article III.

The Founding Fathers manifestly did not intend the constitutional separation-of-powers to be watertight. For example, the Office of the Vice President of the United States is described within in the Legislative Branch Article (Article I, Section 3). Likewise, the Judicial Branch Article (Article III) concludes with a description of a legislative power: “The Congress shall have the power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.”

There is nothing inherently unconstitutional, therefore, about Congress’ mandate in Section 2 of the Inspector General Act of 1978, as amended, that Inspectors General “provide a means for keeping the head of the establishment and the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action.”⁵

By What Authority and For What Purpose Inspectors General Do What They Do?

Inspectors General derive their authority from the Constitution’s own “Accountability Clause” in Article I, Section 9: “a regular statement and account of receipts and expenditures of all public money shall be published from time to time.” This mandate, while prescribed in Article I, does not specify the subject of its passive verb, “shall be published.” The Founding Fathers apparently intended this constitutional duty of accountability to straddle all three branches of our national government: Legislative (Article I); Executive (Article II); and Judicial (Article III).

Implementing legal guidance, whether through statute, regulations, directives, policy memoranda, or otherwise, is typically the way

governmental entities “flesh out” the more general mandates of constitutional and statutory law.

The Inspector General Act of 1978, as amended, contains more than 20 such duties to be carried out by civilian Executive Branch officials who have been confirmed by the United States Senate. Each Inspector General Act duty is typically preceded by the words, “the Inspector General shall.” The “purpose” section of the Inspector General Act clarifies Congress’ expectation that every Inspector General identified by establishment in the Inspector General Act has a duty to provide, “leadership and coordination [in] activities designed (A) to promote economy, efficiency, and effectiveness in the administration of, and (B) to prevent and detect fraud and abuse in, . . . programs and operations” of his or her respective establishment. The statutory delineation of establishments includes most cabinet departments and federal agencies.⁶

The only mandatory operational functions of every statutory Office of Inspector General (OIG) are, “to conduct and supervise audits and investigations relating to the programs and operations of the establishments listed in section 12(2) [of the Inspector General Act].”⁷ In addition to these operational duties, each OIG is obligated by law:

to provide leadership and coordination and recommend policies for activities designed (A) to promote economy, efficiency, and effectiveness in the administration of, and (B) to prevent and detect fraud and abuse in, such programs and operations; and

to provide a means for keeping the head of the establishment and the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action.”⁸

Many of the larger establishments have additional specified Inspector General duties tailored to the complexity of the establishment. For example, “In addition to the other duties and responsibilities specified in this Act, the Inspector General of the Department of Defense shall—

(1) be the principal adviser to the Secretary of Defense for matters relating to the prevention and detection of fraud, waste, and abuse in the programs and operations of the Department;

(2) initiate, conduct, and supervise such audits and investigations in the Department of Defense (including the military departments) as the Inspector General considers appropriate;

(3) provide policy direction for audits and investigations relating to fraud, waste, and abuse and program effectiveness;

(4) investigate fraud, waste, and abuse uncovered as a result of other contract and internal audits, as the Inspector General considers appropriate;

(5) develop policy, monitor and evaluate program performance, and provide guidance with respect to all Department activities relating to criminal investigation programs;

(6) monitor and evaluate the adherence of Department auditors to internal audit, contract audit, and internal review principles, policies, and procedures;

(7) develop policy, evaluate program performance, and monitor actions taken by all components of the Department in response to contract audits, internal audits, internal review reports, and audits conducted by the Comptroller General of the United States;

(8) request assistance as needed from other audit, inspection, and investigative units of the Department of Defense (including military departments); and

(9) give particular regard to the activities of the internal audit, inspection, and investigative units of the military

departments with a view toward avoiding duplication and insuring effective coordination and cooperation.⁹

Between April 2002 and September 2005, the DoD OIG issued approximately 50 policy memoranda, most of which addressed the manner in which that particular Office of Inspector General carried out its statutory duties. The most ambitious of these policy memoranda was formal guidance on implementing each of the explicit statutory mandates in the Inspector General Act. The goal was to explain to the American people precisely how, each time Congress had used the words, "The Inspector General shall," the DoD OIG carries out that mandate.

Obligation to Prescribe and Promulgate Rules

In the absence of more formal rulemaking, the publication of policy memos fulfills a basic requirement of transparency and good governance. After all, if a leader is to hold his or her people accountable to standards of conduct, principles of due process (and fairness) require that those people be notified in advance of the standard to which they will be held accountable.

A practical manifestation of these due process principles arises in the context of judicial review of agency administrative action. The United States Supreme Court calls this the "simple but fundamental rule of administrative law" that "the agency must set forth clearly the grounds on which it acted":

For "[w]e must know what a decision means before the duty becomes ours to say whether it is right or wrong." And we must rely on the rationale adopted by the agency if we are to guarantee the integrity of the administrative process. Only in that way may we "guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." . . . This is essentially a corollary of the general rule requiring that the agency explain the policies underlying its action. A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress.¹⁰

In 1765, Sir William Blackstone explained these enduring principles within the context of the four essential properties of all man-made law (as opposed to Divine Law and Natural Law):

[M]unicipal or civil law [is] the rule by which particular districts, communities, and nations are governed; . . . Let us endeavour to explain its several properties, . . . first, it is a rule; not a transient sudden order from a superior to or concerning a particular person; but something permanent, uniform, and universal. . . . It is likewise 'a rule prescribed.' But farther: municipal law is 'a rule of civil conduct prescribed by the supreme power in a state.' Wherefore it is requisite to the very essence of a law, that it be made by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other.¹¹

These are the enduring four properties of all man-made laws in the Anglo-American tradition of transparent government.¹² Inherent within this tradition is the obligation that the prescribed laws be well promulgated. In describing this obligation, Sir William Blackstone wrote that the government must promulgate its laws in the "most perspicuous manner" available, "not like [Emperor] Caligula, who . . . wrote his laws in very small character, and hung them up upon high pillars, the more effectually to ensnare the people."¹³

These basic principles of due process (and fairness) manifest themselves in American jurisprudence through, among other things, the two *ex post facto* clauses of the United States Constitution. The first *ex post facto* clause is in Article 1, Section 9, which is a general prohibition against passing laws after the fact, which Sir William Blackstone wrote was "even more unreasonable than" the law promulgation methodology of arguably the most infamous Roman despot, Emperor Caligula.¹⁴ It wasn't enough for our Founding Fathers to say there shall be no *ex post facto* laws. They felt obligated to reemphasize that prohibition one section later, in Section 10, as applied to the States.

An IG-specific practical manifestation of these principles of transparent governance, which the author of this book implemented while serving as Inspector General of the Department of Defense, was in the context of investigating allegations against senior officials: "if it takes [the OIG] lawyers more than a week to tell [the IG] what the

legal standard is, [the IG] will not hold anybody else accountable to that standard -- because that would be a Caligula-esque method of enforcing laws. . . . It's not part of the American system of transparent and accountable government."¹⁵

On November 7, 2003, the DoD OIG published on its website the first-ever compilation of official guidance on how each of the statutory mandates in the Inspector General is carried out. As of writing this book, that compilation (updated in December 2004) is still posted on the website.¹⁶ It is first and perhaps the only such compilation thus far to be completed.

CASE STUDY: UNRESOLVED HONOR SCANDAL AND THE STATUTORY DUTY OF EXEMPLARY CONDUCT

Featured prominently in the Introduction to the Department of Defense Liberty Day booklet described in Chapter One is John Adams' 1775 "Exemplary Conduct" leadership standard, reenacted by Congress in 1997 as a tool to combat "dissolute and immoral practices" within the military. The 1997 reenactment is codified separately for each of the military departments, but for all practical purposes is verbatim from the 1775 Naval original (tailored, of course, to the Army and the Air Force):

ART. 1. The Commanders of all ships and vessels belonging to the THIRTEEN UNITED COLONIES, are strictly required to shew in themselves a good example of honor and virtue to their officers and men, and to be very vigilant in inspecting the behaviour of all such as are under them, and to discountenance and suppress all dissolute, immoral and disorderly practices; and also, such as are contrary to the rules of discipline and obedience, and to correct those who are guilty of the same according to the usage of the sea.¹⁷

During the 2001 DoD Transition Team interview, the head of the Transition Team said to the Inspector General candidate, "The bad news is that the position has been vacant for two years and the office is in the midst of a nationally publicized honor scandal. The good news," he continued, "is that by the time your get confirmed by the Senate,

the GAO will have come in and will tell you where all the dead bodies are buried.”¹⁸

In the end, the bad news got worse and the good news never happened.

This nationally publicized honor scandal was laid out by Senator Charles Grassley (R-IA) in a May 21, 2001, letter to Defense Secretary Donald Rumsfeld, in which the Senator announced, “I am writing to inform you that I am conducting an oversight investigation of allegations that 12 to 15 officials in the Inspector General's (IG) office *tampered with audit materials* to alter the outcome of a Peer Review required by law. This is a major integrity violation” as a result of which, according to Senator Grassley, “The IG's office has lost its accreditation as a government audit authority.”¹⁹

The press coverage of the honor scandal only addressed its most obvious manifestations: “a dozen IG auditors were involved in doctoring audit working papers so they could improve their performance in a peer review.”²⁰ The Associate Press reported that the DoD Office of Inspector General, which “investigates fraud and abuse inside the Pentagon is getting a poor grade after it was caught cheating on a review of its own performance.”²¹

As if the press accounts were not bad enough, what became clear within days of the new IG swearing his oath of office was that the scandal went much deeper. What also became clear, as a lesson learned, was that the head of an independent agency, even an acting head, cannot simply recuse himself, as the Acting Inspector General had, from addressing a scandal that goes to the heart and soul of the organization, simply because the allegations involve the acting agency head.²²

Shortly after Senate confirmation, the new DoD IG soon learned that the “live body” left “in command” after the Acting Inspector General had recused himself was not even an officer of the “independent and objective” Office of Inspector General: he was a senior lawyer in the Office of the General Counsel of the Department of Defense who had been detailed to the Office of Inspector General pursuant to a 20-year-old Memorandum of Understanding (which governed the relationship between the DoD OIG and its lawyers). At the time, this apparent violation of Inspector General independence principles, which require that, “The Inspector General and OIG staff must be free

both in fact and appearance from personal, external, and organizational impairments to independence,"²³ was the only such known arrangement in the federal government.

When the new Inspector General asked "his" new senior lawyer who had made the decision not to refer the nationally publicized honor scandal to criminal investigators, the lawyer replied, "I did." When the IG then asked why the lawyer had not referred the matter to criminal investigators, the lawyer replied, "Because there was no *mens rea*" (i.e., no evil intent).²⁴

The Inspector General Act mandates that it is the Inspector General who "shall report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law."²⁵ The Office of Inspector General had not had a Senate-confirmed Inspector General for three years. In fact, for more than 50% of its existence within the Department of Defense, this statutorily "independent and objective unit" was missing a Senate-confirmed leader — and it showed.

The new Inspector General's next question to the senior lawyer was rhetorical: "I might accept that answer for the re-creation of working papers, but for the backdating?" As background, the scandal involved both the re-creation of corrected audit working papers, and the backdating of those corrected working papers as if they had been the originals. To the senior lawyer's credit, he acknowledged the error in judgment. "In retrospect," the lawyer admitted, "it should have been referred to criminal investigators."

What the senior lawyer did not admit, which went to a deeper leadership challenge, was that it is not the lawyer's job to decide when to refer a matter to criminal investigation. That duty in the Office of Inspector General belongs by statute to the lawyer's client (the Office of Inspector General), and the person at the helm of that organizational client had recused himself without designating another "live body" who was legally "within" the Office of Inspector General to make those types of leadership decisions, leaving a leadership vacuum and a proverbial train wreck waiting to happen.

What the senior lawyer did not know yet was that the new Inspector General was already assembling a team of professionals who could properly package an "independent and objective" referral of the OIG audit working paper scandal to criminal investigators.

Bottom-Up Review

Upon Senate confirmation, in light of the still festering honor scandal, the new Inspector General decided not to make any major organizational decisions until an outside team of inspectors conducted an assessment of the scandal along with a 90-day bottom-to-top review of the organization. To accomplish this first ever task, the new IG turned to the most experienced military Inspector General alive at the time, Lieutenant General Richard Trefry, U.S. Army (retired).

General Trefry had served as “The Inspector General” of the United States Army (aka “TIG”) from 1978 to 1983. In his retirement, the General had assumed an *emeritus* status at the Army Inspector General School at Ft. Belvoir, Virginia, still teaching a course as a contractor to new Army flag officers titled, “How the Army Runs.”

It was not long before General Trefry had recruited a team of experienced former Army inspectors general, including at least one other retired general officer. Conducting a top-to-bottom review of a military organization is routine work for Army inspectors general. Army doctrine allows a new commander one such inspection upon assuming command, so that the new commander has a good idea of the strengths and weaknesses of his new command. And that is precisely what General Trefry’s team set about to do for the 20-year-old Department of Defense Office of Inspector General.

While components of the Office of Inspector General had undergone peer reviews before, the Office of Inspector General itself had never been “assessed” by an outside group. The experience made a lot of experienced professional auditors, inspectors, and investigators, very nervous, especially the most senior leaders.

When the Trefry team completed its 90-day assessment, the verdict was arguably mixed but clear enough: “Never before have so many outstanding professionals been so disserved by their leaders.” Suffice it to say, this conclusion made some senior leaders even more nervous.

Like any good Inspector General Report, the Trefry Report included constructive recommendations for moving forward. The new DoD IG accepted most of the more than two dozen such recommendations. The one Trefry recommendation the author of this book later regretted that he had not accepted, in retrospect, was immediately to sever the 20-year-old Memorandum of Understanding with the DoD

Office of General Counsel. The new IG knew at the time that the DoD General Counsel would strenuously object, and he decided to give him a chance to show that the then existing, albeit anomalous, arrangement between the OIG and the DoD General Counsel could work.

Stonewalling the IG

The Department of Defense's institutional disinclination towards an independent DoD Inspector General manifested itself over the years in the form of a 1984 Memorandum of Understanding (MOU) between the Department of Defense General Counsel and the Inspector General. That MOU preceded a debate in Congress over IG independence by a decade.

In 1994, Senator Charles Grassley (R-IA) introduced a legislative amendment "to require Inspectors General to employ legal counsel." In his introductory floor statement, Senator Grassley explained that his amendment was prompted by "misconduct on the C-17 program" that had led to DoD "IG recommendations that disciplinary action be taken against senior officials" — including one Darlene Druyen, who had thus far avoided discipline. According to Senator Grassley, "the legal beagles put up a stonewall that stopped the inspector general cold"

Even those who opposed Senator Grassley's 1994 amendment based their opposition on the fact that all IGs at the time already could hire their own counsel:

"I must emphasize that . . . we already have ample authority to establish our own in-house counsel; we need no statutory amendment to ensure this outcome." Inspector General of the Department of Health and Human Services (and former DoD IG) June Gibbs Brown, April 21, 1994.

"Because Inspectors general currently have the authority to hire counsel within their own organizations should they so desire, we believe that an amendment that requires Inspectors General to do so diminishes their authority and independence rather than augmenting it. I believe the

manner in which legal services are obtained by an Inspector General should be left to the discretion of the Inspector General, who is in the best position to evaluate the needs of his or her office." DoD Deputy Inspector General Derek Vander Schaaf, May 23, 1994.

"As Inspectors General currently have the authority to hire counsel within their organizations should they so desire, the Administration believes that such an amendment would diminish their authority and independence rather than augment it." OMB Administrator Kelman, June 3, 1994.

"Right now, the IG's have complete authority to hire outside help and increase their permanent staff if they wish to do so. This is written into law. If they feel their independence is being compromised in any way, shape or form, they have the authority to hire their own independent counsel" Senator John Glenn, June 8, 1994.

"[The DoD] IG office under existing agreements, . . . can hire independent counsel if he or she so desires." Senator Strom Thurmond, June 8, 1994.

The subject of the 1984 General Counsel-IG MOU had come up during the author of this book's Senate confirmation process. This author's attitude at the time was, "If it's not broke, don't fix it." Shortly after Senate confirmation, it broke. It broke on three specific instances between the summer of 2002 and the winter of 2003.

Manifestation #1 of a Broken GC-IG MOU: The first manifestation that something was broke came to light in the late summer of 2002, and validated the Trefry Report's overall assessment of leadership failure during and after the audit working paper scandal: the new Inspector General made a command decision to forego any Senior Executive Service ("SES") annual bonuses for the appraisal year ending June 30, 2002. When the IG announced this decision, he informed the 16 SES officers serving in the DoD Office of Inspector General that he intended to base bonuses for the next year (his first full year as Inspec-

tor General) on merit principles, and to be as generous as he could be the following year, all depending upon merit principles.

Two months after announcing this decision, the Inspector General learned that the General Counsel for the Department of Defense had awarded a significant annual bonus to the senior lawyer assigned to the Office of Inspector General. This was the same lawyer who had briefed IG after Senate confirmation on the Audit Working Paper scandal, including his own self-described command decision that “because there had been no *mens rea*, there was no need to refer the incident to criminal investigators” (or words to that effect).

The 1984 MOU stipulated that, “The performance of the Assistant General Counsel shall be evaluated by the General Counsel in concurrence with the Inspector General.” For the rating period ending June 30, 2002, the General Counsel did not seek the Inspector General’s concurrence on his evaluation of the lawyers assigned under the MOU, so the IG formally protested the bonus award to the senior lawyer in light of his command decision to forego any SES bonuses for the year.

The General Counsel explained in reply to this protest, “I knew what you would say, so there was no need to consult” (or words to that effect).

Manifestation #2 of a Broken GC-IG MOU: Shortly thereafter, the senior lawyer assigned to the Office of Inspector General recused himself from any involvement in an ongoing investigation by the United States Office of Special Counsel into unspecified allegations that the Inspector General had mishandled the removal of the three SES officers from the Office of Inspector General. The IG promptly informed the DoD General Counsel that there was no way for the IG to have full confidence in a lawyer who had recused himself, especially when there was no way for the IG to understand the reason for the recusal. Accordingly, the IG requested that the DoD General Counsel do whatever is necessary and appropriate to ensure that the Office had a competent and non-recused senior lawyer.

Before the DoD General Counsel could effectuate even a temporary replacement, his senior lawyer assigned to the Office of Inspector General one day casually informed the IG (as they were both leaving the building) that he “had been asked to conduct some legal analysis,” the result of which was that the Inspector General legally

could not be in the Department of Defense “Order of Succession.” The officially promulgated “Order of Succession” lists who takes over leadership of the Department in the event something happened to the Secretary of Defense.²⁶

It was of no practical consequence to the IG or to anyone else within the Office of Inspector General that the Inspector General was not included in the DoD “Order of Succession.” The Inspector General’s direct relationship with the Secretary was spelled out in statute.²⁷ What did matter was that someone other than the Inspector General had tasked the senior lawyer assigned to the OIG for legal analysis about the Inspector General’s legal status, and that the Inspector General only learned about it after the analysis had been completed and delivered to the outside tasker. When the senior lawyer with whom the IG should have had an attorney-client relationship of mutual trust refused even to tell the IG who had tasked him to conduct the legal research, the IG again protested his lack of confidence to the DoD General Counsel.

Although nobody ever told the IG, based on the designated “proponent” for the DoD Directive governing the “Order of Succession,”²⁸ the requestor of the legal analysis was most likely within the Office of General Counsel of the Department of Defense. It didn’t matter, however, who it was. What mattered was that the lawyer assigned to provide legal advice to the Inspector General had refused to inform the Inspector General, when asked by the Inspector General, who had tasked the lawyer to analyze the legal status of the Inspector General.

The DoD General Counsel soon effectuated a temporary solution by replacing the senior lawyer with another lawyer from another agency within the Department of Defense, which while welcome at the time was merely a “band-aide” on an institutional problem that would soon manifest itself in the White House and on national television.

Manifestation #3 of a Broken GC-IG MOU: The third major instance of the MOU breaking down was when the IG discovered that the lawyers assigned to Office of Inspector General had advised the investigators who were conducting an investigation into alleged improprieties by Army Lieutenant General Jerry Boykin of the wrong legal standard for the rule that General Boykin had allegedly broken in the course of delivering a number of speeches about the ongoing war ef-

forts, mostly in religious settings and mostly critical of Islam. This investigation is described and analyzed more fully in another chapter of this book.²⁹ Suffice to say, upon ascertaining that the investigation was being conducted based upon only half of the applicable legal standard, the Inspector General instructed that the matter be reevaluated based on the complete legal standard. The results were significantly different.³⁰

In March 2004, the IG informed the General Counsel of the Department of Defense that he had lost all confidence in the senior lawyer whom the General Counsel still identified as being detailed to the Office of Inspector General. The General Counsel only response was that he, the General Counsel, had not lost confidence (even though he had ordered a temporary replacement).

Consequently, the IG insisted for the third time that the DoD General Counsel arrange to replace the senior lawyer assigned to the Office of Inspector General. When the General Counsel refused, the IG formally abrogated the 1984 MOU. The IG also initiated paperwork for the transfer of the nine lawyer positions that for two decades had been legally within the Office of General Counsel but physically within the Office of Inspector General.

Just prior to departing office, the author of this book had the honor to swear in the first-ever Inspector General-appointed General Counsel for the DoD Office of Inspector General. Three years later, Congress enacted the Inspector General Reform Act of 2008, Section Six of which provides that, "Each Inspector General shall, in accordance with applicable laws and regulations governing the civil service, obtain legal advice from a counsel either reporting directly to the Inspector General or another Inspector General."

The next eight chapters of this book explain, chapter-by-chapter, how the various duties prescribed in the Inspector General Act of 1978, as amended, are carried out through or under the oversight of the DoD Office of Inspector General. Each chapter is introduced by an excerpt from the IG Policy Memo that explains how the respective statutory duty is carried out. That Policy Memo excerpt, by design, includes the front-loaded statutory text of the respective duty.

Chapter Review Questions:

- 1 By what authority and for what purpose would an Inspector General NOT publish an explanation of how he or she implements the Inspector General Act of 1978, as amended?
- 2 What might have motivated senior officials of an Office of Inspector General to have “*tampered with audit materials* to alter the outcome of a Peer Review required by law”? See 18 U.S.C. § 1001(a) (“Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

“(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

“(2) makes any materially false, fictitious, or fraudulent statement or representation; or

“(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

“shall be fined under this title, imprisoned not more than 5 years . . . , or both.”).

- 3 Why might the evidence of the above-mentioned tampering have evaded criminal investigation for more than two years? See 10 U.S.C. § 5947 (“All commanding officers and others in authority in the naval service are required . . . to be vigilant in inspecting the conduct of all persons who are placed under their command; to guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Navy, all persons who are guilty of them”); 10 U.S.C. §§ 3583 & 8583 (same “vigilant in inspecting” and “correct . . . all persons who are guilty” standards for Army & Air Force respectively).
- 4 How should the relationship between Inspector General and General Counsel of a federal agency or military command be

structured? What are key underlying assumptions in any such relationship? How does the Inspector General Reform Act of 2008 address these assumptions?

- 5 By what authority and for what purpose did the President issue the following Signing Statement regarding Inspector General Reform Act of 2008?³¹

Statement by the President on H.R. 928,
the "Inspector General Reform Act of 2008"

Today I have signed into law H.R. 928, the "Inspector General Reform Act of 2008." The Act amends various authorities related to Federal Inspectors General.

Section 6 of the bill gives Inspectors General the right to obtain legal advice from lawyers working for an Inspector General. It is important that Inspectors General have timely and accurate legal advice. It is also important that agencies have structures through which to reach a single, final authoritative determination for the agency of what the law is. This determination is subject to the authority of the Attorney General with respect to legal questions within, and the President's authority to supervise, the executive branch and, of course, the courts in specific cases or controversies. To this end, the "rule of construction" in section 6 ensures that, within each agency, the determinations of the law remain ultimately the responsibility of the chief legal officer and the head of the agency.

Section 8 of the bill includes provisions that purport to direct or regulate the content of the President's budget submissions, including provisions that purport to direct the President to include the comments of Inspectors General with respect to those submissions. The President's budget submissions are recommendations for enactment of legislation appropriating funds. The executive branch shall construe section 8 of the bill in a manner consistent with the President's constitutional authority to recommend for congressional consideration such measures as the President shall judge necessary and expedient.

GEORGE W. BUSH
THE WHITE HOUSE, October 14, 2008.

- 6 By what authority and for what purpose did United States Senators issue the following “Protest” of the President’s Signing Statement for Inspector General Reform Act of 2008?³²

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October 30, 2008 Thursday

LENGTH: 830 words

HEADLINE: SENATORS PROTEST PRESIDENTIAL SIGNING STATEMENT ON INSPECTOR GENERAL REFORM ACT

BYLINE: States News Service

DATELINE: WASHINGTON

BODY:

The following information was released by Iowa Senator Charles Grassley:

A bipartisan group of senators says the presidential signing statement accompanying the Inspector General Reform Act passed by Congress this fall needlessly challenges two important elements of the new law. The senators have called on the President to implement the law according to its text, spirit and intent so that inspectors general have access to independent legal counsel and the ability to submit budget requests that are free from inappropriate agency influence.

The text of the letter sent today by the senators to the President is below.

October 30, 2008

The Honorable George W. Bush

President of the United States

1600 Pennsylvania Avenue, N.W.

Washington, DC 20500

Dear President Bush:

On October 14, 2008, you signed the Inspector General Reform Act of 2008. As co-sponsors of the Senate version of the Act, we believe the new law will help enhance the independence and effectiveness of our nation's Inspectors General (IGs). We write to reinforce the importance of two provisions that were singled out in your signing statement that accompanied this law.

We are pleased that your signing statement acknowledges the importance of timely and accurate legal advice for IGs. Although many IGs already have independent legal counsel, others must rely on the legal advice of their agency's general counsel office advice that may lack critical independence and could reflect inherent conflicts of interest. To address this concern, Section 6 of the Act provides important protections for the independence of IGs by allowing them to obtain legal advice from a counsel either reporting directly to the Inspector General or another Inspector General. This is an arrangement that is already working well in most of the larger departments and agencies. As the rule of construction indicates, this provision does not disrupt the authority of the general counsel within an agency. It is critical, however, that an IG have access to independent legal advice, and if an IG ultimately disagrees with a legal interpretation of agency counsel, then that IG should be free to record this disagreement, and their position on the matter, in their reports and recommendations to the head of their agency and to Congress. Congress and the public deserve the right to understand an IG's independent, unbiased position with respect to potentially inappropriate or illegal conduct.

With respect to Section 8 of the Act, we are concerned that the signing statement may indicate an intention not to comply with the law. Under the new law, the President's budget submissions to Congress must include a line item detailing the President's budget request for each IG, as well as the IG's budget request. If the President's proposed budget would substantially inhibit the IG from performing the duties of the office, the President's budget submission must also include any comments from the affected IG relating to the President's proposal. Congress included Section 8 in the law

to prevent the use of the budget process to inappropriately influence, marginalize, or prevent important investigations initiated by IGs.

Inspectors General within the executive branch occupy a unique position in our government. Though these IGs are executive branch officials, the laws that established the positions mandate that these IGs submit a semi-annual report to Congress detailing significant problems, abuses, and deficiencies and outlining any recommendations for corrective action. Recommendations for corrective action may include proposals for **legislative** action. **Inspector General** reports have provided factual support for modifications to our laws and have encouraged the enactment of important legal changes. Congress relies on the information in these reports and any accompanying recommendations to fulfill its constitutional responsibilities to legislate and to oversee the Executive branch. The budget information required to be submitted to Congress under Section 8 of the Act will also be critical to the performance of Congress's constitutional mandate.

We urge you to implement the entire Inspector General Reform Act of 2008 in a manner consistent with the spirit and intent of the legislation. As public servants, we have a duty to all Americans to ensure that our government operates as efficiently as possible and with the utmost integrity. Inspectors General play an important role in helping us fulfill this duty, rooting out fraud, waste, abuse, and mismanagement in the federal government. The Inspector General Reform Act of 2008 is a critical step in ensuring that Inspectors General can continue to protect taxpayer dollars in this and future administrations.

Sincerely,

Charles E. Grassley

Claire McCaskill

United States Senator

United States Senator

Joseph I. Lieberman

Susan M. Collins

United States Senator

United States Senator

cc:

The Honorable Jim Nussle

Director

Office of Management and Budget

Executive Office of the President

LOAD-DATE: October 30, 2008

Chapter 2 Endnotes

¹ U.S. Const., Art. VI.

² 5 U.S.C. § 3331.

³ President's Council on Integrity & Efficiency, "Quality Standards for Federal Office of Inspector General," p. 8 (October 2003) ("The Inspector General and OIG staff must be free both in fact and appearance from personal, external, and organizational impairments to independence. The Inspector General and OIG staff have a responsibility to maintain independence, so that opinions, conclusions, judgments, and recommendations will be impartial and will be viewed as impartial by knowledgeable third parties. The Inspector General and OIG staff should avoid situations that could lead reasonable third parties with knowledge of the relevant facts and circumstances to conclude that the OIG is not able to maintain independence in conducting its work.") (<http://www.ignet.gov/pande/standards/igstds.pdf>) (last accessed August 30, 2010).

⁴ See Inspector General Act of 1978, as amended, § 5 ("Semiannual Reports"); see generally Lieutenant Colonel Stephen M. Rusiecki, "Washington and von Steuben: Defining the Role of the Inspector General," *The Journal of Public Inquiry*, p. 35 (Fall/Winter 2003) (<http://www.ignet.gov/randp/fw03jpi.pdf>) (last accessed August 30, 2010).

