



**Testimony of Mandy Smithberger, Director of the Straus Military Reform Project at the  
Center for Defense Information  
Project On Government Oversight  
before the  
House Oversight and Government Reform  
Subcommittee on National Security  
on  
“Oversight of the Department of Defense Office of Inspector General’s Military  
Whistleblower Reprisal Investigations”**

**September 7, 2016**

Chairman DeSantis and Ranking Member Lynch, thank you for inviting me to testify today and for your oversight efforts to ensure proper implementation of whistleblower protections. I am Mandy Smithberger, the Director of the Straus Military Reform Project, a program of the Project On Government Oversight (POGO). Thirty-five years ago, POGO was founded by Pentagon whistleblowers who were concerned about the Department’s procurement of ineffective and overpriced weapons. Throughout our history we have promoted improvements to better protect military, civilian, intelligence, and contractor whistleblowers.

The Department of Defense Office of the Inspector General (DoD IG) was intended to be an office that would work with and protect those whistleblowers. However, for years independent evaluations of the DoD IG, including a report on the Administrative Investigation division’s military reprisal investigations issued by the Government Accountability Office (GAO) last year, have raised serious concerns about the office’s capacity and willingness to provide independent oversight of the Department’s treatment of whistleblowers.<sup>1</sup>

POGO has also heard directly from whistleblowers within DoD IG who have expressed serious concerns about the integrity of the office’s processes and investigations, including pressure to back-fill whistleblower case files for the GAO’s review. It is extremely rare to have whistleblowers from an IG shop come forward, but in this case we have a number of them. Concerns raised by individual whistleblowers are also echoed in OPM Survey data, which

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<sup>1</sup> Department of Defense Inspector General, *2002 Military Reprisal Investigation Study*. <https://www.documentcloud.org/documents/2746545-OIG-Assessment.html>; Department of Justice Inspector General, *A Review of the Department of Defense Office of Inspector General’s Process for Handling Military Whistleblower Reprisal Allegations*, July 2009. <http://www.pogoarchives.org/m/go/dod-ig-report-20090701.pdf>; Department of Defense Inspector General, *Review of Office of Deputy Inspector General for Administrative Investigations*, Directorate for Military Reprisal Investigations, May 16, 2011. <http://www.pogo.org/documents/2011/dod-ig-mri-review-2011.html>; Government Accountability Office, *Whistleblower Protection: Actions Needed to Improve DOD’s Military Whistleblower Reprisal Program*, February 2012. <http://www.gao.gov/assets/590/588784.pdf>; Government Accountability Office, *Whistleblower Protection: DOD Needs to Enhance Oversight of Military Whistleblower Reprisal*, May 7, 2015. <http://www.gao.gov/assets/680/670067.pdf>

showed that 26.5 percent of DoD IG employees surveyed responded that they did not feel they could “disclose a suspected violation of any law, rule, or regulation without fear of reprisal.”<sup>2</sup> Forty-five percent of DoD IG employees also disagreed that their senior leadership maintains high standards of honesty and integrity—nearly twice the rate reported by employees at the Department of Defense.<sup>3</sup> Alleged retaliation by DoD IG’s General Counsel against the agency’s former Assistant Inspector General and the former Director of Whistleblowing and Transparency only raises additional concerns about the perilous environment for whistleblowers.<sup>4</sup> We believe this reflects deep cultural problems that must be remedied in order for whistleblowers to believe this office should be trusted as willing and able to protect whistleblowers and to hold accountable those who illegally retaliate against them.

POGO raised concerns about the integrity of military reprisal investigations, timeliness, toxic culture, and transparency in a letter to Principal Deputy IG Glenn Fine in March.<sup>5</sup> We are glad that, since sending that letter, the DoD IG has revised its policies to include proactive release of substantiated reports of misconduct, a policy previously championed on the full Committee by Chairman Chaffetz and Representative Speier, and we hope other IGs will adopt the same policy.<sup>6</sup> But we remain concerned about the deeper cultural problems that remain.

