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Office of the Inspector General
U.S. Department of Justice



**A Report of Investigation
of Certain Allegations Referred by the
Office of Special Counsel Concerning
the Juvenile Justice and Delinquency
Prevention Act Formula Grant Program**

Oversight & Review Division 17-03

July 2017

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NOTICE

This report contains a limited number of redactions to protect the privacy interests of an individual.

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EXECUTIVE SUMMARY

The Department of Justice (Department or DOJ), Office of the Inspector General (OIG), initiated this review following a referral from the Office of Special Counsel (OSC) of allegations made by former OIG Special Agent Jill Semmerling. Semmerling's allegations related to the subject matter and conduct of an OIG investigation into allegations that the Wisconsin Office of Justice Assistance (Wisconsin OJA) submitted fraudulent reports to the Office of Juvenile Justice and Delinquency Prevention (OJJDP) within the Office of Justice Programs (OJP) in order to receive federal funds pursuant to the Juvenile Justice and Delinquency Prevention Act (JJDP Act or JJDPA) formula grant program. Semmerling, who worked in the OIG's Chicago Field Office (CFO), was assigned to lead the underlying investigation in 2008, but was removed from the investigation in October 2009, before that investigation was completed.

The OSC referral to the OIG framed Semmerling's allegations as follows:

1. Employees at OJJDP failed to assure compliance with the core protections of the JJDP Act.
2. Employees at OJJDP failed to investigate allegations that Wisconsin OJA was falsifying detention data to receive federal funding.
3. Employees at OJJDP and OJP issued legal opinions altering long-standing policy and in contravention of law, in order to enable Wisconsin's OJA to circumvent JJDP Act requirements.
4. OIG employees obstructed fact finding in an investigation of the Wisconsin OJA for concealment of non-compliance.
5. Juveniles who have run away from state-ordered placements are being illegally detained in secure facilities, in contravention of statutory grant conditions.

The OSC informed us that allegation 5 presumes that the legal opinions referenced in allegation 3 were in contravention of law. This report addresses allegations 3, 4, and 5, while a separate report from the OIG's Audit Division issued contemporaneously addresses allegations 1 and 2, which the OIG determined were more appropriate for that Division's review.¹ As outlined below and discussed in

¹ Separately, an anonymous whistleblower contacted OSC with two additional allegations, which are set forth in a letter to then-Attorney General Holder dated January 13, 2015: (1) During fiscal years 2009 to 2014, agency managers, including OJJDP Administrator Robert Listenbee, approved full funding for numerous states that were out of compliance with the Disproportionate Minority Contact (DMC) core requirement; and (2) in May 2014, OJJDP managers advised OJJDP employees that every state would be approved for JJDP Act funding in 2015, regardless of compliance with the DMC core requirement. The OIG's Audit Division and Oversight and Review Division will jointly address the DMC allegations in a separate report.

detail in this report, we believe that Semmerling performed an important service by coming forward with these allegations and that she identified a number of serious underlying issues that OJP needs to address, although we ultimately did not substantiate her claims.

The formula grant program authorized by the JJDP Act generally provides that states and territories may receive federal grants to improve their juvenile justice systems and to support juvenile delinquency prevention programs, provided they develop plans that meet certain statutory requirements. Four of these requirements are considered “core requirements” with which the states must comply or face funding reductions. Two core requirements are discussed in this report: Deinstitutionalization of Status Offenders (DSO) and Jail Removal. The DSO core requirement provides that states may lose funding if they place status offenders – that is juveniles who have been charged with crimes that would not be criminal if committed by an adult (*e.g.*, truancy or running away) – in secure detention or correctional facilities. The Jail Removal core requirement provides that states’ formula grant funding is reduced if they fail to comply with the requirement that juveniles not be detained or confined in adult jails or lockups. Through the course of the underlying OIG investigation, Semmerling discovered that OJP’s Office of the General Counsel (OJP OGC) issued legal opinions related to these two core requirements that allegedly allowed Wisconsin to avoid reductions in JJDP Act funding.

With respect to allegations 3 and 5, we focused on three legal opinions issued by OJP’s OGC and the circumstances that led to the issuance of those opinions. The first opinion was a brief 2-page May 28, 2008 memorandum advising OJJDP that juveniles who have been alleged dependent, neglected, or abused but are otherwise “non-offenders” may be placed in secure detention or correctional facilities for violating valid court orders, pursuant to the Valid Court Order (VCO) exception to the DSO core requirement. This opinion further advised OJJDP that a regulation to the contrary was *ultra vires* and therefore unenforceable. The second opinion was a longer September 2010 memorandum related to a similar VCO issue. The third opinion was a July 9, 2008 e-mail advising OJJDP that a facility that alternates between a juvenile detention facility and an adult jail does not violate the Jail Removal core requirement. We also investigated Semmerling’s allegations, as set forth in the OSC referral, that certain OJP employees conspired or colluded with Wisconsin OJA employees to circumvent JJDP Act requirements and made efforts to keep the legal opinions at issue “secret.”

As detailed in the full report that follows, we did not substantiate allegations 3 and 5. We found no persuasive evidence that OJP employees conspired or colluded with Wisconsin OJA employees. The evidence showed that OJJDP employees scrutinized Wisconsin OJA as a result of its past noncompliance with JJDP Act requirements and appropriately sought OGC’s guidance when they discovered that Wisconsin OJA employees were applying the law in ways these OJJDP employees believed might be improper. Similarly, we did not find persuasive evidence that OGC attorneys issued legal opinions altering long-standing policy and in contravention of law for the purpose of enabling Wisconsin to circumvent the requirements of the JJDP Act. The extensive record that we reviewed contains no

evidence that OGC attorneys did anything other than struggle in good faith with a complex statutory framework and ultimately issue opinions that were not pretextual or otherwise reflective of an intent to improperly interpret the law to benefit Wisconsin. Further, contrary to the notion that certain OJJDP officials and OGC employees intentionally kept the legal opinions secret, we found that OGC advised OJJDP to inform all states of the substance of the legal opinions through state trainings and updates to OJJDP's Compliance Manual and that the OJJDP employees who resisted that guidance were those who opposed the opinions. Finally, because we did not find that the legal opinions were improper, we could not conclude that juveniles are currently being detained in contravention of statutory grant conditions as a result of them.

Although we did not substantiate allegations 3 and 5, our review identified several areas where we believe OJP can make significant improvements in its administration of the JJDP Act. These include clarifying OJP's guidance about the JJDP Act's VCO exception and Jail Removal provision, developing a process for making "significant guidance" relating to the JJDP Act known to all states and other stakeholders, and considering measures to enhance communication within and among OJP components. We believe that the need to clarify OJP's guidance about the VCO exception is particularly timely in light of pending related legislation and, therefore, we included within one of our recommendations that OJP clarify its guidance expeditiously so that policymakers within the Department and in Congress may be able to consider it. We also believe improvements can be made to the JJDP Act formula grant compliance monitoring template used to collect information about states' compliance with the JJDP Act requirements. We make six recommendations to address these important issues.

With respect to allegation 4, the Oversight and Review Division sought to determine whether OIG officials obstructed Semmerling's investigation under the criminal statute applicable to obstruction of agency proceedings (18 U.S.C. § 1505), OIG investigative standards set forth in the Inspector General Manual, and the administrative standards of gross mismanagement and abuse of authority under the Whistleblower Protection Act and the Whistleblower Protection Enhancement Act (5 U.S.C. § 2302(b)(8)(B)).² We reviewed Semmerling's conduct of the Wisconsin investigation from her assignment to the matter in April 2008 through her removal from the investigation in October 2009, as well as the subsequent investigative steps that were taken by the two investigators who replaced her after she was removed. We also examined the actions of Semmerling's managers at the CFO, as well as the actions of more senior Investigations Division (sometimes referred to as INV) officials in OIG Headquarters, regarding the Wisconsin investigation.

We found that, in early 2008, an OJJDP employee complained to the OIG that Wisconsin was falsifying the compliance data it submitted to OJJDP in order to qualify for formula grant funds under the JJDP Act. The matter was assigned to

² The Oversight and Review Division was established as a separate Division within the OIG to handle high-level and sensitive matters, and ordinarily reviews allegations of misconduct against OIG personnel.

Semmerling for investigation, and two auditors from the OIG's Chicago Regional Audit Office were later assigned to the case to assist her. The matter was also referred to prosecutors in a U.S. Attorney's Office (or USAO) in a nearby jurisdiction to determine whether a criminal action was warranted.

