

A Review of the Department of Defense Office of Inspector General's Process for Handling Military Whistleblower Reprisal Allegations



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A REVIEW OF THE DEPARTMENT OF DEFENSE OFFICE OF INSPECTOR GENERAL'S PROCESS FOR HANDLING MILITARY WHISTLEBLOWER REPRISAL ALLEGATIONS

SECTION I: INTRODUCTION

The Department of Justice (DOJ) Office of the Inspector General (OIG) conducted a review of the Department of Defense Office of the Inspector General's (DOD OIG) process for handling military whistleblower reprisal allegations at the request of the Acting Inspector General for the Department of Defense (DOD). This report describes the results of that review. In requesting that we conduct this review, the Acting Inspector General stated that the "purpose of the review is to assess whether [the DOD OIG] is properly and effectively discharging [its] statutory responsibilities . . . to protect members of the Armed Forces from reprisal."

In conducting this review, we examined: (1) the statute and DOD regulations relating to military whistleblowers; (2) the allocation of responsibility for conducting investigations of military whistleblower reprisal allegations among the DOD OIG and the Inspectors General of the Army, Navy, Air Force, and Marines (collectively the "service IGs"); (3) the management, staffing, and processes of the DOD OIG Directorate for Military Reprisal Investigations (MRI); (4) the quality of MRI's investigative product and its oversight of the service IGs processing and investigation of reprisal complaints; and (5) the effectiveness of MRI in satisfying its legal obligations and ensuring that reprisal allegations are thoroughly and fairly investigated.

The DOD IG's request that we conduct this review coincided with the completion of an oversight investigation by staff of Senator Charles Grassley. Senator Grassley's staff examined military reprisal investigations by the DOD OIG, focusing in particular on the case of U.S. Navy Lieutenant Jason Hudson.

This review was conducted by two attorneys who are members of the DOJ OIG's senior staff. While our review focused on the DOD OIG's current program and processes for handling military reprisal investigations, we also gathered historical information about the program to better assess its current structure and effectiveness. In addition, we learned of changes to the program that have been implemented by the DOD OIG during our review, and a description of those changes and our assessment of them are included in this report.

We conducted approximately 25 interviews in the course of this review, including interviews of the Deputy Inspector General (IG) and Assistant IG with responsibility for overseeing MRI, managers and staff of MRI, and attorneys from the DOD OIG Office of General Counsel. We also spoke with the Acting DOD IG regarding the scope and purpose of this review. We interviewed management officials from the Inspectors General of the Army, Navy, Air Force, and Marines who supervise the respective service IG units that conduct investigations of a large number of military reprisal complaints. We met with representatives of the Project On Government Oversight (POGO) who contributed to POGO's March 2009 report on Inspectors General, which included a discussion about DOD OIG's handling of reprisal allegations. We spoke with a staff member of one of the services' Boards of Correction of Military Records, and we reviewed the web sites of the other services' Boards. We also met with staff members of Senator Grassley and discussed with them their oversight investigation of the DOD OIG's military reprisal program.

We reviewed a sample of 21 files of cases handled by MRI, selected from cases closed within the past 3 years. We included in our sample cases arising from each of the services. We examined investigations conducted by MRI, as well as the MRI's oversight of service IG reprisal investigations. We reviewed cases in which the reprisal allegations were found to be substantiated and cases in which the allegations were not substantiated.

This report is divided into five sections. After this Introduction, Section II sets forth background information relevant to our report, including a description of the military whistleblower reprisal statute and DOD implementing regulations, the growth in DOD reprisal complaints, and the concerns raised by outside entities about DOD's process for investigating reprisal complaints. Section III discusses the DOD OIG's current organizational structure for handling whistleblower reprisal matters, including the roles of MRI, DOD OIG's Office of General Counsel, and the service IGs. Section IV contains our findings and recommendations regarding DOD's overall handling of reprisal matters. Section V summarizes our conclusions. Appendix A contains our examination of the DOD OIG's handling of the Hudson case.

SECTION II: BACKGROUND

In this section we describe the federal statute and DOD regulations that protect members of the military from reprisal for making certain disclosures. We also briefly discuss the increasing number of military reprisal complaints being presented to the DOD OIG, and we summarize the concerns expressed by Senator Grassley and POGO concerning the DOD OIG's current process for handling these complaints.

A. The Military Whistleblower Protection Act

The rights and responsibilities of DOD service members who make reprisal allegations and the basic scheme for handling such allegations are set forth in the Military Whistleblower Protection Act ("the Act"). 10 U.S.C. § 1034. In addition, the DOD has issued Directive No. 7050.06, which implements the Act.

According to the Act, no person may take or threaten to take an unfavorable personnel action, or withhold or threaten to withhold a favorable personnel action, as a reprisal against a service member for making or preparing a communication to a Member of Congress or an Inspector General or for making or preparing a protected communication to a member of a DOD audit, inspection, investigation or law enforcement organization or to any person or organization in the chain of command. 10 U.S.C. § 1034 (b)(1). A protected communication is defined as a communication that complains of or discloses information that the member reasonably believes constitutes evidence of "a violation of law or regulation" or "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety." *Id.* § 1034 (c)(2).¹ The statute does not define the term personnel action.

The statute directs a DOD IG who receives a reprisal allegation to "expeditiously determine . . . whether there is sufficient evidence to warrant an investigation of the allegation." *Id.* § 1034 (c)(3)(A).² The statute further

¹ This definition is also used in the Whistleblower Protection Act, which governs reprisal in the civilian context. 5 U.S.C. § 2302(b)(8)(A).

² Under the original DOD statute, all service members' complaints of reprisal were required to be made directly to the DOD OIG. In 1998, at DOD OIG's suggestion, the statute was amended to enable complaints to be made either to the DOD OIG or to any service IG. MRI officials told us that the DOD OIG suggested this change because, as the volume of cases grew over the years, MRI was not able to meet the statutory 180-day period for disposition of complaints. At the time DOD OIG proposed the change, the service IGs' investigations units were well-staffed, and it was believed that the change would reduce

provides that if the receiving IG determines that an investigation is not warranted, the IG will forward that determination to the DOD IG for review. Id. § (c)(3)(C). Alternatively, if an investigation is warranted, the statute directs the receiving IG to "expeditiously investigate the allegation" and provides that when the receiving IG is the DOD IG, responsibility for the investigation may be delegated by the DOD IG to an appropriate IG within a military department. Id. § 1034 (c)(3)(D). In those cases where the investigation is conducted by a military department IG, the results of the investigation must be approved by the DOD IG. Id. § 1034 (c)(3)(E). The statute also directs the DOD IG to ensure that the investigating IG "is outside the immediate chain of command of both the member submitting the allegation and the individual or individuals alleged to have taken the retaliatory action." Id. 1034 § (c)(5). No investigation is required of an allegation made more than 60 days after the date on which the service member became aware of the personnel action. Id. 1034 § (c)(4).

The Act provides that completed reports of investigation of reprisal claims are to be provided to the Secretary of Defense and to the complaining service member within 180 days of receipt of the allegation. Id. §§ 1034 (e)(1) & (e)(3). If the investigating IG cannot submit the report within this time frame, the IG is required to provide the Secretary of Defense and the complainant with a notice containing the reasons why the deadline will not be met and the time when the report will be submitted. Id. §§ 1034 (e)(3).

The statute also provides for the investigation of the underlying allegations of wrongdoing about which the service member complained. Pursuant to the statute, the receiving IG is to conduct a "separate investigation" of these allegations if they have not previously been investigated or if any such investigation was "biased or otherwise inadequate." The DOD IG may delegate responsibility for investigating the underlying allegations to the IG of the appropriate service branch. Id. § (d).

Finally, the statute provides a mechanism for review of IG determinations regarding reprisal allegations, first by the Board of Correction of the relevant military service branch and thereafter by the Secretary of Defense. Upon request by the aggrieved service member for review of an IG determination, the Board of Correction is required to review the IG's report, may request that the IG gather further evidence, and may receive oral argument, examine and cross-examine witnesses, take depositions, and if

delays. However, DOD OIG officials acknowledged that the change has not resulted in speedier processing of reprisal complaints.

appropriate conduct an evidentiary hearing.³ The Board then makes a recommendation to the Secretary of the service, who is required to issue a final decision within 180 days after the application is filed. *Id.* § 1034 (f). If the complainant is not satisfied with the service Secretary's disposition of the matter, the complainant may submit the matter to the Secretary of Defense, who is required to issue a decision within 90 days. *Id.* § 1034 (g).

B. DOD's Implementing Regulations

DOD Directive No. 7050.06 (July 23, 2007) contains the DOD's regulations for military whistleblower protection. The Directive tracks the rights and responsibilities set forth in the statute, while elaborating on a few points.