⁵ Inspector General Act of 1978, as amended, §§2(2) & 2(3).

⁶ Inspector General Act of 1978, as amended, Section 2(2) ("Purpose and establishment of Offices of Inspector General; departments and agencies involved[:] In order to create independent and objective units-- (1) to conduct and supervise audits and investigations relating to the programs and operations of the establishments listed in section 11(2); (2) to provide leadership and coordination and recommend policies for activities designed (A) to promote economy, efficiency, and effectiveness in the administration of, and (B) to prevent and detect fraud and abuse in, such programs and operations").

⁷ Inspector General Act of 1978, as amended, §2(1).

⁸ Inspector General Act of 1978, as amended, §§2(2) & 2(3).

⁹ Inspector General Act of 1978, as amended, § 8(c).

¹⁰ Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade, 412 U.S. 800, 807-08 (1973) (internal citations omitted).

¹¹ William Blackstone, Commentaries On The Law Of England, pp. 44-46 (1765-1769).

¹² See Joseph E. Schmitz, "Transparency and Government Accountability: Defining Principles for Inspectors General and for Americans," Remarks as delivered by the Inspector General of the Department of Defense to the Department of State International Visitor Leadership Program, Arlington, Virginia, August 2, 2005 (http://www.dodig.mil/IGInformation/Speeches/stateinternational_080205.pdf) (last accessed August 30, 2010).

¹³ Commentaries On The Law Of England, P. 46.

¹⁴ Ibid.

¹⁵ Joseph E. Schmitz, "Transparency and Government Accountability: Defining Principles for Inspectors General and for Americans," *supra*.

¹⁶ Inspector General of the Department of Defense, "Inspector General Act Implementation and Office of Inspector General Policy Guidance (Revision 2)," December 27, 2004 (http://www.dodig.mil/programs/JIGP/pdfs/DoD_Joint%20IG_Designation_Letter.pdf)

¹⁷ Naval Historical Center, "Rules for the Regulation of the Navy of the United Colonies of North-America; Established for Preserving their Rights and Defending their Liberties, and for Encouraging all those who Feel for their Country, to enter into its service in that way in which they can be most Useful," November 28, 1775 (<http://www.history.navy.mil/faqs/faq59-5.htm>) (last accessed August 30, 2010); see 10 U.S.C. §§ 3583 (Army), 5947 (Navy), & 8583 (Air Force).

¹⁸ See Official Website of the United States Government Accountability Office (www.gao.gov) (last access August 30, 2010).

¹⁹ Letter from Chairman of the Senate Finance Committee Charles Grassley to Secretary of Defense Donald Rumsfeld, May 21, 2001 (emphasis in original).

²⁰ J. Donnelly, "IG Under Fire For Treatment Of Execs," Defense Week, p. 14 (September 23, 2002).

²¹ Associated Press, "Pentagon auditors get poor grade in examination," USA Today (December 5, 2001) (<http://www.usatoday.com/news/washington/dec01/2001-12-05-pentagon-audit.htm>) (last accessed August 30, 2010).

²² See S. Wheeler, "New DoD inspector general cleans house," Insight on the News (September 30, 2002) ("Sources familiar with the investigation of the falsified audit papers tell INSIGHT that Assistant IG Lieberman was involved and 'that is what led to his retirement'.") (http://findarticles.com/p/articles/mi_m1571/is_36_18/ai_92589555) (last accessed August 30, 2010).

²³ President's Council on Integrity & Efficiency, "Quality Standards for Federal Office of Inspector General," p. 8 (October 2003) ("The Inspector General and OIG staff must be free both in fact and appearance from personal, external, and organizational impairments to independence. The Inspector General and OIG staff have a responsibility to maintain independence, so that opinions, conclusions, judgments, and recommendations will be impartial and will be viewed as impartial by knowledgeable third parties. The Inspector General and OIG staff should avoid situations that could lead reasonable third parties with knowledge of the relevant facts and circumstances to conclude that the OIG is not able to maintain independence in conducting its work.") (<http://www.ignet.gov/pande/standards/igstds.pdf>) (last accessed August 30, 2010).

²⁴ See Encyclopedia Britannica On-Line, "Mens Rea" ("in Anglo-American law, criminal intent or evil mind. In general, the definition of a criminal offense involves not only an act or omission and its consequences but also the accompanying mental state of the actor") (<http://www.britannica.com/eb/article-9052042/mens-rea>) (last accessed August 30, 2010).

²⁵ Inspector General Act of 1978, as amended, Section 4(d) ("In carrying out the duties and responsibilities established under this Act, each Inspector General shall report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law."); see *id.*, Section 8(d) ("Notwithstanding section 4(d), the Inspector General of the Department of Defense shall expeditiously report suspected or alleged violations of chapter 47 of title 10, United States Code (Uniform Code of Military Justice), to the Secretary of the military department concerned or the Secretary of Defense.").

²⁶ See DoD Directive 3020.04, "Order of Succession Under Executive Order 13533 and the Federal Vacancies Reform Act of 1998," August 25, 2010

(<http://www.dtic.mil/whs/directives/corres/pdf/302004p.pdf>) (last accessed August 30, 2010).

²⁷ See Inspector General Act of 1978, as amended, Sections 3(a) and 8(c) (1) (“Each Inspector General shall report to and be under the general supervision of the head of the establishment involved, or to the extent such authority is delegated, to the officer next in rank below such head, but shall not report to, or be subject to supervision by, any other officer of such establishment. . . . In addition to the other duties and responsibilities specified in the Act, the Inspector General of the Department of Defense shall . . . be the principal adviser to the Secretary of Defense for matters relating to the prevention and detection of fraud, waste, and abuse in the programs and operations of the Department; . . .”).

²⁸ See *Ibid* (beneath the date of the Directive is “GC, DoD,” which designates the office responsible for keeping the Directive up-to-date, *i.e.* in this instance, the Office of General Counsel of the Department of Defense).

²⁹ See Chapter 3, *infra*.

³⁰ See Department of Defense Office of the Inspector General, “Alleged Improprieties Related to Public Speaking: Lieutenant General William G. Boykin, U.S. Army, Deputy Under Secretary of Defense for Intelligence,” August 5, 2004 (<http://www.dodig.mil/fo/foia/ERR/h03189967206.pdf>) (last accessed August 30, 2010) (see Chapter 7, *infra*).

³¹ Signing Statement is been posted at <http://www.whitehouse.gov/news/releases/2008/10/20081014-7.html>

³² “Protest” of the President’s Signing Statement for Inspector General Reform Act of 2008 at <http://www.ignet.gov/pande/leg/signingstatementresponse.pdf>

PART B.

THE DUTIES OF AN INSPECTOR GENERAL:

Case Studies in Transparent Accountability

At one of Secretary Rumsfeld's weekly staff meetings shortly after the Coalition Forces invaded Iraq, the newly confirmed and appointed Inspector General of the Department of Defense explained to the other "direct reports" at the table the "due process" involved in the investigation of DoD senior officials. Secretary Rumsfeld had already explained to all his direct reports that the issue is not whether but when you will be investigated. The topic of senior official "due process," not surprisingly, was of interest to the audience.

One thing the Inspector General assured his new colleagues was that the model of "due process" to which his office subscribed was quite different from that of the Roman Emperor Caligula, who according to Sir William Blackstone, "wrote his laws in very small character, and hung them up upon high pillars, the more effectually to ensnare the people."¹ After the meeting, Tory Clark, the Assistant Secretary of Defense for Public Affairs, pulled the Inspector General aside and said, "IG-man, I have to say, that had to be the first time anyone has uttered the name Caligula in the Secretary's conference room."

Three years later, in the same conference room, Deputy Secretary Gordon England announced that the Inspector General's "new nickname is 'Fearless Fosdick'." The Inspector General had just completed his testimony before the Senate Armed Services Committee on the Air Force Tanker Scandal (described later in this book), at the hearing for which the Inspector General had been riddled with hostile questions and accusations. At the time, the author of this book was not familiar with the 1940's era comic book character Fearless Fosdick, whom he soon learned was a parody cartoon version of the detective

Dick Tracy, famous for always being riddled with gunshots but always surviving. Here is an artistic depiction of that character:



An Inspector General can be called worse.

Part B Endnotes

¹ William Blackstone, *Commentaries On The Law Of England*, p. 46 (1765-1769).

CHAPTER 3. INDEPENDENT EXTENSION OF THE EYES,
EARS, AND CONSCIENCE OF THE COMMANDER (AND
OF CONGRESS):

Can Chaplains Be Agents of Al-Qaeda?

*“AllIGs extend the eyes, ears, voice, and conscience
of their commanders.”*

Army Regulation 20-1, “Inspector General Activities and Procedures,”
p. 5, ¶1-6(e)(1) (U.S. Department of the Army 2010)

An Inspector General, who by American military tradition serves as an independent extension of the eyes, ears, and conscience of the commander,¹ and/or who by statute is duty-bound to report “serious problems, abuses and deficiencies” to the respective agency head and to Congress,² can assist the agency ahead and Congress in exposing enemies of the United States Constitution who might otherwise hide behind the guise of religion. In fulfilling these roles, an Inspector General can also assist military and civilian leaders, as well as the American People, in knowing better both our enemies and ourselves—in order that we can better defeat our enemies.

The November 2008 criminal conviction in Texas of the Holy Land Foundation as a front for Hamas proves that international terrorist organizations can and do disguise themselves as charitable organizations. The November 2009 Fort Hood massacre by a commissioned Army officer who as a collateral duty “served as a lay Muslim leader running Islamic services on the base in the absence of the Muslim chaplain,”³ demonstrates that international terrorist organizations

can also try to disguise their agents as military chaplains and religious lay leaders.

In Order to Win Any War, We Must Know Both Our Enemies and Ourselves

“WAR WITHOUT END” was the five-inch headline of The Washington Post Outlook section in the wake of General Stanley McCrystal’s June 2010 forced resignation.⁴ This headline, together with the content behind it, exposes a fundamental question gnawing at many if not most Americans: “Who are we fighting and why?” That this question persists without a clear answer more than a decade after September 11, 2001, may be our downfall. The ancient Chinese military philosopher Sun Tzu admonished 2500 years ago: “One who knows neither the enemy nor himself will invariably be defeated in every engagement.”⁵ Americans need to focus on our own “first things,” *i.e.*, defining American principles, in order to win any war, whether it be kinetic warfare in Afghanistan or information warfare in the heartland of America.

“Precisely who are our enemies?” is the question the author of this handbook repeatedly asked military leaders when visiting Afghanistan in 2004 as Inspector General of the Department of Defense. The answers to this question were mixed. Although most coalition forces could identify Al-Qaeda and the Taliban as our enemies, most were generally unclear as to why they were our enemies, other than that they were implicated in the September 11, 2001, terrorist attacks. One coalition general officer described our enemies as, “three disparate enemies: Al Qaeda; Taliban; and HIG.” The latter acronym, the general explained, referred to a warlord in the region east of Kabul on the Pakistani border known as “Engineer,” who “was not a cleric.”

Every civilian military leader and every Soldier, Sailor, Airman, and Marine should know our enemies. In our constitutional Republic, no American citizen should ever be confused about who our enemies are—and why they are enemies. Likewise, those truths announced as “self-evident” in our Declaration of Independence should be as clearly understood by every American today as they were self-evident at the birth of our nation.

We won the Cold War because we knew our enemies—Marxist-Leninist advocates of totalitarianism—and we knew ourselves—a People deeply rooted in the “great civilized ideas” enumerated in our Declaration of Independence: “that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”⁶ These great civilized ideas in turn are the foundation underlying our Constitution and our Bill of Rights.

The Constitution implicitly charges the Commander-in-Chief with the duty of discerning and defining our enemies. In doing so, the Commander-in-Chief ought also to remind us of our defining principles. This is why President Ronald Reagan, in the midst of the Cold War, announced to the British House of Commons—and to the world—his vision for leaving “Marxism-Leninism on the ash heap of history”:

given strong leadership, time, and a little bit of hope, the forces of good ultimately rally and triumph over evil... Here is the enduring greatness of the British contribution to mankind, the great civilized ideas: individual liberty, representative government, and the rule of law under God.⁷

Most Americans know that al-Qaeda is an enemy. But how many Americans “know” al-Qaeda, and understand why al-Qaeda is an enemy? It is not simply because al-Qaeda has declared war against us. In this regard, on February 4, 2011, the United States Court of Appeals for the 2nd Circuit affirmed a criminal conviction under the Material Support of Terrorism Act in a case captioned *United States v. Farhane*.⁸ In its opinion, the Court of Appeal explained that, “Two successive administrations have indicated that the nation is at ‘war’ with al Qaeda.”⁹ The Court of Appeals also referred to the goal of “*jihad*” as being “to establish Sharia (Islamic law).”¹⁰

The Court of Appeals in *Farhane* also explained the “infamous fatwa (religious decree) pronouncing it the individual duty of every Muslim to kill Americans and their allies—whether civilian or military—in any country where that could be done”:

Al Qaeda is the most notorious terrorist group presently pursuing jihad against the United States. In February 1998, its leaders, including Osama bin Laden and Ayman al Zawahiri, issued an infamous fatwa (religious decree) pronouncing it the individual duty of every Muslim to kill Americans and their allies—whether civilian or military—in any country where that could be done. For a detailed discussion of this fatwa and al Qaeda’s terrorist activities up to 2004—including the 1998 bombings of American embassies in Kenya and Tanzania, which killed 224 people; the October 2000 bombing of the USS Cole, which took 17 lives; and the September 11, 2001 airplane attacks on the World Trade Center and the Pentagon, which killed 2,973 persons—see The National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (2004).¹¹

While al-Qaeda defines its war against the United States in terms of “jihad,” Shari’ah defines “jihad” as warfare against non-Muslims, primarily in military terms, but also in economic and cultural terms. As explained in the 2010 “Team BII Report” coauthored by former CIA Director Jim Woolsey and former DIA Director Ed Soyster, among others (the author of this handbook included), titled *Shariah The Threat To America, An Exercise In Competitive Analysis*, “shariah is held by mainstream Islamic authorities—not to be confused with ‘radical,’ ‘extremist’ or ‘political’ elements said to operate at the fringes of Islam—to be the perfect expression of divine will and justice and thus is characterized as a ‘complete way of life’ (social, cultural, military, religious, and political).”¹² Moreover, “While the terrorists can and will inflict great pain on the nation, the ultimate goal of shariah-adherent Islam cannot be achieved by these groups solely through acts of terrorism, without a more subtle, well-organized component operating in tandem with them... That component takes the form of ‘civilization jihad.’ This form of warfare includes multi-layered cultural subversion, the co-opting of senior leaders, influence operations and propaganda and other means of insinuating shariah into Western societies. These are the sorts of techniques alluded to by Yusuf al-Qaradawi, the spiritual leader of the Muslim Brotherhood, when he told a Toledo,

Ohio Muslim Arab Youth Association convention in 1995: 'We will conquer Europe, we will conquer America! Not through the sword, but through *dawa*'.¹³ Accordingly, it is not just our soldiers in Afghanistan who must face this enemy, but also those of us here at home.

In a 2007 audio message, the late al-Qaeda "chief financial officer" Mustafa Abu al-Yazid explained that, "Jihad with money is also an obligation. And here we, in the battlefield in Afghanistan, are lacking a lot of money and a weakness in operations because of lack of money, and many mujahideen are absent from Jihad because of lack or absence of money with which they cannot carry out Jihad. Even many brothers . . . who want to sacrifice themselves for the cause of Allah, we cannot prepare them because of lack of money."¹⁴

Yazid's call for "Jihad with money" is fully consistent with "mainstream" Shari'ah Law, which mandates that all devout Muslims donate money to eight categories of "*Zakat*," including the financing of "volunteers for jihad." As explained in the English-language translation of *Reliance of the Traveller: A Classic Manual of Islamic Sacred Law*: "It is obligatory to distribute one's *zakat* among eight categories of recipients," the seventh of which is, "those fighting for Allah, meaning people engaged in Islamic military operations for whom no salary has been allotted in the army roster . . . but who are volunteers for jihad without remuneration."¹⁵

The word "Islam" means "submission [to Allah]" in Arabic.¹⁶ According to Shari'ah authorities, the notion of Islamic "peace" is profoundly tied to a division of the world into two halves: the world of Islam and peace—called the "*Dar al-Islam*"—and the world of the infidel, disbelief and war—called the "*Dar al-Harb*" (e.g., the United States of America). Islamic "Peace" can only be achieved through universal submission to Allah, *i.e.*, through universal imposition of Shari'ah Law. Until this occurs, Shari'ah Law imposes a duty on all devout Muslims to support "volunteers to jihad" through "*Zakat*," as well as a duty called "*Taqiyya*" to deceive non-Muslims whenever such deceit will promote Islam.¹⁷ While nobody has suggested that all Muslims support *Jihad* and all Muslims deceive non-Muslims to promote Islam, no reputable Shari'ah expert has publicly disclaimed these two legal duties. Ignoring these prescribed Shari'ah duties is tantamount to ignoring *Mein Kampf*, Adolf Hitler's treatise that was ignored by many American leaders in the 1930's—to our great detriment.

According to one modern English language student textbook on Islam, “The word Shari’ah literally means a *straight path* (45:18) or an *endless supply of water*. It is the term used to describe the rules of the lifestyle (*Deen*) ordained for us by Allah. . . . In more practical terms, the Shari’ah includes all the do’s and don’t of Islam.”¹⁸ Once we understand, however, that Shari’ah also includes both duties to support “volunteers to *jihad*” through “*Zakat*” donations, and to deceive non-Muslims in order to promote Islam, we will better “know the enemy” already among us—an enemy that, by its nature, is dead-set on making itself supreme over all other legal systems, including the United States Constitution.¹⁹ Based on these indisputable tenets, Shari’ah Law is an enemy of the United States Constitution: the two are incompatible.²⁰

Lessons Learned from the Holy Land Foundation Trial and the Fort Hood Massacre

In addition to Al-Qaeda and the Taliban in Afghanistan, the November 2008 Holy Land Foundation terrorism conviction and the November 2009 Fort Hood massacre highlight the fact that the American military operating in the United States must also “defend against threats posed by external influences operating on members of our military community.”²¹ Of course, the “internal threats” described in the Department of Defense’s January 2010, “Independent Review Related to Fort Hood,” discussed below, are not unique to the “military community.”

According to the January 2010 DoD Independent Review Related to Fort Hood, “On November 5, 2009, a gunman opened fire at the Soldier Readiness Center at Fort Hood, Texas. Thirteen people were killed and 43 others were wounded or injured. The initial response to the incident was prompt and effective. Two minutes and forty seconds after the initial 911 call, installation first responders arrived on the scene. One-and-a-half minutes later, the assailant was incapacitated.”²²

While the DoD Independent Review concludes that, “To protect the force, our leaders need immediate access to information pertaining to Service members indicating contacts, connections, or relationships with organizations promoting violence,”²³ the published report of the DoD Independent Review does not mention that, “The

suspected Fort Hood terrorist served as a lay Muslim leader running Islamic services on the base in the absence of the Muslim chaplain," a fact that was published on the internet shortly after the Fort Hood massacre.²⁴

In its defense, the DoD Independent Review admits that, "areas in our report will require further study," and that, with regard to the only "suspect" in Fort Hood massacre, Army Major Nidan Hasan, that, "Some signs were clearly missed; others ignored."²⁵ The Report concludes that, "Commanders are our key assets to identify and monitor internal threats. Our findings and recommendations emphasize creating clarity for our commanders with respect to identifying behaviors that may pose internal threats and sharing that information within the Department and with other agencies. . . . To account for possible emerging internal threats, we encourage the Department to develop comprehensive guidance and awareness programs that include the full range of indicators for potential violence."²⁶ Finally, the Report recommends that, "To protect our force, our leaders need immediate access to information pertaining to Service members indicating contacts, connections, or relationships with organizations promoting violence."²⁷

Apropos is emphasis on the need to identify "organizations promoting violence" in the DoD DoD Independent Review of the Fort Hood massacre, the month after that Report the Assistant Attorney General of the United States sent a letter to Members of Congress who had inquired about "the evidence and findings by the Department of Justice and the FBI which resulted in the Council on Islamic Relations (CAIR) being named as an unindicted co-conspirator of the Holy Land Foundation." In his letter, the Assistant Attorney General wrote, "trial transcripts . . . contain testimony and other evidence that was introduced in that trial which demonstrated a relationship among CAIR, individual CAIR founders, and the Palestine Committee. Evidence was also introduced that demonstrated a relationship between the Palestine Committee and HAMAS, which was designated as a terrorist organization in 1995."²⁸

Commenting publicly on the November 2008 Holy Land Foundation guilty verdicts, Patrick Rowan, Assistant Attorney General for National Security, had noted, "Today's verdicts are important milestones in America's efforts against financiers of terrorism. For many years, the Holy Land Foundation used the guise of charity to raise and

funnel millions of dollars to the infrastructure of the Hamas terror organization. This prosecution demonstrates our resolve to ensure that humanitarian relief efforts are not used as a mechanism to disguise and enable support for terrorist groups.”²⁹

Chapter Review Questions:

- 1 By what authority and for what purpose would an Inspector General evaluate the bona fides of a Military Chaplain Endorsing Agency?
- 2 By what authority and for what purpose would an Inspector General recommend that another government official evaluate the bona fides of a Military Chaplain Endorsing Agency?
- 3 By what authority and for what purpose would a DoD operational leader non-concur with an Inspector General recommendation to establish nonreligious criteria to justify the Armed Forces Chaplains Board withdrawal or removal of a religious organization from participating in the DoD chaplain program when evidence indicates that a “religious organization” is either advocating the violent overthrow of the U.S. Government, listed on a watch list as a terrorist organization, or when its principal leaders have been convicted in connection with terrorism?
- 4 By what authority and for what purpose would the United States Department of Defense defer to the “Treasury’s Internal Revenue Service” on matters implicating terrorism threats to U.S. military personnel, as it appears to have none in the Under Secretary of Defense’s non-concurrence with the DoD IG’s recommendation to establish nonreligious criteria to justify the Armed Forces Chaplains Board withdrawal or removal of a religious organization from participating in the DoD chaplain program?
- 5 Why did the January 2010 “DoD Independent Review Related to Fort Hood” not recommend deference to the “Treasury’s Internal Revenue Service” on matters implicating terrorism threats to U.S. military personnel, *e.g.*, when it observed that, “Current policy requires removal of any individual or religious organization from participation in the DoD Chaplain program only if they threaten national or economic security, are indicted or convicted of an offense related to terrorism, or if they appear on the annual State Department list of Foreign

Terror Organizations. This limited authority to deny requests for designation as ecclesiastical endorsers could allow undue improper influence by individuals with a propensity toward violence,” and based on this observation recommended that the Department of Defense, “Review the limitations on denying requests for recognition as ecclesiastical endorsers of chaplains.”³⁷

- 6 Under what circumstances can a chaplain be deemed an agent of Al-Qaeda (or of any other enemy of the United States Constitution)?
- 7 Which “live bodies” within any federal establishment are responsible for inspecting official chaplains to ensure that none are enemy agents?
- 8 Are the November 2008 Holy Land Foundation terrorism convictions tantamount to identification of the Holy Land Foundation and its principal leaders as enemies of the United States Constitution? What about CAIR, ISNA, and the other 200+ unindicted co-conspirators? Are those unindicted co-conspirators presumptive enemies of the United States Constitution?
- 9 Why does the January 2010 “DoD Independent Review Related to Fort Hood” not mention the words “Muslim” or “Islamic” (except once in a footnote reference to a 2007 FBI Law Enforcement Bulletin titled, “Countering Violent Islamic Extremism”), when the only “suspect” in the Fort Hood massacre: (a) “served as a lay Muslim leader running Islamic services on the base in the absence of the Muslim chaplain,” and, according to published accounts shortly after the massacre, “jumped up on a desk and shouted, ‘Allahu akbar!’—Allah is greatest—before opening fire and spraying more than 100 bullets inside a crowded building where troops were preparing to deploy to Afghanistan and Iraq”³⁸?
- 10 Was the Fort Hood massacre “suspect,” Army Major Nidal Hasan, a “violent Islamic extremist” prior to the Fort Hood massacre? If so, why didn’t his commanders identify him as such, pursuant to their statutory duties: “to be vigilant in in-

specting the conduct of all persons who are placed under their command”; “to guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Army, all persons who are guilty of them”; and “to take all necessary and proper measures, under the laws, regulations, and customs of the Army, to promote and safeguard the morale, the physical well-being, and the general welfare of the officers and enlisted persons under their command or charge”? 10 U.S.C. § 3583 (discussed in Chapter Two, *supra*).

Chapter 3 Endnotes

¹ See Army Regulation 20-1, “Inspector General Activities and Procedures,” p. 5, ¶1-6(e)(1), p. 57, ¶8-1, & p. 61, ¶9-2 (U.S. Department of the Army, 2010); Army Inspector General Website, “The IG And The Commander Relationship” (http://wwwpublic.ignet.army.mil/IG_systems.htm) (“IGs serve as extensions of their commander in the following three ways: [1] IGs extend the commander’s eyes and ears[; 2] IGs extend the commander’s voice[; and 3] IGs extend the conscience of the commander.”).

² Inspector General Act of 1978, as amended, Section 4(a).

³ WorldNetDaily Exclusive, “Hasan counseled Fort Hood Muslims: Alleged Army terrorist substitute chaplain for 48,” November 9, 2009 (<http://www.wnd.com/?pageId=115466>).

⁴ “WAR WITHOUT END: The battle between civilian leaders and military brass has defined America’s wars, from Vietnam and the Persian Gulf to Iraq and Afghanistan. It didn’t start with McChrystal—and it won’t end with Petraeus,” *The Washington Post Outlook*, p. B1, June 27, 2010.

⁵ Sun Tzu, *Art of War*, p. 179 (trans. Ralph D. Sawyer 1994).

⁶ Declaration of Independence.

⁷ Ronald Reagan, “Speech to the House of Commons,” June 18, 1982 (www.fordham.edu/halsall/mod/1982reagan1.html).

⁸ *United States v. Farhane*, 634 F.3d 127 (2d Cir. 2011), cert. denied *sub nom. Sabir v. United States*, 132 S. Ct. 833 (2011).

⁹ 634 F.3d at 180, n. 7 (“Two successive administrations have indicated that the nation is at ‘war’ with al Qaeda. See Press Release of Remarks by President Obama on Strengthening Intelligence and Aviation Security, Jan.

7, 2010 ('We are at war. We are at war against al Qaeda, a far-reaching network of violence and hatred that attacked us on 9/11, that killed nearly 3,000 innocent people, and that is plotting to strike us again. And we will do whatever it takes to defeat them.');

Eric Lichtblau, *Bush Seeks to Affirm a Continuing War on Terror*, N.Y. Times, Aug. 30, 2008, at A10 (quoting administration proposal that Congress 'acknowledge again and explicitly that this nation remains engaged in an armed conflict with Al Qaeda . . . and associated organizations, who have already proclaimed themselves at war with us and who are dedicated to the slaughter of Americans'). The executive locates support for its actions in Congress's September 18, 2001 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat.

224 (2001). See, e.g., Harold Hongju Koh, Legal Adviser, U.S. Department of State, *Address to the Annual Meeting of the American Society of International Law: The Obama Administration and International Law* (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm> (explaining that in light of al Qaeda's 'horrific' attacks on the United States, the United States is 'in an armed conflict with al Qaeda' that is justified by both international and domestic law).").

¹⁰ *United States v. Farhane*, 634 F.3d at 132 ("As part of that investigation, an FBI confidential informant known as 'Saeed' cultivated a relationship with Shah, in the course of which Shah was recorded speaking openly about his commitment to jihad (holy war) in order to establish Sharia (Islamic law) . . .").

¹¹ *Id.*, 634 F.3d at 132, n. 4 ("See also *United States v. Moussaoui*, 591 F.3d 263, 273-74 (4th Cir. 2010); *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 103-05 (2d Cir. 2008).").

¹² R. James Woolsey, Lieutenant General Harry Edward Soyster, US Army (retired), *et al.*, *SHARIAH THE THREAT TO AMERICA, AN EXERCISE IN COMPETITIVE ANALYSIS: REPORT OF TEAM BII*, p. 58 (2010).

¹³ *Id.*, p. 24 (footnote citation omitted).

¹⁴ The Investigative Project on Terrorism, "Treasury: Al Qaida in 'weakest financial condition in years'," October 14, 2009 (quoting Mustafa Abu al-Yazid) (<http://www.investigativeproject.org/1460/treasury-al-qaida-in-weakest-financial-condition>).

¹⁵ *Reliance of the Traveller: A Classic Manual of Islamic Sacred Law*, p. 272 (Nuh Ha Min Keller 1991 and 1994).

¹⁶ See Definition of "Islam," Webster's Encyclopedic Unabridged Dictionary of the English Language, p. 1011 (1996) ("Islam[:] Ar[abic] *islām* lit., submission (to God)").

¹⁷ See *Reliance of the Traveller*, pp. 744-46 ("r8.0 LYING").

¹⁸ Yahiya Emerick, "What is Islamic Law?," WHAT ISLAM IS ALL ABOUT: STUDENT TEXTBOOK, p. 354 (1997).