Semmerling initially focused her investigative efforts on the allegations of fraud by Wisconsin employees, but soon broadened the investigation to include activities by OJJDP and OGC officials and their role in approving Wisconsin's grant awards, such as the 2008 VCO Opinion allegedly issued to enable Wisconsin to circumvent the requirements of the JJDP Act. Semmerling relied extensively on the complainant from OJJDP for information about the JJDP Act grant award process and activities within OJJDP during the course of the investigation. (The 2008 VCO Opinion is appended to this report as Attachment A.)

We determined that as the investigation progressed, Special Agent-in-Charge of the CFO John Oleskowicz and other OIG managers at Headquarters grew concerned with Semmerling's failure to move the case forward more quickly and with Semmerling's increasing scrutiny of OJJDP and OGC operations. On May 5, 2009, Oleskowicz received complaints from OJP General Counsel Rafael Madan that Semmerling was inappropriately inserting herself into OJJDP and OGC activities. At the direction of then-Investigations Division Deputy Assistant Inspector General George Dorsett, Oleskowicz met with Semmerling on May 5, 2009 and questioned her about her investigative activities. While Semmerling and Oleskowicz provided us with differing descriptions of the tone and substance of the meeting, we determined that Oleskowicz did not instruct Semmerling at that time to curtail her investigation. Shortly after this meeting, Semmerling [REDACTED], returned to the office in mid-July 2009, and resumed work on the Wisconsin matter.

During Semmerling's absence from the office, Oleskowicz consulted with a senior OIG Human Resources official about what he perceived to be Semmerling's recent inappropriate behavior, particularly at the May 5 meeting. The official advised Oleskowicz to meet with Semmerling to discuss his concerns with her work performance and conduct, and to propose that Semmerling consider utilizing the Department's Employee Assistance Program (EAP). Oleskowicz, along with Assistant Special Agent-in-Charge Kimberly Thomas, met with Semmerling on July 23, 2009. The evidence shows that Oleskowicz suggested to Semmerling that she contact EAP. The evidence further showed that the meeting became contentious, and that Oleskowicz and Thomas raised several concerns about Semmerling's alleged lack of candor and insubordination, including with respect to her work on the Wisconsin matter. We determined that Thomas told Semmerling during the meeting that employees could be fired for such conduct, and that a day after the meeting Thomas provided Semmerling with a memorandum from another Department component describing disciplinary measures, including dismissal, that had been taken against employees who had been found to have engaged in insubordination and lack of candor. We concluded that this conduct by Thomas, who has since retired from the OIG, inappropriately threatened Semmerling with disciplinary action, but that her conduct did not amount to obstruction of the underlying Wisconsin investigation.

Semmerling alleged that it was during this July 23 meeting that Oleskowicz directed her not to investigate the 2008 VCO Opinion that OGC had issued concerning Wisconsin, but rather to limit her investigation to the lowest level Wisconsin employees who may have committed grant fraud. Oleskowicz disputed this allegation, stating that he had merely instructed Semmerling to first focus on the Wisconsin employees alleged to have engaged in the fraud and then determine whether more senior officials were implicated in the fraudulent activity. He stated, and the evidence supports, that he instructed Semmerling to have the criminal prosecutors review the VCO Opinions to determine whether any Department officials had improperly aided Wisconsin in receiving its grant awards.

Following this July 23 meeting, Semmerling continued to investigate the 2008 VCO Opinion and gather information about OGC's plans to present an updated version of the opinion to all states at an upcoming national training session despite opposition from certain OJJDP employees. On October 16, Semmerling wrote an e-mail message to a senior OJJDP official and an advisor to the Assistant Attorney General for OJP to inform them that that OJJDP and OGC officials involved in the opinion were "part of our investigation." Semmerling did not inform her managers or the prosecutors in advance that she intended to make such an assertion about the OIG's investigation to a senior OJP official, and it was not until about 2 hours after Semmerling sent the message to the OJP officials that she forwarded a copy of it to Oleskowicz and Thomas.

On October 23, 2009, after consulting with then-Investigations Division Assistant Inspector General Thomas McLaughlin, Oleskowicz told Semmerling that he was removing her from the case. McLaughlin told us that it was his decision to remove Semmerling from the case. He stated that he had grown frustrated with Semmerling's poor handling of the investigation, and that Semmerling's e-mail message to a senior OJP official was the "last straw" for him because it amounted to an allegation of misconduct against OJP officials without identifying supporting evidence.

Primary responsibility for the OIG's investigation was taken over in October 2009 by another special agent who had been assigned to assist Semmerling a few months prior and a Senior Special Agent (SSA) who also served as the CFO's grant fraud coordinator. These two agents, with the assistance of two OIG auditors, continued the investigation, conducting numerous additional witness interviews and inspections of several detention facilities throughout Wisconsin to determine whether Wisconsin's compliance reports had accurately reflected the universe of facilities that were required to be monitored under the JJDP Act.

The OIG agents, with the support of OIG managers, made several unsuccessful attempts to convince Department prosecutors and civil fraud attorneys that criminal or civil action should be pursued against Wisconsin. It was not until 2013 that these prosecutors and civil fraud attorneys declined to take such action. Both the USAO and the Civil Division generally cited the poor administration of the formula grant fraud program and the absence of sufficient evidence of fraud as reasons for their declinations. In 2014 the OIG issued its final investigative report finding that from 2001 to 2004 Wisconsin OJA submitted to OJJDP inaccurate data

that falsely showed the state to be in compliance with the JJDP Act, among other findings.

Shortly after Semmerling had been removed from the case, she brought the 2008 VCO Opinion and other matters related to the Wisconsin investigation to the attention of then-Inspector General Glenn Fine and Senior Counsel to the Inspector General William Blier. She told Blier that she had been removed from the case because the Investigations Division officials did not want to pursue potential misconduct by OJJDP and OJP officials and risk disrupting OIG's relationship with those offices. She later more formally alleged, first to Blier and then to OSC, that OIG officials had obstructed the investigation. Semmerling also alleged to the OIG that Blier had improperly failed to take corrective action based on her disclosures to him and to OSC.

After thoroughly examining the management actions and decisions taken in the course of Semmerling's investigation, we did not substantiate Semmerling's obstruction allegations based on the elements of criminal obstruction or under a gross mismanagement or abuse of authority analysis. We also concluded that OIG managers acted consistent with their obligation under IG Manual guidelines to conduct the Wisconsin investigation in a thorough, objective, and impartial manner. In reaching this determination, we found it significant that OIG managers supported the criminal and civil investigation for 5 years and staffed it throughout with both agents and auditors; there was no evidence that Semmerling was ever barred or dissuaded from sharing information that she developed with prosecutors; OIG managers supported a criminal or civil prosecution by the USAO, and at one point even threatened to ask for a transfer of the case to a more proactive USAO; when OIG managers removed Semmerling, they replaced her with a Senior Special Agent and continued to staff the investigation with two agents and two auditors; and that it was Department attorneys, not OIG managers, who declined to bring a criminal or civil grant fraud case against Wisconsin OJA, much less criminally pursue Semmerling's broader theory that OJJDP and OGC officials colluded to award Wisconsin grant funds to which it was not entitled.

While we did not corroborate Semmerling's allegations, we nevertheless believe that her tenacious investigation of the allegations made by the OJJDP employee revealed numerous problems that have plagued the JJDP Act grant program for several years. These problems include inefficiencies and potential disparities in the core requirements compliance monitoring, auditing, and grant approval processes, transparency issues, incomplete recordkeeping, poor internal communication between managers and staff, and lack of clarity and consistency in communicating compliance guidance to grantees. The OIG, therefore, intends to initiate an audit of OJJDP's administration of the JJDP Act grant program.