Consistent with the statute, the regulations provide that the DOD IG will receive allegations of reprisal directly from complainants and from service IGs, ¶¶ 5.1.1 & 5.1.2; investigate or request the appropriate service IG to investigate such complaints when warranted, ¶ 5.1.4; and review and approve determinations by service IGs that there is insufficient evidence to warrant investigation of reprisal allegations, and review and approve reports of such investigations by the service IGs. ¶¶ 5.1.3. & 5.1.5. Service IGs are directed to notify the DOD IG within 10 working days of their receipt of a reprisal allegation. ¶ 5.3.2.2. They are also required to forward to the DOD IG for review any determination that there is insufficient evidence to warrant an investigation of a reprisal complaint, complete investigations of such complaints within 180 days, and forward all reports of such investigations to DOD IG for approval. ¶¶ 5.3.2.4 – 5.3.2.7.

The Directive contains definitions of several terms that are used but not defined in the statute. Most importantly, it defines "personnel action" as "any action . . . that affects, or has the potential to affect, [the complaining] military member's current position or career," including a promotion; disciplinary action; transfer or reassignment; performance evaluation; decision on pay; benefits, awards, or training; referral for a mental health evaluation; and any other significant change in duties or responsibilities inconsistent with the military member's grade.⁴ ¶ E2.8. The Directive also defines "chain of command" as both "the succession of commanding officers from a superior to a subordinate through which command is exercised" and "the succession of officers, enlisted members or civilian personnel through

³ We were told by both MRI staff and the staff member of the Board of Correction with whom we spoke that most matters that come before the Boards are decided "on the papers" without hearing or oral argument.

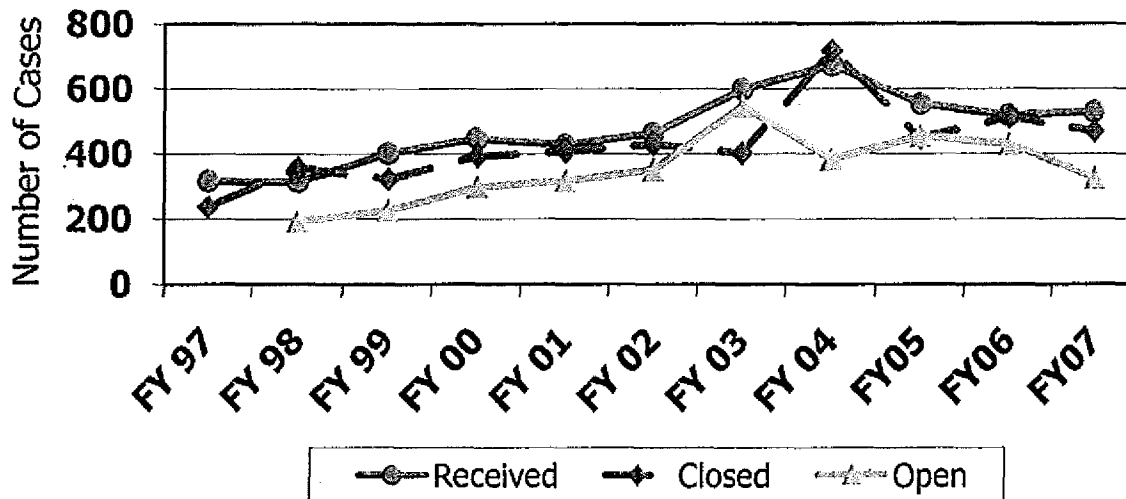
⁴ This provision is similar to the definition of prohibited personnel practice contained in the Whistleblower Protection Act. 5 U.S.C. § 2303(a)(2).

whom administrative control is exercised, including supervision and rating of performance.” ¶ E2.3.

C. Increase in Complaints

Since passage of the Act nearly 20 years ago, the number of reprisal complaints from service members has grown significantly. As shown in Figure 1, MRI’s caseload more than doubled between fiscal years 1997 and 2007, increasing from fewer than 300 complaints received in 1997 to nearly 600 complaints 10 years later. Military reprisal complaints make up the largest percentage of MRI’s cases.

Figure 1: History of Military Reprisal Complaints



Source: DOD OIG

As discussed in more detail below, keeping up with this increasing number of complaints has been difficult for the DOD OIG and the service IGs. Both the MRI and service IG officials we interviewed acknowledged the impact of the rising caseload and said that timeliness is their greatest challenge. Several officials also commented that MRI has not received additional staff or resources to keep up with this growing caseload.

D. Concerns about the Current Process

The DOD IG provided us with two October 2008 letters from Senator Grassley describing the results of an oversight investigation of MRI conducted by his staff. Senator Grassley’s letters described the investigation as assessing how well DOD OIG “watchdogs” military reprisal investigations conducted by the service IGs. Although the letters focus largely on MRI’s

oversight of the Navy IG's investigation of Lieutenant Hudson's reprisal allegations, Senator Grassley also raised systemic concerns about the DOD OIG's overall military reprisal investigation program, including lack of accountability and insufficient oversight by MRI of reprisal investigations conducted by the service IGs, and made several recommendations for improving DOD OIG's handling of reprisal cases. When we met with Senator Grassley's staff, they reiterated and elaborated upon these concerns and recommendations.

In March 2009, POGO released a report examining the work of federal Inspectors General which included a section on whistleblower allegations. In its report, POGO recognized that the DOD OIG is one of only two OIGs that have a unit specifically dedicated to investigating whistleblower complaints but noted concerns about the DOD OIG's handling of whistleblower complaints. POGO stated that it had received "numerous complaints" that investigators do not keep complainants informed of the status of their cases and expressed concern that there was "very little a whistleblower can do to appeal an MRI decision" and that "no higher-ranking officials in DOD OIG review the unit's rulings."

We met with the representatives of POGO who were responsible for this part of the report. They reiterated the points made in the report, and told us that their greatest concern is that MRI does not conduct many investigations; rather, it sends reprisal complaints to the originating service IGs for investigation. They said this procedure raised concerns because the whistleblower concept is "anathema" to the chain of command mentality that exists in the military. They believe that the "military culture," of which the service IGs are a part, makes it unlikely that the service IGs can truly conduct independent investigations. They said they would like to see MRI conduct more, or at least the most important, investigations itself. They said they understood that the DOD IG was increasing MRI's staff, and they would like to see MRI use the additional staff to investigate more allegations instead of referring them to the service IGs.

SECTION III: DOD'S ORGANIZATIONAL STRUCTURE FOR HANDLING MILITARY REPRISAL ALLEGATIONS

In this section we discuss the organizational structure currently used for handling whistleblower reprisal matters, including the roles played by MRI, DOD OIG's Office of General Counsel, and the service IGs.

A. The Directorate for Military Reprisal Investigations

For nearly 20 years, the DOD OIG has had a unit designated to investigate and conduct oversight of service IG investigations of military reprisal allegations. Currently, this unit is known as the Directorate for Military Reprisal Investigations (MRI).⁵ MRI both conducts investigations directly and refers for investigation reprisal complaints to service IGs, whose investigations and dispositions MRI subsequently reviews and approves. As discussed in more detail below, MRI has divided the investigation of reprisal complaints into two phases, resolving most cases after a "preliminary inquiry" and conducting "full investigations" for those complaints that cannot be resolved with a preliminary inquiry.

Within the larger DOD OIG structure, MRI is part of the DOD OIG's Administrative Investigations Division (AI Division). In addition to MRI, the AI Division includes the Directorate for Investigation of Senior Officials (Senior Officials Directorate) and the Civil Reprisal Investigations Directorate.⁶

When we began this review, the AI Division was under the authority of an Assistant IG for Administrative Investigations, who reported to the IG through the Deputy IG for Investigations. The Deputy IG for Investigations was responsible for supervising both criminal and administrative investigations.

A senior DOD OIG official told us that under this management structure, MRI cases were rarely discussed at senior staff meetings. He said that, in his view, the importance of the reprisal cases and the reprisal program would be enhanced if MRI's cases were made "more visible" and that

⁵ Although MRI is also tasked with investigating other matters, such as alleged improper referrals of service personnel for mental health evaluations, military reprisal allegations account for more than 85 percent of MRI's work.

⁶ The Senior Officials Directorate conducts investigations into allegations other than reprisal against senior military and civilian officials and performs oversight of senior official investigations not involving reprisal conducted by the services. The Civilian Reprisal Unit conducts investigations of allegations of whistleblower reprisal made by DOD civilian employees.

more attention should be brought to substantiated allegations so they can be used as an example to commanders about what not to do.

In May 2009, the DOD IG appointed a Deputy IG for Administrative Investigations with direct reporting responsibility to the IG. This Deputy IG for Administrative Investigations has responsibility for supervising the MRI, among other units. Figures 2 and 3 show MRI's location in the prior and current DOD OIG organizational charts for the investigations divisions.