¹⁹ See, e.g., Yahiya Emerick, "What is an Islamic State?," WHAT ISLAM IS ALL ABOUT: STUDENT TEXTBOOK, p. 381 (1997) ("The basis of the legal and political system is the Shari'ah of Allah. Its main sources are the Qur'an and Sunnah. . . . The duty of Muslim citizens is to be loyal to the Islamic State, to live as good Muslims, . . . and to answer the call of their leader if he needs them. . . . Once we become educated in the authentic system of Islam, we must try to establish it somewhere. This is our mission. . . . To repeat what has been mentioned before, the only reason Muslim countries have banished Islam from the political process is because the systems in those countries were imposed from outside."); Seyyid Qutb, MILESTONES, pp. 129, 137 (1964) ("Islam is a comprehensive concept of life and the universe with its own unique characteristics. The concept of human life in all its aspects and relationships which are derived from it is also a complete system which has its particular characteristics. . . . [W]e reject these other systems in the East as well as in the West. We reject them all, as indeed they are retrogressive and in opposition to the direction toward which Islam intends to take mankind. . . . The truth is that Islam not only changes

concepts and attitudes, but also the system and modes, laws and customs, since this change is so fundamental that no relationship can remain.”).

²⁰ U.S. Const., Art. VI (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, . . . shall be the supreme Law of the Land”); see Mark Levin, *LIBERTY AND TYRANNY*, 28-29 (2009) (“Islamic law, or *sharia*, dictates the most intricate aspects of daily life, from politics and finance to dating and hygiene. There is not, and never has been, support for a national construct of this sort in America.”).

²¹ DoD Independent Review Related to Fort Hood, “Protecting the Force: Lessons from Fort Hood,” p. 2, January 2010 (http://www.defense.gov/pubs/pdfs/DOD-ProtectingTheForce-Web_Security_HR_13Jan10.pdf).

²² DoD Independent Review Related to Fort Hood, p. 1.

²³ DoD Independent Review Related to Fort Hood, p. 7.

²⁴ See WorldNetDaily Exclusive, “Hasan counseled Fort Hood Muslims: Alleged Army terrorist substitute chaplain for 48,” November 9, 2009 (<http://www.wnd.com/?pageId=115466>).

²⁵ DoD Independent Review Related to Fort Hood, pp. 2 & 7.

²⁶ DoD Independent Review Related to Fort Hood, p. 3.

²⁷ DoD Independent Review Related to Fort Hood, p. 7.

²⁸ Letter from Assistant Attorney General Ronald Weich to Congresswoman Sue Myrick, February 12, 2010 (<http://www.investigativeproject.org/documents/misc/360.pdf>).

²⁹ United States Department of Justice Press Release, November 24, 2008, *supra*.

³⁰ United States Department of Justice Press Release, "Federal Jury in Dallas Convicts Holy Land Foundation and Its Leaders for Providing Material Support to Hamas Terrorist Organization," November 24, 2008 (<http://www.justice.gov/opa/pr/2008/November/08-nsd-1046.html>).

³¹ Shariah The Threat to America, p. 127).

³² *Id.*, p. 129 (citing in a footnote Jerry Markon, "Muslim activist sentenced to 23 years for Libya contacts," *The Washington Post*, October 16, 2004 (<http://www.washingtonpost.com/ac2/wp-dyn/A36718-2004Oct15?language=printer>)).

³³ *United States v. Alamoudi*, 452 F.3d 310, 311-12 (4th Cir. 2006).

³⁴ 452 F.3d at 312; *see United States v. Alamoudi*, 1:03-cr-00513 (E.D.VA 2004) (docket available through Pacer).

³⁵ Inspector General Act of 1978, as amended, Section 4(a); *see* DoD Inspector General Policy Memo, "Inspector General Act Implementation and Office of Inspector General Policy Guidance (Revision 2)," December 27, 2004.

³⁶

http://www.dodig.mil/Inspections/IE/Reports/Final_DoD%20Chaplain%20Program.pdf

³⁷ DoD Independent Review Related to Fort Hood, p. 14.

³⁸ WorldNetDaily Exclusive, "Hasan counseled Fort Hood Muslims: Alleged Army terrorist substitute chaplain for 48," November 9, 2009 (<http://www.wnd.com/?pageId=115466>).

CHAPTER 4. TEACH AND TRAIN IN WASHINGTON AND
BAGHDAD:

The Assassination of Inspector General al-Mokhtar

Inspector General Mission Essential Task List (METL)



*Support the Superintendent and the Chain of Command;
Provide **assistance** for soldiers, cadets, DA civilians, family
members, and retirees; Conduct thorough **inspections** that
recognize excellence and identify systemic deficiencies; Conduct
investigations that meet the standard of thoroughness and
fairness; **teach and train** at every opportunity*

United States Military Academy, Inspector General Website
<http://www.usma.edu/ig/metl/default.htm>

As explained in Chapter One, the traditional “teach & train” role of an American Inspector General is pounded into every student of the Army Inspector General School. General George Washington del-

egated this role to Major General Friedrich von Steuben, America's first effective Inspector General.

According to the U.S. Army's official history of its Inspectors General, "By the middle of March [1778], Washington had determined to let Steuben show what he could do, reserving the Inspector General's position as a reward for success."¹ Steuben began teaching and training troops, starting with Washington's own guard detail. "Training of the Commander in Chief's guard commenced on 19 March, with Steuben in charge. Steuben himself trained one squad first, then set his subinspectors, whom Washington had been appointing for several days, to drill the other squads, while he supervised. Once the squads were trained, Steuben drilled them as a company, starting each day with squad drills, and ending with company exercises."²

"Steuben not only offered a good example, but specifically instructed officers in how to train their own men. After the model guard company was ready, he extended his system to battalions, then brigades, and in three weeks was able to maneuver an entire division for Washington. His inspectors were his agents. The results of the training were impressive and it did not take long to persuade Washington that Steuben knew what he was doing... On 28 March he appointed Steuben Inspector General."³

Teaching & Training Inspector General Professionals

In June 2003, I delivered the commencement address for the Troy State University's 12th Annual University College - Ft. Myer Commencement Ceremony. The graduates were all mid-level DoD professionals, mostly uniformed officers, who had earned their masters degrees part-time while serving in the Washington D.C. area. The title of the speech was, "Domestic Enemies and Pyrrhic Victories."⁴

As the United States was launching into its second war in two years, I sought to inspire these mid-level DoD professionals to continue developing their potential, but to do so in a manner consistent with their sworn duty to support and defend the Constitution. In the end, the Troy State graduates inspired me to focus on graduate educational opportunities for the 1,300 professionals who worked in the Office of Inspector General.

A few weeks later, I addressed another Troy State graduation ceremony, this one for DoD OIG employees. A review of the program revealed that the master's degree Troy State offered was generally good but was unconnected in any meaningful way to the Office of Inspector General's statutory mission.

This discovery coincided with a related observation that the PCIE community was generally lacking in graduate educational opportunities, and the Trefry Review team's recommendation to provide better mid-level training and cross-functional educational opportunities for auditors, inspectors, and investigators throughout the Office of Inspector General.

Dr. Charles Johnson, who had earned his Doctorate in Education while assigned by the Marine Corps to Northwestern University, accepted an invitation to come aboard the DoD Office of Inspector General as an expert consultant. Within months he had, among other improvements, replaced the Troy State master's program through a competitive bid process with a much superior Georgetown University program tailored to the specific challenges of service within the Office of Inspector General.

At the same time, Dr. Johnson organized the disparate training and educational programs throughout the various components of the Office of Inspector General into a virtual "OIG University," for which he served as the first Dean. The Georgetown University's masters program soon became available to any employee of a member of the Defense Council on Integrity & Efficiency (DCIE), and the virtual "OIG University" ultimately served as a template for an initiative by the PCIE Training Committee to improve the training and educational opportunities throughout the 60 offices of inspector general represented on the PCIE. Dr. Johnson's service as Dean of OIG University was short-lived however, due to demands placed on him by the war in Iraq.

Teaching and Training Iraqi Inspectors General

In the summer of 2003, I encountered Ambassador L. Paul "Jerry" Bremer coming out of Pentagon's "River Entrance." Ambassador Bremer was about to take over as Administrator of Iraq. In the course of our brief conversation, we discussed the historical role of an Inspector General during time of war, and the potential choices of

deputies within the DoD OIG available to serve as his Inspector General in Iraq.

Ambassador Bremer interviewed two DoD Deputy Inspectors General, and hired Rear Admiral Larry Poe, USNR, who soon thereafter deployed to Iraq as the first Iraq-based American Inspector General. Admiral Poe's service as Inspector General laid the groundwork for Congress ultimately to establish the position of Special Inspector General for Iraq Reconstruction (SIGIR).⁵

A few months later, Ambassador Bremer announced publicly that one of the preconditions for transferring sovereignty back to the Iraqi people was the establishment of fully functional Offices of Inspector General in each of the Iraqi ministries. At our next encounter in the Pentagon, I remarked on the Ambassador's ambitions plan, observing that, "Not every Office of Inspector General in Washington D.C. is fully functional."

I suggested that the goal the Ambassador had set for the Iraqi ministry inspectors general would be impossible to achieve unless the DoD OIG's "Dean of Instruction," Dr. Charles Johnson, deployed to Iraq in support of the Coalition Provisional Authority. I warned that even with Dr. Johnson in charge of training, however, the task would still be "almost impossible."

Just after Christmas, Dr. Johnson deployed. Five months later, he invited me to address the 31 newly-trained Iraqi inspectors general in the Baghdad Convention Center.

The location for the speech was a caucus room in the Convention Center, which itself was on the border between the "Green Zone" and the "Red Zone." A significant portion of the Convention Center was being utilized at the time by Coalition and Iraqi law enforcement entities to screen witnesses for war crimes trials.

The IG security detail was nervous about both entering and departing the Convention Center itself, and about transiting within the Convention Center to the caucus room.

Inside the caucus room, Dr. Johnson had arranged the Iraqi inspectors general into a large rectangular seating arrangement behind folding work-tables very much like the monthly meetings in Washington D.C. of the President's Council on Integrity & Efficiency (aka PCIE).

Before saying anything to the newly-training Iraqi inspectors general, I introduced myself personally to each, proceeding around the outside of the work-tables counterclockwise, shaking hands and looking each in the eyes.

When I finally sat down at the head of the rectangular arrangement of work-tables, I was at a loss for words. Many of those 31 pairs of eyes were visibly scared. I realized many of those same eyes would be lifeless within the year; I just didn't know which ones.

The message to the new Iraqi inspectors general was simple: the prospects for success as "champions of integrity" in a post-Saddam Iraq would be no more daunting than the challenges facing General George Washington and the other founding fathers of our country in the Winter of 1778. The keys to success then and now are integrity, training and discipline, moral courage, and a firm reliance on divine providence.

As usual, the questions and answers proved the most interesting part of the exercise. In response to more than one question, my message was to be courageous, expect setbacks along the way, and not lose hope. In this regard, I pledged my office's continuing support to the fledgling Iraqi inspectors general in their difficult trials to come. Up until that point, our main contribution to their training had been Dr. Johnson, for whose mentorship more than one Iraqi inspector general expressed profound gratitude.

I also extended an open invitation to visit the DoD Office of Inspector General to any Iraqi inspector general who came to Washington D.C.

About two weeks later, my Iraqi Ministry of Defense counterpart, Inspector General Layla Jassim al-Mokhtar, came to Washington D.C. Her visit, by design, coincided with the monthly meetings of both the PCIE and the DCIE.

The day after the July 12, 2005, PCIE meeting, I expressed my profound respect for al-Mokhtar's courage. At the same time, I asked her to consider carefully whether or not she would allow my staff to video tape her comments to the DCIE on the following day, especially in light of the additional risk to her life that the eventual publication of such a video recording would effectuate, whether broadcasted in Iraq or in the United States. She agreed.⁶

She also invited me to visit her Office of Inspector General in Baghdad the following month in order to help motivate her own staff to face the challenges ahead. I accepted her invitation.

Within the month, however, Inspector General al-Mokhtar's own bodyguard shot her, ostensibly by accident. She died five weeks later in a Jordanian hospital.

The following excerpts are from the official translation of Inspector General Layla Jassim al-Mokhtar's speech to the PCIE on July 12, 2004:

As one of 31 Iraqi Inspectors General working to build an effective anti-corruption system in Iraq and working to improve the efficiency of our ministries, I believe we Iraqi Inspectors General face many of the same challenges which you, our fellow Inspectors General, face.

Before my remarks on Inspector General issues, I want to express the gratitude of myself and all Iraqi people for the sacrifices made by the people of the United States as well as by the US and coalition military forces in bringing freedom to Iraq. It has not been easy. It will take time to develop the governmental institutions of Iraq, including the anti-corruption system. We are grateful that your respected President and the US government are committed to assisting us in finishing the job which has begun.

For those of you who may not be familiar with the Iraqi anti-corruption system, it was established by Coalition Provisional Authority orders and consists of three inter-related entities: The Commission of Public Integrity, the Board of Supreme Audit (which previously existed) and the Inspectors General. CPA Order 57 of February 5, 2004 provided for an effective program in all Iraqi ministries with processes of review, audit, and investigation in order to improve the level of responsibility and integrity. The program additionally provided for monitoring ministry performance and for fighting fraud, waste, abuse of power,

and any other misconduct through the offices of the Inspectors General.

In the Ministry of Defense [MoD], the Inspector General structure consists of: an Inspection Directorate, Audit Directorate, Investigations Directorate, and Administrative Directorate. There is also a proposal to establish a directorate for intelligence oversight. The MoD Inspector General office started with the following staff: an Inspection Directorate of one civilian and two military, Investigation Directorate of four civilians headed by a female legal counselor, Audit Directorate of three civilians, and Administrative Directorate of four civilians headed by a female engineer. The initial activities of the IG office were to recruit highly qualified employees who could accomplish the work to be done, then to train those employees and to make the best use of their expertise. At the start of this process, recruiting a sufficient number of qualified employees was a challenge. Some reasons for this included a lack of understanding what the mission and goals of the IG system would be. The security situation, including the location of the ministry building itself, was also an issue. Assassination of a number of MoD officials and employees also presented some recruiting difficulties. Despite the challenges, we were able to hire qualified people and that process will continue until we reach our full strength.

With regard to Inspectors General in the other Iraqi ministries, they are engaged in doing their duties. They are going about their activities intended to spread and support the concepts of integrity, transparency and efficiency. These Inspectors General are doing audits, inspections, and investigations in response to information which comes to them. . . .

These Iraqi IG's have many of the same problems and issues which confront you. They work on staff and budget

issues, work to educate their ministers and other government officials on the IG mission so that IG's can be used efficiently and wisely, and they work hard at their duties. I would hope that there could be a cooperative program between the US Inspectors General offices and their Iraqi counterparts for the purpose of building and maintaining an active IG system."⁷

CASE STUDY: VALLEY FORCE IN IRAQ

According to the March 11, 2008, testimony of the Inspector General of the Department of Defense before the Senate Appropriations Committee, the DoD Office of Inspector General (OIG) had, "provided the core staff for the Coalition Provisional Authority IG, and later assisted the stand-up of the SIGIR. Since 2003 the [DoD] OIG has provided 141 full or part-time personnel in support of both organizations. . . . We continue to play a key role in developing and promoting the establishment of effective oversight and security organizations in Afghanistan and Iraq. . . . In July 2007, we initiated a project to document the lessons learned during our 3-year experience in assisting in establishing and developing a viable, sustainable, effective IG system in Iraq. This project will capture the concepts, strategies, options, and practical applications establishing a Federal IG system may be appropriate in nation building missions and as an instrument to combat fraud, waste, abuse, and corruption in developing nations. The expected completion date for the lessons learned report is April 2008."⁸

The following excerpts are from the final draft report of the DoD OIG report on the "Iraqi Principled Governance Initiative." It has never been officially published.

Lessons from Iraq
Inspector General System Implementation (2003-2007)
Report Date: May 2008

PREFACE

The Coalition entered Iraq in 2003, freed the country from its oppressive dictatorship, and dismantled its corrupt governmental infra-

structure. Having achieved its military goals, the coalition immediately embarked on helping Iraq develop a democratic form of government based on strict adherence to rule of law. In doing so, it was found there were significant cultural differences between western and Iraqi perceptions of corruption and the need to avoid it within government. The urgency of quickly developing a new form of government in a failed state, that itself continued under siege, and with differing terms of reference, precipitated inefficiencies in achieving timely objectives. These might have been avoided had we had the advantage of the lessons learned as discussed herein.

This report chronicles the lessons drawn from implementing a new Iraqi institution that underpins rule of law, and is a frontline fighter in the war on corruption: the US mandated (CPA-directed) federal Inspectors General system within each Ministry of Iraqi government. After more than four years, the system remains under-developed, under-resourced, and may well be unsustainable since it lacks ability to professionally train and replenish its present complement of 3,500 auditors, inspectors, investigators, and support staff. The system of 31 Iraqi IGs and their Offices throughout Iraq clearly requires substantial time and attention to achieve lasting effectiveness; and there remain wide variations among the various offices. Although the lessons discussed herein are primarily intended to contribute to future endeavors if ever needed, they might also be of benefit to assist in fully implementing a federal Inspector General system in Iraq.

Chapter Review Questions:

- 1 By what authority and for what purpose did the DoD Inspector General detail one of his Deputy Inspectors General to the Coalition Provisional Authority in Baghdad in 2003?
- 2 By what authority and for what purpose did the Coalition Provisional Authority Administrator, Ambassador Paul Bremer, announce in late 2003 that among other preconditions, the establishment of an effective Office of Inspector General in every Iraqi ministry, was a precondition for the transfer of sovereignty back to the Iraqi People?
- 3 By what authority and for what purpose did the DoD Inspector General deploy his OIG Dean of Instruction to Baghdad in early 2004?
- 4 By what authority and for what purpose did the DoD Office of Inspector General NOT publish its lessons learned report (the final draft of which was extracted to build the case study above), after four years of supporting the establishment in Baghdad of a system of Inspectors General and associated anti-corruption efforts under the auspices of the “Principled Governance Initiative”?

Chapter 4 Endnotes

¹ David Clary and Joseph Whitehorne, "Steuben Trains the Troops," The

² *Ibid.* (footnote omitted).

³ *Ibid.*, p. 39 (footnote omitted).

⁴ Remarks as Prepared for Delivery by Inspector General Joseph E. Schmitz of the Department of Defense: "Domestic Enemies and Pyrrhic Victories," Arlington, VA, Saturday, June 7, 2003
<http://web.archive.org/web/20090320204921/http://www.dodig.osd.mil/IGInformation/Speeches/TroyCommencement672003.pdf>

⁵ See Remarks of the Inspector General of the Department of Defense: "Honor, Courage, Commitment -- and Class" (Retirement of Admiral Larry L. Poe), October 24, 2003
http://web.archive.org/web/20090320204913/http://www.dodig.osd.mil/IGInformation/Intro_of_Iraq_MoD_IG_to_DCIE.pdf

⁶ See Remarks as delivered by Department of Defense Inspector General Joseph E. Schmitz to the Defense Council on Integrity and Efficiency, "Inspector General Introduces Iraqi Counterpart To DCIE As A 'Fellow Champion Of Integrity'," July 14, 2005
http://web.archive.org/web/20090320204913/http://www.dodig.osd.mil/IGInformation/Intro_of_Iraq_MoD_IG_to_DCIE.pdf

⁷ Inspector General Layla Jassim al-Mokhtar's entire speech to the PCIE is posted at
http://www.dodig.mil/IGInformation/Remarks_by_MOD_IG_Mokhtar_071805.pdf

⁸ Hon. Claude M. Kicklighter, Inspector General of the Department of Defense, before the Senate Appropriations Committee, "The effectiveness of U.S. efforts to combat corruption, waste, fraud, and abuse in Iraq," pp. 2, 20-21, March 11, 2008
<http://www.dodig.mil/fo/Prepared%20Statement%20-%20IG%20DoD%20FINAL.PDF>

⁹ CPA Order Number 57, February 5, 2004, p. 1, retrieved online at http://web.archive.org/petabox/20040707043136/http://cpa-iraq.org/regulations/20040212_CPAORD57.pdf

¹⁰ U.S. Department of State and the Broadcasting Board of Governors Office of Inspector General, Report Number: ISP-IQO-06-05, August 2006, p. 22.

¹¹ Except as it relates to the supposed flow of funding directly to the IGs, CPA Order 57 remains unchanged since its promulgation.

¹² CPA Order Number 57, February 5, 2004, p. 2, retrieved online at http://web.archive.org/petabox/20040707043136/http://cpa-iraq.org/regulations/20040212_CPAORD57.pdf

¹³ Ibid, p. 3

¹⁴ USIP, Association for Diplomatic Studies and Training Iraq Experience Project, Jay Bachar Interview, July 19, 2004

¹⁵ “An Integrated Approach to Combating Corruption in Iraq,” July 16, 2006, p.3

¹⁶ USIP, Association for Diplomatic Studies and Training Iraq Experience Project, Rodney Bent Interview, September 14, 2004

¹⁷ SIGIR, Joint Survey of the U.S Embassy-Iraq’s Anticorruption Program, SIGIR 06-021, July 28, 2006, p.i

¹⁸ SIGIR, Joint Survey of the U.S Embassy-Iraq’s Anticorruption Program, SIGIR 06-021, July 28, 2006, p.i

¹⁹ Nouri al-Maliki, interview in *Al-Iraqiya*, http://web.archive.org/petabox/20080704013117/http://www.layalina.tv/Press/PR_III.16.asp

²⁰ DoS, USINFO.STATE.GOV, March 25, 2004 (online at: http://merln.ndu.edu/merln/pfiraq/archive/state/2004_Mar_25-260035.pdf).

²¹ The Honorable Ambassador L Paul Bremer, III, Committee on Government Oversight and Reform U.S House of Representatives, February 6 2007 <https://house.resource.org/110/org.c-span.196561-1.pdf>

²² Condoleezza Rice, Senate Committee on Foreign Relations, October 19, 2005

[http://web.archive.org/petabox/20061013213938/http://foreign.senate.gov/tes
timony/2005/RiceTestimony051019.pdf](http://web.archive.org/petabox/20061013213938/http://foreign.senate.gov/tes
timony/2005/RiceTestimony051019.pdf)

²³ Statement of Mr. Thomas F. Gimble, Acting Inspector General, DoD, before the Subcommittee on National Security, Emerging Threats, and International Relations, House Committee on Government Reform: "Iraq Reconstruction, Governance and Security Oversight," October 18, 2005, p. 6.

²⁴ Admiral Poe interview statement October 2007

²⁵ Originally sent to help establish an Iraqi Academy of Principled Governance, his mission grew to be the advisor to all 31 Iraqi IGs and to represent the IG system to Coalition leadership and Advisory Teams.

²⁶ Admiral Poe Interview 2007.

²⁷ CPA Funding Request, "PRB NO. 655 Project Name: Board of Supreme Audit—Information Systems Infrastructure & Revitalization Program," February 26, 2004. (In CPA Archive)

²⁸ U.S. Department of State and the Broadcasting Board of Governors Office of Inspector General, Report Number: ISP-IQO-06-05, August 2006, p.21

²⁹ (USMC, ret)

³⁰ Originally sent to help establish an Iraqi Academy of Principled Governance, his mission grew to be the advisor to all 31 Iraqi IGs and to represent the IG system to Coalition leadership and Advisory Teams.

CHAPTER 5. INSPECT:

Inspecting Sex Slavery through the Fog of Moral Relativism

“The Commanders of all ships and vessels belonging to the THIRTEEN UNITED COLONIES, are strictly required to shew in themselves a good example of honor and virtue to their officers and men, and to be very vigilant in inspecting the behaviour of all such as are under them, and to discountenance and suppress all dissolute, immoral and disorderly practices; and also, such as are contrary to the rules of discipline and obedience, and to correct those who are guilty of the same according to the usage of the sea.”

Continental Congress, “Rules for the Regulation of the Navy of the United Colonies of North America,” Article 1 (1775)¹

On May 31, 2002, Congressman Christopher Smith (R-NJ) and twelve other members of Congress wrote a letter to Secretary of Defense Donald Rumsfeld, requesting a “thorough, global and extensive” investigation into publicized allegations of U.S. military complicity in international sex slavery, the most heinous form of human trafficking.² Within days, the Commander of United States Forces Korea (USFK), four-star Army General Leon LaPorte, personally visited mein Pentagon City and asked me to address these allegations.

General LaPorte explained, “Congress expects this investigation or inspection to be joint and global. My IG in Korea is not a jointly assigned IG, and I simply do not have the authority to conduct either an investigation or an inspection that is global in scope. Likewise, The Inspector General of the Army does not have the authority to conduct a joint inspection.” He therefore requested that, as the four-star equivalent civilian DoD IG, I travel to Korea to help the Commander “answer the mail” from Congress.

I responded, “The good news is that I just recently decided to stand up an Inspections capability.” Up until that point, the IG office had focused on the main functional capabilities explicitly required by the Inspector General Act of 1978, as amended, namely: audits; investigations; investigative policy oversight, and audit policy oversight.³

“The bad news,” I explained to General LaPorte, “is that it will take me about six months to staff up my new Inspections capability.” I committed, however, to dispatch a team lead by the newly appointed two-star Deputy, Rear Admiral Larry Poe, USNR, to lay the initial groundwork in Korea for a personal inspection visit.

In the course of subsequent sex slavery inspections in Korea, Bosnia-Herzegovina, and Kosovo, the “lessons learned” included:

(1) Among the root causes of the recent resurgence of sex slavery, aside from the obvious profit motive of organized criminals, is a general reluctance of leaders at all levels to promulgate and enforce principle-based standards for subordinates; and

(2) Whenever leaders, especially those of us who swear to “support and defend the Constitution of the United States,”⁴ become aware of humans being referred to as “just” something else (*e.g.*, “they’re just prostitutes,” as discussed below), we ought never to turn a blind eye.

Before inspecting sex slavery on the ground in Korea, the DoD OIG “joint and global” inspection team met with various experts in Washington, D.C., and with international anti-trafficking advocates, including the sponsor of anti-trafficking legislation in the Russian Duma. The bill’s Russian sponsor expressed little hope in the success of her proposed legislation because, as she explained through a translator,

“like most Russian men, the attitude of almost all my brethren in the Duma is that, ‘They’re just prostitutes’.” Unfortunately, the subsequent inspection validated that the Russian Duma holds no monopoly on this moral relativist attitude.

According to some Korean officials, most Russian “entertainers” on Itaewon’s “Hooker Hill” and elsewhere in Korea consent to their employment status. According to the Army Military Police on the ground, however, the contracts for these Russian entertainers are involuntarily sold weekly from one establishment to another.

When one of the young U.S. Army Military Police was asked if he would like to do something about this blatant human trafficking, he unhesitatingly responded in the affirmative. He added promptly, however, that it was beyond his control. The young soldier was obviously waiting for a signal from his own chain-of-command that would empower him to combat this affront to human dignity that, to him, seemed so morally wrong.

Unbeknownst to this soldier, the top of his USFK chain of command had already sent the signal. It just hadn’t made it down to his level—yet.

The next weekend, two teams of U.S. Army military police took on Itaewon’s Hooker Hill, leaving 26 entertainment establishments off limits to American GIs -- and, if nothing else, sent a strong, principle-based moral message throughout the entire chain-of-command that turning a blind eye to sex slavery is not an option.

Shortly thereafter, the IG team issued a report identifying several opportunities to build on the aggressive efforts taken by the USFK leadership to combat human trafficking. In response to the IG’s Phase I report, twenty-six Members of Congress, including most of those who had signed the original letter, signed a second letter to the Secretary of Defense, dated October 10, 2003, concluding with the following admonition: “Commanders and service members at all levels must understand their role in helping to eradicate the scourge of human trafficking and to avoid giving any indication that DOD turns a blind eye to this barbaric practice.”

Before completing the assessment on Korea, the IG’s inspection team turned its attention to the European theater where human trafficking was becoming a growing menace in Bosnia-Herzegovina and Kosovo.

In September 2003, at about the same time our office was kicking off “Phase II” of our joint and global human trafficking inspection, President Bush gave a speech to the United Nations General Assembly, in which he identified human trafficking as a “special evil.” President Bush stated that the “founding documents of the United Nations and the founding documents of America . . . assert that human beings should never be reduced to objects of power or commerce, because their dignity is inherent. Both . . . recognize a moral law that stands above men and nations, which must be defended and enforced by men and nations.”⁵

Four months later, as a result of our completed “Phase II” report and recommendations, the Deputy Secretary of Defense promulgated the Commander-in-Chief’s “zero tolerance” policy on human trafficking, which stated:

The responsibilities of commanders and supervisors at all levels are clear, as codified by Congress under Title 10. Those statutory provisions require commanders and others in authority ‘to be vigilant inspecting the conduct of all persons who are placed under their command; to guard against and suppress all dissolute and immoral practices, and to correct . . . all persons who are guilty of them.’ Efforts to combat trafficking in persons in DoD begin with the recognition that all commanding officers and other DoD officers and employees in positions of authority are expected to conduct themselves in a manner that is consistent with statutory requirements for exemplary conduct.

Concordant with these U.S. anti-trafficking efforts, the North Atlantic Treaty Organization (NATO) circulated a draft policy document on May 21, 2004 (finalized on December 2, 2004), reaffirming that human trafficking constitutes a “serious abuse of human rights, especially affecting women and children,” while at the same time announcing a zero tolerance policy by NATO forces and staff.