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ABBREVIATIONS AND ACRONYMS

AAG	Assistant Attorney General
ACT	Audit and Compliance Team
AIG	Assistant Inspector General
APA	Administrative Procedures Act
AUSA	Assistant U.S. Attorney
ASAC	Assistant Special Agent in Charge
CFO	Chicago Field Office
CIGIE	Counsel of Inspectors General on Integrity
CRAO	Chicago Regional Audit Office
DOC	Department of Corrections
DOJ	Department of Justice
DSO	Deinstitutionalization of Status Offenders
EAP	Employee Assistance Program
ECIE	Executive Council on Integrity and Efficiency
E.O.	Executive Order
EOUSA	Executive Office for Immigration Review
FAUSA	First Assistant U.S. Attorney
FDO	Fraud Detection Office
FY	Fiscal Year
GAO	Government Accountability Office
HHS	Department of Health and Human Services
HQ	Headquarters
ICJ	Interstate Compact on Juveniles
IDMS	Investigation Division Data Management System
IG	Inspector General
IGM	Inspector General Manual
INV	Office of the Inspector General Investigations Division
IRA	Individual Right of Action
JJ	Juvenile Justice
JJDP Act	Juvenile Justice and Delinquency Prevention Act
JMD	Justice Management Division
JP	Justice Programs
JSDR	Juvenile Secure Detention Registry
MIP	Minor in Possession
MOI	Memorandum of Investigation
MSPB	Merit System Protection Board
NCJA	National Criminal Justice Association
NPRM	Notice of Public Rulemaking
O&R	Office of the Inspector General Oversight and Review Division
OCOM	Office of Communication
OGC	Office of the General Counsel
OIG	Office of the Inspector General

OIRA	Office of Information and Regulatory Affairs
OJA	Wisconsin Office of Justice Assistance
OJJDP	Office of Juvenile Justice and Delinquency Prevention
OJP	Office of Justice Programs
OMB	Office of Management and the Budget
OSC	Office of Special Counsel
PCIE	President's Council on Integrity and Efficiency
QSI	Quality Standards for Investigations
RAM	Regional Audit Manager
ROI	Report of Investigation
SA	Special Agent
SAA	State Administering Agency
SAC	Special Agent in Charge
SRAD	State Relations and Assistance Division
SSA	Senior Special Agent
TA	Technical Assistance
VCO	Valid Court Order
WFO	Washington Field Office
WPA	Whistleblower Protection Act

CHAPTER ONE: INTRODUCTION

In March 2008, Office of Juvenile Justice and Delinquency Prevention (OJJDP) employee Elissa Rumsey made a confidential disclosure to the Office of the Inspector General (OIG) alleging that the State of Wisconsin had submitted fraudulent data to OJJDP in order to continue receiving formula grant funds under the Juvenile Justice and Delinquency Prevention Act (JJDP Act or JJDPA). OJJDP is an office within the Office of Justice Programs (OJP) of the Department of Justice (Department or DOJ), and administers the JJDP Act. The JJDP Act generally provides that states and territories shall receive federal formula grants to support juvenile delinquency prevention programs so long as they develop plans that address certain statutory requirements.³ Four of these requirements are considered “core requirements” with which the states must comply or face funding reductions. The states report to OJJDP on their compliance with these core requirements annually, and OJJDP makes determinations, based on this compliance data and periodic core requirements compliance monitoring⁴ audits, whether each state qualifies to continue receiving its full share of grant funding. If a state fails to comply with a core requirement, OJJDP must reduce the state’s grant amount.

The OIG’s Investigations Division opened an investigation into Rumsey’s allegation that Wisconsin had fraudulently manipulated its compliance data, and the matter was assigned to Jill Semmerling, a Special Agent in the Investigations Division’s Chicago Field Office, which opened a criminal investigation. During the course of the OIG’s investigation, Rumsey made additional allegations, including that the OJP Office of the General Counsel had issued “secret” legal opinions that interpreted provisions of the JJDP Act in a manner designed to allow Wisconsin to remain in compliance with the statute so that it could continue to receive its full allotment of funds. The OIG, with Semmerling as the case agent, investigated these allegations in coordination with federal prosecutors, initially from the U.S. Attorney’s Office for the Western District of Wisconsin, and later with prosecutors from the U.S. Attorney’s Office for the Northern District of Iowa.

In December 2008, Rumsey filed a whistleblower retaliation complaint with the Office of Special Counsel (OSC) alleging that OJJDP officials had retaliated against her for making protected disclosures to the OIG.⁵

Semmerling was removed from the Wisconsin investigation in October 2009. Other personnel from the OIG Investigations Division’s Chicago Field Office (or CFO), assisted by the Chicago Regional Audit Office (or CRAO), continued to

³ The JJDP Act is codified at 42 U.S.C. § 5601 *et seq.*

⁴ Unless otherwise noted, the term “compliance monitoring” in this report refers specifically to core requirements compliance monitoring under the JJDP Act formula grant program.

⁵ Rumsey’s retaliation claim was litigated before the Merit Systems Protection Board (MSPB) in 2011. The Administrative Judge denied Rumsey’s request for corrective action. On appeal, the MSPB issued a limited reversal of this determination in October 2013. Aspects of Rumsey’s case are still in litigation.

investigate Rumsey's allegations. However, in 2013, the criminal prosecutors who had worked on the investigation ultimately declined to pursue a criminal action against Wisconsin, and civil attorneys in the Department who had reviewed the matter also declined to pursue a civil fraud action. The OIG's investigation was concluded in 2014 and a final Report of Investigation was issued in September 2014.

In May 2011, Semmerling filed a whistleblower disclosure with OSC alleging illegality and misconduct by employees in OJJDP, OJP OGC, and the OIG. Semmerling did not allege that any prohibited personnel practices had been taken against her. On September 16, 2014, the Special Counsel referred Semmerling's allegations to the Attorney General for investigation. The Special Counsel's referral stated that Semmerling made a whistleblower disclosure that OIG, OJP Office of the General Counsel (OGC), and OJJDP officials may have engaged in actions that constituted a "violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, and a substantial and specific danger to public health." The referral framed Semmerling's allegations as follows:

1. Employees at OJJDP failed to assure compliance with the JJDP Act core protections.
2. Employees at OJJDP failed to investigate allegations that Wisconsin OJA was falsifying detention data to receive federal funding.
3. Employees at OJJDP and OJP issued legal opinions altering long-standing policy and in contravention of law, in order to enable Wisconsin's OJA to circumvent JJDP Act requirements.
4. DOJ OIG employees obstructed fact finding in an investigation of the Wisconsin OJA for concealment of non-compliance.
5. Juveniles who have run away from state-ordered placements are being illegally detained in secure facilities, in contravention of statutory grant conditions.

Following receipt of the OSC referral, the Attorney General delegated to the OIG the requirement to conduct an investigation of Semmerling's allegations and to submit a written report to OSC detailing the information obtained in the investigation and any agency actions taken as a result. See 5 U.S.C. §§ 1213(c), (d)(5), (g); 28 U.S.C. § 510.

This report contains the OIG's findings based on its investigation of Semmerling's allegations, as referred by the OSC. Allegations 3 and 4 were investigated by the OIG's Oversight and Review Division (O&R) and allegation 5 was investigated jointly by O&R and the OIG's Audit Division.⁶ The Audit Division's

⁶ O&R was established as a separate Division within the OIG to handle high-level and sensitive matters, and ordinarily reviews allegations of misconduct against OIG personnel.

findings with respect to allegations 1 and 2 are contained in a separate report to be issued concurrently with this report.⁷

I. Methodology of the Investigation

To conduct this investigation, we obtained and reviewed tens of thousands of pages of relevant documents from the CFO, OIG Headquarters, OJJDP, OJP OGC, the U.S. Attorney's Office (USAO) for the Northern District of Iowa, and the Department's Civil Division. Documents we reviewed included OJJDP guidance and policy materials, internal memoranda, records from the Investigations Division's electronic case management system, witnesses' contemporaneous handwritten notes, drafts of OJP OGC legal opinions, filings with the Office of Special Counsel and the Merit Systems Protection Board, and correspondence between OJJDP and grantee state agencies. We also reviewed the e-mail accounts of several witnesses, including Semmerling and her supervisors in Chicago, senior OIG Headquarters officials, Rumsey and other staff and managers in OJJDP, and attorneys in the OJP OGC.

O&R and the Audit Division interviewed over 40 individuals for this investigation. Witnesses included Semmerling, her immediate supervisors in the CFO and other OIG employees who worked on or supervised her investigation, the special agents who continued the investigation after Semmerling's removal, and senior OIG Headquarters officials, including former Senior Counsel to the Inspector General and current OIG General Counsel Counsel William Blier and former Inspector General Glenn Fine; Rumsey, other OJJDP employees and senior OJJDP officials, including former OJJDP Acting Administrators Melodee Hanes and Jeffrey Slowikowski; former OJJDP Administrator Robert Listenbee; several Department criminal prosecutors and civil attorneys who were involved in the case; and a former Colorado Compliance Monitor. We also interviewed OJP General Counsel Rafael Madan and other OGC attorneys who were responsible for providing legal guidance to OJJDP. Many witnesses were interviewed multiple times.

