

SECRETARY OF LABOR
WASHINGTON, D.C. 20210

MAY 30 2008

The Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, D.C. 20515


Dear Madam Speaker:

Enclosed is the Semiannual Report of the Inspector General of the U.S. Department of Labor for the period October 1, 2007, through March 31, 2008, in accordance with Section 5 of the Inspector General Act. The report covers significant activities, findings, and recommendations for the period.

At page 3 of this report, the Inspector General contends that the Department has taken a new position with respect to the authority of the Office of the Inspector General (OIG) to investigate organized crime and labor racketeering. Please be assured that the Department does not question the authority of the OIG to conduct such investigations. In order to remove any doubt on that issue, I have issued Secretary's Order 01-2008, which directs the Assistant Secretary for Employment Standards to promptly notify the OIG whenever an investigation under the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) uncovers indications of organized crime and labor racketeering and clarifies that the OIG shall have the power to assume the lead in further investigative activities with respect to issues involving organized crime and labor racketeering. The Solicitor of Labor disagrees with the Inspector General's legal position; the Solicitor's legal analysis is attached. I am confident that Secretary's Order 01-2008, which embodies the Department's longstanding policy on the handling of organized crime and labor racketeering investigations, will ensure that this disagreement about Secretarial authority under the LMRDA has absolutely no impact on the operational effectiveness of the OIG.

We appreciate the work done by the OIG and we look forward to continued discussions with the Inspector General about the findings and recommendations in this report.

Sincerely,



Elaine L. Chao

Enclosure

SECRETARY OF LABOR
WASHINGTON, D.C. 20210

MAY 30 2008

The Honorable Richard B. Cheney
President of the Senate
Washington, D.C. 20510

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Sincerely,



Elaine L. Chao

Enclosure



MAY 30 2008

MEMORANDUM FOR THE SECRETARY

From: GREGORY F. JACOB *Greg Jacob*
Solicitor of Labor

Subject: Statement in the Inspector General's Semi-Annual Report Regarding the Secretary of Labor's Authority to Conduct Organized Crime and Labor Racketeering Investigations Under the LMRDA

I have thoroughly reviewed the language in the Inspector General's report regarding the Secretary of Labor's authority to conduct organized crime and labor racketeering investigations under Section 601 of the Labor-Management Reporting and Disclosure Act ("LMRDA"), and have concluded that the Inspector General's position is without factual or legal foundation. The report purports to provide a legal analysis of the effect the Inspector General Act of 1978 ("IG Act") had on the Secretary of Labor's investigative authority under the LMRDA. The report does so, however, without quoting or even referring to the operative language in the IG Act – presumably because the actual language of the statute does not support the Inspector General's position. The report invokes as support for its position a partial quotation from the congressional testimony of former Secretary of Labor Ray Marshall concerning a Secretary's Order he issued in June 1978 – but again, the report fails to reference the actual language of the Secretary's Order. The net effect of these selective omissions, which obscure the true effect of the IG Act in codifying an earlier Secretarial delegation, is to convey a highly misleading impression of the Department's position and of the impact that position could have on investigations conducted by the Office of the Inspector General (OIG).

Any analysis of the underlying legal dispute must begin with the language of the Inspector General Act of 1978. As the OIG report acknowledges, its assertion of exclusive authority "is derived from section 9(a)(1)(J) of the Inspector General Act of 1978." The OIG report claims that section 9(a)(1)(J) "provides for a legislative transfer of authorities previously held by the Department." The OIG report does not quote the actual language of the statute, however, which provides that "[t]here shall be transferred to the Office of Inspector General of the Department of Labor, the office of that Department referred to as the 'Office of Special Investigations.'" ("OSI") (emphasis added). This language makes it indisputably clear that the IG Act transferred to the OIG all of OSI's powers, whatever those powers were – nothing more, and nothing less. If OSI possessed exclusive authority to investigate organized crime and labor racketeering, then so, too, would the OIG. If OSI did not possess exclusive authority to investigate organized crime and labor racketeering, however, the IG Act certainly did not do anything to render that authority exclusive, as it merely transferred to the OIG whatever