Figure 2

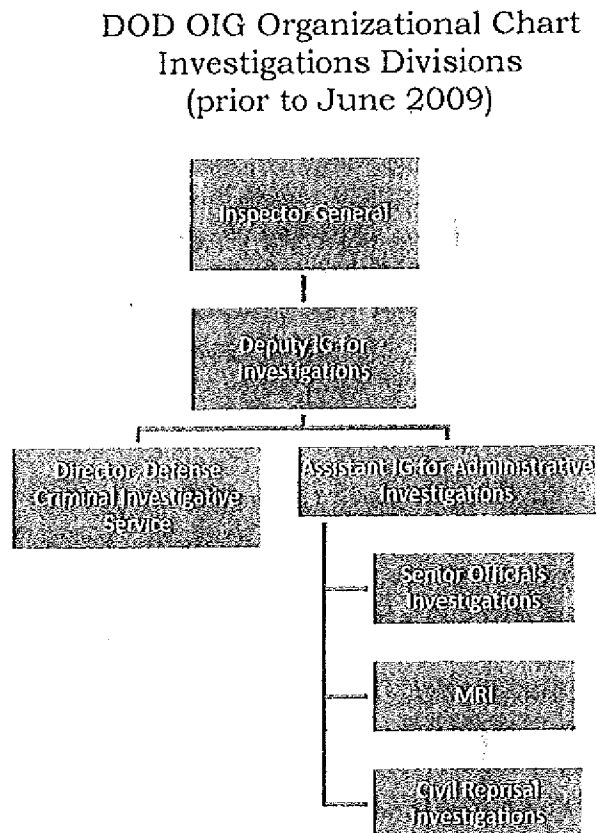
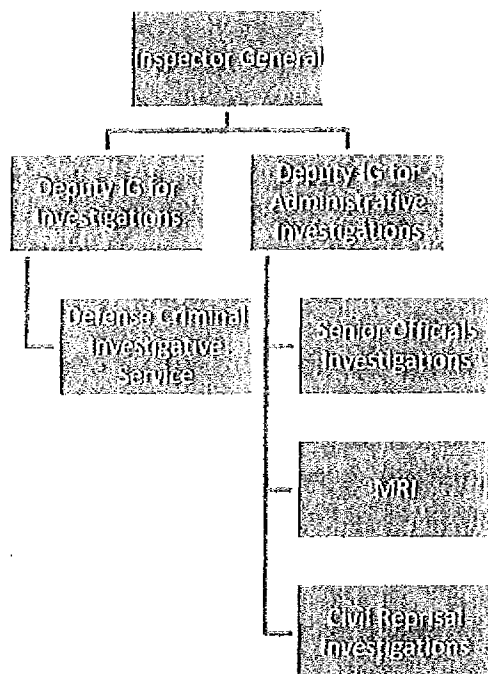


Figure 3

DOD OIG Organizational Chart
Investigations Divisions
(as of June 2009)



B. MRI Staff

MRI is staffed by civilian investigators, most of whom served in the military and many of whom had investigative experience when they joined the unit. MRI's managers, the former Assistant IG for Administrative Investigations, and the Deputy IG for Administrative Investigations are also civilian employees.

During the period of our review, MRI's staff of 17 consisted of the Director, 3 first-line supervisors known as team leaders, 12 investigators, and an investigative support specialist. The Director and 2 of MRI's team leaders have worked in the unit for more than 10 years; the third team leader has been with MRI for 3 years.

The staff of 12 investigators included 3 who have been at MRI for more than 10 years, 1 who has been at MRI for 5-10 years, 5 who have been with the unit for 2-5 years, and 3 who have been at MRI for fewer than 2 years. One of MRI's team leaders assisted in drafting the original military whistleblower legislation during prior employment as a congressional staffer.

During the period of our review, MRI's investigative staff was divided into three teams, each headed by a team leader. Two teams conducted preliminary inquiries of complaints, and one team conducted full investigations and the oversight of investigations conducted by service IGs.

When we began our review, MRI had an open position for a fourth team leader. This position became vacant shortly before the commencement of our review when the incumbent was promoted to become the Executive Assistant to the Assistant Inspector General for Administrative Investigations.⁷ The MRI staff we interviewed told us that this vacancy exacerbated pre-existing case processing delays. One team leader said that having to supervise more investigators caused a "bottleneck" at the team leader level, both in the review of investigators' work and the assignment of new cases.

In early 2009, MRI filled the fourth team leader position with an investigator from the Senior Officials Directorate who had previously worked at MRI. However, at the conclusion of our review the fourth team had yet to be fully constituted because the new team leader was still dedicating much of his time to completing two Senior Officials Directorate investigations.

MRI's investigators are in the military's pay band 2, which means the journeyman level for the position is the equivalent of the civilian General Schedule (GS)-13 level. MRI team leaders are in pay band 3, which is equivalent to GS-14. Several team leaders and investigators noted to us that the compensation level of investigators in the Senior Officials Directorate had recently been increased from pay band 2 to pay band 3, while the compensation of MRI's investigators was left unchanged. MRI personnel told us that this different treatment of MRI investigators for performing comparable investigative work was perceived as unfair and had affected morale in MRI.

As noted above, the primary responsibility of MRI investigators and team leaders is to resolve military reprisal complaints. However, MRI personnel we interviewed told us they are often requested to take on collateral duties, such as conducting training or updating MRI manuals, which take away from their time to conduct case work.

In May 2009, the DOD IG authorized 22 new positions for the AI Division and allocated 10 of these positions to MRI. As a result, at the conclusion of our review MRI was conducting interviews to add 8

⁷ This former team leader wrote a graduate thesis in spring 2008 entitled *Does Someone Need to Blow the Whistle on the Military Whistleblower Protection Program?*, in which he discussed ways "to improve the vitality and responsiveness of the whistleblower reprisal protection program." Shifting the handling of all preliminary inquiries to MRI was among his suggested reforms for the program.

investigators and 2 team leaders to its staff. In addition, 3 of the 22 positions have been designated as administrative support positions for the AI Division: an administrative officer, an aide to the administrative officer, and a training and policy development position. These positions will service all AI Division units.

Table 1 shows MRI's staffing level during the period of our review and the level of staffing following the recent increase.⁸

Table 1

MRI Staffing Levels

Position	Staffing During this Review	Increased Staffing
Director	1	1
Team Leaders	4*	6
Administrative Support	1	4**
Investigators	12	20

* One Team Leader vacancy was filled during the period of our review.

** The 3 new positions will be shared with other AI Division units

Source: DOJ OIG interviews.

Management personnel at MRI and the service IGs described MRI's investigators to us as "solid," "strong," and "professional." MRI's managers said they perceived the investigators as having a positive attitude toward and enjoying their work. One manager stated that those who do not like the work tend to leave the unit. Another manager said that the quality of MRI's investigative staff has improved over recent years. According to this manager, the focus in hiring has been to find investigators with a "sense of urgency" who are able to analyze and write well.

Managers and investigators commented that although all reprisal cases involve the same legal issues, each case has unique aspects and provides the opportunity to learn new things. One team leader stated that despite facial similarities, each case presents new and different facts and circumstances, which keeps everyone "on their toes." This team leader said that as long as she has been doing this work, she still finds factual scenarios, laws, and regulations that she has never encountered before. One investigator described every case as being "like a new story book."

⁸ Prior to this recent staffing increase, one MRI investigator told us that in the past the Senior Officials Directorate had received additional investigative staff while MRI continued to operate shorthanded.

The investigators and managers we interviewed said that they believed MRI staff is generally open-minded, independent, and fair to whistleblowers. One manager said that although everyone "wished they [encountered] more substantive/systemic whistleblower cases," the possibility of that kind of case coming along keeps everyone "energized."

One investigator who said that the majority of people at MRI "try to do right by whistleblowers" also noted that the high percentage of former military people hired at MRI was "somewhat concerning" to her because of a perception that military people tend to be less sympathetic to whistleblowers. This investigator said that on a few occasions she had heard comments from MRI staff referring to complainants as "cry babies" or similar terms. She said that in her view such comments were inappropriate, not because they actually affect an investigator's judgment but because they may create the perception that MRI does not give whistleblowers "a fair shake." This investigator also questioned whether MRI's management was "a strong believer" in the occurrence of reprisal, but said that management will support a finding of reprisal if "the evidence is strong."

In general, the service IG officials we interviewed told us that their overall impression of MRI's management and investigators is good. They described MRI's staff as conscientious and thorough. One service IG official expressed the view that while "some [MRI] investigators may be more inclined to give the complainant the benefit of the doubt than others, in the end all the investigators are objective."

The service IG officials we spoke with described the interactions between MRI and their units as professional and recognized that MRI has a great deal of expertise in the reprisal area. One service IG official said that MRI's Director was "very knowledgeable and very helpful." However, one service IG official told us that while the MRI Director had "good technical skills, is a great investigator, a very good writer, and has good analytical skills," she was not a good manager because she did not communicate effectively with members of her staff and did not trust the investigators with "a level of responsibility commensurate with their experience and pay grade."