Given the nature of this investigation, we took steps to avoid any actual or apparent bias or lack of objectivity. These steps included the recusal of senior OIG officials involved in the Wisconsin investigation, as well as the recusal by General Counsel Blier due to his receipt and review of Semmerling's complaints, from involvement in this investigation.

The OIG offered all relevant components and appropriate individual witnesses, including those alleged to have committed misconduct, the opportunity

⁷ A separate whistleblower contacted OSC with two additional allegations, which are set forth in a letter to then-Attorney General Holder dated January 13, 2015: (1) During fiscal years 2009 to 2014, agency managers, including OJJDP Administrator Robert Listenbee, approved full funding for numerous states that were out of compliance with the Disproportionate Minority Contact (DMC) core requirement; and (2) in May 2014, agency managers advised OJJDP employees that every state would be approved for JJDP Act funding in 2015, regardless of compliance with the DMC core requirement. The Audit Division and O&R will address the DMC allegations in a separate joint report.

to review and comment on a draft of this report. OJP submitted a formal response to this report, which we include as Attachment E. Other witnesses on whose performance we commented were also given an opportunity to review a draft of this report, and we have incorporated their comments, as appropriate, in the final report and noted their inclusion.

II. Organization of this Report

Chapter Two provides relevant background and context to assist the reader in understanding the various legal authorities and governmental entities involved in our investigation. We first summarize the applicable authorities governing the award of juvenile justice formula grants under the JJDP Act and its implementing regulations, followed by a description of the Department's Office of Justice Programs, including OJJDP and OJP's Office of the General Counsel, and the Wisconsin Office of Justice Assistance (Wisconsin OJA), as those entities were organized during the period covered by our review (2008 through 2014, except as otherwise noted). We next describe OJJDP's process for monitoring compliance with the JJDP Act and discuss differing views within OJJDP regarding how most effectively to administer the grant program. We also describe the issuance of a legal opinion by OJP OGC in May 2008 that is related to certain of the allegations addressed in this report. Lastly, and with Semmerling's consent, we provide background information about her whistleblower allegations and describe the procedural history of this investigation.

Chapter Three addresses the allegations that employees at OJJDP and OJP issued legal opinions altering long-standing policy and in contravention of law, in order to enable Wisconsin OJA to circumvent JJDP Act requirements, and that juveniles who have run away from state-ordered placements are being illegally detained in secure facilities, in contravention of statutory grant conditions (allegations 3 and 5, respectively). We provide a detailed description of two legal opinions issued by OGC concerning application of the Valid Court Order (VCO) exception to the DSO core requirement under the JJDP Act – one issued in May 2008 in response to a question raised by OJJDP staff following a compliance visit to Wisconsin, and a second opinion issued in 2010 in response to a similar question raised by state compliance monitoring officials in Colorado. We also describe OGC's advice to OJJDP in 2008 concerning a question raised by OJJDP staff about Wisconsin's compliance with the Jail Removal core requirement. We then provide an analysis of our findings regarding the handling of these matters and discuss our concerns regarding OJP's procedures for identifying and publicizing significant policy guidance, as well as other areas of concern related to poor communication within OJP, primarily between OJJDP and OJP OGC. We make several recommendations to address these issues.

In Chapter Four we address the allegation that OIG officials obstructed Semmerling's fact finding in her investigation of the Wisconsin OJA for concealment of non-compliance (allegation 4). We provide a detailed chronology of Semmerling's investigative activities and of the Investigations Division's management decisions, both within the CFO and at OIG headquarters, that bore

upon the conduct and scope of the investigation. We also describe the investigative activities on the Wisconsin matter that were undertaken after Semmerling's removal from the case in October 2009. Semmerling's interactions with senior OIG managers following her complaints to them about the alleged obstruction of the investigation are also discussed. Lastly, we provide our analysis of whether OIG officials criminally obstructed the Wisconsin investigation or otherwise abused their authority or exercised gross mismanagement in their handling of the case.

In Chapter Five we provide a summary of our primary conclusions and recommendations.

CHAPTER TWO: BACKGROUND

In this chapter, we first summarize the applicable authorities governing the award of juvenile justice formula grants, including the Juvenile Justice and Delinquency Prevention Act (JJDP Act) and its implementing regulations. In Part II, we describe the structure of the Department's Office of Justice Programs (OJP), including the Office of Juvenile Justice and Delinquency Prevention (OJJDP) and OJP's Office of the General Counsel (OGC), as those entities were organized during the period covered by our review (2008 through 2014, except as otherwise noted). In Part III we describe the structure of Wisconsin Office of Justice Assistance (Wisconsin OJA) during our review period. In Part IV, we provide an overview of OJJDP's process of monitoring compliance with the JJDP Act and discuss disagreements within OJJDP regarding the best approach to that process. In Part V, we describe the issuance of a legal opinion by OJP OGC in May 2008 that became a focus of several of the allegations addressed in this review. Lastly, in Part VI, we provide background information about Semmerling's whistleblower allegations and describe the procedural history of this investigation.

I. Overview the Juvenile Justice and Delinquency Prevention Act

Congress passed the JJDP Act in 1974 to improve the juvenile justice system and support state and local efforts to prevent juvenile delinquency. The original JJDP Act established formula grants to assist state and local governments with building and managing delinquency prevention programs; promulgated "core" requirements that states receiving such grants must follow; and created OJJDP and other government entities to coordinate and administer federal juvenile justice efforts.⁸ Since 1974, the JJDP Act has been amended several times, with Congress increasing accountability measures for grant recipients, adding new grant programs, and modifying the "core" requirements for formula grant recipients.⁹ Congress last reauthorized the JJDP Act in November 2002, which took effect on October 1, 2003 (FY 2004).¹⁰ Although the 2002 reauthorization expired on September 30, 2007 (FY 2007), its substantive provisions remain in effect.¹¹ While

⁸ Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (1974).

⁹ See Congressional Research Service, *Juvenile Justice: Legislative History and Current Legislative Issues* (Nov. 27, 2012).

¹⁰ Juvenile Justice and Delinquency Act of 2002, 42 U.S.C. § 5601 *et seq.* (2002).

¹¹ On April 30, 2015, Senators Charles Grassley and Sheldon Whitehouse introduced S. 1169, the Juvenile Justice Reauthorization Act of 2015, a bipartisan bill to reauthorize the JJDP Act. See S. 1169, 114th Cong. § 205 (2015). On July 23, 2015, the Senate Judiciary Committee referred S. 1169 to the Senate as a whole for consideration. On September 8, 2016, Representative Carlos Curbelo introduced a similar bill in the House of Representatives. The House passed this bill on September 22, 2016, and referred it to the Senate on September 26, 2016. <https://www.congress.gov/bill/114th-congress/house-bill/5963/text?resultIndex=6> (last accessed June 13, 2017).

participation in the formula grant program is voluntary, only one state, Wyoming, chose not to participate during the time period relevant to this report.¹²

Title II of the JJDP Act governs the formula grant program, which is administered by OJJDP.¹³ According to an October 2015 OJJDP policy statement, OJJDP has disbursed more than \$2 billion in formula grant funds to participating states over the past 40 years. The amount of funds disbursed to the states varies by year. For example, according to OJJDP's annual reports, OJJDP awarded approximately \$60 million in Title II formula grants in FY 2008 and approximately \$28 million in FY 2013.¹⁴

Title II funds are allocated annually among the states based on the relative population of people under age 18. See 42 U.S.C. § 5633(a). In order to qualify for the formula grant, each state must submit a 3-year plan for carrying out juvenile justice efforts, consistent with the JJDP Act. 42 U.S.C. § 5633(a). The plan must be updated and submitted to OJJDP annually for approval. 42 U.S.C. § 5633(a). The JJDP Act lists 28 items that must be included within each state plan for the state to be eligible for funding. 42 U.S.C. § 5633. For example, the state plan must designate the state agency that will supervise the preparation and administration of the plan and must provide for the development of research and training activities. 42 U.S.C. §§ 5633(a)(1), (10).

Among the statutory requirements of the JJDP Act formula grants are four "core requirements," as follows:

¹² All five of the permanently inhabited U.S. territories and the District of Columbia also participate in the grant program. Unless otherwise indicated, this report hereinafter uses the term "states" to include both states and territories. After reviewing a draft of this report, OJP informed the OIG that Nebraska recently notified OJJDP that it no longer wishes to participate in the Formula Grant Program.