that was delegated to OSI by that order was the authority to “[a]dminister[] the Department’s participation in the Organized Crime Strike Force Program.” The OIG report fails to quote the relevant language from the Secretary’s Order, which cannot reasonably be construed as having conferred on OSI exclusive authority over all matters involving organized crime and labor racketeering. Instead of quoting the language from the Secretary’s Order, the OIG report selectively quotes from Secretary Marshall’s April 25, 1978, congressional testimony before the Permanent Subcommittee on Investigations of the Committee on Government Affairs. Read in full, however, Secretary Marshall’s testimony makes it unmistakably clear that OSI did not have exclusive authority over matters involving organized crime and labor racketeering. Secretary Marshall testified that “a number of the Department’s own programs complement the fight against organized crime,” and specifically noted that “we have devoted considerable resources to our enforcement program under the Labor-Management Reporting and Disclosure Act – LMRDA – and 939 individuals have been convicted for violations of the act as a result of referrals we have made to the Department of Justice for prosecution.” In fact, immediately following the Marshall quote regarding OSI that the OIG report cites, Secretary Marshall testified that “the Department has other programs, besides our participation in the Strike Forces, which often have been of assistance in the fight against organized crime; namely, the Labor-Management Reporting and Disclosure Act and the Employee Retirement Income Security Act.” (emphasis added). None of Secretary Marshall’s testimony had anything to do with the IG Act, and the OIG report errs in labeling it “legislative history.” To the extent the testimony has any relevance to the issue of exclusive authority, however, it clearly undermines the position the Inspector General takes in his report.

Moreover, basic principles of delegation law establish that the Secretary could not have delegated to OSI exclusive authority over matters involving organized crime and labor racketeering through Secretary’s Order 8-78. As the Solicitor’s Office memorandum referenced in the OIG report points out, “[a] delegation of authority without such retention of authority in the Secretary would be inconsistent with the statutory mandate that made the Secretary responsible for carrying out the responsibilities entrusted to the Secretary by statute.” *See, e.g.*, 3 U.S.C. § 301; Brenda Lindlief Hall, *Subdelegation of Authority Under the Endangered Species Act*, 20 Pub. Land & Resources L. Rev. 81, 88 (1999) (“the subdelegating agency head cannot surrender totally his or her authority”). Thus, when Secretary’s Order 8-78 delegated to OSI the authority to “[a]dminister[] the Department’s participation in the Organized Crime Strike Force Program,” the Secretary necessarily retained the statutory authority to conduct organized crime and labor racketeering investigations under Section 601 of the LMRDA. There is no support for the Inspector General’s position that Congress *sub silentio* stripped the Secretary of her investigative authority under the LMRDA when it enacted the Inspector General Act of 1978, without uttering a single word to that effect.

It is important to note that the OIG report is at best highly misleading when it claims that “the Office of the Solicitor incorrectly states that the OIG’s labor racketeering authority is derived from a delegation from the Secretary.” It is a matter of historical fact, as outlined above, that the OIG’s labor racketeering authority originated as a delegation to

OSI of authority from the Secretary. Secretary's Order 8-78 delegated to OSI the Secretary's authority to "[a]dminister[] the Department's participation in the Organized Crime Strike Force Program," and the IG Act then transferred OSI to the OIG. The Solicitor's Office has always acknowledged, however, that the OIG's authority to administer the Department's participation in the Organized Crime Strike Force Program is now codified by statute and thus cannot be revoked by the Secretary. In fact, the legal opinion of the Solicitor's Office that is referred to by the OIG report notes that OSI's responsibilities "automatically transferred to the OIG on the date of enactment [of the IG Act]," and expressly concludes that the delegation of authority effected by Secretary's Order 8-78 was "subsequently codified by the IG Act." Nowhere does the legal opinion even remotely imply that the Secretary has the power to revoke or interfere with the OIG's acknowledgedly "explicitly transferred" and "codified" authority.

In light of the above, I am puzzled by the OIG report's statement that the Department's position – that the IG Act did not strip the Secretary of Labor of her investigatory authority under the LMRDA – "may interfere with OIG investigations." In fact, as the report recounts, OIG has had substantial success over the last thirty years in investigating organized crime and labor racketeering activities, despite the fact that the Department has never accepted OIG's position that it has exclusive authority in this area. Moreover, it is difficult to see how OIG's authority in this area could possibly be interfered with as an operational matter, since the Secretary has made quite clear that agencies identifying evidence of organized crime and labor racketeering are required to promptly notify the OIG, and that the OIG then has the authority to assume the lead over the organized crime and labor racketeering elements of the investigation. *See, e.g.*, Secretary's Order 01-2008. In other words, OIG already has the right of first refusal to assume the lead in any organized crime and labor racketeering investigation within the Department.

In sum, it appears that the OIG and the Department are in virtually complete agreement about how the Department's organized crime and labor racketeering investigations should be run as an operational matter. The Solicitor's Office finds no legal support, however, for the OIG's view that the Inspector General Act of 1978 *sub silentio* stripped the Secretary of Labor of her investigative authority under Section 601 of the LMRDA.