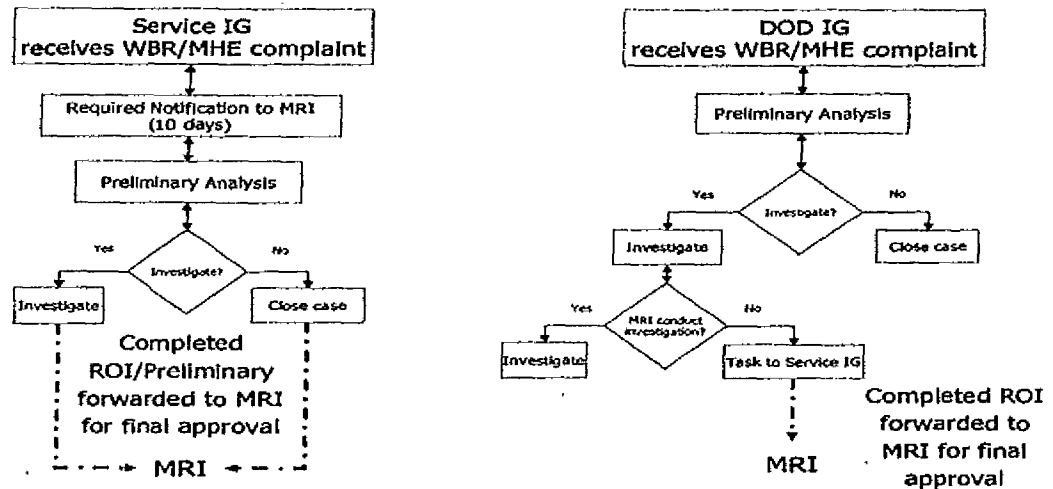
C. MRI's Investigative Processes

As noted above, service members may make reprisal complaints either directly to the DOD OIG or to the various service IGs. MRI and the service IGs share responsibility for investigating these complaints, with MRI having the final authority to approve a service IG's disposition of a complaint. Figure 4 shows the flow of reprisal matters within and between MRI and the service IGs.

Figure 4

Military Whistleblower Reprisal (WBR) Case Processing Flow

Investigative Process



Notes: MHE – Mental Health Evaluation; ROI – Report of Investigation
Source: DOD OIG

In addition to its responsibility for oversight of reprisal complaints handled by the service IGs, MRI receives complaints directly from the DOD OIG Hotline. The Hotline is staffed by investigators who receive all types of complaints, including reprisal allegations. The Hotline staff, who are not part of the Administrative Investigations Division but are supervised within the DOD OIG by the Assistant IG for Congressional Liaison, forward all reprisal complaints to the Director of MRI. MRI reviews the complaints and determines whether an investigation is required or whether the matter can be closed without investigation because the criteria for military reprisal have not been met. If MRI determines that an allegation received via the Hotline should be investigated, MRI will likely conduct a preliminary inquiry of the complaint. If a full investigation is required, in most cases the matter will be referred to the appropriate service IG.

Beginning in about 1998, MRI officials said they made an effort to pattern MRI's handling of reprisal cases on the process employed by the agency responsible for processing civilian whistleblower complaints, the Office of Special Counsel. After making an initial determination that a complaint's allegation qualifies as reprisal under the law, MRI conducts a preliminary inquiry, which entails receiving information from and interviewing the complainant, as well as obtaining from the military department relevant

documents. The interview with the complainant is recorded. During the preliminary inquiry stage, neither the person alleged to have engaged in reprisal nor other witnesses are interviewed. MRI has a checklist of the steps its investigators must complete as part of the preliminary inquiry.

MRI procedures require the team leader to participate in the complainant interview. Several investigators told us that this requirement can be the source of delay because, given their heavy work load, team leaders are not always immediately available when the investigator is ready to conduct the complainant interview.

When the preliminary inquiry is complete, the investigator prepares a report, which is reviewed and edited by the assigned team leader and often by MRI's Director.⁹ MRI team leaders and investigators told us that the process of report writing at the preliminary inquiry stage and after full investigation can be very time consuming and that reports often go through numerous drafts. Some investigators we spoke with expressed irritation with the report editing process, which MRI's managers acknowledged was arduous and a source of frustration for the investigators. One source described the process as "very painful" and said that managers engaged in "over editing" and had "an obsession with brevity." Another said that it was difficult when one style of report writing was "fine one time, but not the next," and observed that managers' edited "not for the sake of improving the product, but just to make it shorter."

When the report is finalized, it is presented to MRI's Complaint Review Committee (CRC). The CRC is comprised of MRI's Director, the team leader and the investigator handling the case being presented, and an attorney from the DOD OIG Office of General Counsel.¹⁰ The investigator makes a presentation of the case to the committee, and the CRC members discuss the

⁹ The report analyzes the reprisal complaint by addressing four questions, referred to by MRI staff as the "acid test": (1) Did the military member make a protected communication? (2) Was an unfavorable personnel action taken or threatened following the protected communication? (3) Did the official responsible for taking the personnel action know about the protected communication? and (4) Does the evidence establish that the personnel action would have been taken if the protected communication had not been made?

¹⁰ The MRI and Office of General Counsel officials we spoke with stated that the General Counsel's office role in reprisal cases is limited primarily to participation in the CRC and to conducting legal sufficiency reviews of MRI reports. Although MRI investigators and team leaders sometimes consult attorneys from the General Counsel's office during the course of an investigation on specific legal issues, for the most part the attorneys do not participate in the process at the investigation stage. At one time the DOD OIG's General Counsel was not independent from DOD's Office of General Counsel. Initially as a result of a DOD administrative directive and more recently because of legislation, the DOD OIG's General Counsel is independent of DOD's General Counsel and reports only to the DOD IG.

case and determine whether a full investigation should be conducted or whether the case should be closed because there is insufficient evidence of reprisal. If the case is closed, MRI notifies the complainant and provides the complainant with a redacted copy of its report. If the CRC determines that a case should be fully investigated, the investigation may be conducted by MRI, but because of staffing considerations MRI more often refers the matter to the service IG for full investigation. MRI would most likely retain for investigation high profile matters (including cases of congressional interest), as well as cases that involve multiple services. MRI's target time frame for completing preliminary inquiries is 90 days.

Full investigations represent a much smaller percentage of MRI's reprisal workload than preliminary inquiries. At any given time, MRI is conducting full investigations in about 10 cases, as compared to scores of preliminary inquiries. Moreover, as a result of the increase in preliminary inquiries being handled by MRI and the staffing level in the unit at the time of our review, MRI officials said they expected to conduct even fewer full investigations in the future. At present, MRI still conducts most of the full investigations arising from reprisal allegations received from the Hotline. However, MRI has begun referring to service IGs some full investigations that were initiated by Hotline referral.

The process for full investigations by MRI staff entails the investigator, and often the team leader, traveling to the base or location where the reprisal allegation arose. Sworn testimony is obtained from all relevant witnesses, either in person or by telephone, and the testimony is recorded. In addition, the investigator obtains any documents that may be necessary to complete the investigation and prepare the final report. The investigator, a team leader, and MRI's Director participate in the drafting of the final report, which undergoes the same multi-layered editing process as reports of preliminary inquiries. When the MRI draft of the report is completed, it is reviewed by the DOD OIG Office of General Counsel for legal sufficiency.

At the conclusion of an investigation, MRI provides a redacted version of its report to the complainant and to the relevant service IG with instruction to forward the findings to the appropriate command.

One senior DOD OIG official told us that MRI generally does not reject complaints or close investigations on technical or jurisdictional issues. The service IG officials we spoke with told us, for example, that MRI does not rigidly enforce the statutory deadline for making a reprisal complaint. Both MRI personnel and service IG officials told us that MRI gives the benefit of the doubt to the complainant on the questions of whether there was a protected disclosure, management's knowledge of it, and if there was an adverse personnel action. MRI personnel and service IG officials also told us that in most cases MRI addresses the issue of whether there was a basis

independent of the protected disclosure for the adverse personnel action. DOD OIG personnel said that they made the decision to handle cases this way to ensure whistleblower complaints are taken seriously and adequately investigated.

As noted earlier, in addition to handling complaints directly, MRI conducts oversight of service IG investigations and dispositions of reprisal matters. When the service IG completes a preliminary inquiry or full investigation, it forwards its report and copies of any relevant documents to MRI. Similarly, if a service IG decides to close a matter without investigation, this disposition must be approved by MRI.

Both MRI investigators and team leaders are involved in the oversight of service IG whistleblower investigations. Typically, the investigator reads the complaint, the service IG's report, key documents, and testimony. The investigator then makes a written recommendation to the team leader whether to accept or reject the service IG's findings. The investigator may also recommend that the case be sent back to the service IG for further investigation. The team leader reads the investigator's report and any underlying documents he or she feels necessary to fully understand the case. If the team leader agrees with the service IG's finding, the team leader has final authority to close the case, the MRI Director is not consulted, and there is no legal review by the DOD OIG Office of General Counsel. However, if the team leader disagrees with the service IG's findings, the MRI Director makes the final determination. If the MRI Director rejects the service IG's finding, the DOD Office of General Counsel conducts a legal review of the matter. MRI staff told us that MRI usually concurs with the service IG's findings.¹¹

MRI officials estimated that the target time line for it to complete its oversight review of full investigations conducted by service IGs is about 30 days. The target for review of a service IG's proposal to close a case without full investigation after completion of a preliminary inquiry is about 20 days.