¹³ In addition to the JJDP Act Title II formula grant program, OJJDP administers discretionary grant programs. Formula grants are grants for which recipients do not compete, but rather that they receive as long as they satisfy the requirements set forth in the statutory scheme. The amount of funds allocated to each state is determined by statute. Formula grants are unlike discretionary grants, which are competitive, and they are unlike block grants, which are sums of money granted by the federal government to state and local governments with only general restrictions on how the money should be spent.

¹⁴ The decline in Title II formula grant awards appears to be reflective of a larger trend in reduced funding for several programs administered by OJJDP. As noted in one prominent study:

[N]umerous carve-outs and earmarks have diminished the capacity of OJJDP's authorized programs – particularly its state formula/block grant programs, mandate to coordinate federal efforts, non earmarked research and data collection, and technical assistance – to carry out the core requirements of the JJDP Act.

"Reforming Juvenile Justice: A Development Approach," National Research Council (published 2013), p. 308, as quoted in "Implementing Juvenile Justice Reform: The Federal Role," National Academy of Sciences (2014), at p. 33.

- Deinstitutionalization of Status Offenders (DSO)

States may not place status offenders in secure detention facilities or secure correctional facilities. 42 U.S.C. § 5633(a)(11)(A). Status offenders are juveniles who “are charged with or who have committed an offense that would not be criminal if committed by an adult,” such as truancy, curfew violations, or running away. 42 U.S.C. § 5633(a)(11)(A); 28 C.F.R. § 31.304(h). The DSO requirement is subject to several exceptions, including an exception permitting the secure detention of juveniles who have violated a valid court order (the VCO exception), which we discuss in more detail in Part V of this Chapter and Chapter Three. See 42 U.S.C. § 5633(a)(11)(A); 28 C.F.R. §§ 31.303(f)(3). Under the DSO provision, states also may not place non-offenders in secure detention or secure correctional facilities. 42 U.S.C. § 5633(11)(B). Non-offenders are juveniles who are not charged with any offense and who are either aliens or alleged to be dependent, neglected, or abused. 42 U.S.C. § 5633(a)(11)(B); 28 C.F.R. § 31.303(f)(3)(vii); 28 C.F.R. § 31.304(i). The non-offender subsection of the DSO provision does not specifically list any exceptions. 42 U.S.C. § 5633(a)(11)(B). The JJDP Act regulations provide that “[a] non-offender such as a dependent or neglected child cannot be placed in secure detention or correctional facilities for violating a valid court order.” 28 C.F.R. § 31.303(f)(3)(vii). However, as discussed in Part V of this chapter and in Chapter Three, OJP OGC declared this regulation *ultra vires* in a 2008 legal opinion.

- Separation of Juveniles from Adults in Institutions (Separation)

States may not detain or confine juvenile delinquents, status offenders, or non-offenders in any institution in which they have contact with adult inmates. 42 U.S.C. § 5633(a)(12). To meet this requirement, states must maintain sight and sound separation between juveniles and adult inmates, either by using separate facilities or through policies and procedures intended to prevent simultaneous use. See OJJDP Guidance Manual for Monitoring Facilities Under the JJDP Act, § 2.5 (Jan. 2007) (2007 OJJDP Guidance Manual).

- Removal of Juveniles from Adult Jails and Lockups (Jail Removal)

States may not detain or confine juveniles in any jail or lockup for adults, subject to certain exceptions. See 42 U.S.C. § 5633(a)(13). Status offenders (including those qualifying for the VCO exception), non-offenders, alien juveniles, and juveniles charged with civil offenses may not be detained in an adult jail or lockup for any length of time. See 42 U.S.C. §§ 5633(a)(11)(B), (a)(13); 28 C.F.R. § 31.303(f)(3)(iv); see also 2007 OJJDP Guidance Manual at §§ 2.1, 2.4; OJJDP Guidance Manual for Monitoring Facilities Under the JJDP Act, § 2.4 (Oct. 2010) (2010 OJJDP Guidance Manual). The Removal requirement does not preclude states from maintaining “collocated facilities” that house both juveniles and adults in the same building or complex of buildings, as long as certain statutory and regulatory

requirements are met. 42 U.S.C. §§ 5633(a)(12), (13); 42 U.S.C. § 5603(28); 28 C.F.R. § 31.303(e)(3).

- Reduction of Disproportionate Minority Contact (DMC)

States must address juvenile delinquency prevention efforts and system improvement efforts designed to reduce, without establishing numerical standards or quotas, the disproportionate number of juvenile members of minority groups who come into contact with the juvenile justice system. See 42 U.S.C. § 5633(a)(22); 28 C.F.R. § 31.303(j).

The state's plan must provide for "an adequate system of monitoring jails, detention facilities, correctional facilities, and non-secure facilities to insure that" the core requirements are met and for annual reporting to the Administrator. 42 U.S.C. § 5633(a)(14). In connection with this requirement, states must identify all facilities that might hold juveniles pursuant to public authority, known as the "monitoring universe." See 28 C.F.R. § 31.303(f)(1); OJJDP Guideline Manual: Audit of Compliance Monitoring Systems, Ch. 1(6) (Aug. 2000) (OJJDP Audit Manual). States must then classify each facility within the universe as a type of facility, "e.g. juvenile detention or correctional facility, adult correctional institution, adult jail, lockup, or other type of secure or nonsecure facility." 2007 OJJDP Guidance Manual at § 5.1. Based upon these classifications, the states determine which facilities they are required to monitor under the JJDP Act. They then submit core requirements compliance monitoring reports to OJJDP in which they report violations of the core requirements within these facilities. See 2007 and 2010 OJJDP Guidance Manuals at § 5.1.

If a state reports violation rates that are in excess of the regulatory maximum for any of the core requirements for a given fiscal year, such state's funding for a later fiscal year "shall be reduced by not less than 20%" for each core requirement unfulfilled. 42 U.S.C. § 5633(c)(1). In addition any state that fails to satisfy a core requirement will be ineligible for any funds for the same fiscal year, unless either (1) the state agrees to expend 50% of the remaining funds allocated to the state to achieve compliance; or (2) the Administrator determines that the state has achieved substantial compliance and has made "an unequivocal commitment" through legislative or executive action to achieve full compliance within a reasonable time. 42 U.S.C. § 5633(c)(2).

Separate from the penalty for failure to substantively comply with a core requirement, the JJDP Act provides that if a state fails to submit a plan or submits a plan that "the Administrator, after reasonable notice and opportunity for hearing, . . . determines does not meet the requirements of" the JJDP Act, the Administrator "shall endeavor to make that State's allocation . . . available to local public and private nonprofit agencies within such State for use in carrying out activities of the kinds described in" the core requirement paragraphs. 42 U.S.C. § 5633(d). Any such funds that are not distributed to local public and private nonprofit agencies are to be distributed "on an equitable basis" to the other participating states. *Id.* Thus, the OJP General Counsel told us that if a state fails to submit a plan or fails to

adequately incorporate within its plan one of the 28 statutorily required items, such state should be ineligible for funds altogether.¹⁵

Additionally, according to OJJDP officials OJJDP may freeze a state's funds or restrict draw-down of the funds already allocated to a state for a given year if a state fails to properly comply with one of the 24 non-core requirements. For example, OJJDP has frozen or restricted draw-down of funds to states that have not properly identified their monitoring universes under 42 U.S.C. § 5633(a)(14). Similarly, states that fail to timely submit yearly core requirements compliance monitoring data "face a restriction on the drawdown of funds for active Formula Grants program awards." 2007 and 2010 OJJDP Guidance Manuals at § 6.2. A restriction on draw-down of funds may be accomplished through a "special condition" placed on the state's funding appropriation for a given year, until the state corrects the problem.¹⁶

II. Structure of OJP, including OJJDP and OJP OGC

According to its website, OJP works with federal, state, local, and tribal justice systems on crime control, crime prevention, and other law enforcement and justice-related matters, through the provision of grants and other activities. See <http://ojp.gov/about/about.htm> (last accessed February 6, 2017). OJP is headed by an AAG and contains six programmatic bureaus and several support offices. One such support office is OJP OGC, which provides legal guidance to the AAG and all of the other OJP offices and bureaus. Laurie O. Robinson was the AAG from November 2009 through February 2012, when Mary Lou Leary became Acting AAG for about a year. Karol Mason was the AAG from April 2013 until January 2017, when Alan Hanson became the Acting AAG.