Ensuring the fairness of military reprisal investigations is particularly important because military whistleblowers still have a higher burden of proof to show illegal retaliation than other federal whistleblowers. In the military, the burden is placed on our service members to prove that they were illegally retaliated against, versus in civilian cases where the burden is placed on the agency to prove there was no retaliation. We believe this is one contributing factor to low substantiation rates for military whistleblower reprisal cases. The House’s version of the National Defense Authorization Act includes a bipartisan provision to update these burdens, and we hope this Committee will support including this provision in the final legislation now in conference.<sup>7</sup>

Fixing these deep cultural problems will require more than the tweaks to policies and training sessions the DoD IG has instituted thus far. It must include changes in leadership in the offices of General Counsel and Administrative Investigations. Congress’s leadership on these issues has been essential. I want to thank Chairman DeSantis and Ranking Member Lynch for cosponsoring

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<sup>2</sup> Office of Personnel Management, Federal Employee Viewpoint Survey Results of DoD IG for 2015, p. 4.

<sup>3</sup> Ibid, p. 12.

<sup>4</sup> Marisa Taylor, “Is whistleblower advocate for nation’s spies under attack?” *McClatchy*, April 2, 2014. <http://www.mcclatchydc.com/news/nation-world/national/national-security/article24766012.html>; Charles S. Clark, “Intel Community Whistleblower Chief Fighting Old Pentagon Bosses,” *Government Executive*, July 27, 2016. <http://www.govexec.com/defense/2016/07/intel-community-whistleblower-chief-fighting-old-pentagon-bosses/130274/>; Charles S. Clark, “Fired Pentagon Whistleblower Goes Public in Attack on IG’s Office,” *Government Executive*, May 23, 2016. <http://www.govexec.com/defense/2016/05/fired-pentagon-whistleblower-goes-public-attack-igs-office/128511/>

<sup>5</sup> “Letter to Pentagon Watchdog to Address Internal Misconduct Regarding Military Whistleblower Reprisal Investigations,” March 16, 2016. <http://www.pogo.org/our-work/letters/2016/letter-to-pentagon-watchdog.html>

<sup>6</sup> Department of Defense Office of Inspector General, “DoD IG Monthly Update - June 2016.” [http://www.dodig.mil/eletter/eletter\\_view.cfm?id=6975](http://www.dodig.mil/eletter/eletter_view.cfm?id=6975); House Oversight and Government Reform Committee, “Full Committee Business Meeting – September 17,” September 17, 2014. <https://oversight.house.gov/markup/full-committee-business-meeting-17/>

<sup>7</sup> House, National Defense Authorization Act for Fiscal Year 2017, (H.R. 4909), Sec. 545, Introduced by Representative Mac Thornberry.

legislation to protect whistleblowers at the Veterans Administration and contractors throughout the federal government, respectively. And we are encouraged to see that Chairman Chaffetz and Ranking Member Cummings, along with Senators Grassley, McCaskill, and Gillibrand, are continuing to pursue concerns about the DoD IG's reprisal investigations.<sup>8</sup>

### Questionable Outcomes for Whistleblowers

POGO is concerned because the DoD IG has dismissed without full investigation 86 percent of the military cases it has received since pledging to make reforms in 2011.<sup>9</sup> The IG's rate of dismissal is particularly striking because it is more than double that of Service IGs, who many consider to be less independent. For purposes of comparison, during the same time period the DoD IG dismissed an even higher percentage of civilian and contractor reprisal cases, substantiating only 7 out of over 1,300 complaints received. And for another comparison, the DoD IG's investigative rates for civilian reprisals are about half of what we have seen for federal employee whistleblowers at the Office of Special Counsel.<sup>10</sup> The DoD IG's low investigation and substantiation rates create the appearance that the office is focused on closing, rather than investigating, the cases it receives.

POGO worries that one reason the rate of dismissals without full investigation is so high for military cases is that, following the 2012 GAO report, the DoD IG adopted a practice to "reduce cycle time" by automatically closing cases within 10 days if the complainant failed to provide additional information.<sup>11</sup> While we appreciate the need to keep cases moving, we worry that this short of a timeline, or any other practice that seeks to close otherwise viable claims of retaliation by military service members, may infringe upon the whistleblowers' due process rights and may fail to uphold the intent of the law. Service members may be deployed, disabled, or otherwise hindered from providing supporting documentation in the 10-day requirement, and therefore lose their chance at a fair investigation of their claims.