However, the service IG officials we interviewed told us that MRI's oversight reviews of their cases were much slower, in many instances taking 6-8 months. One service IG official stated that MRI is "very slow" and its review was a "painstaking process." Another service IG official said he believes that MRI engages in "overkill" in its oversight investigations and requires more information to close a case than is necessary.

As noted in Section II, the military whistleblower statute also provides for the investigation of the underlying allegation of wrongdoing about which

¹¹ MRI maintains records of all military reprisal complaints it and the service IGs receive, and the manner of their disposition.

the service member complained. MRI's Director told us that it is not part of MRI's responsibilities to conduct this "separate investigation." However, MRI requires its investigators to include in their reports the manner in which the underlying allegations were addressed. If MRI finds that investigation of the underlying allegation has not been addressed, MRI informs the DOD OIG Hotline so that the investigation can be referred to the appropriate component of the DOD OIG or service IG.

D. The Service IGs

Unlike MRI, which specializes in handling reprisal complaints, service IGs investigate all types of complaints. Moreover, there are at least several levels within the service IGs in each military branch, and each service has hundreds of IG units. For example, an IG office may be located on a base or other post. Above that level, divisions and sub-divisions of the military branches may also have IGs, which may be referred to as "major command" or "field command" IGs. For ease of reference, we refer to this type of IG collectively as field IGs. The investigative and management staff of the field IGs are active-duty members of the military assigned temporarily to the IG office for a period that typically does not exceed 2 years.

Each service branch also has a "headquarters" IG unit. The headquarters IGs are active-duty military officers appointed to the position for terms of about 3 years. Each of the four service branches employs civilian investigators and mid-level managers at their headquarters IG offices who oversee reprisal investigations conducted by the various field IGs and who are the primary points of contact between MRI and the service IGs.

As the statistics in Table 2 show, the service IGs are the initial point of intake for about half of all new reprisal complaints, and they conduct the large majority of reprisal investigations. Service IGs are required under the law to notify MRI of military reprisal complaints they receive within 10 days of the complaint being made. All four military branches require the field IGs to notify the headquarters IG of a reprisal complaint, through the chain of command, which in turn notifies MRI. MRI must approve the service IGs' disposition of all reprisal complaints.

Table 2
Military Reprisal Caseload and Dispositions
October 2007-March 2009

	October 1, 2007- March 31, 2008	April 1, 2008- September 30, 2008	October 1, 2008- March 31, 2009
Total Military Reprisal Cases (pending plus Closed)	650	692	660
New cases during period	288	291	323
MRI	135	156	174
Service IGs	153	135	149
Pending cases at end of period	410	376	430
MRI	69	81	169
Service IGs	341	295	261
Cases closed during period	240	316	230
MRI	77	86	100
Service IGs	163	230	130
Cases closed after preliminary inquiry	181	244	202
MRI	73	83	99
Service IGs	108	161	103
Cases closed after full investigation	50	60	24
MRI	4	3	1
Service IGs	46	57	23
Cases closed after reprisal allegation(s) substantiated	9	12	4
MRI	0	0	0
Service IGs	9	12	4

Source: DOD OIG Semi-annual reports; MRI.

Several MRI and service IG officials we interviewed told us that maintaining an adequate level of staffing and experience at field IG offices is a constant challenge. They said that field IGs compete for resources with military components engaged in military actions around the world. Consequently, fully staffing field IG offices is a lower priority than staffing other service branch components. In addition, as noted above, field IG investigators are transient positions and often have little experience and time

to develop investigative expertise. MRI and the service IG officials also said that field IG investigations suffer from the frequent movement of witnesses to new posts and assignments during an investigation.

Service IG officials told us that these staffing issues were the main reasons for delays in completing reprisal investigations in a timely manner. In addition, one of the officials said that MRI contributes to delays in completion of service IG investigations by having developed a reputation for requiring a heavily documented file for its review and approval. A service IG official also said that the field IGs were doing more investigative work than was necessary at the early stages of a case because of the perception that MRI would not approve a proposed disposition without extensive investigation. As a result, in some instances this service IG official said he received and forwarded to MRI "binders" in cases that he believed could have been disposed of by way of a very brief preliminary analysis.

The service IGs we interviewed described their processes for handling reprisal complaints as generally similar. Complainants typically bring reprisal allegations to a field IG, which reports the matter up the chain through its major command IG to the headquarters IG unit that oversees reprisal investigations. The headquarters IG notifies MRI of the complaint. However, MRI assigns most cases to field IG offices for investigation.

MRI relies primarily on the service IGs to ensure that cases it delegates to the service IGs are assigned to a field IG outside the chain of command of the parties involved in the complaint. MRI's Director told us that the service IGs are familiar with the statutory requirement that reprisal complaints be investigated outside the chain of command, but that because there are literally hundreds of field IGs it would be difficult for MRI to trace chains of commands in all instances.

Like MRI, the service IGs conduct a preliminary analysis of the complaint before initiating a full investigation. At the preliminary stage, the field IG interviews the complainant and collects relevant documents. If the field IG determines through a preliminary inquiry that no reprisal occurred, the field IG sends its report to the major command IG, and the major command IG forwards the report to the headquarters IG. The headquarters IG reviews the report, and if the headquarters IG concurs with the field IG's report it sends the report to MRI with a recommendation that the case be closed.

If a complaint cannot be resolved after preliminary inquiry, a full investigation is conducted, usually by the field IG. The full investigation includes sworn testimony from the complainant, management officials, and other witnesses, as well as a review of all relevant documentation. At the end of the investigation, the field IG finds the allegations substantiated or not

substantiated and prepares a report for review by the headquarters IG. If the headquarters IG agrees with the report's conclusion, it sends the report to MRI for approval. If the headquarters IG disagrees with the finding, it seeks to resolve the matter with the field IG. If it is unable to do so, the headquarters IG may send the report to MRI with an addendum explaining the disagreement. MRI makes the final decision.

Typically, all reports sent to the headquarters IG include a legal review conducted by the field IG's lawyer, as well as by the major command IG's legal staff. If the report does not include a legal review, the headquarters IG requests that one be conducted by its legal staff before sending the matter to MRI for approval.

Since mid-2008, pursuant to a memorandum of understanding with the Department of the Army IG, MRI has been conducting the preliminary inquiries for all reprisal allegations arising in the Army, regardless of whether the complaint is initially received by MRI or by an Army IG office. This process was adopted because the large number of reprisal complaints to Army IG offices led to lengthy delays in the investigative process for such cases.

E. Process After MRI Closes a Case

If MRI does not substantiate a reprisal complaint, the complainant may file an application with the appropriate Board of Correction seeking to have the unfavorable personnel action removed from his service record. The Board staff member we spoke with told us that disagreement with an MRI finding is rare. According to this staff member, the Board is not bound by MRI's finding and Board officials give each matter a fresh look and "do what they think is right." Appeals from the decisions of the Boards of Correction are to the Secretary of Defense.

If MRI substantiates a reprisal complaint, the DOD OIG has no authority to require the military department to take action. The complainant must still apply to the service's Board of Correction to have the unfavorable personal action corrected. However, according to the Board staff member we spoke with, the Boards typically accept the DOD OIG's finding that the personnel action was a result of reprisal. The decision to take action against the retaliator belongs to the relevant service. MRI said it tracks whether the service takes corrective action.

F. Training and Information Sharing Between MRI and the Service IGs

MRI provides training periodically for service IGs and regularly sends team leaders and investigators to present a session about reprisal investigations at the services' "IG school" training courses. The service IGs we interviewed told us that they looked to MRI as the reprisal experts and said they would welcome additional training and guidance from MRI.

Over the years, MRI's Director and team leaders said they have at times met approximately quarterly with their counterparts at the headquarters service IGs to discuss emerging issues, interpretations of the reprisal statute, best practices, and uniform investigative standards. However, the service IGs we met with told us that such meetings have not occurred regularly and seem to have lapsed because of MRI staffing shortages. One service IG official told us that interaction with MRI "used to be better" when the quarterly meetings were being held more regularly and described the quarterly meetings as a "great exchange of ideas" on topics of interest to the service IGs. MRI also distributed "delinquent case reports" at the meetings and discussed the status of pending cases. The service IG officials uniformly suggested resumption and expansion of these meetings.

Another service IG official told us that MRI's quarterly meetings had provided a good forum for discussion of issues related to reprisal cases. This same service IG official emphasized that it would be helpful if MRI developed consistent standards to be applied in all cases and suggested that MRI should capture and distribute as "precedent" certain of its cases involving definitions of terms and interpretations of the statute and regulations so all the services as well as MRI could apply more consistent standards across cases. Several of the service IG officials we interviewed said that MRI should update and reissue its guidance and instructions for investigating reprisal complaints.

G. Review of MRI Files

We reviewed a sample of 21 files of cases handled by MRI, selected from cases closed within the past 3 years. We included in our sample cases arising from each of the services. We examined investigations conducted by MRI, as well as MRI's oversight of service IG reprisal investigations. Table 3 shows the breakdown of the types of cases we reviewed.