A. OJJDP

OJJDP is one of the six programmatic bureaus within OJP. OJJDP is headed by a Presidentially-appointed Administrator, who reports to the Attorney General

¹⁵ Witnesses told us that during the period relevant to our review Wyoming was the only state that had elected not to participate in the formula grant program and, as a result, OJJDP instead has awarded its allocation to a nonprofit agency within the state. OJP General Counsel Rafael Madan told us that "two days" before his O&R interview he learned that OJJDP did not abide by the provision of the JJDP Act that requires the Administrator to deny formula grant eligibility to a state that fails to incorporate within its plan one or more of the 28 statutorily required items. Instead, OJJDP would temporarily "freeze" a state's allocated funding in that circumstance, a process that is described in the next paragraph. Madan told us that he was concerned that OJJDP staff appeared to misunderstand the law in this regard and that it was an issue he planned to address. After reviewing a draft of this report, OJP informed us that the state of Nebraska recently advised OJJDP that it no longer intends to participate in the Formula Grant Program.

¹⁶ After reviewing a draft of this report, Deputy General Counsel Moses stated that the practices described in this paragraph are being modified and, in particular, OJJDP will treat the absence of an adequate monitoring system, among other mandatory application requirements, as an eligibility issue.

through the Assistant Attorney General for OJP.¹⁷ See 28 C.F.R. § 0.94. Between 2002 and 2009, J. Robert Flores was the OJJDP Administrator. After Flores resigned in January 2009, OJJDP was headed by two successive Acting Administrators: Jeffrey Slowikowski from January 2009 to January 2012, and Melodee Hanes from January 2012 to March 2013. Robert Listenbee served as the Administrator of OJJDP from March 2013 to January 2017, when Eileen Garry became the Acting Administrator. The Administrator of OJJDP reports directly to the AAG.

OJJDP has undergone several reorganizations. It is not necessary to provide the details of each of these reorganizations for this report. During our review period, the personnel who reported directly to the Administrator were the Deputy Administrators. Among the Deputy Administrators were a Deputy Administrator for Programs (formerly Marilyn Roberts and currently Chyrl Jones (néé Chyrl Penn)) and a Deputy Administrator for Policy Development (Nancy Ayers, followed by Melodee Hanes, for most of the relevant period).

The Deputy Administrator for Programs oversaw three divisions: the "Demonstration Programs Division," the "Child Protection Division," and the "State Relations and Assistance Division" (SRAD). SRAD is the Programs Division most relevant to our review, because it had primary responsibility for overseeing the JJDP Act formula grant program. During our review period, Gregory Thompson and Chyrl Jones were the Associate Administrator and Deputy Associate Administrator, respectively, of SRAD.¹⁸ Thompson and Jones supervised the OJJDP State Representatives who were responsible for, among other things, reviewing formula grant plans and core requirements compliance monitoring reports submitted by states in connection with the JJDP Act, conducting audits and other visits to states, and otherwise managing grants to states. Each OJJDP State Representative was assigned a handful of states to monitor.

OJJDP State Representatives conducted the initial review of states' core requirements compliance monitoring reports and drafted letters that advised states whether they were in or out of compliance with the JJDP Act statutory requirements ("determination letters"). Thereafter, all determination letters were reviewed by the Compliance Monitoring Coordinator, a position once contained within SRAD and, in 2006, moved, along with a few other coordinator-type positions, to the Policy Division. Elissa Rumsey was the Compliance Monitoring Coordinator during our review period. After review by the Compliance Monitoring Coordinator, the determination letters were reviewed by the Deputy Associate Administrator and Associate Administrator of SRAD, the Deputy for Programs, and, ultimately, the

¹⁷ Until August 10, 2012, the position of OJJDP Administrator was subject to Senate confirmation. Congress removed the confirmation requirement for the OJJDP Administrator as part of a broad effort to reduce the number of positions subject to Senate confirmation. See Presidential Appointment Efficiency and Streamlining Act of 2011, Pub. L. No. 112-166, 126 Stat. 1283 (codified at 3 U.S.C. § 102 note (2012)).

¹⁸ Thompson told us he is currently the Senior Advisor to the Administrator.

Administrator. This chain of review for determination letters existed even after the Compliance Monitoring Coordinator Position moved to the Policy Division.

In or about 2007, Flores also created within SRAD a core requirements compliance monitoring team, which consisted of four employees with specialized expertise in the area of core requirements compliance monitoring, to provide assistance to the OJJDP State Representatives. One member of this team was given the title of Compliance Monitoring Liaison.¹⁹

During our review period, OJJDP also had a Senior Juvenile Justice Policy and Legal Advisor (Senior Advisor). The Senior Advisor was an attorney by training and had a background in family law and juvenile justice matters. However, she was not a member of OGC and thus, according to witnesses we interviewed, was not authorized to provide legal advice to OJJDP. Like attorneys embedded in other OJP program bureaus and offices, OJJDP's Senior Advisor had various duties, including reviewing proposed legislation, helping to draft regulations, and serving as a liaison with OJP's OGC and other offices on juvenile justice matters.

B. OJP OGC

OJP OGC is responsible for advising OJP components on all legal matters relating to OJP's functions, duties, and activities. OJP OGC thus provides legal guidance to OJJDP on the JJDP Act. OJP OGC's legal advice is binding on OJP component agencies. Under OJP Order 1001.5A, "No OJP officer or employee may take any action in contravention of legal advice from the [General Counsel], without the approval and concurrence of the Assistant Attorney General (AAG)."²⁰ The order further states, "No payment, appointment, finding, determination, affirmance, reversal, assignment, authorization, decision, judgment, waiver, or other substantive ruling, arising from or in connection with any programmatic claim against the United States under any program administered by OJP. . . may be made without the concurrence of the [General Counsel]."

Rafael Madan has been the OJP General Counsel since 2001. Under the General Counsel, there are Deputy General Counsels and Attorney Advisors. The Deputy General Counsels and Attorney Advisors each have different duties and program areas assigned to them. During our review through the present, Deputy General Counsel Charles Moses has been in charge of juvenile justice matters, among other responsibilities. Moses is also OJP's designated ethics official. There were three Attorney Advisors specifically assigned to handle juvenile justice matters, among other duties (JJ attorneys). These attorneys told us that they spent over 50% of their time working on juvenile justice matters.

¹⁹ In May 2013, OJJDP was formally reorganized to separate state liaison and state core requirements compliance monitoring functions, resulting in the creation of an Audits and Compliance Team (ACT) to handle state compliance reviews and audits.

²⁰ Witnesses told us that they could not recall any instances in which an OJJDP employee or manager approached the AAG seeking to take action in contravention of the General Counsel's opinion.

When OJJDP employees had questions on JJDP Act compliance matters, they generally sought guidance directly from one or more of the JJ attorneys. Depending upon the complexity and novelty of the issue, the JJ attorneys would decide whether to handle the issue on their own, usually through an informal e-mailed opinion, or to seek input from Moses or Madan and possibly prepare a formal opinion to the Administrator. The General Counsel, or at least a Deputy, generally reviewed all formal legal opinions to the Administrator or other OJJDP management. General Counsel Madan told us that when OGC attorneys provide guidance to OJP components, they seek to predict how a court would resolve the issue and provide guidance accordingly.

JJ attorneys also reviewed appeals from states contesting findings by OJJDP that they were out of compliance with one or more JJDP Act requirements. In connection with this appellate function, in approximately 2009 JJ attorneys began reviewing all out-of-compliance determination letters to avoid unnecessary reversals on appeal. The JJ attorneys also worked with OJJDP staff on updating regulations and seeking amendments to the JJDP Act.

C. OJJDP's Relationship with OJP OGC

OJJDP's relationship with OGC during our review period was generally described to us as tense. For many years, OGC had not been heavily involved in OJJDP matters. According to OGC witnesses, this was because former OJJDP Senior Policy Advisor and Acting Administrator John J. Wilson, who had helped to author the JJDP Act, was informally providing legal guidance to OJJDP. Wilson was at one time an attorney with OGC. OJJDP witnesses told us that OJJDP staff generally believed that Wilson acted as OJJDP's official legal counsel.

In 2007, OGC became more involved in giving legal advice to OJJDP. This appears to have resulted, at least in part, from one JJ attorney attending a juvenile justice training conference where she realized that some of the guidance OJJDP had been providing to the states was inconsistent with the statute. In addition, in or about 2009, OGC realized that OJJDP had not been notifying states of their right to appeal compliance determinations, as required by regulation. 28 C.F.R. § 18.5. Based upon OGC's guidance, OJJDP began notifying states of the appeal right in September 2009. As a result, states began appealing and OGC's appellate role with respect to OJJDP expanded.