On September 16, 2004, Secretary of Defense Rumsfeld issued a one page Memorandum on “Combating Trafficking in Persons,” in which he expressed his “view on this important matter to augment the [Deputy Secretary’s] January 30, 2004 memo on this subject.”⁶ In it,

Secretary Rumsfeld admonished that, “No leader in this department should turn a blind eye to this issue,” urging commanders to “be vigilant” and “make full use of all tools available, including DoD Inspectors General and criminal investigative organizations, to combat these prohibited activities.”⁷

Secretary Rumsfeld’s bottom line: “I am committed to taking every step possible to combat Trafficking in Persons.”⁸

In furtherance of Secretary Rumsfeld’s commitment, the Department of Defense extended its “zero tolerance” policy on June 21, 2005, to contractors.⁹ The new rule required “contractors to establish policy and procedures for combating trafficking in persons and to notify the contracting officer of any violations and the corrective action taken.”¹⁰

Whatever else one might say about sex slavery in the 21st Century, the joint and global IG inspection and associated proactive measures taken by U.S. and Western leaders reaffirm the “moral truth” that human trafficking falls within those “dissolute and immoral practices” envisioned by our Continental Congress when it prescribed a leadership duty to “guard against and suppress” such practices through, *inter alia*, vigilance by leaders in “inspecting the conduct of all persons who are placed under their command.”¹¹

Chapter Review Questions:

- 1 By what authority and for what purpose would an IG inspect sex slavery?
- 2 Why did the U.S. Forces Korea Commander ask the IG of the Department of Defense, instead of the three-star Army IG, to address the allegations of complicity between Korean-based U.S. military personnel and international sex slavery?
- 3 Under what circumstances should a military commander (or a corporate Chief Executive Officer) call in an independent IG professional—as opposed to his own legal or compliance staff—to assess how the “tone at the top” is trickling down to the lowest levels?
- 4 Are human traffickers “enemies” of the U.S. Constitution? If so, why?
- 5 By what authority and for what purpose does Congress require all those “elected or appointed to an office of honor or profit in the civil service or uniformed services” to take an oath of office to “support and defend the Constitution of the United States against all enemies, foreign and domestic; ... So help me God”?²⁷
- 6 Under what circumstances should an individual who is NOT “elected or appointed to an office of honor or profit in the civil service or uniformed services,” such as an enlisted service member or a contractor, be required to take an oath of office to “support and defend the Constitution of the United States against all enemies, foreign and domestic”?²⁸?
- 7 During the course of the DoD IG’s Human Trafficking Inspection, union lawyers representing contractors in Korea reportedly claimed that the new restrictions being imposed by the Commander, at the recommendation of the IG, could not

legally be imposed upon contractors. What possible justification could there be for exempting DoD contractor personnel from the Secretary of Defense's "Zero Tolerance" policy on human trafficking?

Chapter 5 Endnotes

¹ Recodified in 1997 for the Army, Naval Services, & Air Force at 10 U.S.C. §§ 3583, 5947, & 8583 respectively.

² Congressman Smith at the time was the Co-Chairman of the Commission on Security and Cooperation in Europe. His congressional co-signers were: George Voinovich; Frank Wolf; Dennis Kucinich; Steny Hoyer; Tom Lantos; Robert Aderholt; Joe Pitts; Melissa Hart; Mike Pence; Marcy Kaptur; Cynthia McKinney; and Diane Watson.

³ See Inspector General Act of 1978, as amended, §3(d) (“Each Inspector General shall, in accordance with applicable laws and regulations governing the civil service—(1) appoint an Assistant Inspector General for Auditing who shall have the responsibility for supervising the performance of auditing activities relating to such programs and operations of the establishment, and (2) appoint an Assistant Inspector General for Investigations who shall have the responsibility for supervising the performance of investigative activities relating to such programs and operations.”); *id.*, § 8(c)(5)&(7) (“In addition to the other duties and responsibilities specified in this Act, the Inspector General of the Department of Defense shall . . . (5) develop policy, monitor and evaluate program performance, and provide guidance with respect to all Department activities relating to criminal investigation programs; [and] (7) develop policy, evaluate program performance, and monitor actions taken by all components of the Department in response to contract audits, internal audits, internal review reports, and audits conducted by the Comptroller General of the United States.”).

⁴ 5 U.S.C. § 3331 (“An individual . . . elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: ‘I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of

evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.”).

⁵ George W. Bush, President of the United States of America, Address to the United Nations General Assembly, September 23, 2003 (<http://www.un.org/webcast/ga/58/statements/usaeng030923.htm>).

⁶ Donald Rumsfeld, Secretary of Defense, Memorandum to Service Secretaries, etc., September 19, 2003, attached to Inspector General of the Department of Defense Testimony before the House Committee on Armed Services and the Commission on Security and Cooperation in Europe on “Implementing the Department of Defense ‘Zero Tolerance’ Policy with regard to Trafficking in Humans,” September 21, 2004 (http://www.dodig.osd.mil/fo/JES_TIP_Testimony_092104.pdf).

⁷ *Ibid.*

⁸ *Ibid.*

⁹ Defense Federal Acquisition Regulation Supplement; Combating Trafficking in Persons, 70 Fed. Reg. 35,603 (2005) (to be codified at 48 C.F.R. pts. 212, 225, and 252) (proposed with request for comments June 21, 2005).

¹⁰ *Id.*

¹¹ 10 U.S.C. § 5947 (statutory Exemplary Conduct leadership standard), *supra*.

¹² “Assessment of DoD Efforts to Combat Trafficking in Persons: Phase I—United States Forces Korea,” Case Number H03L88433127, July 10, 2003. <http://www.dodig.mil/fo/Foia/H03L88433128PhaseI.PDF>

¹³ Within USFK, Courtesy Patrols consist of noncommissioned officers from individual company-sized units detailed to patrol off-post locations to ensure the safety and proper comportment of soldiers assigned to their units while off-duty.

¹⁴ Each Branch of Service has its own self-prescribed values. For the Navy and Marine Corps its is “Honor, Courage, and Commitment”; for the Air

Force, “Integrity First, Service Before Self, and Excellence in All We Do”; and the Army has “Loyalty, Duty, Respect, Selfless-Service, Honor, Integrity, and Personal Courage.”

¹⁵ Neither Fox News nor USFK were able to identify the Service members serving on Courtesy Patrol who made comments during the Fox News video. There have been no reports of either reprisal or disciplinary action being taken against Service members as a result their appearances in the Fox News report. However, based on our conversations with other Service Members, we believe the Service member was repeating a generally held perception that many of the women who work in off-installation bars were exploited by debt-bondage, illegal confiscation of identity papers, and threats of physical violence. We found this perception to be corroborated by an abundance of articles on human trafficking and information from the United Nations and the Department of State’s Office to Monitor and Combat Trafficking in Persons, as well statements by Korean government authorities and local non-governmental organizations which focus on aiding off-installation victims.

¹⁶ The Armed Forces Disciplinary Control Board is the commander’s tool for identifying and placing civilian establishments off-limits to Service members. According to a memorandum dated September 10, 2003, from the Chief of Staff, USFK, an investigation will be conducted “when credible evidence is presented” that the establishments “support, harbor, or in any-way sanction prostitution... Businesses may be placed ‘Off Limits’ to USFK personnel due to these illegal activities.”

¹⁷ The following are selected excerpts from Department of Defense Office of Inspector General Report, “Assessment of DoD Efforts to Combat Trafficking in Persons: Phase II—Bosnia-Herzegovina and Kosovo,” Case Number H03L88433127, December 8, 2003.
<http://www.hrw.org/reports/2002/bosnia/ig.pdf>

¹⁸ As discussed in greater detail below, the Fighter Management Pass Programs offer Service members stationed in the Balkans an opportunity to travel on pass to three alternative locations in Europe for rest and relation.

¹⁹ See National Security Presidential Directive (NSPD)-22, Combating Trafficking in Persons,” of December 16, 2002, which is further described in the “Standards” section of this report. That Directive states, “The United States hereby adopts a ‘zero tolerance’ policy regarding United States government employees and contractor personnel representing the United States abroad who engage in trafficking in persons.”

²⁰ We understand that the Office of the Under Secretary of Defense for Policy is already working with the North Atlantic Council of NATO to adopt standards of conduct for NATO-led forces.

²¹ Ambassador Pamela Hyde Smith’s remarks at the NATO Euro-Atlantic Partnership Council Meeting of July 24, 2003, in Brussels (as delivered).

²² In November 2000, the Military Extraterritorial Jurisdiction Act of 2000, Public Law 106-523, was enacted. This Act was designed to close some of the jurisdictional loopholes that, in some instances, had rendered U.S. citizens essentially immune from prosecution for crimes committed overseas. The scope of the Act, however, is limited to “certain members of the Armed Forces and . . . persons employed by or accompanying the Armed Forces outside the United States.”

²³ Ms. Bolkovac brought suit under the (U.K.) Public Interest Disclosure Act of 1998.

²⁴ Air Force contract number F34061-97-D0422.

²⁵ Because of the possibility of retaliation by DynCorp employees and the Serbian mafia, CID placed Mr. Johnston and his wife in protective custody.

²⁶ The letter of agreement also required DynCorp employees to notify DynCorp management of any employee engaging in human trafficking. The letter, however, did not include any indication that DynCorp would protect, and not reprise against, such whistleblowers. See, for example, 10 U.S.C. 2409, which states, “An employee of a contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing . . . information relating to a substantial violation of law related to a contract” DynCorp also indicated to this Office that it has placed 234

business establishments in Bosnia off-limits to all its employees, and that it has instructed the IPTF to inform DynCorp of any employee who visited the off-limits establishment.

²⁷ 5 U.S.C. §3331.

²⁸ Ibid.

CHAPTER 6. INVESTIGATE FRAUD,
WASTE & ABUSE:

The Air Force Tanker Scandal

The Conventions of a number of the States having, at the time of adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added, and as extending the ground of public confidence in the Government will best insure the beneficent ends of its institution; ...

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, ... nor be deprived of life, liberty, or property, without due process of law...

U.S. Constitution, Preamble to Bill of Rights and Amendment V

The \$23.5 billion Air Force Tanker lease proposal had been designed to “generate \$2.3 billion in profit for Boeing,”¹ but instead resulted in the imprisonment of both the Chief Financial Officer of Boeing and the Chief Procurement Officer of the United States Air Force. It has been described as “the Pentagon’s biggest procurement scandal since the late 1980s.”²

Unraveling the Air Force Tanker scandal started with a distraught call from Senator John McCain's staff. A senior Air Force procurement officer, Darlene Druyen, had refused to identify the Wall Street expert who had recommended that the Air Force lease as opposed to buy a new fleet of aerial refueling aircraft to replace the Air Force's aging fleet of KC-135 tanker aircraft. According to Senator McCain's staff, the Air Force procurement officer claimed that she could not disclose the identity of the Wall Street expert on account of a non-disclosure agreement. Senator McCain's staff sensed deceit, and therefore requested an investigation.

As Darlene Druyen was not senior to the three-star Air Force Inspector General, Senator McCain's allegation of dishonesty was referred to the Air Force IG. The resultant Report of Investigation addressed a number of issues ancillary to the allegation of deceit, but did not answer the central question: Had Darlene Druyen lied to Senator McCain's staff?

The working papers appended to the Air Force IG Report made it abundantly clear that Darlene Druyen had lied to Senator McCain's staff. Based on supporting documentation, it was apparent that there was no non-disclosure agreement with the Wall Street expert, either in writing or otherwise. Senator McCain's staff was right.

When our office forwarded the Air Force IG's Report of Investigation to Senator McCain, I insisted on clarifying in the cover letter that notwithstanding all the other findings of the Air Force IG, Darlene Druyen should have been more forthright with the Senator's staff.

Subsequently, the Secretary of the Air Force called me into his office, and in the presence of the Air Force Chief of Staff, suggested that I could be sued for slander for writing such things about Darlene Druyen. Of course, I was just carrying out my statutory duty by calling it as I saw it, and being rightfully concerned about basic candor towards Congress.

On October 6, 2003, the Chairman of the National Legal and Policy Center, whose mantra is "promoting ethics in public life," sent me a letter captioned, "Allegations of Misconduct regarding the Boeing Lease Proposal." In the letter, the Chairman raised a number of "fact questions and ethical concerns" relating to Darlene Druyun's daughter Heather, whom "Boeing employed . . . while Ms. Druyun was negotiat-

ing on the Air Force's behalf on a multi-billion dollar procurement proposal from which Boeing stood to benefit."³

What ensued was a complex series of interlocking audits, leadership reviews, and investigations that led to two criminal convictions and the exposure of a flawed \$23.5 billion effort by the Air Force to procure replacement tankers sole-source from Boeing.

On June 7, 2005, the Senate Armed Services Committee held a hearing, "To receive testimony on the Department of Defense Inspector General's Management Accountability Review of the Boeing KC-767A Tanker Program." A number of Senators asked tough questions about how I had carried out my statutory obligation of independence. Senator Carl Levin (D-MI), in particular, read a statement accusing me of violating my statutory duty of independence by consulting with White House lawyers on how best to conform with a redaction protocol agreed to by the Committee Chairman, Senator McCain, and the White House.

To be sure, conformity with a redaction protocol agreement between the Committee Chairman, Senator McCain, and the White House was a test of Inspector General independence. Some of my senior staff had suggested that I simply ignore the protocol, which I considered a legally binding agreement. At the same time, lawyers from the DoD Office of General Counsel were suggesting that redactions should be reviewed by them to ensure compliance with the White House protocol. In the end we chose carefully to steer through two "legal shoals": potential compromises to IG independence from the White House Counsel's Office on one side; and from the DoD General Counsel on the other side. From my perspective "at the helm," the redacted work product my office submitted to Congress had not run aground of either shoal.

Early on, according to the New York Times, "The Air Force took strong issue with Mr. Schmitz's conclusions and said it 'non-concurs emphatically' with nearly all of his recommendations."⁴ In the end, the Air Force's senior acquisition official and the Chief Financial Officer of Boeing both went to prison, and Congress cancelled the deal.

Chapter Review Questions:

- 1 By what authority and for what purpose might:
 - a An Air Force procurement officer withhold from a senior Senator on the Senate Armed Services Committee the identify of a Wall Street expert who had recommended that the Air Force lease as opposed to buy a new fleet of aerial refueling aircraft?
 - b The IG redact from his report to Congress the names of senior White House and Senate officials pursuant to an agreement between and among a Committee Chairman, an individual member that Committee, and the White House?
- 2 At the June 2005 Senate Armed Services Committee hearing on the Inspector General's "Management Accountability Review of the Boeing KC-767A Tanker Program," Ranking Member Senator Carl Levin (D-MI) "called the report 'totally inadequate',"⁶ while Senator John McCain (R-AZ) remarked, "I'd like to say a word about [the Inspector General of the Department of Defense], who I think has steadfastly done an outstanding job, not only on this occasion, but on other occasions. I appreciate the courage he has shown."
 - a Was it appropriate for an Inspector General to consult directly with the Office of the Counselor to the President, without going through the General Counsel of the Department of Defense, in order to ensure compliance with a redaction protocol agreement between the Senate Armed Services Committee Chairman, Senator McCain, and the White House?

- b** What alternatives could the Department of Defense Inspector General have pursued instead of complying with a redaction protocol agreement between the Senate Armed Services Committee Chairman, Senator McCain, and the White House?

Chapter 6 Endnotes

¹ Jeffrey St. Clair, "Onward and Downward: Book Cooking at Boeing," July 26, 2003 (<http://www.counterpunch.org/stclair07262003.html>).

² Andrea Shalal-Esa, Reuters, "Pentagon Acquisition Needs Cultural Change: Some lower-level U.S. Air Force and Pentagon officials do not yet fully recognize the need to overhaul defense procurement to make it more transparent and avoid problems of the past, the U.S. military's top internal watchdog said on Thursday," September 3, 2005 (<http://www.corpwatch.org/article.php?id=12597>).

³ Letter from Chairman of National Legal and Policy Center to Inspector General of the Department of Defense, October 6, 2003 (<http://www.nlpc.org/view.asp?action=viewArticle&aid=46>).

⁴ R. Oppel, "Pentagon Says Changes Are Needed in Boeing Jet Deal," New York Times, April 10, 2004 (<http://query.nytimes.com/gst/fullpage.html?res=9A05E3D81338F933A25757C0A9629C8B63>).

⁵ The following are selected excerpts from the prepared testimony of the Inspector General of the Department of Defense before the Senate Armed Services Committee on the "Management Accountability Review of the Boeing KC-767A Tanker Program," June 6, 2005:
http://www.dodig.mil/fo/Hrng_KC767A_6-7-2005_v5.pdf

⁶ M. Allen, "Details on Boeing Deal Sought: Senators Raise Questions About White House Involvement," The Washington Post, June 8, 2005 (<http://www.washingtonpost.com/wp-dyn/content/article/2005/06/07/AR2005060701751.html>).

CHAPTER 7. NON-CRIMINAL INVESTIGATIONS:

“A Guy Named Satan” and “Fast & Furious”

It is the policy of this Office of Inspector General that any person whose professional reputation is directly impacted by an audit, inspection, investigation, or oversight activity of this Office be afforded the ‘essential constitutional promises’ of procedural due process in a manner transparently consistent with [the United States Constitution, as explained by the United States Supreme Court in Hamdi v. Rumsfeld, 124 S. Ct. 2633(2004)].

IG Policy Memo, “Due Process in the Activities of the Office of the Inspector General,” August 20, 2004

In the aftermath of the terrorist attacks on September 11, 2001, U.S. Army Lieutenant General Jerry Boykin delivered a number of speeches about the ongoing war efforts, mostly in religious settings, such as churches. Some of his speeches were delivered in uniform, and many of his speeches were critical of Islam.¹ At the time, General Boykin was the senior uniformed military leader in the Office of the Undersecretary of Defense for Intelligence.

Eleven years later, in the aftermath of the terrorist attack against Americans in Benghazi, Libya, on September 11, 2012 (and substantively unrelated to either of these terrorist attacks), the Inspector General of the Department of Justice (“DOJ”) released a report titled,

“A review of ATF’s Operation Fast and Furious and Related Matters.” This IG Report involved, “Numerous firearms bought by straw purchasers [that] were later recovered by law enforcement officials at crime scenes in Mexico and the United States. One such recovery occurred in connection with the tragic shooting death of a federal law enforcement agent, U.S. Customs and Border Protection Agent Brian Terry . . . on December 14, 2010, as he tried to arrest persons believed to be illegally entering the United States.”

The DOJ “Fast and Furious” IG Report, like the DoD IG report on General Boykin, exemplifies the IG role in investigating non-criminal allegations against senior government officials. Both IG Reports are included as case studies in this chapter.

According to the DoD IG’s final report on General Boykin, which is posted on the internet and excerpted below, General Boykin’s speeches “followed a standard pattern, exemplified below”:

After telling the story of Esther—a biblical figure who, according to LTG Boykin, became queen of Persia and was told she had been “raised up for such a time as this” to save her people (the Jews in Persia), LTG Boykin analogized the story to the election of President Bush who, he said, had been placed in the presidency by God “for such a time as this” (referring to the war on terrorism).

After showing slides of the terrorist attacks of September 11, 2001, on the New York World Trade Center and the Pentagon, LTG Boykin commented, “we watched in disbelief as radical Muslims in other parts of the world danced and rejoiced in our misery.”

LTG Boykin then asked his audience, “why do they [radical Muslims] hate us?” He answered his question by stating that the United States’ cultural heritage is Judeo-Christian and “[they hate us] because we support Israel and we will never abandon Israel.”

While showing slides of Osama bin Laden, Saddam Hussein, and Kim Jong Il, LTG Boykin asked his audience if each of these individuals is “the enemy.” He answered his own question in the negative, stating the true enemy is a spiritual one: “the principalities of darkness”; “a guy named Satan.”²

LTG Boykin told his audience the United States is in a spiritual battle and that he was recruiting a spiritual army. He asked the audience to pray “for me, my soldiers, our leaders.”

LTG Boykin then showed slides of Service members in the Special Forces and various weapons systems used by military forces in Afghanistan and Iraq. He noted how some of the Service members were lightly armed, mounted on horseback, and did not appear formidable. He discussed certain devices used by Service members as depicted in slides (personal digital assistants and laser target designators, enabling them to request and direct fire from supporting aircraft onto enemy positions and equipment). He noted these devices rendered Service members capable of defeating large forces, pointing out that these Service members could “reach back” to a greater power to defeat the enemy. He analogized this to a Christian’s ability to “reach back” to a greater power through prayer.

In several of his presentations, LTG Boykin described personal experiences in operations in Iran, Somalia, and Grenada, and explained how his faith helped him to overcome difficulties he encountered during those operations.³

During the course of the Inspector General investigation into these speeches, lawyers assigned to the Office of Inspector General advised the investigators that a rule forbade senior DoD officials from giving speeches in religious settings. That rule, according to the lawyers, provided that, “Community relations activities shall not support, or appear to support, any event that provides a selective benefit to any

individual, group, or organization, including any religious or sectarian organization..."⁴

Of course, the investigators had soon substantiated the allegations of wrongdoing based on the "rule" provided by the lawyers. There was only one problem -- the second part of the same religious setting speech rule provided an exception: "When DoD support is provided to one non-Federal entity, the DoD Component commands or organizations providing such support must be able and willing to provide similar support to comparable events sponsored by non-Federal entities."⁵

At about the same time the investigators were substantiating General Boykin's violation of the first half of the legal standard, the President of the United States was announcing on national television that he would reserve judgment on General Boykin until the DoD Inspector General completed his investigation.

The author was very familiar with the religious settings rule, having recently reviewed its precise text in preparation for a speech at a Georgetown University function. It soon became apparent that investigators had neglected to ascertain whether or not General Boykin ever declined an invitation to present his speech based upon the denomination of the inviting church. I therefore instructed that the matter be reevaluated based on the complete legal standard.

As a result, the conclusions of the investigation were significantly different. The OIG revised the findings associated with the religious setting speech rule, but stood by its conclusions regarding General Boykin's "failures to properly clear his speeches, issue disclaimers, and report travel reimbursements."⁶

The final report of investigation explained that "we did not determine whether the substance of LTG Boykin's faith-based statements constituted an appropriate topic for a speech by a senior DoD official, compromised his fitness for performing his assigned special operations or intelligence duties, or reflected on his ability to exercise sound judgment." The *by what authority and for what purpose* reasoning for this action is contained in the following three bullets:

- * First, we believe freedom of expression considerations under the First Amendment to the U.S. Constitution apply in this case.

- * Second, in the context of the substance of his statements, we believe LTG Boykin's fitness for duty and judgment are subjective issues for consideration solely by appropriate management officials, exercising independent and unfettered discretion, rather than for investigation by an inspector general.
- * Finally, we believe our approach in this matter is consistent with the "Quality Standards for Investigations," issued by the President's Council on Integrity and Efficiency (PCIE) in December 2003, which emphasizes that investigative reports "should include a clear and concise statement of the applicable law, rule, or regulation that was allegedly violated or that formed the basis for the investigation." The PCIE standards further provide that investigators are expected to make "sound, objective assessments and observations," and avoid "personal opinions."⁷

Chapter Review Questions:

- 1** Under what circumstances, by what authority, and for what purpose might a command legal advisor not document his or her legal advice to the commander?
- 2** When an Inspector General must review “legal advice provided by command legal advisors to commanders” in order to conduct an investigation, under what circumstances, if any, can the attorney-client privilege be invoked to withhold information from the Inspector General?
- 3** In the context of an Inspector General review of “legal advice provided by command legal advisors to commanders,” to whom does the attorney-client privilege belong, and who has the authority to waive it?
- 4** Is there a mechanism whereby the subject of an Inspector General investigation can disclose privileged attorney-client communications to an Inspector General without waiving the attorney-client privilege?

Chapter 7 Endnotes

¹ See generally K. Rhem, "Inspector General to Investigate General's Comments," American Forces Press Service, October 21, 2003 (<http://www.defenselink.mil/news/newsarticle.aspx?id=28279>).

² Cf. Ephesians 6:12 ("For our struggle is not with flesh and blood but with the principalities, with the powers, with the world rulers of this present darkness, with the evil spirits in the heavens.").

³ Department of Defense Office of the Inspector General, "Alleged Improprieties Related to Public Speaking: Lieutenant general William G. Boykin, U.S. Army, Deputy Under Secretary of Defense for Intelligence," pp. 8-9, August 5, 2004 (<http://www.dodig.osd.mil/fo/foia/ERR/h03189967206.pdf>).

⁴ Department of Defense Directive 5410.18, "Public Affairs Community Relations Policy," Paragraph 4.2.9, November 20, 2001.

⁵ *Ibid.*

⁶ Department of Defense Office of the Inspector General, "Alleged Improprieties Related to Public Speaking: Lieutenant general William G. Boykin, U.S. Army, Deputy Under Secretary of Defense for Intelligence," at 2.

⁷ *Id.*, p. 4.

⁸ "Alleged Improprieties Relating to Public Speaking: Lieutenant General William G. Boykin, U.S. Army, Deputy Under Secretary of Defense for Intelligence," Case Number H03L89967206, August 5, 2004. <http://www.dodig.mil/fo/Foia/ERR/h03189967206.pdf>

⁹ DoD Directive 5230.9, "Clearance of DoD Information for Public Release," and Army Regulation (AR) 360-1, "The Army Public Affairs Program," impose restrictions on public release of "official DoD information," Official DoD information is defined, in part, as information that "was ac-

quired by DoD employees as part of their official duties or because of their official status within the Department”

¹⁰ Pursuant to DoD 5500.7-R, “Joint Ethics Regulation (JER),” a disclaimer, when required, “shall expressly state that the views presented are those of the speaker . . . and do not necessarily represent the views of DoD.”

¹¹ For reasons set forth in the “Scope” section of this report, we did not critique the content of LTG Boykin’s speeches.

¹² While the following paragraphs provide what we believe is a reasonable synopsis of responses provided by LTG Boykin, we recognize that any attempt to summarize risks oversimplification and omission. Accordingly, we incorporated comments by LTG Boykin throughout this report where appropriate and provided copies of his response to the Acting Secretary of the Army together with this report.

¹³ As described throughout this report, LTO Boykin’s speeches to religious-oriented groups were a personal activity, not part of his official duties. However, the substance of his speeches related to his official duties, and the circumstances of their presentation (in military uniform, introduction by rank/position) created a perceived association with his official duties.

¹⁴ The following are selected excerpts from the Department of Justice Inspector General’s September 20, 2012, Testimony before the House Committee on Oversight and Government Reform. <http://www.justice.gov/oig/testimony/t1220.pdf>; the entire IG Report, albeit redacted, titled “A Review of ATF’s Operation Fast and Furious and Related Matters,” September 19, 2012, is posted at <http://www.justice.gov/oig/reports/2012/s1209.pdf>

CHAPTER 8. AUDIT:

Reporting to the American People on How Their Government Spends Their Money

*[A] regular statement and account of receipts and
expenditures of all public money shall be published
from time to time.*

U.S. Constitution, Article I, Section 9.

Most public sector audits, whether or not conducted by an Office of Inspector General, satisfy in one way or another the constitutional imperative that, “a regular statement and account of receipts and expenditures of all public money shall be published from time to time.”¹ The Inspector General Act of 1978, as amended, requires that, “Each Inspector General shall . . . appoint an Assistant Inspector General for Auditing who shall have the responsibility for supervising the performance of auditing activities relating to programs and operations of the establishment.”² The professional standards for those auditing activities are promulgated by the United States General Accountability Office, in what is referred to as the “Yellow Book.”³

As explained by the Comptroller General of the United States in the Introduction to the Yellow Book:

The principles of transparency and accountability for the use of public resources are key to our nation’s governing processes. Government officials and recipients of federal moneys are responsible for carrying out public functions

efficiently, economically, effectively, ethically, and equitably, while achieving desired program objectives. High-quality auditing is essential for government accountability to the public and transparency regarding linking resources to related program results.⁴

In the aftermath of the Enron accounting scandal of 2001,⁵ and the ensuing enactment by Congress of the Sarbanes Oxley Act of 2002,⁶ the Government Accountability Office prescribed two overarching independence principles for all public sector audit organizations:

(1) audit organizations must not provide nonaudit services that involve performing management functions or making management decisions and

(2) audit organizations must not audit their own work or provide nonaudit services in situations in which the non-audit services are significant or material to the subject matter of the audits.⁷

The following case study illustrates how these independence principles enable auditors to shed light better for the American People to see how their government is spending their money—pursuant to our Constitution’s mandate in Article I, Section 9, that “a regular statement and account of receipts and expenditures of all public money shall be published from time to time.”

On April 15, 2010, the Inspectors General of the Department of Defense and of the Department of State both appeared before the Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Contracting Oversight, to report on their joint audit of “Contracts for Afghan National Police Training.” The DoD Inspector General testified that:

Oversight of U.S. contingency operations in Southwest Asia is a top priority of the DoD IG. As the principal oversight agency for accountability within the Department of Defense, the DoD IG is committed to providing effective and meaningful oversight in Southwest Asia. Our priority is to assist DoD and the Congress in identifying and deterring waste, fraud, and abuse of taxpayer monies;

and, most importantly, ensuring the brave men and women serving in Southwest Asia are as well equipped and led as possible. We will continue to coordinate and integrate our efforts within the oversight community to minimize duplication and ensure oversight coverage is as comprehensive and effective as possible.⁸

Finally, a key distinction between the public sector audit and inspection functions, both sometimes conducted side-by-side within the same Office of Inspector General, is the applicability of Yellow Book professional standards to the former, and a separate set of professional standards and traditions to the latter. The two functions are bound together by a common overarching purpose, “to assure that [government] resources are used efficiently and effectively and that [government] actions comply with laws and regulations.”⁹ In constitutional parlance, both auditors and inspectors carry out a duty to account—independently and objectively—to their stakeholders and ultimately to the American People on how their government is spending their money.

Chapter Review Questions:

- 1 By what authority and for what purpose do Offices of Inspector General conduct audits?
- 2 Who promulgates professional standards for OIG audits, and what is the name of the publication in which those standards are prescribed?
- 3 What are the difference between and the common features of audits and inspections?
- 4 By what authority and for what purpose would two separate Offices of Inspector General conduct a joint audit?