Table 3

MRI Reprisal Case Files Examined
During DOJ OIG's Review
(by type of investigation and service branch)

	Army	Navy	Air Force	Marines
MRI-Conducted Investigations				
Preliminary Inquiries	3	1	1	1
Full Investigations	1	1	1	
Allegation(s) substantiated	1	1		
MRI Oversight of Service IG Investigations				
Preliminary Inquiries		1	1	
Full Investigations	1	1	1	1
Allegation(s) substantiated	1	1	1	1

SECTION IV: FINDINGS AND RECOMMENDATIONS REGARDING THE MILITARY REPRISAL PROCESS

In this section we describe our findings and recommendations regarding the DOD OIG's handling of whistleblower complaints alleging reprisal. In summary, we concluded that MRI has implemented processes and procedures that are generally effective in ensuring that complaints are adequately investigated and resolved. However, we believe that improvements are needed to help ensure that the DOD OIG's military reprisal program is timely satisfying its obligations under the statute and more effectively protecting members of the services from reprisal. We also note that while the DOD OIG began making some reforms during the period of our review that are consistent with several of our recommendations, other of our recommendations go beyond the reforms currently being implemented.

A. Findings

We found that MRI generally is staffed by experienced investigators and supervised by knowledgeable managers. All of MRI's full-time investigators are civilian employees, but most have military service in their background. In general, the managers and staff we interviewed appeared to be professional, conscientious, and dedicated to their work.

We also found that MRI has established procedures and protocols designed to ensure that complaints are adequately investigated and fairly resolved. Based on our review of 21 files, we found that MRI produces written reports that adequately describe the facts of the cases and the reasons for MRI's disposition of the matter. The files we reviewed contained documentation of the activity in the case from opening to closure by MRI, including the number of days the case was open, an MRI report, correspondence with the service IG about MRI's disposition of the case, and transcripts of recorded testimony and copies of documentary evidence gathered in the case. In cases investigated by MRI, the files included initiation letters from the assigned investigators to the complainant informing the complainant that an investigator had been assigned to the case and providing the investigator's contact information. The file also included certified mail correspondence with the complainant about the outcome of the case. In addition, the files show contact between MRI investigators and complainants in connection with the initial interview of the complainant, often in connection with a subsequent interview of or follow-up questions posed to the complainant, and also when there was a change in the investigator assigned to the case. In cases investigated by the service IGs, MRI's files contained letters requesting that the service IG notify the complainant of the outcome of the investigation. In some cases, the service

IG's subsequent letters to complainants were included in MRI's files. Although we found evidence in some files of contact by the service IG with the complainant during the course of the investigation, it was not always clear from the files that the service IGs were as consistent in keeping in contact with the complainant as was MRI.

In the sample of MRI files we examined, MRI oversight cases were generally closed within about 2 months of MRI receiving the case from the service IG. However, these cases were often pending with the service IGs for lengthy periods. The files we reviewed of cases investigated by MRI, whether preliminary inquiries or full investigations, took anywhere from 6 months to over 2 years to resolve, with several investigations lasting well over a year.

From our review of these case files, it appears that MRI conducts thorough investigations. The files we reviewed were often voluminous and included transcripts of recorded interviews of relevant witnesses and relevant documentary evidence. Generally, the interview transcripts showed that witnesses were questioned about appropriate subject matter and that the investigators' approach was probing.

The files we examined in which MRI reviewed investigations conducted by the service IGs also were generally thorough and complete. However, some of the cases we reviewed that were investigated by the service IGs and reviewed by MRI reflected the inexperience and lesser knowledge of the service IGs about reprisal investigations. We found instances in these files where information of marginal relevance or that was extraneous to the issues in the case was included.

We also found that most military reprisal investigations, whether handled by MRI or the service IGs, are not completed within the 180-day time period provided for by the statute. Based on our interviews, we found that service IGs compete for investigators and resources with components engaged in military actions around the world. Consequently, fully staffing service IG offices is a lower priority than staffing other service components. In addition, service IG investigators are rotational positions and as a result these IG investigators often have little experience and insufficient time to develop expertise in investigating whistleblower complaints. Service IG investigations also suffer from the frequent movement of witnesses to new posts and assignments in the course of an investigation. MRI may also contribute to delays in completion of service IG investigations by its having developed a reputation for requiring a heavily documented file for its review and approval.

In our judgment, the failure of MRI to meet consistently the statutory time deadline is largely a function of insufficient staffing to handle the large and growing number of reprisal allegations. One factor that contributed to

delays in MRI's case processing during our review was the failure promptly to fill a team leader vacancy.

We also found systemic factors that appear to contribute to MRI's backlog and delays in case processing. The most significant factor was the influx of new cases resulting from MRI's memorandum of agreement with the Army IG to handle the preliminary inquiries of all reprisal complaints arising in the Army. Shifting all such preliminary inquiries from Army IG offices to MRI has more than doubled MRI's pending cases over the last year, and until recently no additional investigative staff were allocated to MRI to handle the increased workload. In addition, the extensive editing and re-writing of reports and other MRI processes such as requiring that team leaders attend interviews of complainants caused delays in MRI's timeliness.

We found that the military reprisal program has not had a high profile within the DOD OIG. One senior DOD OIG manager told us that MRI matters are rarely discussed within the OIG and substantiated cases of reprisal are not publicized. In addition, Senior Officials Directorate investigators are compensated on a higher pay band than MRI investigators.

With regard to the service IGs, we concluded that MRI could improve its oversight of their work. Staffing of the field IG offices that conduct investigations is transitory, and the field IG investigators may have little or no investigative experience, let alone experience in handling military whistleblower cases. In light of these factors, we do not believe that the training and guidance MRI has provided the service IGs has been adequate.

In addition, as noted above, the service IGs conduct a large number of reprisal investigations and are therefore responsible for some of the delay in completing these investigations. Yet, MRI has made little effort to track the status of cases that have been assigned to the field IGs or to prompt the service IGs for more timely action.

We also found that MRI relies primarily on the service IGs to ensure that delegated cases are assigned to investigating entities that are outside the chain of command of the parties involved in the complaint. This is not only statutorily required, it is also an important factor in ensuring that reprisal investigations are perceived as fair and unbiased. Although the MRI Director told us that the service IGs are familiar with the requirement that reprisal complaints be investigated outside the chain of command and that because there are hundreds of field IGs it would be difficult for MRI to trace chains of commands in all instances, we believe that MRI should do more to ensure that cases delegated to the service IGs are assigned for investigation outside the chain of command of the involved parties.

Based on our review, including our examination of a sample of MRI case files, MRI makes an effort to communicate with complainants regarding their complaints and reports the results of MRI investigations to them. Nevertheless, the POGO representatives we spoke with told us of the perception by complainants that they often are not kept well-informed about the status of their complaints. We believe that part of this perception may be caused by a less than diligent effort by some of the service IGs to keep complainants informed regarding delegated investigations.

We therefore make the following recommendations to enhance MRI's oversight of the service IGs and improve the overall efficiency and effectiveness of the program.

B. Recommendations

Based on our review, we make the following recommendations to the DOD IG regarding the operation of the MRI.

1. Hire Additional Investigators and Team Leaders

We recommend that MRI hire additional investigators and team leaders. As noted in Section III, during the pendency of our review the DOD IG authorized MRI to hire 8 more investigators and 2 more team leaders. MRI should fill these positions as quickly as possible and ensure that the new staff members receive adequate and prompt training.

2. Evaluate How MRI Allocates its Resources

We recommend that MRI evaluate how to use its expanded resources to best address the needs of the military reprisal program. MRI now has about 9 months experience handling the preliminary inquiries of all reprisal complaints arising in the Army. Based on an assessment of that experience, MRI should consider whether it should use its new resources to conduct the preliminary inquiries of reprisal complaints arising in all of the services. Such a model would have several potential benefits. It would enable MRI to have greater control of the time in which preliminary inquiries are completed, ensure that the initial review of all complaints was handled outside of any military chain of command, and broaden the impact of MRI's expertise in identifying the types of cases that warrant further investigation.

However, MRI's evaluation of the optimal allocation of its resources should balance the above potential benefits against its ability to conduct oversight of the reprisal investigations it delegates to the service IGs and to provide training and ongoing guidance to the service IGs.

MRI currently identifies cases from among the preliminary inquiries that it retains for full investigation instead of referring them to a service IG. We recommend that MRI consider establishing specific criteria to identify the categories of cases from among preliminary inquiries that would benefit most from MRI's expertise in handling the full investigation.

3. Create Dedicated Administrative and Training Positions

In the past, MRI has tasked investigators and team leaders to handle administrative and training projects as collateral duties. This has resulted in lapses in providing updates and guidance to the service IGs, reductions in training and meetings with the service IGs, and diversion of investigative resources.

We recommend that dedicated positions be created for these functions. We understand that the DOD OIG has recently authorized three positions that will serve the AI Division as a whole. However, the DOD IG should consider whether these shared positions will be sufficient to provide the level of support required by MRI.