Several witnesses told us that many OJJDP staff members resisted the enhanced involvement of OGC. OGC began issuing opinions that were contrary to the guidance that Wilson had provided, and some OJJDP staff resented that OGC was changing the way things had been done for decades.

OGC attorneys stated that certain OJJDP employees became personally hostile toward them when they did not like OGC's opinions. The three JJ attorneys said that they therefore worked closely together and tried not to attend meetings with OJJDP staff alone. OGC witnesses told us that the three JJ attorneys met at least weekly to discuss OJJDP compliance matters to ensure that they were giving consistent guidance to OJJDP.

III. Structure of Wisconsin Office of Justice Assistance

During our review period, Wisconsin Office of Justice Assistance (Wisconsin OJA) was Wisconsin's State Administering Agency (SAA) for administering federal and state grant programs related to criminal justice.²¹ Wisconsin OJA had an Executive Director and a Deputy Director. The Executive Director of Wisconsin OJA was also the President of the National Criminal Justice Association (NCJA), an organization that represents state, tribal and local governments on crime control issues. According to its website, the NCJA "communicates state, tribal and local views on crime prevention and control to federal executive and other public and private agencies."²² The Juvenile Justice Section within the Justice Programs Division of Wisconsin OJA administered the federal juvenile justice grants, including the JJDP Act formula grants, and monitored the various facilities within the state for compliance with the JJDP Act. There were two different Directors of Justice Programs during our review period. Thus, we will refer to these individuals as JP Director 1 and JP Director 2.

Within the Juvenile Justice Section was at least one Juvenile Justice Specialist, a DMC Coordinator, and a Compliance Monitor, among other positions. The Juvenile Justice Specialist was responsible for overseeing the funding streams and staffing the state advisory group. The Compliance Monitor's primary roles were to classify facilities within the state's monitoring universe, collect data from facilities, conduct site visits to facilities, and submit core requirements compliance monitoring reports to OJJDP. In this report, we will refer to Compliance Monitor 1, who served from 2001 through the end of 2004, and Compliance Monitor 2, who served from the beginning of 2005 through August 31, 2007. Once Compliance Monitor 2 left Wisconsin OJA, the Director of Justice Programs and the Juvenile Justice Specialists assumed the roles of monitoring the facilities' compliance with the JJDP Act and reporting to OJJDP.

IV. Core Requirements Compliance Monitoring

Each year states must submit to OJJDP both an updated 3-year plan under the JJDP Act and a core requirements compliance monitoring report detailing the number of violations of the DSO, Separation, and Jail Removal core requirements. See 28 C.F.R. § 31.303(f)(5). Below we describe certain aspects of the core requirements compliance monitoring process during the time period relevant to our review.²³

²¹ Wisconsin OJA has since been disbanded and the SAA for federal justice grants is now housed within Wisconsin's Department of Justice.
http://www.ncjp.org/states/wi?vdt=glossary%7Cpage_1 (last accessed February 6, 2017).

²² <http://www.ncja.org/about-ncja> (last accessed February 6, 2017);
<http://www.ncja.org/sites/default/files/documents/David%20Steingraber.pdf> (last accessed February 6, 2017).

²³ OJJDP issued a policy document that changed some of OJJDP's policies and practices in October 2015 and updated the same policy document in December 2016 (2015 Policy Document).

(Cont'd.)

A. Timeline for Reporting Data and Penalizing States for Violations

Historically, OJJDP allowed different states to adhere to different timelines for submitting compliance data. While some states reported on a calendar year basis, others reported by Federal fiscal year. During our review period, states typically reported their violations from the previous year in order to receive funding in the year following submission of the report. As a result, OJJDP often made funding determinations for a particular fiscal year based upon 2 year old data. Sometimes the data used for a particular year's funding was 3 years old.

This time gap meant that a state could be penalized for years-old problems even if it had since corrected those problems by the time OJJDP reduced the state's funding. As a result, OJJDP developed a policy of allowing states to submit more recent data if newer data would not raise the same compliance concerns as older data.²⁴ This policy was explained in OJJDP's Guidance Manual. When discussing the time lag between the year of the compliance data provided and the year that any reduction in funding might happen, the Manual provided:

This timeframe provides a State that has identified a compliance problem with sufficient time to request technical assistance, develop a corrective action plan, and take the necessary steps to provide OJJDP with more current data demonstrating compliance, thereby maximizing the state's opportunity to receive its full fiscal year allocation.

The rationale behind this practice was that a state – and its youth who benefit from the programs funded by OJJDP dollars – should not be penalized for a problem it had already corrected. Thus, sometimes the data relied upon for a particular year's funding might be only 1 year old or less.

B. Determinations of Compliance and Noncompliance

OJJDP generally makes a determination of compliance and awards a state its full funding if the state's self-reported data reveals, on its face, that the state is in compliance with the core requirements and there is no reason to question that data. Conversely, OJJDP makes a determination of noncompliance and reduces funding if the state's self-reported data reveals violations of the core requirements in excess of the minimum allowable. Witnesses have testified that OJJDP finds

See OJJDP Policy: Monitoring of State Compliance with the Juvenile Justice and Delinquency Prevention Act, <https://www.ojjdp.gov/compliance/monitoring-state-compliance-JJDPA-policy.pdf>. The 2015 Policy Document indicates that it would become "fully effective with the Fiscal Year 2017 funding compliance determinations." In this report, we focus on the policies and practices that were in place during the period relevant to our review, in part to assess whether Wisconsin was treated differently from other states during that time. However, we occasionally note when a significant policy has changed.

²⁴ OJJDP's 2015 Policy Document established a standard, more condensed timeline for all states to follow beginning in FY 2017. See OJJDP Policy: Monitoring of State Compliance with the Juvenile Justice and Delinquency Prevention Act <http://www.ojjdp.gov/compliance/monitoring-state-compliance-JJDPA-policy.pdf> at 2. Accordingly, after reviewing a draft of this report, OJP told us that the practice of allowing states to submit more recent data was eliminated in 2015.

approximately 8 to 10 states out of compliance with one or more core requirements each year.

OJJDP State Representatives, however, might question a state's self-reported data if there is a reason to do so. For example, witnesses told us that the OJJDP State Representative might question a large change in a particular violation rate from year to year or a discrepancy between the state's classification of a facility for inclusion in the monitoring universe and what an OJJDP employee observed during a recent visit. Thompson told us that questioning the state involves asking the state to provide additional information to explain the discrepancy or suspect data, and possibly requiring the state to amend its report. In addition, unreported compliance problems may be identified during an audit, described below.

C. Audits

The JJDP Act requires OJJDP to conduct audits of state core requirements compliance monitoring systems. See 42 U.S.C. § 5614(b)(6). While the statute does not specify a time period, OJJDP's policy during the period relevant to our review was to audit each state at least every 5 years, as permitted by time and monetary limitations.²⁵ OJJDP's former Compliance Monitoring Liaison told us that the primary purpose of the audit is to confirm that the state has an effective system in place for assessing and reporting violations. Compliance audits begin with a "desk audit" of the state's written monitoring plan, and typically involve about a week of fieldwork culminating in an exit conference and a written report. Fieldwork includes interviews with staff responsible for core requirements compliance monitoring, inspections of various types of facilities used to hold juveniles, and reviews of admission and release records to verify the most recently submitted compliance data reported to OJJDP. See OJJDP Audit Manual at Ch. 2(10)-(16). Thompson told us that during audits, OJJDP employees will visit a sampling of facilities and verify a sampling of data in each.

Following the audit, OJJDP will issue an audit report, including recommendations and findings. According to Thompson and others, OJJDP has never conducted an audit that did not result in at least some recommendations and findings. The state has the opportunity to respond in writing to OJJDP's audit report, and further communication between OJJDP and the state ensues until the issues are resolved. OJJDP staff work with the state to resolve the problems by providing technical assistance and training. However, if the state is unable to present an adequate plan for resolving the problems identified in the audit, OJJDP may freeze the state's funding or reduce drawdown until such a plan is produced or the problem is otherwise resolved.

²⁵ In reality, due to workloads, the audits did not happen that often. This is something that OJJDP has been working to improve recently by, among other things, creating a separate unit solely dedicated to core requirements compliance monitoring called the Core Protections Division. In the 2015 Policy Document, OJJDP established a requirement that audits be conducted at least once every three years. See OJJDP Policy: Monitoring of State Compliance with the Juvenile Justice and Delinquency Prevention Act <http://www.ojjdp.gov/compliance/monitoring-state-compliance-JJDPA-policy.pdf>. at 9.