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<sup>8</sup> Letter from Representative Jason Chaffetz, Representative Elijah Cummings, Senator Charles Grassley, Senator Kirsten Gillibrand, and Senator Claire McCaskill, to Acting Inspector General Glenn Fine, about military reprisal investigations, June 10, 2016. [http://www.grassley.senate.gov/sites/default/files/constituents/2016-06-10%20CEG%20et%20al%20to%20DOD%20OIG%20\(Whistleblower%20Reprisal%20Investigations\)%20\(003\).pdf](http://www.grassley.senate.gov/sites/default/files/constituents/2016-06-10%20CEG%20et%20al%20to%20DOD%20OIG%20(Whistleblower%20Reprisal%20Investigations)%20(003).pdf)

<sup>9</sup> "Testimony of Marguerite C. Garrison, Deputy Inspector General for Administrative Investigations, Department of Defense, before the Subcommittee on Contracting Oversight," December 6, 2011, p. 37. <https://www.gpo.gov/fdsys/pkg/CHRG-112shrg72560/pdf/CHRG-112shrg72560.pdf>; See Appendix A to this Testimony

<sup>10</sup> Between FY 2012 and FY 2015 the Office of Special Counsel processed and closed 12,852 complaints and referred 1,045 to be investigated by the Investigation and Prosecution Division (IPD). During the same time period DoD OIG processed and closed 874 civilian reprisal cases and investigated 35. This example isn't perfectly analogous since the Office of Special Counsel's Complaints Examining Unit and Alternative Dispute Resolution Unit can also get resolution for prohibited personnel practices, and this referral rate includes all prohibited personnel practices, not just whistleblower retaliation claims. Office of Special Counsel, *Annual Report to Congress for Fiscal Year 2015*, p. 17. <https://osc.gov/Resources/FINAL-FY-2015-Annual-Report.pdf>; Appendix A.

<sup>11</sup> Department of Defense Inspector General, *Semiannual Report to the Congress: April 1, 2012 – September 30, 2012*, p. 54. [http://www.dodig.mil/sar/SAR\\_OCT\\_2012\\_web.pdf](http://www.dodig.mil/sar/SAR_OCT_2012_web.pdf)

We also share the concerns of the oversight committees of jurisdiction that the DoD IG may be dismissing or closing reprisal cases without talking to the whistleblower first.<sup>12</sup> In POGO's experience, whistleblowers are rarely savvy enough about the whistleblower process to know what information they must include in their initial claim to open an investigation. While these conversations can take some time, we have found that talking to whistleblowers is essential in making determinations about which cases should be pursued.

Failing to talk to whistleblowers may also be contributing to whistleblowers feeling betrayed by the DoD IG. POGO has found several instances in which the DoD IG referred whistleblower disclosures back to entities that are not sufficiently independent to conduct the investigation. In some of those instances whistleblowers felt the IG needlessly exposed them to additional retaliation, and had they known the IG was going to refer their disclosures they would have chosen to withdraw their complaints. We believe this is yet another problem that could be easily resolved by the DoD IG consistently talking to whistleblowers, and by changing the law to allow whistleblowers to choose whether an allegation deemed worth investigating should be pursued by a service, component, or DoD IG.

Finally, the GAO review and reviews conducted by others have raised concerns about whether investigative processes are consistently and properly followed. For example, POGO and Congress found several instances in which the DoD IG interpreted protections for contractor whistleblowers too narrowly.<sup>13</sup> The IG has been responsive, and revisited those cases once those errors were pointed out to them, but we cannot have an IG system that requires outside intervention to reopen cases or intervene into the investigative process to ensure whistleblower protections are appropriately applied.<sup>14</sup>

We are also increasingly concerned about the implementation of existing contractor whistleblower protections. It appears significant delays by DoD and the National Aeronautics and Space Administration (NASA) in implementing regulations has left contractors without protections intended by Congress.

A 2011 Internal Review Team report questioned substantiation rates, disagreeing with the DoD IG's own decisions in 47 percent of the cases they reviewed. In those instances in which the DoD

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<sup>12</sup> Letter from Representative Jason Chaffetz, Representative Elijah Cummings, Senator Charles Grassley, Senator Kirsten Gillibrand, and Senator Claire McCaskill, to Acting Inspector General Glenn Fine, about military reprisal investigations, June 10, 2016, p. 5. [http://www.grassley.senate.gov/sites/default/files/constituents/2016-06-10%20CEG%20et%20al%20to%20DOD%20IG%20\(Whistleblower%20Reprisal%20Investigations\)%20\(003\).pdf](http://www.grassley.senate.gov/sites/default/files/constituents/2016-06-10%20CEG%20et%20al%20to%20DOD%20IG%20(Whistleblower%20Reprisal%20Investigations)%20(003).pdf)