Chapter 8 Endnotes

¹ U.S. Const., Art. I, Section 9.

² Inspector General Act of 1978, as amended, §3(d)(1).

³ See General Accountability Office, "Government Auditing Standards," July 2007 Edition (<http://www.gao.gov/new.items/d07731g.pdf>).

⁴ *Id.*, p. 1.

⁵ See United States House of Representatives, Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, "Financial Collapse of ENRON Corporation, with Focus on ENRON's Inside and Outside Counsel," March 14, 2002
<http://ftp.resource.org/gpo.gov/hearings/107h/78506.pdf> William C. Powers, Jr., "Report of Investigation by the Special Investigative Committee of the Board of Directors of Enron Corp.," February 1, 2002
<http://fl1.findlaw.com/news.findlaw.com/wp/docs/enron/specinv020102rpt1.pdf>

⁶ Pub.L. 107-204, 116 Stat. 745, enacted July 30, 2002.

⁷ See "Government Auditing Standards," July 2007 Edition, p. 41 (explaining in a footnote that, "The concepts of significance and materiality include quantitative as well as qualitative measures in relation to the subject matter of the audit."); President's Council on Integrity & Efficiency, "Qualify Standards for Federal Offices of Inspector General," aka Silver Book, p. 11 (October 2003) ("Auditors and audit organizations within OIGs have a specific independence standard required by *Government Auditing Standards*. This standard requires that, while auditors have the capability of performing a range of services for their clients, in some circumstances it is not appropriate for them to perform both audit and certain nonaudit services for the same client.") (<http://www.ignet.gov/pande/standards/igstds.pdf>).

⁸ Hon. Gordon S. Heddell, Inspector General of the Department of Defense, "Contracts for Afghan National Police Training," April 15, 2010 <http://www.dodig.mil/fo/Foia/ERR/h03189967206.pdf>

⁹ Richard Leach, Auditor General of the Navy, and Vice Admiral Ronal Route, USN, Naval Inspector General, "Auditors Don't Inspect and Inspectors Don't Audit: Comparison of the Naval Audit Service and Naval Inspector General Functions," *Defense AT&L*, p. 20 (May-June 2005).

¹⁰ "DOD Obligations and Expenditures of Funds Provided to the Department of State for the Training and Mentoring of the Afghan National Police," Department of State Report No. MERO-A-10-06, Department of Defense Report No. D-2010-042, February 9, 2010 <http://www.dodig.mil/Audit/reports/fy10/10-042.pdf>

¹¹ Greg Bruno, "Afghanistan's National Security Forces," Council on Foreign Relations Backgrounder, New York, April 16, 2009.

¹² The Joint Coordination and Monitoring Board consists of representatives from the Afghan Government and the International Community and coordinates the implementation of the Afghanistan Compact, which defines the principles of political cooperation for the period of 2006 to 2011. The Joint Coordination and Monitoring Board provides direction to address issues of coordination, implementation, and financing for the benchmarks and timelines of the Compact and reports on the implementation.

¹³ According to FAR 42.202, "Assignment of Contract Administration," contracting officers may delegate contract administration authority. The delegation authorizes the appointee to perform specified tasks under an identified contract.

¹⁴ A cost is allowable only when the cost is reasonable, allocable, and conforms to the terms of the contract (FAR 31.201-2).

¹⁵ A cost is allocable if it is (a) incurred specifically for the contract; (b) benefits both the contract and other work, and can be distributed to the contract and other work in reasonable proportion to the benefits received; or

(c) necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown (FAR 31.201-4).

¹⁶ A cost is reasonable if, in its nature and amount, does not exceed that which would be incurred by a prudent person (FAR 31.201-3).

¹⁷ DCAA's mission is to perform services regarding contracts and subcontracts to all DOD components responsible for procurement and contract administration.

¹⁸ Acceptance means an authorized Government official acknowledges that goods and services received conform to contract requirements.

¹⁹ The Prompt Payment Act ensures that Federal agencies pay vendors in a timely manner.

²⁰ *Report on Audit of Billing System*, Audit Report No. 03181-2009D11010001.

²¹ According to FAR 52.232-25(a)(3), "Prompt Payment," October 2008, an invoice is considered proper when it contains the name and address of the contractor, invoice date, contract number, description, quantity, unit of measure, unit price, and price of goods delivered or services performed.

CHAPTER 9. INVESTIGATIVE OVERSIGHT:

Friendly-Fire Death of Corporal Patrick Tillman

In addition to the other duties and responsibilities specified in this Act, the Inspector General of the Department of Defense shall . . . initiate, conduct, and supervise such audits and investigations in the Department of Defense (including the military departments) as the Inspector General considers appropriate[,] develop policy, monitor and evaluate program performance, and provide guidance with respect to all Department activities relating to criminal investigation programs[, and] give particular regard to the activities of the internal audit, inspection, and investigative units of the military departments with a view toward avoiding duplication and insuring effective coordination and cooperation.

Inspector General Act of 1978, as amended, Section 8(c)

Who inspects the inspector? Within the Department of Defense, Congress has explicitly deemed all audits and investigations, including but not limited to the audits conducted by the military depart-

ment Auditors General and the investigations conducted by the uniformed Inspectors General of each military department, subject to the supervision of the DoD Inspector General: “In addition to the other duties and responsibilities specified in this Act, the Inspector General of the Department of Defense shall . . . initiate, conduct, and supervise such audits and investigations in the Department of Defense (including the military departments) as the Inspector General considers appropriate.”¹ That supervision also extends to non-criminal “command” investigations conducted by uniformed soldiers in the battlefield, such as the investigations associated with the friendly-fire death in Afghanistan of Army Corporal Patrick Tillman.

Of course, each Senate-confirmed Inspector General remains under the oversight of the various Committees of the United States Congress, including but not limited to the Senate Homeland Security and Governmental Affairs Committee, which Committee “owns the Inspector General Act” and through which Committee each Presidential nominee to an Inspector General position must be “sequentially referred” in the course of the Senate confirmation process.² Congress exercises its oversight of Inspectors General through its review of statutorily mandated semi-annual reports to Congress,³ as well as through the various Committees regularly calling upon Inspectors General to testify about their audit, inspection, investigative, and oversight activities.

An article in *Rolling Stone* magazine has been credited with forcing the early retirement of General Stanley A. McChrystal, Commander of NATO’s International Security Assistance Force and U.S. Forces-Afghanistan, in July 2010. That same article describes General McChrystal’s role in the cover-up of famed NFL star Pat Tillman’s death by friendly fire in Afghanistan:

After Cpl. Pat Tillman, the former-NFL-star-turned-Ranger, was accidentally killed by his own troops in Afghanistan in April 2004, McChrystal took an active role in creating the impression that Tillman had died at the hands of Taliban fighters. He signed off on a falsified recommendation for a Silver Star that suggested Tillman had been killed by enemy fire. (McChrystal would later claim he didn’t read the recommendation closely enough—a

strange excuse for a commander known for his laserlike attention to minute details.) A week later, McChrystal sent a memo up the chain of command, specifically warning that President Bush should avoid mentioning the cause of Tillman's death. "If the circumstances of Corporal Tillman's death become public," he wrote, it could cause "public embarrassment" for the president.⁴

Corporal Tillman was killed by friendly fire during combat operations in Afghanistan on April 24, 2004. The foreword of the 85-page DoD OIG report, "Review of Matters Related to the Death of Corporal Patrick Tillman, U.S. Army," reprinted below, provides the circumstances that precipitated this IG review:

The course of this review, in particular the central issues, was framed through a series of requests from the Army Inspector General, Members of Congress, and the family of Corporal Patrick Tillman concerning Corporal Tillman's death by friendly fire while participating in combat operations in Afghanistan on April 22, 2004.

Within 30 days thereafter, Corporal Tillman's death was investigated twice by Army officers under the provisions of Army Regulation 15-6, "Procedures for Investigating Officers and Boards of Officers." Because of unresolved concerns regarding the nature of Corporal Tillman's death and its aftermath, a third investigation was completed by an Army general officer in January 2005. However, by letter dated April 21, 2005, Mr. [REDACTED], father of Corporal Tillman, raise significant issues with the results of that investigation.

By memorandum dated June 2, 2005, the Army Inspector General requested that this Office conduct an independent review of concerns expressed by Mr. [REDACTED]. After completing an initial assessment, we requested that the Army Criminal Investigation Command conduct a full investigation into the facts and circumstances of Corporal Tillman's death. Concurrently, we conducted a review of

the three investigations noted above, the adequacy of Army notifications to the Tillman family in the weeks following his death, and the basis for the posthumous award of the Silver Star.

Several Members of Congress also questioned the series of events that led to Corporal Tillman's death, subsequent investigations, the need to establish accountability in matters concerning the death and its aftermath, and the possibility of an Army cover-up. Correspondence to this Office from Senator John McCain in July 2005 and Representative Michael M. Honda in August 2005 questioned specific findings of the investigations. Correspondence from Senator Charles Grassley, Representative Zoe Lofgren, and Representatives Honda, Ike Skelton, Christopher Shays, and Dennis Kucinich in March 2006 reiterated those concerns, requested further explanations regarding Army actions taken following Corporal Tillman's death, and asked for briefings after we completed our work.

In addition, the Senate Armed Services Committee, the House Armed Services Committee, and the Subcommittee on National Security, Emerging Threats, and International Relations (House Committee on Government Reform) requested the results of our review.

This report provides the results of our review and summarizes results of the concurrent investigation by the Army Criminal Investigation Command. The full Army Criminal Investigation Command report is being issued separately. We concur with the results of that investigation. Although some of the Army activities related to Corporal Tillman's death remain classified, this report is unclassified to promote maximum utility and avoid delays that would attend a classified issuance.

Chapter Review Questions:

- 1 By what authority and for what purpose did the Army Inspector General request that the DoD Office of Inspector General conduct an independent review of concerns expressed by Corporal Tillman's father regarding the nature of Corporal Tillman's death and its aftermath, including a third investigation completed by an Army general officer in January 2005?
- 2 Why do Army regulations require that investigating officers "be senior to any person whose conduct or performance of duty may be investigated, or against whom adverse findings or recommendations may be made," with limited exceptions?
- 3 Why did the DoD Inspector General's findings of accountability for, (a) "LTG Kensinger provid[ing] misleading testimony to BG Jones and th[e DoD Office of Inspector General] when he denied that he knew friendly fire was suspected before the memorial service for CPL Tillman," and (b) "the failure to inform the award approval authority (Acting Secretary [of the Army] Brownlee) of suspected friendly fire" only reach as far as LTG Kensinger and MG McChrystal respectively?
- 4 How does the "misleading testimony" of an Army Lieutenant General implicate the statutory leadership standard enacted by Congress in 1997, that:

All commanding officers and others in authority in the Army are required - (1) to show in themselves a good example of virtue, honor, patriotism, and subordination; (2) to be vigilant in inspecting the conduct of all persons who are placed under their command; (3) to guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Army, all persons who are guilty of them; and (4) to take all necessary and proper measures, under the laws, regulations, and customs of the Army, to promote and safeguard the morale, the physical well-being, and the gen-

eral welfare of the officers and enlisted persons under their command or charge?¹⁶

- 5 Should the civilian Secretaries of the military departments, i.e., the Secretaries of the Army, Navy, and Air Force, be held accountable to the same leadership standard enacted by Congress in 1997 for, "All commanding officers and others in authority in [each of the military departments]"? Should the Secretary of Defense be held to the same leadership standard?
- 6 By what authority and for what purpose would the Inspector General of the Department of Defense hold himself to the statutory leadership standard enacted by Congress for, "All commanding officers and others in authority in the Army," Navy, and Air Force respectively?

Chapter 9 Endnotes

¹ Inspector General Act of 1978, as amended, §8(c).

² Sequential referral means that the nominee is vetted first by the Senate Committee with primary jurisdiction over the executive branch department or agency to which the Inspector General is to be appointed, after which the nomination is referred to the Senate Homeland Security and Governmental Affairs Committee for further vetting at the discretion of the Chairman of that Committee.

³ See Inspector General Act of 1978, as amended, §5.

⁴ Michael Hastings, "The Runaway General: Stanley McChrystal, Obama's top commander in Afghanistan, has seized control of the war by never taking his eye off the real enemy: The wimps in the White House," *Rolling Stone* 1108/1109, July 8-22, 2010, on newsstands Friday, June 25 (http://www.rollingstone.com/politics/news/17390/119236?RS_show_page=0).

⁵ Review of Matters Related to the Death of Corporal Patrick Tillman, U.S. Army," Report Number IPO2007E011, March 26, 2007. The entire report is available in redacted form at http://www.defenselink.mil/home/pdf/Tillman_Redacted_Web_0307.pdf

⁶ We initiated our review in response to a request from the Army Inspector General, who determined that an independent examination was needed after the third Army investigation failed to resolve issues raised by the Tillman family.

⁷ Based on initial Army investigations, some of the Service members involved in the incident received non-judicial punishment for dereliction of duty under Article 15 of the Uniform Code of Military Justice.

⁸ In 2005 the Army Safety Center was renamed the Army Combat Readiness Center.

⁹ Service members involved in this incident were at the time members of the U.S. Army, 75th Ranger Regiment, and its subordinate units unless otherwise identified.

¹⁰ ILT [REDACTED] like many other Service members involved in the friendly fire incident and its aftermath, has since been promoted. However, in this report, we will identify Service members using the rank and position that they held at the time of events at issue unless otherwise noted.

¹¹ A “safety” investigation is conducted to determine the cause of an accident with the sole purpose of preventing future accidents. In general, safety investigation reports are privileged and not releasable outside safety channels. A “legal” investigation is undertaken to inquire into all the facts and circumstances surrounding an accident, as well as to obtain and preserve all available evidence for use in litigation, claims, disciplinary actions, or adverse administrative actions.

¹² The phrase “primary next of kin” is defined in DoDI 1300.18, “Military Personnel Casualty Matters, Policies, and Procedures,” as the unremarried surviving spouse.

¹³ Army publications refer to “legal” and “safety” investigations as “collateral” and “accident” investigations, respectively.

¹⁴ A later paragraph of the Regulation refers to the centralized investigation as a “USASC [U.S. Army Safety Center] accident investigation board.”

¹⁵ With regard to the appointment of single investigating officer versus a board of officers, we find AR 600-34 (which requires only a single investigating officer) to be controlling in this case rather than AR 600-8-1 (which requires a board of officers). AR 600-34 specifically addresses legal investigations of friendly fire cases and was published more recently than AR 600-8-1. Additionally, the most recent version of AR 600-8-1, dated April 7, 2006, gives the appointing authority the option of appointing either a single officer or a board of at least three officers to inquire into the suspected friendly fire incident.

¹⁶ 10 U.S.C. §3583 (“Requirement of exemplary conduct”); *see* 10 U.S.C. §§ 5947 & 8583 (same leadership standard for the Naval Services and Air Force respectively); Continental Congress, “Rules for the Regulation of the Navy of the United Colonies of North America” (1775), Article 1 (www.history.navy.mil) (original 1775 version of the same leadership standard); Continental Congress, “Articles of War” (1775) (A November 1775 Amendment required not only that an officer found guilty of fraud “be *ipso facto* cashiered, and deemed unfit for further service as an officer,” but also that “it be added in the punishment, that the crime, name, place of abode, and punishment of the delinquent be published in the news papers, in and about the camp, and of that colony from which the offender came, or usually resides: after which it shall be deemed scandalous in any officer to associate with him.”).

CHAPTER 10. INTELLIGENCE OVERSIGHT:

Why Didn't We Know About 9/11 Beforehand?

The Conventions of a number of the States having, at the time of adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added, and as extending the ground of public confidence in the Government will best insure the beneficent ends of its institution...

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Constitution, Preamble to Bill of Rights and Amendment X

Oversight of the intelligence activities of the United States federal government is a shared responsibility of the Executive and Legislative branches of the national government.¹ These two branches, together with the Judiciary in cases and controversies within the jurisdiction of federal courts, include a number of structural checks on governmental abuses of power in the realm of intelligence activities. Inspectors General, as explained in this chapter, serve a vital role in these structural checks on abuses of governmental power.

For over three decades, Executive Order 12333, titled “United States Intelligence Activities,” has been the primary regulatory instrument guiding the United States intelligence community. It directs that intelligence activities be conducted in a “responsible manner that is consistent with the Constitution and applicable law and respectful of the principles upon which the United States was founded.”² The most recent amendments to Executive Order 12333, issued in 2008, continue to emphasize these principles:

Timely, accurate, and insightful information about the activities, capabilities, plans, and intentions of foreign powers, organizations, and persons, and their agents, is essential to informed decisionmaking in the areas of national security, national defense, and foreign relations. Collection of such information is a priority objective and will be pursued in a vigorous, innovative, and responsible manner that is consistent with the Constitution and applicable law and respectful of the principles upon which the United States was founded.³

*“Principles Upon Which the United States Was Founded”
(as applied to Intelligence Oversight)*

In order fully to understand the concept of Intelligence Oversight, one must first understand the following foundational assumptions:

- 1 By constitutional design, the federal government of the United States of America is a government of limited powers, in contrast to the governments of each State within the United States, to which the Tenth Amendment acknowledges, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved . . .”⁴; and
- 2 All three branches of the national government are bound by the principle of limited national government formalized in the Tenth Amendment.

The Constitution established a system of shared powers, in both a vertical direction (between the national government and the States), and horizontally within the federal government. Under Article I, “The Congress shall have Power . . . to pay the Debts and provide for the common Defense and general Welfare of the United States...; To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations; To declare War...; To raise and support Armies,...; To provide and maintain a Navy; To make rules for the Government and Regulation of the land and naval Forces; to provide for calling forth the Militia, and for governing such Part of them as may be employed in the Service of the United States...”⁵ Under Article II, “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”⁶

Under the constitutional “separation of powers,” if the President abuses his power as Commander in Chief, both the Legislative and the Judicial branches serve as structural “checks” on such abuses, the former through the “power of the purse,” the latter through the power of judicial review.

In 1936 and then again in 1992, the United States Supreme Court provided a 10th Amendment-based test for checking abuses of power by the national government. In 1992, the Supreme Court reaffirmed its own limited judicial review role in the context of striking down the Low-Level Radioactive Waste Policy Act of 1985 as unconstitutional:

Our task would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution. “The question is not what power the Federal Government ought to have but what powers in fact have been given by the people.” *United States v. Butler*, 297 U.S. 1, 63 (1936).⁷

Since 1992, the Supreme Court has struck down at least four efforts by Congress to exercise national power without constitutional authority:

- * *New York v. United States*, 505 U.S. 144 (1992) (striking down the Low-Level Radioactive Waste Policy Act of 1985);
- * *United States v. Lopez*, 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act of 1990);
- * *Boerne v. Flores*, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act of 1993); and
- * *Printz v. United States*, 521 U.S. 898 (1997) (striking down the 1993 Brady Act).

Intelligence Oversight Rules and Procedures

“U.S. person” is defined by Executive Order 12333 to mean “a United States citizen, an alien known by the intelligence agency concerned to be a permanent resident alien, an unincorporated association substantially composed of United States citizens or permanent resident aliens, or a corporation incorporated in the United States, except for a corporation directed and controlled by a foreign government or governments.” Rules and procedures for the collection, retention, and dissemination of information about “U.S. persons,” while addressed separately in various intelligence community regulations and directives implementing Executive Order 12333, are not exclusive to the intelligence community. For example, DoD Directive 5200.27, titled “Acquisition of Information Concerning Persons and Organizations not Affiliated with the Department of Defense,” prescribes a general prohibition against, “collecting, reporting processing, or storing information on individuals or organizations not affiliated with the Department of Defense, except in those limited circumstances where such information is essential to the accomplishment of the Department of Defense missions...”⁸

Intelligence activities, by their very nature, create potential for abuses of power in the collection, retention, or dissemination of information about U.S. persons. Accordingly, the intelligence community has more detailed rules and regulations to constrain such abuses. The

Department of Defense and each of the military departments has its own version of implementing rules and procedures for Executive Order 12333's general admonition that intelligence activities be conducted in a "responsible manner that is consistent with the Constitution and applicable law and respectful of the principles upon which the United States was founded."⁹ For example, the Department of Defense emphasizes that:

All DoD intelligence and CI activities shall be carried out pursuant to the authorities and restrictions of the U.S. Constitution, applicable law, Reference (c) [Executive Order 12333], the policies and procedures authorized herein, and other relevant DoD policies authorized by Reference (b) [DoD Directive 5143.01, "Under Secretary of Defense for Intelligence," November 23, 2005]. Special emphasis shall be given to the protection of the constitutional rights and privacy of U.S. persons.¹⁰

In addition to its Directive on "DoD Intelligence Activities," the Department of Defense has a detailed Regulation titled, "Procedures governing the activities of DoD intelligence components that affect United States persons," which prescribes standards for the collection, retention, and dissemination of information about U.S. persons by intelligence components within the Department of Defense. This Regulation includes a slightly expanded version of the definition of the term "United States Person" in Executive Order 12333:

- (1) A United States citizen;
- (2) An alien known by the DoD intelligence component concerned to be a permanent resident alien;
- (3) An unincorporated association substantially composed of United States citizens or permanent resident aliens;
- (4) A corporation incorporated in the United States, except for a corporation directed and controlled by a foreign government or governments. A corporation or corporate subsidiary incorporated abroad, even if partially or wholly

owned by a corporation incorporated in the United States,¹²
is not a United States person.

The DoD Intelligence Oversight Regulation also prescribes duties of each individual DoD employee, “including contractors and persons otherwise acting at the direction of such an agency,”¹³ and of all Inspectors General for identifying and reporting “questionable activities.” The Regulation defines these as, “any conduct that constitutes, or is related to, an intelligence activity that may violate the law, any Executive Order or Presidential directive, including E.O. 12333,¹⁴ reference (a)), or applicable DoD policy, including this Regulation” :

- a Each employee shall report any questionable activity to the General Counsel or Inspector General for the DoD intelligence component concerned, or to the DoD General Counsel or the ATSD(IO).

- b Inspectors General, as part of their inspection of DoD intelligence components, and General Counsels, as part of their oversight responsibilities shall seek to determine if such components are involved in any questionable activities. If such activities have been or are being undertaken, the matter shall be investigated If such activities have been undertaken but were not reported, the Inspector General shall also ascertain the reason for such failure and recommend appropriate corrective action.

- c Inspectors General, as part of their oversight responsibilities, shall, as appropriate, ascertain whether any organization, staffs, or offices within their respective jurisdictions but not otherwise specifically identified as DoD intelligence components, are being used for foreign intelligence or counterintelligence purposes to which Part 2 of E.O. 12333, (reference (a)), applies, and, if so, shall ensure the activities of such components are in compliance with the Regulation and applicable DoD policy.

- d Inspectors General, as part of their inspection of DoD intelligence components, shall ensure that procedures exist within such components for the reporting of questionable activities, and that employees of such components are aware of their responsibilities to report such activities.¹⁵

While all Inspectors General are required to receive and either to investigate or to refer out for investigation, allegations of “questionable activities” involving possible abuses of power within the intelligence community, the Department of Defense has established an Intelligence Oversight Officer who is required by Directive to coordinate with the DoD Office of Inspector General.¹⁶ That DoD Intelligence Oversight Officer is the Assistant to the Secretary of Defense for Intelligence Oversight (ATSD(IO)), and serves as, “the focal point for all contacts with the Intelligence Oversight Board of the President’s Foreign Intelligence Advisory Board (since renamed the President’s Intelligence Advisory Board) pursuant to [Executive Order 12863, “President’s Foreign Intelligence Advisory Board,” September 13, 1993, as amended by Executive Order 13070, December 15, 1997; Executive Order 13301, May 14, 2003; and Executive Order 13376, April 13, 2005], and shall perform the responsibilities assigned in DoD Directive 5148.11”¹⁷:

The Assistant to the Secretary of Defense for Intelligence Oversight shall serve as the principal staff assistant and advisor to the Secretary and Deputy Secretary of Defense for the independent oversight of all intelligence, counter-intelligence, and intelligence-related activities (hereafter referred to collectively as “intelligence activities”) in the Department of Defense. In this capacity, the ATSD(IO) shall ensure that all intelligence activities performed by any of the DoD Components are conducted in compliance with Federal law, Executive orders, Presidential directives, and DoD Directives System issuances.¹⁸

The duties of the ATSD(IO) include, “Report[ing] the following to the Secretary and Deputy Secretary of Defense, and the Intelligence Oversight Board of the President’s Foreign Intelligence Advisory

Board . . . at least quarterly, in coordination with the [General Counsel], DoD”:

- * Significant oversight activities undertaken.
- * Significant DoD intelligence activities of questionable legality or propriety, the investigative action on them, and the current status until the matter is resolved.
- * Matters of concern or substance arising out of inspections and investigations conducted by the ATSD(IO); the DoD GC’s accounting of applications to the Foreign Intelligence Surveillance Court; and, significant items from the intelligence oversight reports submitted to the ATSD(IO) by the DoD Components.¹⁹

In carrying out these duties, the ATSD(IO) is authorized by the Secretary of Defense to, “Require an Inspector General or other cognizant investigative official of a DoD Component to report allegations of improprieties or illegalities of intelligence activities by, or within, a DoD Component.”²⁰

The ATSD(IO) and the General Counsel, DoD, shall report in a timely manner to the White House Intelligence Oversight Board all activities that come to their attention that are reasonably believed to be illegal or contrary to Executive Order or Presidential directive. They will also advise appropriate officials of the Office of the Secretary of Defense of such activities.²¹

The major DoD Components, including the military departments, have their own rules and procedures for how each carries out Intelligence Oversight activities.²²

Posse Comitatus Act

Closely allied to Executive Order 12333 as a check against abuses of federal power is the Posse Comitatus Act. Posse Comitatus

was enacted by Congress in 1878 to restrict domestic law enforcement activities of the United States military in response to abuses committed during the reconstruction period following the Civil War.²³ The Posse Comitatus Act makes it a federal crime to use, “any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws,” unless “expressly authorized by the Constitution or Act of Congress”:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.²⁴

Although the statute on its face only applies to the Army, “the Air Force is covered under the law by later amendment because its origins lie within the Army... [I]t is followed by the Department of the Navy through incorporation of its proscriptions into regulations issued by the Secretary of the Navy.”²⁵

Consistent with this longstanding criminal prohibition by Congress, Department of Defense regulations prohibit the following forms of direct assistance to civilian law enforcement agencies unless otherwise expressly authorized by federal statute – such as, for example but not limited to, the Inspector General Act of 1978, as amended:

- * Interdiction of a vehicle, vessel, aircraft, or other similar activity;
- * A search or seizure;
- * An arrest, apprehension, stop and frisk, or similar activity;
- * Use of military personnel for surveillance or pursuit of individuals, or as undercover agents, informants, investigators, or interrogators.²⁶

Because both the Posse Comitatus Act and Executive Order 12333 involve checks on abuses of power by the federal government, and because the occasions for such abuses can sometimes overlap in the context of intelligence activities, Posse Comitatus Act training is often

combined with Intelligence Oversight training, especially within the intelligence community, typically during the course of a periodic Intelligence Oversight Inspection conducted by an Inspector General.

Chapter Review Questions

- 1 By what authority and for what purpose does the Department of Defense maintain an Intelligence Oversight Officer who is in not part of the DoD Office of Inspector General?
- 2 What role, if any, might the DoD's Intelligence Oversight Office have played in identifying the intelligence-related allegations that ultimately were investigated by the DoD Office of Inspector General?
- 3 Under what circumstances might an individual who witnesses what he thinks might be an abuse of power within the intelligence community not report his concerns either to the chain of command or to an Inspector General?

Chapter 10 Endnotes

¹ See United States Central Intelligence Agency, “Intelligence Oversight,” updated September 10, 2009 (<https://www.cia.gov/library/publications/additional-publications/the-work-of-a-nation/intelligence-oversight/index.html>).

² Executive Order 12333, “United States Intelligence Activities,” ¶2.1, December 4, 1981.

³ *Id.*, as amended July 30, 2008.

⁴ U.S. Const., Amendment X.

⁵ U.S. Const., Article I, Section 8.

⁶ U.S. Const., Article II, Section 2, cl. 1.

⁷ *New York v. United States*, 505 U.S. 144, 157 (1992)
<http://www.law.cornell.edu/supct/html/91-543.ZS.html>

⁸ DoD Directive 5200.27, “Acquisition of Information Concerning Persons and Organizations not Affiliated with the Department of Defense,” ¶3.1, January 7, 1980 (<http://www.dtic.mil/whs/directives/corres/pdf/520027p.pdf>).

⁹ Executive Order 12333, ¶2-1.

¹⁰ DoD Directive 5240.1, ¶4-1, August 27, 2007
(<http://www.dtic.mil/whs/directives/corres/pdf/524001p.pdf>).

¹¹ DoD 5240.1-R, “Procedures governing the activities of DoD intelligence components that affect United States persons,” December 1982
(<http://atsdio.defense.gov/documents/5240.html>).

¹² DoD 5240.1-R, Definitions, ¶27(a); *see id.* ¶27(b) (“A person or organization outside the United States shall be presumed not to be a United States person unless specific information to the contrary is obtained. An alien in

the United States shall be presumed not to be a United States person unless specific information to the contrary is obtained.”).

¹³ DoD 5240.1-R, Definitions, ¶10 (“Employee. A person employed by, assigned to, or acting for an agency within the intelligence community, including contractors and persons otherwise acting at the direction of such an agency.”).

¹⁴ DoD 5240.1-R, Procedure 15, B(1).