4. Evaluate the Current Report Drafting and Editing Process

During our review, MRI team leaders, MRI investigators, and service IG officials often commented about MRI's demanding report drafting and editing process. We appreciate the value of a quality written product. However, at some point the timely completion of a product outweighs the marginal value of improvements resulting from additional time and energy spent drafting and editing these reports. We recommend that MRI evaluate whether its current demands for report drafting and editing can be improved and streamlined to produce a professional product in a more timely fashion.

5. Eliminate Requirement that Team Leaders Attend Complainant Interviews

Team leaders and investigators reported to us that team leaders can cause bottlenecks in the system due to their limited number and heavy workload. Specifically, several investigators reported delays caused by having to wait for team leaders to be available before conducting complainant interviews.

Complainant interviews are not the first step in the investigative process. To the contrary, prior to the interview the investigator has thoroughly reviewed the file, collected relevant documentary material, and discussed the case with the relevant team leader. Moreover, most MRI investigators are experienced. We recommend that MRI consider modifying its policy so that team leaders participate in complainant interviews only

when needed, such as when the matter involves an inexperienced investigator, particularly complex facts, or other special circumstances.

6. Elevate Supervision of the AI Division to a Deputy Inspector General

We believe that the AI Division should be under the direction of a DOD Deputy IG so that MRI is overseen by an official who reports directly to the DOD IG. This structure raises the profile, attention, and priority given to the work of MRI, as well as the other components of the AI Division, within the DOD OIG. This structure also means that administrative investigations no longer compete for higher-level management attention and resources with criminal investigations. We note that the recent DOD OIG organizational restructuring, undertaken on the Acting IG's initiative, elevated supervision of the AI Division to a Deputy IG. We believe that this change was warranted and should continue.

7. Develop a Strategy to Bring Attention within the Services and to the Public to Substantiated Cases of Reprisal

To the extent permitted by law, we recommend that the DOD OIG publicize the results of investigations that substantiate allegations of reprisal. Doing so would heighten awareness within the services of the reprisal law, potentially deter future incidents of reprisal, and possibly encourage other reprisal victims to come forward. In this regard, MRI should consider creating summaries of substantiated cases and distributing them to the service IGs.

8. Consider Carefully the Allocation of Resources within the AI Division to Reflect the Priority the DOD OIG Places on the Military Reprisal Program

The scope of this review did not encompass an assessment of DOD OIG's allocation of resources among AI Division units or elsewhere within the OIG. However, we recommend that when allocating resources, assigning collateral duties, or making other decisions that may affect one or more unit's ability to perform its mission, the DOD IG allocate adequate resources to reprisal investigations to demonstrate commitment to the military reprisal program and the needs of MRI. For example, we recommend that management of the AI Division ensure that the newly authorized division-wide positions address MRI's critical needs in training and providing updated guidance to the service IGs. In addition, as discussed in Section III, investigators assigned to the Senior Officials Directorate are eligible for higher grades than MRI investigators. As a result, MRI may be at a disadvantage in recruiting, and MRI investigator positions may be viewed as less prestigious than Senior Official Directorate slots. We recommend that the DOD IG

evaluate the grade level of MRI investigator positions compared to that of Senior Official Directorate slots.

9. Enhance Training for and Communication with Service IGs

We recommend that MRI substantially enhance its training program for service IGs and consider instituting a requirement that any service IG investigator assigned to handle a military reprisal matter have received a standard course of training on such cases. We also recommend that MRI resume regular meetings with service IGs to discuss recurring issues, emerging issues, "lessons learned," and best practices. In addition, we recommend that MRI focus additional attention on creating and updating written policy guidance regarding whistleblower law, including recurring and emerging issues, best practices, and precedent, which could be provided as an aid to the service IGs. These issues should be a priority for the newly created AI Division training position.

10. Consider Instituting a Protocol to Ensure that Service IGs Assigned to Delegated Investigations are Outside the Chain of Command

We recommend that MRI require the service IGs to report to MRI the name of the investigating IG at the time an investigation is first opened. We further recommend that MRI consider requiring the headquarters level service IGs to maintain a record of the investigating service IG and to report that information to MRI when a delegated investigation commences.

11. Create a Tickler System that Prompts MRI Staff to Periodically Check on the Status of Delegated Matters

As discussed above, the service IGs have had difficulty conducting reprisal allegations in a timely manner. Currently, MRI makes little effort to periodically check the status of delegated investigations. We believe that active tracking of service IG cases and prompting by MRI could help improve the timeliness of investigations at the service IG level. Accordingly, we recommend that MRI enhance its automated tracking of delegated investigations and create a tickler system that would prompt MRI staff to inquire about the status of delegated cases at regular intervals.

12. Improve Service IGs Communication with Complainants

We recommend that MRI work with the management officials from the service IGs to ensure that complainants are timely informed of the status of the investigations conducted by the service IGs.

SECTION V: CONCLUSION

Our review found that the biggest challenge MRI faces is timeliness. MRI has not been able to come close to resolving complaints within the statutory 180-day deadline. These delays are detrimental both to the complainant, who is left without a resolution, and to the accused managers, whose careers may be put on hold while the matter is being resolved. Accordingly, we make several recommendations aimed at helping MRI reduce the amount of time it takes to process whistleblower complaints.

In addition to the issue of timeliness, we found MRI needs to improve the way in which it interacts with and oversees the work of the service IGs. In view of the large and growing number of reprisal investigations being handled by the service IGs, MRI should provide greater oversight, training, information sharing, and guidance to the service IGs. The service IGs recognize that they lack MRI's expertise in reprisal investigations, and we found that the service IGs would welcome MRI taking on a greater oversight role of their reprisal work. It appears that some of the service IGs are not as diligent in keeping complainants informed of the status of their complaints, and we believe that MRI should do more to ensure that they maintain adequate lines of communication with complainants.

We also found that the military reprisal program has not had a high enough profile within the DOD OIG.

In this report, we make 12 recommendations to the DOD IG regarding the operation of MRI and the service IGs in handling of military reprisal investigations. We believe that, if implemented, these recommendations can help improve the handling of military reprisal investigations within the DOD.

APPENDIX A

APPENDIX A: THE HUDSON CASE

We reviewed MRI's entire oversight file on U.S. Navy Lieutenant Jason Hudson. MRI's file includes the reports, interview transcripts, and documents collected by the various Navy IG offices that investigated the case over a 22-month period beginning in February 2003. We did not conduct any independent investigation of the matter, and therefore the summary of the Hudson case below is based on the file materials and is not a detailed recitation of all the facts in the case.¹

Hudson's reprisal complaint arose in November 2002. At the time, he was assigned to a management position in the Navy's Nashville, Tennessee, recruiting office. Hudson had been transferred to Nashville in March 2002 from a similar position in Knoxville to relieve friction in the Knoxville recruiting office between Hudson and another employee. The commanding officers told Navy investigators that in transferring Hudson they saw an opportunity to monitor Hudson more closely and improve his prospects for career development.

Hudson's mid-term performance evaluation in July 2002 stated that he was confrontational, had difficulties as a manager in building a cohesive team, and failed to meet deadlines. The Navy IG's interviews of Hudson's supervisors and other witnesses and documents from the investigative file indicate that in the months after his transfer Hudson continued to have problems with deadlines and unprofessional confrontations with members of the Nashville recruiting staff. Hudson's supervisors memorialized these issues in file memoranda and internal e-mails.

In a file memorandum dated August 17, 2002, one of Hudson's supervisors wrote that she had discussed with the commanding officer removing Hudson from his management position because of his increasing difficulties with "people skills." The memorandum stated that Hudson loudly exchanged "curse words" with a subordinate in front of other personnel one day, and had a confrontation the next day with an administrator that involved yelling and swearing. According to the memorandum, Hudson's supervisor returned to the office early from travel because of these events. The same memorandum stated that "Hudson has continued to miss deadlines."

¹ For example, we do not summarize the command structure in which this case arose, the specifics of Hudson's position and responsibilities, the positions of the various other employees with whom Hudson had encounters, the specifics of the reportedly discriminatory recruiting regulation, or the several adverse personnel actions in addition to his demotion that Hudson claimed resulted from his raising the issue of the discriminatory regulation. Instead, we describe the circumstances in which the case arose in general terms.

A file memorandum dated October 9, 2002, written by one of Hudson's commanding officers, referred to "Hudson's bickering" and stated Hudson's supervisor had explained to Hudson that he was not working as a team player and was not listening to his supervisors. In that memorandum, the supervisor wrote that she recommended to the commanding officer that Hudson be relieved of his management position because "things still were not getting better and he was not amenable to change."

In an e-mail to Hudson on October 21, 2002, one of Hudson's supervisors informed him that he had missed a deadline relating to a command inspection and reminded him that he had to improve his efforts to meet deadlines. Another e-mail to Hudson from his supervisor on October 28 expressed concern to Hudson about the "incompleteness of personnel evaluations submitted from his department."