<sup>13</sup> Project On Government Oversight letter to DoD Inspector General Jon T. Rymer, "POGO Urges Department of Defense IG to Broaden Its Interpretation of Contractor Whistleblower Protection Law," May 20, 2014. <http://www.pogo.org/our-work/letters/2014/pogo-urges-dept-of-defense-ig-to-broaden-whistleblower-protection-law.html>; Tony Messenger, "Messenger: Fired Guard employee is vindicated with U.S. Senate inquiry," *St. Louis Post-Dispatch*, February 29, 2016. [http://www.stltoday.com/news/local/columns/tony-messenger/messenger-fired-guard-employee-is-vindicated-with-u-s-senate/article\\_e6ecc02e-3c03-504e-9c4e-f238564b7cfe.html](http://www.stltoday.com/news/local/columns/tony-messenger/messenger-fired-guard-employee-is-vindicated-with-u-s-senate/article_e6ecc02e-3c03-504e-9c4e-f238564b7cfe.html)

<sup>14</sup> Scott Amey, "DoD IG Pledges to Better Protect Contractor Whistleblowers," October 30, 2014. <http://www.pogo.org/blog/2014/10/dod-ig-pledges-to-better-protect-contractor-whistleblowers.html>; Tony Messenger, "Messenger: Inspector General agrees to reopen case of fired Missouri Guard whistleblower," *St. Louis Post-Dispatch*, April 19, 2016. [http://www.stltoday.com/news/local/columns/tony-messenger/messenger-inspector-general-agrees-to-reopen-case-of-fired-missouri/article\\_ebe033f7-e5d4-5889-93eb-d20024ac76d7.html](http://www.stltoday.com/news/local/columns/tony-messenger/messenger-inspector-general-agrees-to-reopen-case-of-fired-missouri/article_ebe033f7-e5d4-5889-93eb-d20024ac76d7.html)

IG declined to investigate, the reviewers disagreed 68 percent of the time.<sup>15</sup> In a positive step forward, the DoD IG has implemented a number of reforms since then. We recommend that either GAO investigators or an outside IG conduct another peer review to see if those reforms have resulted in more consistent application of whistleblower laws.

### **Misconduct within the DoD IG**

One of the major issues raised by the GAO review was problems with the DoD IG's case management system. Specifically, the GAO found that the IG uploaded key case documents after it had closed the case in 77 percent of cases closed in fiscal year 2013, and altered case variables for 83 percent of cases closed in fiscal year 2014. Case variables that were changed after the fact included information used to evaluate timeliness of investigations and investigative outcomes, including "changes to the date the service member filed the complaint and the organization that conducted the investigation, as well as the result code, which indicates whether the case was fully investigated."<sup>16</sup>

Case files were such a mess that IG management instructed investigators to "stand down" on other work in September 2013 in order to add additional records to closed cases in the case management system. Emails shared with POGO said personnel could also apply for overtime to work on or amend the information in their own and others' old cases. Internal instructions by DoD IG management to staff that were shared with POGO provide evidence of efforts to improperly influence the GAO's findings, including advising staff to add information to files that were specifically within the scope of the GAO's review. Management's instructions raise serious concerns about those DoD IG officials and the cases processed by the Administrative and Whistleblower Reprisal Investigations teams, since changing these records likely had a significant impact on the GAO's findings. We are concerned that the DoD IG has only seen this as a compliance exercise and does not understand the gravity of trying to mislead GAO investigators.

Since sending our letter, additional whistleblower allegations that IG General Counsel Henry Shelley improperly destroyed files in a whistleblower case have been referred to the DoD IG by the Office of Special Counsel for investigation. Principal Deputy IG Fine in turn referred the allegations to the Department of Justice Inspector General for an independent investigation, and we applaud him for doing so.<sup>17</sup> But we are troubled because this is only the latest allegation of many that Shelley engages in a systemic practice of improperly interfering with and undermining personnel investigations. In 2008 we raised concerns about Shelley's efforts to overturn substantiated findings of anti-Semitism against an Army Engineer at the behest of the Army, and raised concerns again last year about his unusually active role in watering down findings that

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<sup>15</sup> Department of Defense Inspector General, *Review of Office of Deputy Inspector General for Administrative Investigations, Directorate for Military Reprisal Investigations*, May 16, 2011, Executive Summary. <http://www.pogo.org/documents/2011/dod-ig-mri-review-2011.html>

<sup>16</sup> *Whistleblower Protection: DOD Needs to Enhance Oversight of Military Whistleblower Reprisal*, 2015, pp. 23-25.