¹⁵ DoD 5240.1-R, Procedure 15,

¹⁶ DoD Directive 5148.11, “Assistant to the Secretary of Defense (Intelligence Oversight),” ¶4-14, May 21, 2004 (<http://atsdio.defense.gov/documents/51481p.pdf>).

¹⁷ DoD Directive 5240.1, ¶5-3.

¹⁸ DoD Directive 5148.11, “Assistant to the Secretary of Defense (Intelligence Oversight),” ¶4, May 21, 2004 (<http://atsdio.defense.gov/documents/51481p.pdf>).

¹⁹ *Id.*, ¶4-6.

²⁰ *Id.*, ¶6.6.1.

²¹ DoD 5240.1-R, Procedure 15, ¶3(e).

²² See Army Regulation 380-10, “U.S. Army Intelligence Activities,” ¶15-6, May 3, 2007 (http://www.army.mil/usapa/epubs/pdf/r381_10.pdf); Secretary of the Navy Instruction 3820.3E, “Oversight of Intelligence Activities Within the Department of the Navy,” September 25, 2005 (http://www.fas.org/irp/doddir/navy/secnavinst/3820_3e.pdf); Air Force Instruction 14-104, “Oversight of Intelligence Activities,” April 16, 2007 (<http://www.fas.org/irp/doddir/usaf/afi14-104.pdf>); see also Marine Corps Inspector General Program: Intelligence Oversight Guide (Marine Corps Inspector General 2009); Defense HUMINT Service, “Intelligence Law Handbook,” Publication CC-0000-181-95 (September 1995).

²³ See Defense HUMINT Service, “Intelligence Law Handbook, ¶8.4, September 1995 (“Historical Note”).

²⁴ 18 U.S.C. §1385.

²⁵ Intelligence Law Handbook, ¶8-4(e).

²⁶ DoD Directive 5525.5, “DoD Cooperation with Civilian Law Enforcement Officials,” Enclosure 4, ¶E4.1.3, January 15, 1986 (Administrative Re-issuance Incorporating Change 1, December 20, 1989) (http://www.fas.org/irp/doddir/dod/d5525_5.pdf); see Intelligence Law Handbook, ¶8-9.

²⁷ “Alleged Misconduct by Senior DoD Officials Concerning the Able Danger Program and Lieutenant Colonel Anthony A. Shaffer, U.S. Army Reserve,” September 18, 2006. http://permanent.access.gpo.gov/lps83632/r_H05L97905217-PWH.pdf

²⁸ LTC Shaffer served in DIA as both a civilian employee and, when called to active duty, a military officer. Because the allegations cover time periods and events that relate to both his military and civilian duties, we will refer to LTC Shaffer using his military rank in this report.

²⁹ As discussed in this report, LTC Shaffer was placed on administrative leave from DIA and vacated his office in April 2004. His office was then cleared for occupancy by another employee.

³⁰ The 9/11 Commission was created by congressional legislation signed by President George W. Bush in November 2002. The Commission’s mission was to prepare a full account of circumstances surrounding the September 11, 2001, terrorist attacks and report its findings to the President and Congress.

³¹ We acknowledge that some Government office supplies may have been included in the shipment (e.g., commercially available pens, pencils, blank CD ROM disks), but considered that inclusion an oversight not warranting further investigation.

³² LTC Shaffer provided the four documents to congressional staff.

³³ In conducting reprisal analysis, we recognize that whistleblower complaints made by civilian employees in the intelligence community are excluded from the jurisdiction of the Office of Special Counsel under Section 2302 (a)(2)(c) of Title 5, United States Code. However, it is our policy to apply Title 5 standards for all investigations into complaints of reprisal submitted by civilian appropriated fund employees.

³⁴ Based on the revocation of his access and anticipated revocation of his clearance, LTC Shaffer was proposed for removal from his DIA civilian position in November 2005. That action was held in abeyance pending completion of this investigation. LTC Shaffer continued on paid administrative leave.

³⁵ Photographs of Figures 1 and 2 were retrieved from a laptop computer that contained Able Danger material in a safe at USSOCOM Headquarters. We did not locate the original charts.

³⁶ We did not locate the actual chart that had been provided to CAPT [REDACTED].

³⁷ Dr. [REDACTED] testified that the Able Danger team did not have access to LIWA's data. Rather, she had provided CAPT [REDACTED] file transfer protocol (FTP) access that enabled CAPT [REDACTED] to download products that were uploaded by LIWA personnel for him.

³⁸ Mr. [REDACTED] told us that after he was read on to Able Danger, he began accumulating large quantities of data primarily from open sources. He said that he subjected that data to LIWA analytical tools and found numerous potential al Qaeda links in the United States. However, he acknowledged that he had not vetted this preliminary work and that he did not identify any of the 9/11 terrorists or other potential targets of interest.

³⁹ CAPT [REDACTED] told us that he performed a number of searches of Portuguese language Web sites.

⁴⁰ Coincidentally, this briefing occurred 2 days before the attack on the USS COLE (DDG-67) in Aden, Yemen. CAPT [REDACTED] told us that Yemen was mentioned as a "hotspot" during the briefing, but characterized

any assertion that GEN Schoomaker failed to act on a warning of an imminent threat there as “all crap.”

⁴¹ The campaign plan itself is classified.

⁴² CAPT [REDACTED] first met Dr. [REDACTED] sometime between January 10 and 14, 2000, while at JWAC for the Initial Planning Conference. On CAPT [REDACTED]’s timeline is an entry for January 23, 2000, “LIWA provides suggestions . . . including demos.” Accordingly, we concluded the charts were provided to CAPT [REDACTED] between January 15 and 23, 2000.

⁴³ We noted that Dar es Salaam is the capitol of Tanzania, and Nairobi is the capitol of Kenya. The U.S. Embassies in Dar es Salaam and Nairobi were both attacked on August 7, 1998.

Chapter 11. WHISTLEBLOWER REPRISAL:
Tombstones at Arlington National Cemetery

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or threaten to take any action against any employee as a reprisal for making a complaint or disclosing information to an Inspector General, unless the complaint was made or the information disclosed with the knowledge that it was false or with willful disregard for its truth or falsity.

Inspector General Act of 1978, as amended, §7(c)

There are at least six types of reprisal allegations, governed by five separate but related sets of statutory standards. Moreover, within the federal government there are overlapping responsibilities for the various types of reprisal allegations. For example, while the U.S. Office of Special Counsel has primary responsibility for overseeing civilian whistleblower reprisal investigations throughout the federal government,¹ any Office of Inspector General can receive and process a civilian whistleblower reprisal allegation. Likewise, any Office of Inspector General within the Department of Defense, whether civilian or military, can process a reprisal allegation by a uniformed military Service member:

- * “If the Inspector General receiving such an allegation is an Inspector General within a military department, that In-

spector General shall promptly notify the Inspector General of the Department of Defense of the allegation,” 10 U.S.C. §1034(c)(3)(B), and

- * “the results of the investigation shall be determined by, or approved by, the Inspector General of the Department of Defense (regardless of whether the investigation itself is conducted by the Inspector General of the Department of Defense or by an Inspector General within a military department).” 10U.S.C. §1034(c)(3)(E).

The statutes governing reprisal allegations and associated primary proponents are as follows:

Type of Reprisal Allegation:	Primary Investigative Office(s):	Governing Law:
Civilian Whistleblower Protection (GS employees)	U.S. Office of Special Counsel	5 U.S.C. §2302
Military Whistleblower Protection	Military Dep’t IGs & DoD IG	10 U.S.C. §1034
DoD Civilian Whistleblower Protection (non-GS):	DoD Inspector General	IG Act, as amended, §7
* Nonappropriated Fund employees;		10U.S.C. §1587

Type of Reprisal Allegation:	Primary Investigative Office(s):	Governing Law:
* Contractor Employees		10 U.S.C. §2409
Intelligence Community Whistleblower Protection	DoD Inspector General	IG Act, as amended, §8H

Some federal agencies, such as the Department of Defense and the military departments, treat “Improper Referrals for Mental Health Evaluation” as a separate category of reprisal allegations. In this regard, the Department of Defense has promulgated DoD Directive 6490.1 and DoD Instruction 6490.4, each governing, “Mental Health Evaluations of Members of the Armed Forces.” Under the DoD Directive, “The Inspector General of the Department of Defense shall: ... Conduct or oversee an investigation of an allegation submitted by the Service member or the Service member’s legal guardian to an IG that the member was referred for a mental health evaluation in violation of this Directive or DoD Instruction 6490.4.”² In any event, Title 5 of United States Code includes “a decision to order psychiatric testing or examination” among its list of ten specified “personnel actions” that could form the basis for a whistleblower reprisal allegation.³

The DoD IG Hotline maintains general information about each type of reprisal allegation and a sample reprisal complaint letter at: http://www.dodig.mil/hotline/reprisal_complaint.htm

For any whistleblower reprisal investigations, whether under Title 5, Title 10, or the Inspector General Act, the whistleblower (aka complainant) bears the burden of establishing the first three of the following four required “elements” for substantiating whistleblower reprisal:

- * The complainant made a “disclosure of information” protected by statute (aka a “protected communication”), such as an EEO complaint or a lawful communication either to a Member of Congress or to an Inspector General;

- * An official in a position to effectuate an adverse personnel action either (a) took or threatened to take an adverse personnel action, or (b) withheld or threatened to withhold a favorable personnel action⁴; and
- * The official responsible for taking, withholding, or threatening the personnel action knew about the protected communication.⁵

If the complaining whistleblower establishes these first three elements by a preponderance of the evidence (*i.e.*, more likely than not), the burden shifts to the complained against official to establish – by a clear and convincing evidence standard⁶ -- that:

- * The personnel action would still have been taken, withheld, or threatened even if the protected communication had not been made.⁷

Civilian Whistleblower Protection (GS Employees)

Under Section 2302(b)(8) of Title 5, United States Code, it is illegal to, “take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

- (i)** a violation of any law, rule, or regulation, or
- (ii)** gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.⁸

Under Title 5, other than the provision regarding a “disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures” quoted above, the identity of the recipient to whom a “protected disclosure” is made, which might qualify the discloser as a protected whistleblower, is not further specified.⁹

Military Whistleblower Protection

Under the Military Whistleblower Protection Act, “protected communications” include communications not only with Members of Congress and IGs, but also with any “member of a Department of Defense audit, inspection, investigation, or law enforcement organization” or with “any person or organization in the chain of command.”¹⁰

The following chronology is posted on the website of the Office of the Inspector General of the Department of Defense (<http://www.dodig.mil/INV/MRI/pdfs/Timeline.pdf>), and is illustrative of the special interest Congress has taken in military whistleblowers, and the evolving legal standards for military whistleblower reprisals:

History of Military Whistleblower Protection Act and Statute Prohibiting the Use of Mental Health Evaluations in Reprisal

1985 - Congresswoman Barbara Boxer introduces a bill to provide protections for military whistleblowers.

1986 - Substance of Boxer bill becomes an amendment to the FY 1987 House Defense Authorization bill. The language dies in conference between the House and Senate.

November 1987 - The Defense Acquisition Policy Panel of the House Armed Services Committee holds a hearing on the Boxer bill to protect military whistleblowers. The witnesses include whistleblowers Chief Petty Officer Michael R. Tufariello, U.S. Naval Reserve, and Major Peter C. Cole, U.S. Army National Guard, Texas. Mr. Derek Vander Schaaf, Deputy Inspector General, Department of Defense, also testifies.

1988 - Boxer's "Military Whistleblower Protection Act" (10 U.S.C. 1034) is enacted as part of the FY 1989 Defense Authorization Act. It is intended to protect military members who make disclosures of wrongdoing to Members of Congress or an **IG from reprisal**. It requires the DoD to investigate allegations of whistle blower reprisal from military members.

1990 - Boxer amendment to the FY 1991 Defense Authorization Act prohibits the referral of military members for mental health evaluations (MHE) in reprisal for making protected communications as defined by the 10 U.S.C. 1034. It requires the DoD to implement regulations specifying procedures for referring military members for MHEs.

1991- Congress includes an amendment to 10 U.S.C. 1034 in the FY *1992/1993* Defense Authorization Act extending protections to whistleblowers that make disclosures to auditors, criminal investigators, inspectors, and other DoD law enforcement officers.

1992 - Congress includes a Boxer provision in the FY 1993 Defense Authorization Act requiring the DoD to implement regulations governing the referral of military members for MHEs. It again prohibits referring military members for MHEs in reprisal for making communications protected under 10 U.S.C. 1034.

1994 - As part of the FY 1995 Defense Authorization Act, Congress again expands the protections afforded under 10 U.S.C. 1034. It broadens the definition of “protected communication” to include allegations of sexual harassment or discrimination. It also expands the universe of those to whom protected communications can be made, to include any person or organization designated pursuant to regulations or administrative procedures to receive such communications, including those in the military member’s chain of command.

1998 - Congress amends 10 U.S.C. 1034 to do the following: 1) give Military Department IGs the authority to receive allegations of whistleblower reprisal and conduct preliminary inquiries into such allegations; 2) require Military Department IGs to report receipt of reprisal allegations to the DoD IG within 10 days and to have their reports of preliminary inquiry and investigation reviewed and approved by the DoD IG; 3) reduce burdensome administrative requirements; and 4) insert the word “gross” before the word “mismanagement.”

2002 - The Homeland Security Act transfers the assets and personnel of the U.S. Coast Guard from the Department of Transportation to the Department of Homeland Security. Therefore, references in 10 U.S.C. 1034 to the Department of Transportation are replaced with references to the Department of Homeland Security.

2004 - The FY 2005 Defense Authorization Act amends 10 U.S.C. 1034 to clarify that any individual within a Military member’s chain of command can receive protected communications, as well as any person or organization

designated by regulation or established procedure to receive protected communications.

2007 - The Directive which implements 10 U.S.C. 1034 is reissued. Included among the revisions to DoDD 7050.06 is the addition of the definition of “chain of command” as: the “succession of commanding officers from a superior to a subordinate through which command is exercised, but also the succession of officers, enlisted members or civilian personnel through whom administrative control is exercised, including supervision and rating of performance.”¹¹

Under the Military Protection Act, the whistleblower should report any allegation of a retaliatory personnel action to an Inspector General within 60 days; otherwise, the IG is not required by the statute to conduct even a preliminary inquiry:

Neither an initial determination [“whether there is sufficient evidence to warrant an investigation of the allegation”] nor an investigation . . . is required in the case of an allegation made more than 60 days after the date on which the member becomes aware of the personnel action that is the subject of the allegation.¹²

DoD Non-GS Civilian Employee Whistleblower Protection

Section 1587 of Title 10, United States Code, which is implemented within the Department of Defense by DoD Directive 1401.03, “DoD Nonappropriated Fund Instrumentality (NAFI) Employee Whistleblower Protection,” defines a NAFI employee as:

a civilian employee who is paid from nonappropriated funds of Army and Air Force Exchange Service, Navy Exchange Service Command, Marine Corps exchanges, or any other instrumentality of the United States under the jurisdiction of the armed forces which is conducted for the comfort, pleasure, contentment, or physical or mental improvement of members of the armed forces. Such term includes a civilian employee of a support organization

within the Department of Defense or a military department, such as the Defense Finance and Accounting Service, who is paid from nonappropriated funds on account of the nature of the employee's duties.¹³

This special whistleblower protection statute stipulates that:

Any civilian employee or member of the armed forces who has authority to take, direct others to take, recommend, or approve any personnel action shall not, with respect to such authority, take or fail to take a personnel action with respect to any nonappropriated fund instrumentality employee (or any applicant for a position as such an employee) as a reprisal for—

(1) a disclosure of information by such an employee or applicant which the employee or applicant reasonably believes evidences—

(A) a violation of any law, rule, or regulation; or

(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

if such disclosure is not specifically prohibited by law and if the information is not specifically required by or pursuant to executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(2) a disclosure by such an employee or applicant to any civilian employee or member of the armed forces designated by law or by the Secretary of Defense to receive disclosures described in clause (1), of information which the employee or applicant reasonably believes evidences—

(A) a violation of any law, rule, or regulation; or

(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.¹⁴

DoD Directive 1401.03 assigns responsibility for investigating whistleblower reprisal allegations by NAFI employees to the DoD Inspector General: “The IG DoD shall:

5.1.1. Receive complaints of reprisal by NAFI employees, former employees, or applicants, and expeditiously determine whether there is sufficient evidence to warrant an investigation.

5.1.2. Notify the NAFI employee, former employee, or applicant, and the Director, Administration and Management (DA&M), OSD, if the IG DoD determines that an investigation will not be conducted.

5.1.3. Conduct an investigation if it has been determined that investigation of a complaint of reprisal is warranted. Upon completion of the investigation, provide the Under Secretary of Defense for Personnel and Readiness (USD(P&R)) and the DA&M with a report of findings of fact, conclusions, and recommendations.

5.1.4. Protect the confidentiality of NAFI employees, former employees, or applicants making protected disclosures unless the IG DoD determines that disclosure of the employee’s, former employee’s, or applicant’s identity is necessary to resolve the complaint(s).¹⁵

Within the Department of Defense, the heads of DoD Components, including military departments and various subordinate DoD agencies—some of whom have their own Offices of Inspector General—are required to, “Ensure that NAFI employees, former employees, or applicants making disclosures of information the employee or applicant reasonably believes evidences a violation of law, rule, or regulation; mismanagement; a gross waste of funds; an abuse of authority; or a substantial or specific danger to public health or safety; or any reprisal, are advised of their right to submit complaints directly to the IG DoD and of the procedures for doing so,” and to, “Ensure that complaints of reprisal received from NAFI employees, former employees, or applicants are forwarded to the IG DoD.”¹⁶

Defense Contractor Employee Reprisal

Section 2409 of Title 10, United States Code, establishes standards for the protection of Defense contractor employees, “from reprisal for disclosure of certain information”:

(a) Prohibition of Reprisals.— An employee of a contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a Member of Congress, a representative of a committee of Congress, an Inspector General, the Government Accountability Office, a Department of Defense employee responsible for contract oversight or management, or an authorized official of an agency or the Department of Justice information that the employee reasonably believes is evidence of gross mismanagement of a Department of Defense contract or grant, a gross waste of Department of Defense funds, a substantial and specific danger to public health or safety, or a violation of law related to a Department of Defense contract (including the competition for or negotiation of a contract) or grant.

(b) Investigation of Complaints.—

(1) A person who believes that the person has been subjected to a reprisal prohibited by subsection (a) may submit a complaint to the Inspector General of the Department of Defense, or the Inspector General of the National Aeronautics and Space Administration in the case of a complaint regarding the National Aeronautics and Space Administration. Unless the Inspector General determines that the complaint is frivolous, the Inspector General shall investigate the complaint and, upon completion of such investigation, submit a report of the findings of the investigation to the person, the contractor concerned, and the head of the agency.

(2)

(A) Except as provided under subparagraph (B), the Inspector General shall make a determination that a complaint is frivolous or submit a report under paragraph (1) within 180 days after receiving the complaint.

(B) If the Inspector General is unable to complete an investigation in time to submit a report within the 180-day period specified in subparagraph (A) and the person submitting the complaint agrees to an extension of time, the Inspector General shall submit a report under paragraph (1) within such additional period of time as shall be agreed upon between the Inspector General and the person submitting the complaint.¹⁷

The Inspector General of the Department of Defense is designated by DoD Directive to, “Receive and investigate complaints of reprisal for making disclosures protected by [Section] 2409 of title 10, United States Code.”¹⁸

Improper Referrals for Mental Health Evaluation

According to Department of Defense Directive 6490.1, “Mental Health Evaluations of Members of the Armed Forces”:

4.3.2. No person may refer a Service member for mental health evaluation as a reprisal for making or preparing a lawful communication to a Member of Congress, any appropriate authority in the chain of command of the Service member, an IG or a member of a DoD audit, inspection, investigation or law enforcement organization.

5.2. The Inspector General of the Department of Defense shall:

5.2.1. Conduct or oversee an investigation of an allegation submitted by the

Service member or the Service member's legal guardian to an IG that the member was referred for a mental health evaluation in violation of this Directive or DoD Instruction 6490.4¹⁹

Whistleblower Misrepresentations of Material Fact

According to guidance promulgated by the DoD Office of Inspector General, "On rare occasions, you may come across an assertion by a third party that the whistleblower knew or should have known that the information provided in the initial protected communication was not true. If that is the case, you must resolve the issue of 'reasonable belief.' If you find that the complainant either made false statements or intentionally misrepresented the truth regarding the reported wrongdoing, then you may refer the matter for appropriate command action and close the reprisal investigation."²⁰

Both the Inspector General Act of 1978 and the official reprisal complaint form utilized by the United States Office of Special Counsel (posted at <http://www.osc.gov/documents/forms/osc11.htm>) envision the possibility that intentional misrepresentation of material facts by a whistleblower could result in criminal prosecution of the whistleblower for making a false official statement. Specifically, Section 7(c) of the Inspector General Act disclaims any obligation to protect a whistleblower if, "the complaint was made or the information disclosed with the knowledge that it was false or with willful disregard for its truth or falsity."²¹ Likewise, OSC Form 11 requires complainants to sign under penalty of perjury before any reprisal investigation is commenced, citing 18 U.S.C. § 1001 as the basis for criminal prosecution if the reprisal complaint includes "a false statement or concealment of a material fact."²²

Federal Agency Compliance with Whistleblower Protection Laws

The United States Office of Special Counsel offers a training and certification program to assist federal agencies with both understanding and complying with federal whistleblower protection laws. Following is an overview of the Office of Special Counsel's certification program, as posted on its website:

The Office of Personnel Management recognizes 2302(c) certification as a “**suggested performance indicator**” for ‘getting to green’ on the Strategic Management of Human Capital element of the President’s Management Agenda.

In 1994, Congress responded to reports of widespread ignorance in the federal workforce concerning employees’ right to be free from prohibited personnel practices (PPP), especially retaliation for whistleblowing, by enacting 5 U.S.C. §2302(c). That provision charges “[t]he head of each agency” with responsibility for “ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them” under the prohibited personnel practice and whistleblower retaliation protection provisions of Title 5.

OSC’s 2302(c) Certification Program allows federal agencies to meet the statutory obligation to inform their workforces about the rights and remedies available to them under the Whistleblower Protection Act (WPA) 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 the following five requirements:

1. Placing informational posters at agency facilities;
2. Providing information about PPPs and the WPA to new employees as part of the orientation process;
3. Providing information to current employees about PPP’s and the WPA;
4. Training supervisors on PPPs and the WPA; and
5. Creation of a computer link from the agency’s web site to OSC’s web site.²³

On December 31, 2002, the United States Office of Special Counsel certified the DoD Office of Inspector General as the first federal Office of Inspector General that had formally complied with 5

U.S.C. §2302(c). The official “Certificate of Compliance” read that it was “in recognition of meeting 5 U.S.C. §2302(c)’s obligation to inform the DODIG work force of their rights under the prohibited personnel practice and whistleblower protection provisions of chapters 12 and 23 of Title 5.”

Office Special Counsel whistleblower protection certification is for a set period of time, and remains in effect provided that the agency meets its ongoing information obligations under the Office of Special Counsel’s Certification Program. As of the writing of this handbook, 24 federal agencies, including the DoD OIG and four other Offices of Inspector General, were certified as compliant under the Office of Special Counsel’s Certification Program.²⁴

Chapter Review Questions:

- 1 By what authority and for what purpose did the Inspector General of the Department of Defense investigate Ms. Gray's allegations of whistleblower reprisal by her U.S. Army supervisors at Arlington National Cemetery, instead of referring the allegations to the Army Inspector General for a reprisal investigation?
- 2 What are the four elements that must be established in order for an Inspector General to substantiate any reprisal allegation?
- 3 Who bears the burden of establishing in each of the four elements of a reprisal allegation, and what is the respective standard of proof for each element? What justifies a higher standard of proof for one of those elements as compared to the other three, as applied in the Inspector General of the Department of Defense's Report of Investigation, "Whistleblower Reprisal Allegation: Arlington National Cemetery," Report No. CRI-HL109655, pp. 3-4 (June 29, 2010):

The first stage of the whistleblower reprisal analysis is held to a preponderance of the evidence. "Preponderance" of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. . . . The second stage of analysis is held to a clear and convincing evidence standard. "Clear and convincing" evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. It is a higher standard than preponderance of the evidence, but lower than beyond a reasonable doubt.

- 4 By what authority and for what purpose did the Inspector General of the Department of Defense "non-substantiate" reprisal in the Arlington National Cemetery "Whistleblower

Reprisal Investigation,” yet in the same report of investigation substantiate a failure “to exhibit adequate performance and management in the supervision and termination of Ms. Gray”?

- 5 By what authority and for what purpose might the Inspector General of the Department of Defense have referred his findings of fact (as opposed to the fully investigated and unsubstantiated reprisal allegations) in the Arlington National Cemetery “Whistleblower Reprisal Investigation” to the Army Inspector General for an investigation into whether or not the findings of facts amounted to a violation of the Army Leadership Regulation (AR 600-100)?
- 6 Is the Exemplary Conduct leadership standard enacted by Congress in 1997 for, “All commanding officers and others in authority in the Army” (10 U.S.C. §3583) applicable to the Army civilian “officials responsible for handling Ms. Gray’s supervision and termination,” *e.g.*, the Arlington National Cemetery Superintendent, a member of the Senior Executive Service (SES)? Is this statutory leadership standard applicable to the Assistant Secretary of the Army for Civil Works, a Senate-confirmed Presidential appointee, to whom the Inspector General of the Department of Defense recommended, “consider[ation of] corrective action with respect to ANC officials responsible for handling Ms. Gray’s supervision and termination”? *Compare* AR 600-100, Army Leadership, “Command,” p. 17 (2007):

Command includes the leadership, authority, responsibility, and accountability for effectively using available resources and planning the employment of, organizing, directing, coordinating, and controlling military forces to accomplish assigned missions. It includes responsibility for unit readiness, health, welfare, morale, and discipline of assigned personnel. Title 10, Section 3583, requires exemplary conduct by all commanding officers and others in authority in the Army. All commanders are required to—

- a. Present themselves as examples of virtue, honor, patriotism, and subordination;

b. Be vigilant in inspecting the conduct of all persons who are placed under their command;

c. Guard against and suppress all dissolute and immoral practices and to correct, according to the laws and regulations of the Army, all persons who are guilty of them; and

d. Take all necessary and proper measures under the laws, regulations, and customs of the Army to promote and safeguard the morale, physical well being, and the general welfare of officers and enlisted personnel under their command or charge.

with id., “Civilian Creed”:

The Civilian Creed refers to the professional attitudes and beliefs that characterize the Department of Army Civilian (DAC). At its core, the Civilian Creed requires unrelenting and consistent determination to do what is right and to do it with pride, both in war and peace. No matter the conditions, it is the DA civilians selfless commitment to the Nation, the Army, and fellow civilians and Soldiers that keeps them going. It is the professional attitude that inspires every Department of Army Civilian.

- 7 How can any leader who has been “elected or appointed to an office of honor or profit in the civil service or uniformed services” (5 U.S.C. §3331, “Oath of office”), and therefore must take the same statutory oath of office to “support and defend the Constitution of the United States against all enemies, foreign and domestic,” hold a subordinate officer, whether “in the civil service or uniformed services,” to a leadership standard to which the senior leader is not willing to hold himself or herself?

Chapter 11 Endnotes

¹ See 5 U.S.C. §2302(c) (“The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management, and for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them under this chapter and chapter 12 of this title. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.”).

² DoD Directive 6490.1, ¶5.2.

³ See 5 U.S.C. §2302(a)(2)(A)(x).

⁴ See United States Office of Special Counsel, Form 11 (“Legal Elements of a Violation[:] By law, certain elements must be present before OSC can establish that a legal violation of law has occurred. Two of the required elements that must be established are: (1) that a whistleblower disclosure was made; and (2) that an agency took, failed to take, or threatened to take or fail to take a personnel action because of the whistleblower disclosure.

Your description of these elements will help OSC’s investigation of your allegation(s).”) (<http://www.osc.gov/documents/forms/osc11.htm>); Inspector General of the Department of Defense, Inspector General Guide 7050.6, “Guide to Investigating Reprisal and Improper Referrals for Mental Health Evaluation,” ¶¶2.3-2.4, February 6, 1996

http://web.archive.org/web/20120422181015/http://www.dodig.mil/INV/MR/IGDGF7050_6.pdf

⁵ See Inspector General Guide 7050.6, ¶2.5.

⁶ 5 C.F.R. §1209.4(d) (“Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief

as to the allegations sought to be established. It is a higher standard than ‘preponderance of the evidence’ as defined in 5 CFR 1201.56(c)(2).’); see Inspector General of the Department of Defense, “Whistleblower Reprisal Investigation: Arlington National Cemetery,” Report No. CRI-HL109655, p. 4, June 29, 2010 (linked and excerpted below as the chapter case study).

⁷ See Inspector General Guide 7050.6, ¶2.6; 5 C.F.R. §1209.4(d) ().

⁸ 5 U.S.C. §2302(b)(8).

⁹ See United States Office of Special Counsel, Form 11 (“Protected Disclosures[:] A disclosure of information is a protected whistleblower disclosure if a Federal employee, former employee, or applicant for Federal employment discloses information which he or she reasonably believes evidences: (a) a violation of any law, rule, or regulation; (b) gross mismanagement; (c) a gross waste of funds; (d) abuse of authority; or (e) a substantial and specific danger to public health or safety.”).

¹⁰ 10 U.S.C. §1034(b)(1)(b).

¹¹ United States Department of Defense, Office of the Inspector General, “History of the Military Whistleblower Protection Act and Statute Prohibiting the Use of Mental Health Evaluations in Reprisal”).