On November 18, 2002, two civilian members of Hudson's staff met with Hudson's commanding officers to complain about Hudson's interpersonal and management skills. They told the officers that morale in Hudson's unit was very low because of Hudson's constant public "bickering" with the chief recruiter and his micro-management of the staff. They also said they felt that Hudson did not trust them to do their jobs because he constantly questioned their work. One of the employees said that she was always fearful of being fired because of Hudson's management of her. She said that Hudson had told her that he would not have hired her.

Also on November 18, Hudson initiated two meetings: one with his commanding officer and the second with an equal opportunity assistant in the recruiting command. At these meetings, Hudson complained that a Navy recruiting regulation that had been implemented on October 8, 2002, was discriminatory and, therefore, illegal.²

On November 21, 2002, Hudson's supervisors' demoted him, relieving him of his management position, and re-assigned him to be an Officer Recruiter. In a file memorandum on that date, Hudson's commanding officer wrote that he was taking the action because of the way Hudson "has continued to treat personnel in his department." Hudson's commanding officer also wrote that he told Hudson that the quality of his work was overshadowed by the way he dealt with his staff and that Hudson had created an environment that many of his personnel considered uncomfortable. The memorandum stated that the commanding officer cited to Hudson several of the interpersonal incidents in

² The recruiting regulation had set higher enlistment eligibility testing standards for certain minority recruits than for other minorities and non-minorities.

which Hudson was involved, which had contributed to the decision to demote him.

A report in the MRI file showed that Hudson was not the first to question the recruiting regulations, and that the Navy had received numerous complaints about the regulation. The Navy rescinded the recruiting regulation on November 21.

In February 2003, Hudson made his allegation to investigators assigned to the IG's office of the Commander, Naval Recruiting Command that he was demoted because of his complaint about the recruiting policy. He alleged that he had not been told previously that his supervisors had concerns about his performance and his interactions with other employees. That field IG conducted an investigation and in an April 2003 report concluded that Hudson's reprisal complaint was not substantiated. However, the report did not meet the technical requirements for a reprisal investigation because it did not expressly address the components of a reprisal complaint.³ A reviewing Navy IG, the IG for the Bureau of Naval Personnel, requested that the field IG comply with such requirements.

In February 2004, the IG for the Commander, Naval Recruiting Command, completed a second report and also found Hudson's reprisal complaint unsubstantiated. The IG for the Bureau of Naval Personnel reviewed the second report of the field IG and concurred that Hudson's demotion was not an act of reprisal. The reviewing IG issued its report in August 2004.

On November 16, 2004, the Navy IG concurred with the field and reviewing IGs' conclusion of no retaliation, and forwarded all three reports to MRI. The Navy IG concluded that Hudson had been relieved of his management position because of his abrasive and confrontational management and interpersonal style, and not in retaliation for "blowing the whistle" on the Navy's discriminatory recruiting regulation. The reviewing Navy IG's report stated that the evidence showed that Hudson had been counseled about being abrasive and confrontational, contained documents and statements of Hudson's supervisors and other witnesses, and concluded this evidence was more credible than Hudson's claim that he had not been told about his supervisors' concerns.

³ The four questions, identified for service IGs in guidance provided by the DOD OIG based on the military reprisal statute, are: (1) Did the military member make a protected communication? (2) Was an unfavorable personnel action taken or threatened following the protected communication? (3) Did the official responsible for taking the personnel action know about the protected communication? and (4) Does the evidence establish that the personnel action would have been taken if the protected communication had not been made?

The Navy IG forwarded the investigative reports to MRI, which concurred with the Navy IG's conclusion on February 17, 2005. MRI notified the Navy IG of its concurrence by letter dated March 3, 2005. The Navy IG informed Hudson that it did not find his complaint to be substantiated and forwarded to him a copy of the reviewing IG's investigative report by letter dated March 28, 2005.

MRI's file also indicated that MRI's first contact with the Hudson case occurred while the investigation was still being investigated by the Navy IG, several months before MRI received the Navy's final report. In this contact, an MRI investigator who was serving as the MRI Director's Executive Assistant returned a telephone call from Hudson's attorney. The attorney had called to alert MRI about his client's complaint. The MRI investigator, who later handled the review of the Navy IG's report of investigation in the Hudson case, continued to receive telephone calls from Hudson's attorney before MRI received the Navy's report. The file indicates that as a result of these calls, the MRI investigator would contact the Navy IG to check on the status of the investigation. The MRI investigator told us that, based on the information provided by Hudson's attorney in these telephone calls, she developed a view of the matter that was sympathetic to Hudson.

According to the MRI investigator, when the Navy IG forwarded the Hudson case to MRI, the investigation received priority attention because of the level of "outside interest" in it.⁴ The MRI investigator said she reviewed all the evidence and read all of the Navy IG reports, and that she concluded that the Navy IG reached the correct conclusion. According to the investigator, the Navy's investigation showed that Hudson had problems dealing with subordinates and superiors in that he was too aggressive. The investigator said that the evidence also showed that Hudson was told about these problems multiple times and that civilian employees had complained and said they could not work with Hudson. The investigator stated that the Navy IG's investigations contained all the information that was needed to make a decision in the case.

The investigator therefore recommended to MRI's Director that the case be closed. MRI's Director supervised the investigator's oversight review of the Hudson case because the investigator was working as the Director's Executive Assistant and the Director had been involved in the case from the beginning when Hudson's attorney first called MRI. The MRI Director agreed with the MRI investigator and the Navy IG's conclusion in the case.

⁴ The outside interest appears to refer to Hudson's attorney's contact with MRI, and a high-level DOD official's request to the DOD IG to "look into this matter and respond" to Hudson's attorney. The attorney was an acquaintance of the high-level DOD official.

Our review of the Hudson case file indicated that MRI's concurrence with the Navy IG's conclusion that Lieutenant Hudson was not a victim of reprisal was not unreasonable. The file contained evidence that Hudson's supervisors had voiced concerns about his performance for several months before his November 2002 report that he believed the Navy had implemented a discriminatory recruiting regulation.

For example, the evidence showed that Hudson was transferred in March 2002 because of friction between Hudson and a subordinate. In Hudson's mid-term performance evaluation in July 2002, he was told that he was confrontational, had difficulties as a manager in building a cohesive team, and failed to meet deadlines. In addition, file memoranda from Hudson's supervisors indicated that Hudson's difficulties in these areas persisted and that he was advised of his need to improve.⁵

In August 2002 one of Hudson's supervisors wrote in a file memorandum that she had discussed with the commanding officer removing Hudson from his management position because of his increasing difficulties with "people skills." The evidence also indicated that Hudson's problems escalated and that he was involved in several interpersonal incidents in October 2002, causing one of Hudson's supervisors to again recommend to the commanding officer that Hudson be relieved of his management responsibilities. Moreover, on November 18, 2002, immediately prior to Hudson being relieved of duty, Hudson's supervisors' met with two of Hudson's subordinates, who complained about Hudson's interpersonal and management skills.

It is true that on that same date, Hudson reported his concern that the Navy's recruiting regulation was illegal. In isolation, Hudson's demotion 3 days after disclosing his concerns about the recruiting regulation raises an inference that the two events were connected. However, considering the record of Hudson's performance history, the escalating series of events in October 2002, one supervisor's recommendation in August and again in October that Hudson be relieved of his supervisory responsibilities, and ultimately Hudson's supervisors' meeting with Hudson's subordinates, we believe it was not unreasonable for the Navy IG investigation to conclude, and for MRI to concur, that Hudson was not demoted in retaliation for making the disclosure.⁶

⁵ A report of the oversight investigation conducted by Senator Grassley's staff questioned the Navy IGs' accepting these file memoranda as evidence. However, the file memoranda were consistent with the other evidence, such as Hudson's mid-term performance evaluation, internal e-mails, and witness statements.

⁶ It is also noteworthy that Navy personnel other than Hudson reported concerns over the recruiting regulation, and that the Navy rescinded the regulation on November 21, one and one-half months after its implementation.

Moreover, our review of MRI's file in the Hudson case and our interviews of the MRI personnel who conducted that review showed that MRI was alerted by Hudson's attorney to the issues in the case at an early stage and that it gave the case substantial attention and reviewed it with care.

However, our examination of the Hudson case leads us to make several observations about MRI's oversight of the service IGs. We noted that the initial investigation of Hudson's allegations, which concluded that Hudson's reprisal claim was not substantiated, was returned to the investigating service IG by a reviewing Navy IG because the report of the investigation did not expressly address the four "key questions" relevant to reprisal claims. Consequently, a reviewing Navy IG appropriately returned it for further investigation. The investigating service IG's second report conducted the required reprisal analysis and reached the same conclusion -- that Hudson's claim was not substantiated. Subsequently, the reviewing Navy IG issued a third report, again concluding that Hudson's demotion was not in reprisal for his raising concerns about the discriminatory recruiting regulation. These multiple layers of investigations, reviews, and reports provide concrete examples of problematic issues relating to the efficiency and effectiveness of the service IGs' investigations. This case, among other things, informed our recommendation that MRI establish an ongoing comprehensive training program for service IGs and conduct closer oversight of investigations being conducted by the service IGs.