THE INHERENT CONFLICT OF INTEREST WITH DOJ'S OPR AND DAVID MARGOLIS

Who watches the watchers? Always a valid question; today I want to look at the DOJ Office of Professional Responsibility and its conduct in the investigation of United States governmental attorneys, specifically within the Office of Legal Counsel, involved in the Bush/Cheney torture program. Aside from the facts and conclusions (discussion underway here, here and here), the report is notable for the process producing it, namely the DOJ investigating itself and, not so shockingly, exculpating itself. This will be the first in a series of more specific posts on this blog discussing the multiple, and severe, conflict of interest issues inherent in the OPR Report.

The first, and most obvious, issue of conflict with OPR is that it places evaluation and resolution of ethical complaints against DOJ attorneys in the hands of the DOJ. The power to determine whether there is any impropriety is solely within the hands of those supervising and/or ultimately responsible for the impropriety. Pursuant to 28 C.F.R. § 0.39a, OPR reports directly to the Attorney General and Deputy Attorney General. A vested interest if there ever was one.

Most governmental agencies have independent Inspectors General which operate independently of the agency leadership, have jurisdiction of the entire agency including legal counsel, and thus have credibility as somewhat neutral and detached evaluators and voices. Not so the DOJ, who has arrogated upon themselves the sole right to sit in judgment of themselves. This action to grab the exclusive authority for themselves and exclude the independent IG was first accomplished by Attorney General Order 1931-94

dated November 8, 1994 subsequently codified into the Code of Federal Regulations and reinforced through section 308 of the 2002 Department of Justice Reauthorization Act. Just in time for the war on terror legal shenanigans!

Glenn Fine, the DOJ IG has given Congressional testimony to the US Senate regarding the inherent conflict:

> Second, the current limitation on the DOJ OIG's jurisdiction prevents the OIG – which by statute operates independent of the agency – from investigating an entire class of misconduct allegations involving DOJ attorneys' actions, and instead assigns this responsibility to OPR, which is not statutorily independent and reports directly to the Attorney General and the Deputy Attorney General. In effect, the limitation on the OIG's jurisdiction creates a conflict of interest and contravenes the rationale for establishing independent Inspectors General throughout the government. It also permits an Attorney General to assign an investigation that raises questions about his conduct or the conduct of his senior staff to OPR, an entity that reports to and is supervised by the Attorney General and Deputy Attorney General and that lacks the insulation and independence guaranteed by the IG Act.
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> This concern is not merely hypothetical. Recently, the Attorney General directed OPR to investigate aspects of the removal of U.S. Attorneys. In essence, the Attorney General assigned OPR – an entity that does not have statutory independence and reports directly to the Deputy Attorney General and Attorney General – to investigate a matter involving the Attorney General's and the Deputy Attorney General's conduct. The IG Act created OIGs to avoid this type

> of conflict of interest. It created statutorily independent offices to investigate allegations of misconduct throughout the entire agency, including actions of agency leaders. All other federal agencies operate this way, and the DOJ should also.
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> Third, while the OIG operates transparently, OPR does not. The OIG publicly releases its reports on matters of public interest, with the facts and analysis underlying our conclusions available for review. In contrast, OPR operates in secret. Its reports, even when they examine matters of significant public interest, are not publicly released.

The entirety of Fine's testimony is instructive, the cited portion is taken from pages 12-16.

So what do the numbers and data exhibit for the OPR's effort at professional responsibility and accountability? Not a very compelling story at all. From a *Crime & Federalism* look at the 2006 numbers which were, until recently, the most current information available:

> Of 869 complaints, less than 10% were even deemed worthy of an investigation. Not bad, right? Even if you're reported, the odds are clearly in your favor.
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> Perhaps one will say that crank litigants make a lot of frivolous complaints. That would be wrong. Sixty-nine percent of investigated complaints were initiated by judges. Private lawyers and private litigants amounted for less than 3% of complaints leading to investigation.
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> Of the 84 cases worthy of investigation (58 of which were cases where a judge had already found prosecutorial misconduct), in only 18 cases were prosecutors disciplined. According to

> OPR, there is a crisis within the federal judiciary.
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> Federal judges are making frivolous allegations of prosecutorial misconduct. After all, federal judges found prosecutorial misconduct in at least 58 cases. Yet OPR only found prosecutorial misconduct in 18 of those 58 cases. (58-18 = 40 federal judges filing frivolous complaints.)
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> The numbers don't add up. DOJ's Office of Professional Responsibility investigated less than 10% of all reported cases of prosecutorial misconduct. While federal judges found prosecutorial misconduct in 58 cases, DOJ only found prosecutorial misconduct in 18 of those 58 cases. It's pretty clear that the Department of Justice cannot be trusted to investigate itself.
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> Self-policing is a failure. In 2009 alone, there have been nearly a dozen high-profile cases of prosecutorial misconduct. If OPR continues its mission, those prosecutors can sleep easy. The odds are clearly on their side.

The just recently released 2007 OPR Annual Report is no better than that of 2006, and arguably even more bleak.