<http://web.archive.org/web/20120609183916/http://www.dodig.mil/INV/mri/pdfs/Timeline.pdf>

¹² 10 U.S.C. §1034(c)(4).

¹³ 10 U.S.C. §1587(a)(1).

¹⁴ *Id.*, §1587(b).

¹⁵ Department of Defense Directive 1401.03, “DoD Nonappropriated Fund Instrumentality (NAFI) Employee Whistleblower Protection,” ¶5.1, April 23, 2008 (<http://www.dtic.mil/whs/directives/corres/pdf/140103p.pdf>).

¹⁶ *Id.*, ¶¶5.3.1 & 5.3.3.

¹⁷ 10 U.S.C. §2409.

¹⁸ Department of Defense Directive 5106.01, “Inspector General of the Department of Defense,” ¶5.19.2, April 13, 2006 (<http://www.dtic.mil/whs/directives/corres/pdf/510601p.pdf>).

¹⁹ Department of Defense Directive 6490.1, “Mental Health Evaluations of Members of the Armed Forces,” October 1, 1997 (certified Current as of November 24, 2003) <http://www.dtic.mil/whs/directives/corres/pdf/649001p.pdf>

²⁰ *Id.*, ¶2.3.

²¹ Inspector General Act of 1978, as amended, §7(c).

²² United States Office of Special Counsel. Form 11 (the completion of which requires the complainant to, “certify that all of the statements made in this complaint (including any continuation pages) are true, complete, and correct to the best of my knowledge and belief. I understand that a false statement or concealment of a material fact is a criminal offense punishable by a fine of up to \$250,000, imprisonment for up to five years, or both. 18 U.S.C. § 1001.”) (<http://www.osc.gov/documents/forms/osc11.htm>); see 18 U.S.C. § 1001 (“Statements or entries generally[:] **(a)** Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully— **(1)** falsifies, conceals, or covers up by any trick, scheme, or device a material fact; **(2)** makes any materially false, fictitious, or fraudulent statement or representation; or **(3)** makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.”).

²³ United States Office of Special Counsel, “Overview of 2302(c) Certification Program” (<http://www.osc.gov/outreachCertificationProgram.htm#>).

²⁴ See United States Office of Special Counsel, “Agencies That Have Completed The 2302(C) Certification Program”
<http://www.osc.gov/outreachAgenciesCertified.htm>

²⁵ “Whistleblower Reprisal Investigation: Arlington National Cemetery,”
Report Number CRI-HL109655, June 29, 2010
<http://s3.documentcloud.org/documents/5199/redacted-dodig-report-on-gina-gray.pdf>

²⁶ We acknowledge that Ms. Gray’s whistleblowing activities continued after her termination and we understand that she contributed relevant information during a recently concluded investigation by the Army Inspector General into ANC operations. Because those later whistleblowing activities are not germane to the matter of her termination, we do not discuss them further in this report.

²⁷ U.S. Army PA Specialist (OS-1035-12) Position Description.

²⁸ DoD Directive 5106.01, (Apr. 13, 2006) at 5.19.

²⁹ DoD Directive 5106.01, (Apr. 13, 2006) at 5.19.1.

³⁰ Executive Order 12731 (October 17, 1990).

³¹ 5 U.S.C. Section 2302 (b)(8)(A)(i-ii).

³² 5 C.F.R. Section 1209.7.

³³ 5 C.F.R. Section 1201.56(c)(2).

³⁴ This third finding may be established where the acting official had knowledge, actual or imputed, of the complainant’s disclosure and the personnel action took place within a period of time subsequent to the disclosure, such that a reasonable person could conclude that the disclosure was a contributing factor in the decision to take the action. *Redschlag v. Department of the Army*, 89 MS.P.R. 589,635 (2001), review dismissed, 32 Fed. Appx. 543 (Fed. Cir. 2002) In deciding whether a personnel action occurred within a period of time sufficient to conclude the disclosure was a contributing factor, the probative value of the evidence may be affected by the passage of

time. Weak but substantiating evidence may be sufficient to prove reprisal after a short time frame; stronger evidence may be required to prove reprisal over relatively longer time frames.

³⁵ 5 C.F.R. Section 1209.4(d).

³⁶ *Carr v. Social Security Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999) (stating it is appropriate to consider the strength of the Agency's evidence in support of its personnel action when determining whether the Agency has shown by clear and convincing evidence that it would have taken that action in the absence of the employee's protected disclosure).

³⁷ 5 U.S.C. Appendix, Section 7(A)(2008) (provisions by which a DoD employee may file complaints with the Inspector General).

³⁸ Standard Form 50-B - Notification of Personnel Action (Apr. 14, 2008).

³⁹ Memorandum from [REDACTED], Marine Barracks Washington, D.C., to OIG DoD, *Media Coverage concerning the funeral of [REDACTED] at ANC* (Apr. 8, 2009).

⁴⁰ OIG DoD Interview of [REDACTED] (Apr. 29, 2009) at 31. [REDACTED] testified that the original location was changed "because the Marine Corps, and the Air Force, and the Navy put their escorts at the foot of the grave" and "we [ANC] just can't put you [the media] in the middle of the funeral."

⁴¹ OIG DoD Interview 0 A r. 28, 2009) at 26 and 28.

⁴² OIG DoD Interview 0 (Apr. 29,2009) at 31 and OIG DoD Interview 0~ (Apr. 28, 2009) at 26.

⁴³ *William Gregory Hall*, ANC, [http://www.pdfonfly.com/pdfs/http_ www.arlingtoncemetery.net_wghall.htm.pdf](http://www.pdfonfly.com/pdfs/http_www.arlingtoncemetery.net_wghall.htm.pdf)

⁴⁴ Dana Milbank, *What the Family Would Let You See, the Pentagon Obstructs*, Washington Post (Apr. 24, 2008) at A3.

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- ⁴⁵ OIG DoD Interview of Ms. Gray (Jan. 15, 2009) at 22.
- ⁴⁶ OIG DoD Interview of [REDACTED] (Apr. 28, 2009) at 39.
- ⁴⁷ *Id.* at 40.
- ⁴⁸ *Id.* at 36.
- ⁴⁹ E-mail from Ms. Gray to [REDACTED] [REDACTED] and [REDACTED] *More Documentation* (Apr. 24, 2008, 9:10 p.m.).
- ⁵⁰ E-mail from Ms. Gray to [REDACTED] [REDACTED] and [REDACTED] ANC Documents (Apr. 25, 2008, 7:19 p.m.).
- ⁵¹ OIG DoD Interview of [REDACTED] (Apr. 28, 2009) at 24-25.
- ⁵² OIG DoD Interview of [REDACTED] (Apr. 15, 2009) at 10 and 12-13.
- ⁵³ E-mail from [REDACTED] to Mr. Metzler and other Army officials, *EXSUM* (April. 28, 2008, 10:08 a.m.).
- ⁵⁴ E-mail from Ms. Gray to [REDACTED] *FW: EXSUM Additional Info* (Apr. 28, 2008, 12:34 p.m.).
- ⁵⁵ E-mail from [REDACTED] to Mr. Metzler, [REDACTED] and other U.S. Army officials, *EXSUM additional info* (Apr. 28, 2008, 11:42 a.m.).
- ⁵⁶ ANC Media Release (Apr. 29, 2008).
- ⁵⁷ OIG DoD Interview of Ms. Gray (Jan. 15, 2009) at 55. *See also* OIG DoD Interview of [REDACTED] (Apr. 29, 2009) at 35-36, 42, and 63 and OIG DoD Interview [REDACTED] (Apr. 28, 2009) at 61-63.
- ⁵⁸ OIG DoD Interview of [REDACTED] (Apr. 16, 2009) at 23-24.
- ⁵⁹ *Id.* at 54-55.
- ⁶⁰ Dave Mazzarella, *Agendas collide at Arlington National Cemetery*, Stars and Stripes (May 7, 2008).
- ⁶¹ OIG DoD Interview of Mr. Metzler (Apr. 17, 2009) at 34-35 and 37-38.

⁶² E-mail from Ms. Gray to [REDACTED] and Mr. Metzler, *Memorial Day PAO Assignments* (May 20, 2008, 6:44 p.m.) and E-mail from [REDACTED] to Ms. Gray, *RE: Memorial Day PAO Assignments* (May 21, 2008, 7:48 a.m.).

⁶³ E-mail from to *FW: Memorial Day PAG Assignments* (May 21, 2008, 1:39 p.m.).

⁶⁴ OIG DoD Interview of [REDACTED] (Apr. 16, 2009) at 36.

⁶⁵ E-mail from [REDACTED] to [REDACTED] and Mr. Metzler, *Gina Gray* (May 22, 2008, 8:21 a.m.).

⁶⁶ E-mail from [REDACTED] to [REDACTED] *Gina Gray* (May 27, 2008, 8:13 a.m.).

⁶⁷ E-mail from [REDACTED] to [REDACTED] *Status* (June 2, 2008, 11:03 a.m.) and E-mail from [REDACTED] to [REDACTED] *RE: Status* (June 2, 2008, 11:17 a.m.).

⁶⁸ AR 690-400 (Oct. 16, 1998) Chapter 4302, Total Army Performance Evaluation System, Section 1-5(a).

⁶⁹ E-mail from Ms. Gray to [REDACTED] *RE: PAO* (June 3, 2008, 10:44 a.m.).

⁷⁰ Letter from Ms. Gray to Senator Warner (June 6, 2008). We determined the last line is in reference to Ms. Gray stating that there were no regulations allowing ANC to restrict the media from getting a ‘good shot.’ *See also* OIG DoD Interview of Ms. Gray (Jan. 15, 2009) at 31 whereby Ms. Gray testified that she was directed by [REDACTED] to lie to the media.

⁷¹ E-mail from Mr. Pessin to [REDACTED] [REDACTED] and Ms. Gray, *RE: Reminder – Access Follow-up* (June 19, 2008, 11:33 a.m.).

⁷² Letter from Senator Warner to Mr. Morrell (June 24, 2008).

⁷³ E-mail from [REDACTED] to [REDACTED] *Removal Information for Gina Gray* (June 24, 2008, 1:41 p.m.).

⁷⁴ OIG DoD Interview of Ms. Gray (January 15, 2009) at 114-117 and Memorandum for Record from Ms. Gray to OIG DoD (Apr. 3, 2009).

⁷⁵ E-mail from [REDACTED] to [REDACTED] *Termination Info - Gray* (June 27, 2008, 11:18 a.m.).

⁷⁶ Memorandum from [REDACTED] to Ms. Gray, *Termination During Probationary Period* (June 27, 2008).

⁷⁷ Letter from Mr. Metzler to Senator Warner (July 9, 2008).

⁷⁸ To satisfy this element the complainant is not required to disclose information that actually evidences one of those conditions. Rather, the complainant is only required to make a non-frivolous allegation that the matters disclosed were ones that a reasonable person in his or her position would believe evidenced one of those conditions. *See Rusin v. Dep 't of the Treasury*, 92 M.S.P.R. 298, 318 (2002). *See also Garst v. Dep 't of the Army*, 60 M.S.P.R. 514, 518 (1994). Reasonable belief is an objective standard. That is, a disinterested observer with knowledge of essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions evidence a violation of a law, rule, or regulation. *See Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999); accord *Russin, id.*

⁷⁹ OIG DoD Interview of [REDACTED] (Apr. 28, 2009) at 39.

⁸⁰ *Id.* at 26 and 28.

⁸¹ OIG DoD Interview of Ms. Gray (Jan. 15, 2009) at 11.

⁸² OIG DoD Interview of [REDACTED] (Apr. 28, 2009) at 26.

⁸³ Dana Milbank, *What the Family Would Let You See, the Pentagon Obstructs*, Washington Post (Apr. 24, 2008) at A3.

⁸⁴ OIG DoD Interview of [REDACTED] (Apr. 28, 2009) at 39.

⁸⁵ OIG DoD Interview of Ms. Gray (Jan. 15, 2009) 27-28.

⁸⁶ OIG DoD Interview of [REDACTED] (Apr. 28, 2009) at 40.

⁸⁷ *Id.* at 36.

⁸⁸ E-mail from [REDACTED] to OIG DoD, *FW: ANC Documents* (Dec. 17, 2009, 3:57 p.m.). *See also* e-mail from [REDACTED] to OIG DoD, *Follow-up Information* (Dec. 18, 2009, 9:33 a.m.).

⁸⁹ E-mail from Ms. Gray to [REDACTED] [REDACTED] and [REDACTED] *More Documentation* (Apr. 24, 2008, 9:10 p.m.).

⁹⁰ OIG DoD Interview of [REDACTED] (Apr. 15, 2009) at 10 and 12-13.

⁹¹ Memorandum for Record from Ms. Gray to OIG DoD (Jan. 22, 2010).

⁹² Memorandum from Ms. Gray to Senator Warner (June 6, 2008) and e-mail string back and forth confirming receipt of letter and inquiring into the “status of my [Ms. Gray’s] complaint from Ms. Gray to [REDACTED], Senator Warner Staffer, *RE: From Senator Warner’s Office* (June 22, 2008, 7:40 p.m.). *See also* OIG DoD Interview of Ms. Gray (Jan. 15, 2009) at 31 whereby Ms. Gray testified that she was told to lie to the media.

⁹³ Ms. Gray’s position description states the following applicable responsibilities: “Assists media representatives in obtaining information... Serves as... primary contact for local and national media, which requires immediate responsiveness. Responds to media queries.”

⁹⁴ OIG DoD Interview of Ms. Gray (Jan. 15, 2009) at 19-21.

⁹⁵ *Willis v. Dep’t of Agriculture*, 141 F.3d 1139, 1143 (Fed. Cir. 1998).

⁹⁶ OIG DoD Interview of Ms. Gray (Jan. 15, 2009) at 19-20.

⁹⁷ *Id.* at 27-28.

⁹⁸ *Id.* at 8.

⁹⁹ E-mail from [REDACTED] to OIG DoD, *FW: ANC Documents* (Dec. 17, 2009, 3:57 p.m.) (“... since April 2008, Ms. Gray did decide to use the MDW rules (*the Jackman Memo*). She [Ms. Gray] did state that she would use the rules she had since the CFR [32001] rules were not published. That was her decision, not mine. I did not try to sway her one way or the other.”).

¹⁰⁰ Memorandum from Ms. Gray to OIG DoD, *Memorandum for Record; ANC Media Policies* (Apr. 9, 2009) (“This [Jackman] memorandum was a factor in my determination that there had been a violation of an established regulation and prompted me to go to OCPA for guidance.”).

¹⁰¹ Department of the Arm_General Order 13, *Army National Cemeteries* (Oct. 29, 2004).

¹⁰² OIG DoD Interview of [REDACTED] (Apr. 29, 2009) at 56.

¹⁰³ *Special Counsel v. Costello*, 75 MSPR 562, 580, 585-86 (1997) (disclosures must be “specific and detailed, not vague allegations of wrongdoing regarding broad or imprecise matters.”). *See also Padilla v. Department of Air Force*, 55 MSPR 540, 543-44 (1992).

¹⁰⁴ 5 U.S.C. Section 2302.

¹⁰⁵ OIG DoD Interview of Ms. Gray (Jan. 15, 2009) 116-117.

¹⁰⁶ Allegation of reprisal number one was not supported by sufficient evidence to conclude that the action occurred. Additionally, ANC RMOs denied they removed the responsibility. *See* OIG DoD Interview of Mr. Metzler (Apr. 17, 2009) at 18 and OIG DoD Interview [REDACTED] (Apr. 29, 2009) at 95-96; and OIG DoD Interview of [REDACTED] (Apr. 28, 2009) at 104 and 106-108.

¹⁰⁷ *Id.*

¹⁰⁸ U.S. Army PA Specialist (GS-1035-12) Position Description at 2.

¹⁰⁹ DA Form 7222-1 - Senior System Civilian Evaluation Report Support Form (June 3, 2008). [REDCATED] testified that this meant all media requests were to go to Mr. Metzler for approval. *See* OIG DoD Interview of [REDACTED] (Apr. 28, 2009) at 76.

¹¹⁰ E-mail from [REDACTED] Fort Meyer to OIG DoD, *RE: DoD IG Investigation* (Apr. 29, 2009, 11:27 a.m.).

¹¹¹ E-mail from Ms. Gray to [REDACTED] *RE: PAO* (June 3, 2008, 10:44 a.m.) (“Am I correct in understanding that you want to approve every request that comes in.”).

¹¹² E-mail from Ms. Gray to [REDACTED] *Monday Morning* (June 12, 2008, 2:36 p.m.) (Whereby Ms. Gray asked [REDACTED] permission for the Virginia Department of Tourism to shoot a “tomb guard... walking the mat on Monday morning at sunrise.”). *See also* E-mail from Ms. Gray to [REDACTED] *German film crew follow-up* (June 12, 2008, 2:12 p.m.).

¹¹³ OIG Memorandum of Record *Conversations with [REDACTED] and [REDACTED]* (Oct. 27, 2009). *See also* OIG DoD Interview of [REDACTED] (Apr. 15, 2009) at 23 and 36-37, whereby [REDACTED] did not discuss her conversation with Ms. Gray to [REDACTED] and only interacted with [REDACTED] in preparing for Memorial Day 2008.

¹¹⁴ Inspector General Act of 1978, as amended, sections 7(a) and 8(c)(2). The evidence gathered in this investigation warranted our review and comments.

¹¹⁵ AR 600-100, Army Leadership (March 8, 2007) at 1-6, (4), (5), and (7). Further, section 1-8. Leader development, sub-section C. states, “All leaders have a responsibility to develop those junior to them to the fullest extent possible. In addition to institutional training and education, leaders can facilitate development through the knowledge and feedback they provide through *counseling, coaching, and mentoring.*”

¹¹⁶ AR 690-400, Total Army Performance Evaluation System (Oct. 16, 1998) at section 2-6(a).

¹¹⁷ OIG DoD Interview of [REDACTED] (Apr. 28, 2009) at 103.

¹¹⁸ OIG DoD Interview of [REDACTED] (Apr. 29, 2009) at 29 and 49-50 (“I was getting some indication from [REDACTED] that she wasn’t getting feedback from her. I didn’t get involved. She would just mention to me she didn’t get this, she wasn’t getting that.” ... “She’s [Ms. Gray’s] not doing this, she’s not doing that. But that’s still at

the first level... I don't get involved at that level.”). *See also Id.* at 76.

¹¹⁹ OIG DoD Interview of [REDACTED] (Apr. 29, 2009) at 80-81.

¹²⁰ AR 600-100, Army Leadership (March 2007) at section 1-8c.

¹²¹ OIG DoD Interview of [REDACTED] (Apr. 29, 2009) at 69 and 82-85. [REDACTED] also testified that he agreed with the termination.

¹²² OIG DoD Interview of [REDACTED] (Apr. 16, 2009) at 36. [REDACTED] testified that his office told [REDACTED] that “It was not insubordination.”

¹²³ Memorandum for Record from [REDACTED] *Memorial Day* (May 26, 2008).

¹²⁴ OIG DoD Interview of [REDACTED] (Apr. 16, 2009) at 35 and 27 (“Because initially they [REDACTED] and [REDACTED] wanted to go ahead with termination right away (early May). Both myself and the attorney said give us some more stuff. Even though you can, it is not the right thing to do. If you want to terminate somebody we want to hear a summary of why you want to terminate them.” ... “We tell all of our supervisors to give us documentation.”).

¹²⁵ AR 600-100, Army Leadership (March 8, 2007) at 1-8.

¹²⁶ OIG DoD Interview of [REDACTED] (Apr. 14, 2009) at 13 and OIG DoD Interview of Ms. Gray (Jan. 15, 2009) at 44-45. *See also* E-mail from to Mr. Metzler and other U.S. Army officials, *EXSUM* (Apr. 28, 2008, 10:08 a.m.) (“We just got a call from Sec Def office. They want an EXSUM by 12:00.”).

¹²⁷ Executive Summary from MDW and APR. 30, 2008).

¹²⁸ OIG DoD Interview of Mr. Metzler (Apr. 17, 2009) at 42. *See also* E-mail from [REDACTED] to

Ms. Hoehne, Principal Deputy Chief OCPA, [REDACTED] and Ms. Gray, *Media Guidelines Review* (May 12, 2008, 1:50 p.m.), whereby [REDACTED] states, “This follows our meeting concerning the media

guidelines currently being used at ANC and the suggested changes discussed.”

¹²⁹ OIG DoD Interview of [REDACTED] (Apr. 28, 2009) at 64-65.

¹³⁰ Executive Summary from Mr. Metzler (May 1, 2008).

¹³¹ OIG DoD Interview of [REDACTED] (Apr. 28, 2009) at 57-58 ([OIG Investigator]: “Do you believe Ms. Gray was blamed for the increased media attention at ANC?” [REDACTED]: “Yes.”).

PART C.

LESSONS LEARNED

CHAPTER 12. FIRST AND LASTING THINGS:

Enemies Foreign and Domestic

I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

Title 5, United States Code, Section 3331.

In *Marbury v. Madison*, the bedrock United States Supreme Court case establishing the principle of judicial review, Chief Justice John Marshall wrote, “The government of the United States has been emphatically termed a government of laws, and not of men.”¹ In a society based upon the rule of law, of course, laws must first be both prescribed and promulgated before they can be enforced.² This final chapter summarizes some of the most significant lessons learned in the course of helping military commanders throughout the world better to promulgate and to enforce laws against human trafficking.

The Congressional request for a joint and global inspection of sex slavery, discussed in detail in Chapter 5, serves an apt background for summarizing and giving context to some more general and profound lessons learned, foremost of which are that:

- 1 Among the root causes of the recent resurgence of human trafficking, aside from the obvious profit motive of organized

criminals, is a general reluctance of leaders at all levels to promulgate and to enforce principle-based standards for subordinates who create the demand for prostitution generally, and for sex slavery specifically;

- 2 Whenever leaders, especially those of us who swear to “support and defend the Constitution of the United States,”³ become aware of humans being referred to as “just” something else (e.g., “they’re just prostitutes,” as discussed below), we ought never to turn a blind eye; and
- 3 In addition to “fraud, waste, and abuse” being domestic enemies of the United States Constitution, moral relativism itself, more fundamentally, is a domestic enemy of that same Constitution.⁴

Domestic Enemy #1: Moral Relativism

Following a ceremony at the Pentagon on the first anniversary of 9-11 honoring “America’s Heroes Lost September 11, 2001,” the author escorted Dr. Henry Kissinger to his waiting car. As we walked, I mentioned that I had recently queried one of Dr. Kissinger’s mentors, Dr. Fritz G. A. Kraemer⁵ -- who also happened to be one of my mentors -- about what Dr. Kraemer thought was the most dangerous “domestic enemy to the United States Constitution.” Dr. Kraemer, who for nearly thirty years had served as a senior Pentagon advisor, unhesitatingly answered with the single word, “Relativism.” Upon hearing this, Dr. Kissinger unhesitatingly replied, “I agree.”

Moral relativism rejects absolute, principle-based moral values.⁶ As such, moral relativism is inconsistent with foundational principles and enduring core values of the United States of America. Both moral relativism and its practical manifestations in the form of human trafficking are antithetical to foundational principles and enduring shared values of the ever-expanding Western Alliance.⁷

Our forefathers were well-schooled in Blackstone’s Commentaries, the most definitive English language legal treatise at the time of the American Revolution. In his Commentaries, Blackstone explained the “Nature of Law” in terms antithetical to moral relativism:

Man, considered as a creature, must necessarily be subject to the laws of his creator, [who] has laid down only such laws as were founded in those relations of justice that existed in the nature of things antecedent to any positive precept. These are the eternal, *immutable laws of good and evil*, to which the creator himself in all his dispensations conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions. Such among others are these principles: that we should live honestly, should hurt nobody, and should render to every one it's due; to which three general precepts Justinian has reduced the whole doctrine of law.⁸

Even before the Declaration of Independence, John Adams embedded within our country's earliest laws the aspirational standard that no American leader should ever turn a blind eye to human practices inconsistent with these "immutable laws of good and evil,"⁹ notwithstanding the fog of moral relativism that typically surrounds human practices that are objectively immoral.

Article 1 of the 1775 "Rules for the Regulation of the Navy of the United Colonies of North America," drafted by John Adams and enacted by the Continental Congress, reads in its entirety: "The Commanders of all ships and vessels belonging to the THIRTEEN UNITED COLONIES, are strictly required to shew in themselves a good example of honor and virtue to their officers and men, and to be very vigilant in inspecting the behaviour of all such as are under them, and to discountenance and suppress all dissolute, immoral and disorderly practices; and also, such as are contrary to the rules of discipline and obedience, and to correct those who are guilty of the same according to the usage of the sea."¹⁰

In 1798, the same founding father who had drafted the 1775 Naval leadership standard admonished American military officers that "Oaths in this country are as yet universally considered as sacred obligations,"¹¹ warning that "Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other."¹²

A century later, shortly after the Civil War, the United States Supreme Court sustained the court martial of an Army Captain "related to the incurring by the accused of debts" when "the circumstances un-

der which the debts were contracted and not paid were such as to render the claimant amenable to the charge” of “conduct unbecoming an officer and a gentleman.”¹³ In the same case, the Court of Claims had explained, “We learnt as law students in Blackstone that there are things which are *malum in se* [i.e., wrong in itself] and, in addition to them, things which are merely *malum prohibitum* [i.e., wrong because prohibited]; but unhappily in the affairs of real life we find that there are many things which are *malum in se* without likewise being *malum prohibitum*. In military life there is a higher code termed honor, which holds its society to stricter accountability; and it is not desirable that the standard of the Army shall come down to the requirements of a criminal code.”¹⁴

In the following century, during the Vietnam War, the United States Supreme Court upheld the constitutionality of the “general articles” of the Uniform Code of Military Justice (UCMJ), which proscribe, *inter alia*, “all disorders and neglects to the prejudice of the good order and discipline in the armed forces.”¹⁵ The Supreme Court reviewed the history of the UCMJ’s general articles, tracing them back to 17th Century “British antecedents of our military law”¹⁶ and through the United States Supreme Court’s own precedent of the 19th Century.¹⁷

In a 1974 concurring opinion, the Supreme Court described “[r]elativistic notions of right and wrong” (i.e., moral relativism) as antithetical to the principle of military necessity:

Fundamental concepts of right and wrong are the same now as they were under the Articles of the Earl of Essex (1642), or the British Articles of War of 1765, or the American Articles of War of 1775, or during the long line of precedents of this and other courts upholding the general articles. And, however unfortunate it may be, it is still necessary to maintain a disciplined and obedient fighting force. . . . The general articles are essential not only to punish patently criminal conduct, but also to foster an orderly and dutiful fighting force. . . . Relativistic notions of right and wrong, or situation ethics, as some call it, have achieved in recent times a disturbingly high level of prominence in this country, both in the guise of law reform, and as a justification of conduct that persons would normally

eschew as immoral and even illegal. The truth is that the moral horizons of the American people are not foot-loose...¹⁸

Subsequently, in the midst of the Cold War between the Western Alliance and the Soviet Union, the Commander-in-Chief of the United States shared with Members of the British House of Commons his vision for leaving “Marxism-Leninism on the ash heap of history” -- based on underlying assumptions antithetical to *moral relativism*: “given strong leadership, time, and a little bit of hope, the forces of good ultimately rally and triumph over evil . . . Here is the enduring greatness of the British contribution to mankind, the great civilized ideas: individual liberty, representative government, and the rule of law under God.”¹⁹

Shortly after the Cold War concluded in Europe, the Polish-born Roman Pontiff, speaking in Baltimore, Maryland, likewise urged every generation of Americans to acknowledge “the moral truths which make freedom possible,” starting with those “truths” acknowledged in our Declaration of Independence and reiterated in the Gettysburg Address.²⁰ This enduring American and profoundly Western concept of “moral truths” simply cannot be squared with moral (or ethical) models that reject immutable “concepts of right and wrong.”²¹

More recently, in the aftermath of various U.S. military sexual misconduct scandals of the 1990’s, the United States Congress reenacted for leaders of all three military departments (Army, Navy, and Air Force) the same “exemplary conduct” leadership standard enacted by our Continental Congress as Article I of the 1775 Navy Regulations,²² thereby reaffirming “a very clear standard by which Congress and the nation can measure officers of our military services.”²³ Title 10 of the United States Code thus still incorporates the principle-based substance of John Adams’ 1775 leadership standard: “All commanding officers and others in authority . . . are required to show in themselves a good example of virtue, honor, patriotism, and subordination; . . . to guard against and suppress all dissolute and immoral practices, and to correct . . . all persons who are guilty of them.”²⁴

These long-standing and principle-based moral pronouncements by Congress exemplify the reality that duly-enacted laws in our republic are the societal analog to an individual's conscience.²⁵

In the Anglo-American tradition, our national legislatures prescribe the national conscience through public laws, legislating what is right and what is wrong for the nation, *i.e.*, what choices we ought and ought not to make.²⁶ Of course, as with any individual conscience formation process, there is always the possibility that this societal conscience be mis-formed, *i.e.*, inconsistent with a higher law.²⁷ For this reason, our first President in his first Annual Address encouraged our representatives in Congress “*to discriminate the spirit of liberty from that of licentiousness, cherishing the first, avoiding the last, and uniting a speedy, but temperate vigilance against encroachments, with an inviolable respect to the laws.*”²⁸ In this regard, as with the relationship between individual conscience and individual behavior, societal conscience formation process is distinct from, yet integrally related to, both the promulgation and the enforcement processes.