<sup>17</sup> Charles S. Clark, "Pentagon Watchdog Officials Now Under Justice Department Probe," *Government Executive*, March 22, 2016. <http://www.govexec.com/defense/2016/03/pentagon-watchdog-officials-now-under-justice-department-probe/126859/>

then-Secretary of Defense Leon Panetta improperly provided classified information to *Zero Dark Thirty* filmmakers.<sup>18</sup>

## Problem of Acting IGs

POGO views IGs as an essential component of a well-functioning federal government, and over the past few years we have undertaken a number of efforts to study and improve the IG system. One of those efforts is to draw attention to the large number of IG offices that are operating without permanent leadership.<sup>19</sup> POGO firmly believes that the effectiveness of an IG office can be diminished when that office does not have permanent leadership, especially when the vacancy exists for an extended period of time, as many of the current vacancies have.

In addition, a permanent IG has the ability to set a long-term strategic plan for the office, including setting investigative and audit priorities. An acting official, on the other hand, is known by all OIG staff to be temporary, which one former IG has argued “can have a debilitating effect on [an] OIG, particularly over a lengthy period.”<sup>20</sup>

While the DoD IG does not hold the record for the longest vacancy, we believe that filling this position should be a priority for the next administration. Addressing the DoD IG’s deep cultural problems—all of which predate Principal Deputy IG Fine—requires permanent leadership.

## Recommendations

The DoD IG should:

- Investigate and consider for removal any senior officials found to have illegally destroyed evidence in whistleblower or other case files, improperly instructed employees to back-fill cases, or otherwise interfered with the independence and integrity of investigations;
- Develop and follow uniform procedures for conducting civilian, intelligence, contractor, and military whistleblower reprisal investigations, including training for soliciting pertinent evidence;
- Request a GAO or outside IG audit of the DoD IG’s reprisal investigations to ensure that investigators’ decisions to dismiss, investigate, and substantiate reprisal are proper and based on the legal requirements for examining any evidence presented;

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<sup>18</sup> Project On Government Oversight Letter to Congress, “POGO letter to members of Congress regarding the DOD Inspector General,” May 1, 2008. <http://www.pogo.org/our-work/letters/2008/go-igi-20080501.html>; Adam Zagorin, “Exclusive: New Documents in Zero Dark Thirty Affair Raise Questions of White House-Sanctioned Intelligence Leak and Inspector General Coverup,” April 16, 2015. <http://www.pogo.org/our-work/articles/2015/new-documents-in-zero-dark-thirty-affair-raise-questions.html>; Marisa Taylor, “Official who oversees whistleblower complaints files one of his own,” *McClatchy*, July 26, 2016. <http://www.mcclatchydc.com/news/nation-world/national/national-security/article91949562.html>

<sup>19</sup> Project On Government Oversight, “Where Are All the Watchdogs?” <http://www.pogo.org/tools-and-data/ig-watchdogs/go-igi-20120208-where-are-all-the-watchdogs-inspector-general-vacancies1.html>

<sup>20</sup> Government Accountability Office, *Inspectors General: Limitations of IG Oversight at the Department of State*, October 31, 2007, p. 8. <http://www.gao.gov/assets/120/118417.pdf>

- Make sure investigators and reviewers are maintaining case files in real time to make sure its data is reliable on an ongoing basis;
- Whenever possible inform complainants whether their cases are still active, and consistently follow the law to notify complainants whose cases go beyond 180 days why the deadline will not be met and accurately report the estimated completed date in a timely manner;
- Report to Congress about the timeliness of investigations;
- Consistently include in its semiannual reports instances when DoD or its components declined to take the DoD OIG's recommended actions;
- As practicable, make sure investigators do not dismiss reprisal cases without interviewing complainants;
- Ensure it does not refer cases back to the offices named by the whistleblower without their consent.

## **Conclusion**

Whistleblowers who report concerns that affect our national security must be lauded, not shunned or, worse, harmed. And the law must protect them. The perceived and real failures of the DoD IG to act as a check on violations of law should be of grave concern. It is POGO's hope that Congress and the DoD IG will ensure that whistleblowers can successfully step forward to expose and stop wrongdoing, and be confident that they will not suffer retaliation as a result.