So how can the public have trust in the determinations of the OPR when it comes to allegations of misconduct by high level DOJ officials? Simply put, it cannot. Judges have no trust nor respect for the OPR either. In January of 2008, Massachusetts District Court Judge Mark Wolf sent a scathing letter to the Attorney General stating *inter alia*:

> "The [Justice] Department's performance in the Auerhahn matter raises serious questions about whether judges should continue to rely upon the department to

> investigate and sanction misconduct by federal prosecutors," wrote Wolf, who last July, after expressing frustration with his punishment, took the unusual step of asking the Massachusetts Board of Bar Overseers to launch disciplinary proceedings against Auerhahn.
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> Wolf also wrote that "the department's failure to be candid and consistent with the court has become disturbingly common in the District of Massachusetts."

Wolf is far from alone, from a fantastic and stunning article in the American Bar Association Journal entitled "The Roach Motel" comes the description of how Judge Emmet Sullivan of the DC District Court feels about the competence of the OPR:

> Mistrusting the OPR, Sullivan took things a step further. He dismissed the case on April 7 and appointed a special prosecutor to investigate six of the lawyers from the department's Public Integrity Section involved with the trial.
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> The judge said he had been lodging OPR complaints for varying violations since autumn, but had heard nothing of them. "The silence has been deafening," he said. And the latest round of ethical accusations was "too serious and too numerous," Sullivan said, to entrust the investigation to an office controlled by the attorney general with "no outside accountability."
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> Defense attorney Sullivan told the court he'd complained three times to Mukasey about the conduct and never received so much as an acknowledgment. "Shocking, but not surprising," Judge Sullivan responded.

Two more lines from the American Bar Association

speak volumes:

> "I used to call it the Roach Motel of the Justice Department," says Fordham University law professor Bruce A. Green, a former federal prosecutor and ethics committee co-chair for the ABA Criminal Justice Section. "Cases check in, but they don't check out."

and

> Under the Bush administration, probes of misconduct often went undisclosed because of the potential for personal embarrassment. Upon taking office, President Barack Obama admonished all federal agencies that such personal or political considerations shouldn't weigh against the public interest. Probes should not be withheld just because they might cause discomfort.
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> "These people should be embarrassed," Green says.

As amply demonstrated by the whitewash at the hands of the OPR and David Margolis, things have not particularly improved in the least under the hope and change of Barack Obama and Eric Holder. *The Roach Motel* is an absolute must read, and the OPR is still an embarrassment.

Time after time the reports of frustration with the OPR process wind up with one name involved: David Margolis. Margolis is not even part of the OPR, yet controls every significant report emanating from the OPR and, by his own admission, has been the sole gatekeeper for any findings of misconduct "since the 1990s". If Margolis has ever found misconduct by higher level officials in the department, I cannot find it. Of course that is not surprising in light of the secrecy and lack of transparency testified to by Glen Fine. Secrecy and opaqueness proudly wielded and ordered at the command of – you guessed it – David Margolis, who is concerned

that his department's attorneys not be "humiliated". Public disclosure and trust is such a quaint thing compared to protecting your own it seems for Mr. Margolis.

This is the one and same David Margolis who, in the rare and previously unheard of instance where findings of professional misconduct by DOJ leaders and/or elite attorneys such as the OLC crew of Yoo and Bybee actually were made by the OPR, took it upon himself to personally and unilaterally gut the findings and protect his own.

But just as there is an inherent conflict in the DOJ's use of the fiction of the OPR to police itself, so too does David Margolis have issues giving the distinct appearance of impropriety. Who and what is David Margolis? A definitive look at the man was made by the National Law Journal (subscription required):

> "Taking him on is a losing battle," says the source. "The guy is Yoda. Nobody fucks with the guy."
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> ….
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> Margolis cut his teeth as an organized-crime prosecutor, and he often uses mob analogies in talking about his career at the Justice Department. When asked by an incoming attorney general what his job duties entailed, Margolis responded: "I'm the department's cleaner. I clean up messes."
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> The analogy calls to mind the character of Winston Wolfe, played by Harvey Keitel in the 1994 film "Pulp Fiction." In the movie, Wolfe is called in by mob honchos to dispose of the evidence after two foot soldiers accidentally kill a murder witness in the back of their car.

Further views into the professional soul of David Margolis, or lack thereof, can be found from Jeff Kaye, Scott Horton and more Scott

Horton.

So, the in-house “Yoda”, who considers himself the “department’s cleaner” is the guy the DOJ put in charge of protecting the American public from the virulent malfeasance of actors such as John Yoo and Jay Bybee, not to mention all the other cases that courts and citizens have been able to get no action on over the years. It seems David Margolis has his own institutional interests that present an appearance of conflict with his duties to protect the public from malevolent lawyering by DOJ attorneys, especially high ranking ones. Pretty much explains everything.

As I said at the outset, this is merely the first in a series of posts discussing the many and severe conflict issues surrounding the OPR Torture Report. From this general introduction, over the next few days, I will have more as will both Marcy and Mary.