Lessons Learned By Inspecting Sex Slavery through the Fog of Moral Relativism

Although volumes could be written about the reprehensible nature of sex slavery and other forms of human trafficking, and how moral relativism contributes to the challenges of inspecting and meeting related leadership challenges, at least five points warrant emphasis:

- 1 Moral relativism is an enemy of the United States Constitution;
- 2 The President of the United States has identified 21st Century sex slavery as “a special evil” under “a moral law that stands above men and nations”²⁹;
- 3 Military leaders at all levels need robustly to promulgate and to enforce principle-based standards for subordinates who create the demand for sex slavery;
- 4 American and other “Western” leaders ought “to be vigilant inspecting the conduct of all persons who are placed under

their command; to guard against and suppress all dissolute and immoral practices, and to correct . . . all persons who are guilty of them”³⁰ -- in this regard, ostensible consent by the parties to immoral practices such as sex slavery ought never to be an excuse for turning a blind eye; and

- 5 Even as we confront the new asymmetric enemies of the 21st Century, those of us who take an oath to defend the Constitution of the United States (and similar principle-based legal authorities) should recognize, confront, and suppress sexual slavery and other “dissolute and immoral practices” whenever and wherever they raise their ugly heads through the fog of moral relativism -- “so help [us] God.”³¹

American First Things

In August 2005, at the request of the U.S. Department of State, I addressed an international audience composed of representatives of friendly foreign nations, all interested in learning about the United States generally, on the subject (as determined by the State Department sponsors) of, “U.S. Experience with Promoting Transparency and Government Accountability.”

I started my comments on “U.S. Experience with Promoting Transparency and Government Accountability” with an obscure quote from a primer on U.S. Government. It was written in 1890 by a Harvard professor named John Fiske. In his book titled “Civil Government in the United States,” Professor Fiske pointed out:

The most essential feature of a government, or at any rate, the feature with which it is important for us to become familiar at the start is the power of taxation. The government is that which taxes. If individuals take away some of your property for purposes of their own, it is robbery. You lose your money and you get nothing in return. But if the government takes away some of your property in the shape of taxes, it is supposed to render to you an equivalent in the shape of good government – something without which our lives and property would not be safe. Herein

seems to lie the difference between taxation and robbery. When the highway man points his pistol at me, and I hand him over my purse and watch, I am robbed. But when I pay the tax collector, who can seize my watch or sell my house over my head if I refuse, I am simply paying what is fairly due from me towards supporting the government.³²

Even before our Declaration of Independence, we had a robust English common law, which forms the foundation of our system of government. A significant number of people around the world today continue to rely on the English common law. It is somewhat of a misnomer that we broke from England in 1776. When our forefathers wrote the Declaration of Independence, they were defending their rights as Englishmen to live under a free system of government based upon the rule of law.

About ten years before our Declaration, Sir William Blackstone wrote the definitive treatise on English common law, which was used by our forefathers to establish the United States Constitution. Blackstone wrote in his 1765 treatise that there are four essential attributes of all civil laws. Essentially, he was defining a system of transparent government, which forms the basis of our American system today. He mentions four essential attributes of all man-made laws:

- 1 A law must be a rule, as opposed to a judgment;
- 2 It must be of general applicability, as opposed to a bill of attainder, which would be directed at one person;
- 3 It must be prescribed; and
- 4 It must be prescribed by the sovereign, not by somebody without authority.³³

These are the four essential elements of the Anglo-American tradition in transparent government.

According to Blackstone, rules need to be prescribed in advance. In describing this principle, Blackstone wrote that it is important the government not only prescribe, but also promulgate the laws in the most perspicuous manner available, “not like [Emperor] Caligula, who . . . wrote his laws in very small character, and hung them up upon high pillars, the more effectually to ensnare the people.”³⁴

This principle, citing the historical despot as the antithesis of transparent government, has found its way into, among other things, the *ex post facto* clauses of the U.S. Constitution. There are two *ex post facto* clauses: one in Article 1, Section 9, which generally proscribes retroactive lawmaking. Keep in mind that at the time the framers wrote the Constitution, Blackstone had just deemed *ex post facto* laws as even more unreasonable than the law methodology of Emperor Caligula.³⁵ There is a second *ex post facto* clause in Article 1, Section 10, which applies the proscription against *ex post facto* laws to the States.

That principle is one that every Office of Inspector General ought to apply. What the author of this book told his investigators is this: “If it takes our lawyers more than a week to tell [the Inspector General] what the legal standard is, we will not hold anybody else accountable to that standard -- because that would be a Caligula-esque method of enforcing laws. We’re just not going to do that. It’s not part of the American system of transparent and accountable government.”

There is another provision of our U.S. Constitution which is called the Accountability Clause. It is also Article 1, Section 9, which reads, “a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.” In effect, we have a constitutional right to a public accounting of how our money is spent by our government. This constitutional principle is what ultimately took form in the Inspector General Act of 1978,³⁶ a 1982 amendment to which created the DoD Office of Inspector General.³⁷

The design and purpose of the Inspector General Act was to create independent and objective units in each of the government departments in the Executive Branch that would be able, in effect, to carry out that constitutional duty of public accountability. Each of the offices, each of the cabinet-level departments in the U.S. Government, has a Senate-confirmed, presidentially-appointed inspector general.

In October 2003, the President invited all members of what at the time was called the President’s Council on Integrity & Efficiency (PCIE) to come to the White House to celebrate the 25th anniversary of the Inspector General Act of 1978. The President thanked all of the Inspectors General present for their service and he explained his perspective of government transparency and accountability. He said,

“Every time an inspector general roots out fraud, waste or abuse in the government, the inspector general increases the confidence of the American people in our government.” That is an important American principle – the notion of it being *our* government. The first three words of the Constitution are, “We the People.”

“We the People” – the principle of popular sovereignty – is also one of those foundational principles that define who we are as Americans. The principles of transparency and government accountability, along with integrity and popular sovereignty, are so foundational that they literally define who we as Americans are. Those principles are shared by most of our allies today in the Global War on Terrorism, and by many other friendly nations that rely upon the notion of the rule of law, which is so foundational to who we are as Americans.

IG Principles

During my first one-on-one meeting as Inspector General with the Secretary of Defense, I reiterated my vision to the Secretary that the DoD Inspector General ought not only to carry out the statutory duties enumerated in the Inspector General Act, but also that the DoD Inspector General ought to serve in the traditional military inspector general role as “an extension of the eyes, ears, and conscience of the Commander.”³⁸

Turning to his Special Assistant (who was observing the one-on-one meeting), Secretary Rumsfeld replied, “In that case, Larry, the IG needs a copy of my Principles.” After the meeting, Larry DiRita handed me a two-page list of Secretary Rumsfeld’s “Principles for the Department of Defense.”³⁹

Within weeks, I had incorporated each of Secretary Rumsfeld’s principles that related in any way to either the statutory duties of the DoD Inspector General or the traditional duties of military inspectors general into a separate list of “DoD Inspector General Principles,” which evolved over the three and a half years of the Inspector General’s tenure.

The following is an abridged list of DoD IG Principles as of 2005:

- 1 An IG in the Department of Defense serves as an independent ‘extension of the eyes, ears, and conscience of the Commander’; as such an IG is always a paradigm of military leadership – the only issue is whether he or she is a good paradigm.
- 2 Integrity is synonymous with truth.
- 3 Accountability is a sacred duty for all who swear (or affirm) the statutory Oath of Office; Article I of the Constitution mandates that “a Regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”
- 4 IG reports should include, whenever possible, both a front-loaded recitation of any allegation, quoting the prescribed standards at issue, and a summary of constructive proposals.
- 5 Every Member of Congress deserves IG respect.
- 6 Whenever a federal IG contemplates the exercise of a “police power,” he or she should ask and, whenever possible, insist upon a written answer to the question, “By what authority?”

- 15 The professional reputation of senior officials is protected by the due process clause, which requires, among other things, that legal standards to which officials may be held accountable be prescribed, widely-promulgated, and understandable by the average senior official.

Most of these IG Principles are self explanatory, at least to professional IGs. Suffice to say, they reflect important general principles that warrant repetition within an organization of professionals that includes both experienced auditors, inspectors, and investigators, but also less experienced professionals, including some freshly graduated from college.

These IG principles, for the most part, simply adapted the Secretary of Defense’s more general principles to either IG tradition or statutory guidance for the Office of Inspector General. This was a deliberate attempt to inculcate a sense of “tethered independence.”

Hence, Principle #1 was, “An IG in the Department of Defense serves as an independent ‘extension of the eyes, ears, and conscience of the Commander.’” This principle melded traditional Army IG doctrine with the “independence” mandate within the Inspector General Act of 1978, as amended.⁴⁰

IG Principle #15 was a deliberate attempt to inculcate within the small cadre of investigators whose daily jobs placed into the balance the careers of officials who by virtue of their seniority had sacrificed substantially more privacy rights than the vast majority of soldiers, sailors, airmen, marines, and civilians serving throughout the Department of Defense.

As an example of the disparate treatment afforded senior officials, privacy restrictions in the Department of Defense prevent the web posting of most names of civilian employees on an organizational chart, including the organizational chart for an Office of Inspector General. Not so for flag officers and members of the Senior Executive Service. By virtue of their seniority these individuals sacrifice that modicum of privacy. Their names and their job descriptions can be and are published, while the names of all others are entitled to privacy protection.

The United States Supreme Court had also explained that senior officials, also known as “public officials,” need to be treated differently than the average citizen in various contexts, including defamation and slander as well as the due process of law protected by the United States Constitution. Hence, IG Principle #15 formalized the Supreme Court’s guidance that, “The professional reputation of senior officials is protected by the due process clause, which requires, among other things, that legal standards to which officials may be held accountable be prescribed, widely-promulgated, and understandable by the average senior official.”

In August 2004, IG principle #15 found itself re-promulgated in a separate IG Policy Memo addressing the United States Supreme Court’s decision in *Hamdi v. Rumsfeld*. In that case, the Supreme Court found that the Department of Defense had violated the due process rights of an American-born man who had moved as a child to Saudi Arabia with his family, and who was later detained in Afghanistan after the terrorist attacks of September 11, 2001, allegedly for having taken up arms with the Taliban.

In particular, according to the Supreme Court opinion, Yaser Esam Hamdi by 2001 “resided in Afghanistan. At some point that year, he was seized by members of the Northern Alliance, a coalition of military groups opposed to the Taliban government, and eventually was turned over to the United States military. The Government assert[ed] that it initially detained and interrogated Hamdi in Afghanistan before transferring him to the United States Naval Base in Guantanamo Bay in January 2002. In April 2002, upon learning that Hamdi is an American citizen, authorities transferred him to a naval brig in Norfolk, Virginia, The Government contend[ed] that Hamdi [was] an ‘enemy combatant,’ and that this status justifies holding him in the United States indefinitely without formal charges or proceedings unless and until it makes the determination that access to counsel or further process is warranted.”⁴¹ The Court disagreed.

While others within the Department of Defense were lamenting this legal “defeat,” the Inspector General issued a policy memo,⁴² reaffirming and applying to the daily challenges within the Office of Inspector General the same long-standing due process guidance reaffirmed by the Court:

For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. It is equally fundamental that the right to notice and **an** opportunity to be heard must be granted at a meaningful time and in a meaningful manner. These essential constitutional promises may not be eroded. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2649 (2004) (internal citations and quotation marks omitted).

“These essential constitutional promises” are American and Inspector General “first things.” During the course of every IG audit, inspection, or investigation, Inspectors General have the privilege -- as well as an oath-bound duty -- to “support and defend” these and other American “first things” against fraud, waste, abuse, and other “enemies” of the United States Constitution, “foreign and domestic So help me God.”⁴³

Chapter 12 Endnotes

¹ 5 U.S. (1 Cranch) 137, 163 (1803).

² See William Blackstone, I COMMENTARIES ON THE LAWS OF ENGLAND, pp. 44-46 (1765) (All “municipal or civil law . . . is likewise ‘a rule *prescribed*.’ Because a bare resolution, confined to the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it. . . [W]hatever what is made use of, it is incumbent upon the promulgators to do it in the most public and perspicuous manner; not like Caligula, who (according to Dio Cassius) wrote his laws in very small character, and hung them up upon high pillars, the more effectually to ensnare the people.”).

³ 5 U.S.C. § 3331 (“An individual . . . elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: ‘I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.’”).

⁴ See Sun Tzu, THE ART OF WAR (“If you know the enemy and know yourself, you need not fear the result of a hundred battles. If you know yourself but not the enemy, for every victory gained you will also suffer a defeat. If you know neither the enemy nor yourself, you will succumb in every battle.”) (<http://classics.mit.edu/Tzu/artwar.html>).

⁵ At the October 8, 2003, Arlington National Cemetery funeral of Fritz Kraemer, Dr. Kissinger was one of three eulogists. See Hodgson, “Fritz Kraemer: Brilliant geopolitical strategist who launched Henry Kissinger’s

rise to power,” *The Guardian*, November 12, 2003.
(<http://www.guardian.co.uk/usa/story/0,12271,1083074,00.html>).

⁶ See *THE CAMBRIDGE DICTIONARY OF PHILOSOPHY*, p. 690 (Robert Audi, General Editor, 1995) (“relativism, the denial that there are certain kinds of universal truths”); Kreeft, *A REFUTATION OF MORAL RELATIVISM*, *supra*, at 28-29 (“Relativism is the philosophy that denies absolutes. Any absolutes. Everyone believes there are many relativities, that some things are relative; but relativism claims that all things are relative. . . . [M]oral relativism says, 'Perhaps there are absolutes in nonmoral knowledge, like 'two plus two makes four', but not in moral knowledge: we know no moral absolutes'.”).

⁷ For example, eleven republics and/or satellite states of the former Soviet Union have recently become members of the North Atlantic Treaty Organization (NATO): The German Democratic Republic (East Germany), Hungary, Poland, the Czech Republic; Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia, and Slovenia.

⁸ Blackstone’s Commentaries, *supra*, pp. 39-40 (emphasis added; footnote citation omitted).

⁹ *Id.*

¹⁰ Continental Congress, “Rules for the Regulation of the Navy of the United Colonies of North America” (1775), Article 1
[http://www.pdfonfly.com/pdfs/http_ www.navyhistory.org_rules-for-the-regulation-of-the-navy-of-the-united-colonies-of-north-amer.pdf](http://www.pdfonfly.com/pdfs/http_www.navyhistory.org_rules-for-the-regulation-of-the-navy-of-the-united-colonies-of-north-amer.pdf)

¹¹ J. Adams, Oct. 11, 1798, Letter “to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts,” in *THE WORKS OF JOHN ADAMS -- SECOND PRESIDENT OF THE UNITED STATES*, Vol. IX, p. 229 (C.F. Adams, ed. 1854).

¹² *Id.*; cf. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 468 (1892) (“Every constitution of every one of the forty-four States contains language which either directly or by clear implication recognizes a profound rever-

ence for religion and an assumption that its influence in all human affairs is essential to the well being of the community.”); James H. Hutson, RELIGION AND THE FOUNDING OF THE AMERICAN REPUBLIC, pp. 57-58 (Library of Congress 1998) (At the time immediately after the American Revolution, “It appears that both the politicians and the public held an unarticulated conviction that it was the duty of the national government to support religion, that it had an inherent power to do so, as long as it acted in a nonsectarian way without appropriating public money. . . . This conviction – that holiness was a prerequisite for secular happiness, that religion was, in the words of the Northwest Ordinance, ‘necessary to good government and the happiness of mankind,’ was not the least of the Confederation’s legacies to the new republican era that began with Washington’s inauguration in 1789.”); Peter Kreeft, A REFUTATION OF MORAL RELATIVISM, *supra*, p. 162 (“[E]ven in a secular society like America it’s still true that religion is the firmest support for morality. There has never been a popular secular morality that’s lasted and worked in holding a society together. Society has always needed morality, and morality has always needed religion. Destroy religion, you destroy morality; destroy morality, you destroy society. That’s history’s bottom line.”).

¹³ *United States v. Fletcher*, 148 U.S. 84, 91-92 (1893).

¹⁴ *Fletcher v. United States*, 26 Ct. Cl. 541, 562-63 (1891), quoted with approbation in *Parker v. Levy*, 417 U.S. 733, 765 (1974) (Blackmun, J., joined by Burger, C.J., concurring).

¹⁵ *Parker v. Levy*, 417 U.S. at 738 (quoting and citing Article 134 of the UCMJ, 10 U.S.C. § 934).

¹⁶ *Id.* at 745.

¹⁷ *Id.* at 745-49.

¹⁸ *Id.* at 765 (Blackmun, J., joined by Burger, C.J., concurring).

¹⁹ Ronald Reagan, “Speech to the House of Commons,” June 18, 1982 (www.fordham.edu/halsall/mod/1982reagan1.html).

²⁰ John Paul II, “Homily in Orioles Park at Camden Yards,” ¶7 (October 8, 1995) (<http://www.catholic-forum.com/saints/pope0264is.htm>).

²¹ *Parker v. Levy*, *supra*, 417 U.S. at 765; see John Paul II, *Veritatis Splendor*, ¶¶1&101 (1993) (http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_j_p-ii_enc_06081993_veritatis-splendor_en.html) (“As a result of that mysterious original sin, . . . giving himself over to relativism and skepticism, [man] goes off in search of an illusory freedom apart from truth itself. . . . Indeed, ‘if there is no ultimate truth to guide and direct political activity, then ideas and convictions can easily be manipulated for reasons of power. As history demonstrates, a democracy without values easily turns into open or thinly disguised totalitarianism.’” (footnote and citation omitted)).

²² See 10 U.S.C. §§ 3583, 5947, & 8583 (same “exemplary conduct” leadership standard for all “commanding officers and others in authority” in the Army, Naval Services and Air Force respectively).

²³ Senate Armed Services Committee, “National Defense Authorization Act for Fiscal Year 1998” (Report to Accompany S. 924), p. 277, quoted in the Introduction, “The Declaration of Independence and the Constitution of the United States of America” http://www.pdfonfly.com/pdfs/http_www.csce.gov_index.cfm_FuseAction=ContentRecords.ViewWitness&ContentRecord_id=546&ContentType.pdf

²⁴ 10 U.S.C. § 5947; see 10 U.S.C. § 3583 (Army) and § 8583 (Air Force); see also 10 U.S.C. § 933 (“Conduct unbecoming an officer and a gentleman”).

²⁵ *Cf. Church of the Holy Trinity v. United States*, *supra*, 143 U.S. at 467-70 (“[T]he Declaration of Independence[,] the constitutions of the various States[, and] the Constitution of the United States . . . affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations

of private persons; they are organic utterances; they speak the voice of the entire people.”).

²⁶ See generally Blackstone, *supra*, at 42-44 (describing “human law” as: (a) subordinate to “the law of nature and of revelation”; and (b) “properly defined to be ‘a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong’”).

²⁷ See *id.*

²⁸ George Washington, First Annual Address, January 8, 1790 (emphasis added).

²⁹ *Id.*

³⁰ 10 U.S.C. § 5947, *supra*.

³¹ 5 U.S.C. § 3331 (statutory Oath of Office).

³² John Fiske, *Civil Government In The United States Considered With Some Reference To Its Origins*, p. 8 (1890).

³³ William Blackstone, COMMENTARIES ON THE LAW OF ENGLAND, p. 44-46 (1765-1769), (“[M]unicipal or civil law [is] the rule by which particular districts, communities, and nations are governed; . . . Let us endeavour to explain it’s several properties, . . . first, it is a rule; not a transient sudden order from a superior to or concerning a particular person; but something permanent, uniform, and universal. . . . It is likewise ‘a rule prescribed.’ But farther: municipal law is ‘a rule of civil conduct prescribed by the supreme power in a state’. Wherefore it is requisite to the very essence of a law, that it be made by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other.”).

³⁴ *Ibid.* at p. 46.

³⁵ *Ibid.* (“yet, whatever way is made use of [to notify the people], it is incumbent on the promulgation to do it in the most public and perspicuous manner; not like Caligula, who (according to *Dio Cassius*) wrote his laws in very small characters, and hung them up upon high pillars, the more effectually to ensure the people. There is still a more unreasonable method that this which is called making of laws *ex post facto*.”).

³⁶ Inspector General Act of 1978, Public Law 95-452, October 12, 1978.

³⁷ National Defense Authorization Act for Fiscal Year 1983, Public Law 97-252, Section 1117, September 8, 1982.

³⁸ Army Regulation 20-1, Inspector General Activities and Procedures 5 (Department of the Army, 2002).

³⁹ “SUBJECT: Principles for the Department of Defense

“1. Do nothing that could raise questions about the credibility of DoD. DoD must tell the truth and must be believed to be telling the truth or our important work is undermined.

“2. Do nothing that is or could be seen as partisan. The work of this Department is non-partisan. We have to continuously earn the support of all the people of the country and in the Congress. To do so we must serve all elements of our society without favor.

“3. Nothing is more important than the men and women who work in this Department - they are its heart and soul and its future. Our country's success depends on them. We must all treat them with respect, show our concern for them and for their lives and their futures, and find opportunities to express our full appreciation for all they do for our country.

“4. The public needs and has a right to know about the unclassified activities of DoD. It is our obligation to provide that information professionally, fully and in good spirit.

“5. Help to create an environment in DoD that is hospitable to risk-taking, innovation, and creativity. This institution must encourage people of all types if we are to transform and be successful.

“6. Work vigorously to root out any wrongdoing or corruption in DoD. Waste undermines support for the Department, and robs DoD activities of the resources they need.

“7. Consistently demonstrate vigilance against waste. It is the taxpayers' money, earned by people who work hard all across this land. We owe it to them to treat their dollars respectfully, and we owe it to the importance of our responsibilities to see that every dollar is spent wisely.

“8. Reflect the compassion we all feel when innocent lives are lost, whether U.S. service people or innocents killed by collateral damage.

“9. Demonstrate our appreciation for the cooperation we receive from other nations and for the valuable contributions coalition forces bring to our efforts - whether in peacetime by way of strengthening the deterrent, or in wartime by securing victory.

“10. Because of the complexity of our tasks, DoD must work with other departments and agencies of the federal government in a professional manner, respectful of others' views but willing to raise issues to the next higher level up the chain of command, as necessary.

“11. DoD personnel-civilian and military-must not compromise classified information. It is a violation of federal criminal law, and those who do so are criminals. They are also individuals who have lost their moorings and are willing to put the lives of the men and women in uniform at risk. They must be rooted out, stopped and punished.

“12. The Legislative Branch is in Article I of the Constitution; the Executive Branch is Article II. That is not an accident. We must respect the Constitutional role of Congress, learn from those who have knowledge that can be helpful and work constructively, with

revolving coalitions, to achieve the important goals of the Department and the country.

“13. Finally, the President of the United States is our Commander-in-Chief.

Those of us in DoD - military and civilian - believe in civilian control, are respectful of it and must be vigilant to see that our actions reflect that important Constitutional obligation.

“Donald Rumsfeld.”

⁴⁰ *See, e.g.*, Inspector General Act of 1978, as amended, § 2 (“Purpose and establishment of Offices of Inspector General; departments and agencies involved[:] In order to create independent and objective units...”).

⁴¹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 510-11 (2004).

⁴² Inspector General Policy Memo, “Due Process in the Activities of the Office of Inspector General,” August 20, 2004
<http://web.archive.org/web/20050612185319/http://www.dodig.osd.mil/IGInformation/IGPolicy/dueprocess0804.pdf>

⁴³ 5 U.S.C. § 3331 (“Oath of Office”).

CONCLUSION

An enemy of the United States Constitution gnaws at the good order and discipline of the American Armed Forces and, by extension, of the entire Western Alliance. This enemy answers to the name *moral relativism*, feeding on the side of human nature that would turn a blind eye to moral truths, as in "We hold these truths to be self-evident, . . ." ¹ In the midst of a Global War on Terrorism, our Commander-in-Chief admonished us all, "when we forget these truths, we risk sliding into a dictatorship of relativism." ²

One such would-be "dictatorship of relativism" manifested itself during the course of an inspection requested by Congress into human trafficking -- also known as "Trafficking in Persons," "TIP," or in its most common form, "sex slavery," ³ the subject matter of another chapter of this book. Even as this joint and global sex slavery inspection was being launched, the President of the United States devoted almost one fifth of his speech to the United Nations General Assembly to the subject of human trafficking.

You might ask why, in the midst of the Global War on Terrorism, our national leader would focus so much on human trafficking. One answer might be the nexus between human traffickers and the arms traffickers supporting the terrorists. ⁴ A more fundamental answer might be that the challenges of modern-day human slavery force us to focus on "first things," *i.e.*, the principles worth fighting for, in order that we might better focus on important "second things," which include survival.

The principle of "first and second things," as explained by the late British author C.S. Lewis, maintains that, "You can't get second things by putting them first; you can get second things only by putting first things first. . . . The first and most practical [thing is] to have

something to live for and to die for, lest we die.”⁵ A contemporary C.S. Lewis expert explains the principle more bluntly: “the society that believes in nothing worth surviving for beyond mere survival will not survive.”⁶

Although C.S. Lewis may have coined the term, the principle of first and second things is much older than the United States of America. It appears to have been recorded by Plato in the year 360 BC, in his explanation of “Just Laws.”⁷ In any event, for Americans in the 21st Century, the combination of our Declaration of Independence, Constitution, and Bill of Rights comes as close to a written embodiment of the core principles that define who we are. C.S. Lewis, and perhaps Plato, would have called these defining principles American “First Things.”

For an American Inspector General, “First Things” include integrity, efficiency, independence, and transparent accountability. Three and a half years at the helm of the most expansive Office of Inspector General in the world taught the author of this book that humility, too, is another necessary Inspector General “First Thing.”

While serving as Inspector General, the author found himself constantly asking not only his staff but also himself two core questions, “By what authority and for what purpose”? These two questions routinely guided how this Inspector General carried out his constitutional and statutory duties. The same two questions can help prevent any Inspector General from misconstruing his statutory authority or otherwise abusing power.⁸

Conclusion Endnotes

¹ Declaration of Independence (July 4, 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. . .”).

² George W. Bush, “President Attends National Catholic Prayer Breakfast,” May 20, 2005 (describing Pope Benedict XVI’s warning about “the dictatorship of relativism” as tied to “the American Model of liberty rooted in moral conviction.”).

³ See George W. Bush, “President Bush Addresses United Nations General Assembly,” September 23, 2003 (“an estimated 800,000 to 900,000 human beings are bought, sold or forced across the world’s borders . . . generat[ing] billions of dollars each year -- much of which is used to finance organized crime”); see also “Findings,” Victims of Trafficking and Violence Protection Act of 2000, Section 102(b)(1) (“Approximately 50,000 women and children are trafficked into the United States each year.”); Trafficking Victims Protection Reauthorization Act of 2003; George W. Bush, “President Bush Addresses United Nations General Assembly,” September 21, 2004 (“Because we believe in human dignity, America and many nations have joined together to confront the evil of trafficking in human beings. We’re supporting organizations that rescue the victims, passing stronger anti-trafficking laws, and warning travelers that they will be held to account for supporting this modern form of slavery. Women and children should never be exploited for pleasure or greed, anywhere on Earth.”).

⁴ See United States Department of State, “Trafficking in Persons Report,” p. 14 (June 2004) (“Trafficking Fuels Organized Crime According to the UN, human trafficking is the third largest criminal enterprise worldwide, generating an estimated 9.5 billion USD in annual revenue according

to the U.S. intelligence community. . . . There have also been documented ties to terrorism.”).

⁵ C.S. Lewis, “Time and Tide,” reprinted in *GOD IN THE DOCK* (1942).

⁶ Peter Kreeft, *A Refutation Of Moral Relativism: Interviews With An Absolutists*, p. 133 (1999).

⁷ Plato, *The Laws* 361b-d (360BC) (“[Just laws] serve the right end, that of effecting the happiness of those who enjoy them. They, in fact, secure them all good things. But there are two different kinds of good things, the merely human and the divine; the former are consequential on the latter. Hence a city which accepts the greater goods acquires the lesser along with them, but one which refuses them misses both. The lesser are those among which health holds the first place, comeliness the second, strength for the race and all other bodily exercises the third, while the fourth place belongs to a wealth which is not blind, but clear-sighted, because attendant on wisdom. Of divine goods, the first and chiefest is this same wisdom, and next after it sobriety of spirit; a third, resulting from the blending of both of these with valor is righteousness, and valor itself is fourth. All of these naturally rank before the former class, and, of course, a lawgiver must observe that order. Next, he should impress it upon his citizens that all his other injunctions have a view to these ends, and that among the ends, the human look to the divine, and all the divine to their leader, wisdom.”).

⁸ See generally U.S. Const., Preamble to the Bill of Rights (“THE Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstructions or abuse of its powers, that further declaratory and restrictive clauses be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution. . . .”).

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Joseph E. Schmitz served as Inspector General of the Department of Defense from April 2002 until September 2005; before that, while he was a Partner in the international law firm of Patton Boggs LLP, he served as Inspector General of the Naval Reserve Intelligence Command (as a Naval Reserve Captain). Among his other accomplishments, Inspector General Schmitz was responsible for the training of 31 newly-appointed Iraqi inspectors general prior to the June 2004 transfer of sovereignty back to the Iraqi people. He now serves as Chief Legal Officer for the PACEM group of companies, whose range of products and services include the provision of defense equipment, and cutting-edge approaches to risk management, consultancy, and training. He also serves as Chairman of the Advisory Board for PACEM Solutions International, headquartered in Falls Church, Virginia. He graduated with distinction from the U.S. Naval Academy, and earned his J.D. degree from Stanford Law School. In 2013, Mr. Schmitz was inducted into the National Wrestling Hall of Fame (Virginia Chapter) as an "Outstanding American." He and his wife Mollie have eight children, and live in Bethesda, Maryland.

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