OJJDP witnesses told us that, during the period relevant to our review, states typically did not permanently lose funds in connection with problems identified during an audit. Even if OJJDP found unreported violations from a given year, the remedies were generally technical assistance or reduction in drawdown rather than reversing an earlier compliance determination or recouping funds that had previously been awarded. However, OJJDP would look more critically at a subsequent year's report based upon particular problems identified at an earlier audit. OJJDP witnesses told us that some state employees, including juvenile justice specialists from Wisconsin, believed that this practice encouraged states to lie about their data: Specifically, according to OJJDP witnesses, certain state officials believed that if a state submitted accurate data showing the state to be out of compliance, the state's funding would be reduced, but that if a state falsified data and was found to be out of compliance during the course of an audit, the state would receive technical assistance.²⁶ Former SRAD Associate Administrator Thompson disputed this belief, emphasizing that OJJDP's approach was to offer all states as much assistance as necessary to achieve compliance.

D. Differences of Opinion within OJJDP Regarding Core Requirements Compliance Monitoring and Modification of Rumsey's Duties

There have been and continue to be differences of opinion within OJJDP as to how to conduct JJDP Act oversight. The JJDP Act has been described as incorporating a "carrot and stick" approach to encouraging states to abide by best practices in handling juvenile justice. Specifically, grants and technical assistance are the carrots, and the audits and remedial measures, such as reductions in funding for failure to comply, are the sticks. Rumsey and others in OJJDP have expressed concern that certain OJJDP employees, including Thompson, have been overly eager to "work with states" and provide technical assistance rather than hold their feet to the fire by enforcing the JJDP Act. They believe that such an approach undermines the spirit of the JJDP Act and could ultimately harm children. One employee stated that before Rumsey became Compliance Monitoring Coordinator, core requirements compliance monitoring mostly involved "rubber stamping."

²⁶ After reviewing a draft of this report, OJP told us that, "for significant issues identified through compliance audits, in which OJJDP determines that the state has an inadequate system of compliance monitoring, OJJDP may take steps to recoup funds." For example, OJP told us that in 2017 it recouped approximately \$1.7 million through a settlement agreement with Wisconsin. This is because, as noted above, if a state fails to submit a plan or fails to adequately incorporate within its plan one of the 28 statutorily required items, such state should be ineligible for funds altogether. See 42 U.S.C. § 5633(d). However, as also noted above, General Counsel Madan told us that during the period relevant to our review OJJDP employees did not appear to understand this aspect of the statutory provision.

In addition to the audits, OJJDP attempts to visit every state approximately once per year for a "programmatically" or "site" visit. During such a visit, OJJDP staff will assess all of the juvenile justice grants flowing to the state, including block, formula, and discretionary grants, check the state's organizational setup and staffing, meet with the State Advisory Group members, and even meet with some of the children intended to benefit from the grants. OJJDP also makes "technical assistance" (TA) visits to states, or sends contractors to states to do so, as needed or upon request.

We found that other OJJDP employees, including Thompson and Slowikowski, generally gave states the benefit of the doubt and were more inclined to work with the states, such as by providing technical assistance, than punish them. According to Slowikowski and Thompson, OJJDP is not an enforcement agency, and OJJDP has taken the approach of working with states to resolve their compliance problems for many years. This approach is based upon the belief that reducing a state's funding could result in the elimination of important state programs that benefit children and that states might opt out of the formula grant program altogether if the requirements for participating are too onerous. These differences of opinion have caused significant strife within OJJDP.

We learned from witnesses that some states believed that OJJDP changed certain core requirements compliance monitoring requirements and made the process of core requirements compliance monitoring more onerous after Rumsey became Compliance Monitoring Coordinator. In October 2007, OJJDP held a training conference in Denver, Colorado. During the conference, then-Administrator Flores had a meeting with state employees from several states at their request. Juvenile justice specialists from several states complained about Rumsey's approach, although they did not identify her by name, and complained that OJJDP had changed its requirements in ways that were inconsistent with the statute and regulations. Among other things, there were complaints that OJJDP had expanded the scope of the monitoring universe and had begun requiring states to conduct more frequent inspections of facilities than before. The state employees complained that these changes were made by amending the Guidance Manual, without complying with the Administrative Procedures Act's (APA's) formal rulemaking process. One of the most outspoken states at the meeting was Wisconsin. Utah, Idaho, Louisiana, and Iowa also were among the states that raised concerns and were particularly vocal. According to a document prepared by a working group of the states, at least 37 states joined in the complaints about OJJDP's practices.

Flores asked OJP OGC to opine on the states' claims that OJJDP's practices were not permitted by law, and OGC agreed that the Guidance Manual contained some requirements that were more expansive than the statute allowed. Flores then sent a memorandum to State Agency Directors in which he clarified OJJDP's guidance, consistent with OGC's advice.

As a result of the Denver conference and the concerns expressed by the states, in January 2008 Flores transferred several of Rumsey's responsibilities to a member of the Compliance Monitoring Team, who was given the title of Compliance Monitoring Liaison. This change meant that Rumsey would no longer have direct contact with state employees. She did not regain her responsibilities until Slowikowski became Acting Administrator in 2009. Some OJJDP employees believed that part of the reason Flores reassigned some of Rumsey's responsibilities was that Rumsey had a poor rapport or an overly confrontational approach with state employees. According to Thompson, Rumsey "remained as the Compliance Monitoring Coordinator, but . . . it was a watered-down version."

Thompson and some other OJJDP employees told us they believed that Rumsey harbored resentment as a result of these events, and became more demanding of Wisconsin and other states that had complained about her.²⁷ Certain of Rumsey's superiors and co-workers became skeptical of the concerns Rumsey expressed about Wisconsin because they believed she was motivated by Wisconsin's complaints about her.

V. OJP OGC's 2008 VCO Legal Opinion

On May 28, 2008, OJP OGC issued a legal opinion regarding the valid court order (VCO) exception to the Deinstitutionalization of Status Offenders (DSO) core requirement (2008 VCO Opinion, appended to this report as Attachment A). The 2008 VCO Opinion was written in response to a question from SRAD Associate Administrator Thompson, based upon an issue that arose during an OJJDP site visit in Wisconsin. The issue was whether a dependent, neglected, or abused child who had run away from a non-secure placement, but had not been formally charged as a status offender for the act of running away, could be placed in a secure correctional or detention facility for violating a VCO. The opinion concluded that 28 C.F.R. § 31.303, which provides that "[a] non-offender such as a dependent or neglected child cannot be placed in secure detention or correctional facilities for violating a valid court order" is "*ultra vires* and, thus, cannot be enforced." As a result of OGC's opinion, OJJDP sent a letter advising Wisconsin OJA that its practice of securely confining juveniles in that situation comported with the JJDP Act. As explained in Chapter Three, most, if not all, OJJDP employees disagreed with the conclusion of the 2008 VCO Opinion, which generated years of passionate debate between OJP OGC and certain OJJDP employees.

According to e-mails and other documents we reviewed, Rumsey shared the 2008 VCO Opinion with Semmerling as an example of Thompson using OGC as a "cover" to keep Wisconsin in compliance with the JJDP Act formula grant program. As a result, Semmerling sought to investigate the 2008 VCO Opinion and whether it represented collusion between OJP employees and Wisconsin OJA. As explained in Chapter Four, Semmerling's focus on the VCO issue became a source of disagreement between Semmerling and her supervisors.

In Chapter Three, we address Semmerling's allegation that OJP issued the 2008 VCO Opinion, as well as another legal opinion, in contravention of law in order to enable Wisconsin's OJA to circumvent JJDP Act requirements. In Chapter Four, we address Semmerling's allegation that OIG employees obstructed fact finding in the investigation of Wisconsin OJA by, among other things, allegedly prohibiting Semmerling from investigating the 2008 VCO Opinion and removing her from the case before she had concluded the investigation.

²⁷ Former Administrator Flores also met with the Executive Director of Wisconsin OJA, in his capacity as President of the National Criminal Justice Association, regarding concerns about core requirements compliance monitoring, in January 2008. Thompson also attended this meeting. Thompson said he did not recall discussing Wisconsin's particular compliance issues at the meeting.

VI. Procedural History

On February 3, 2008, Rumsey made an informal complaint to then-Deputy Assistant Inspector General for Investigations (INV) George Dorsett at his home about issues in OJJDP. On March 19, 2008, OIG investigators interviewed Rumsey about her complaint. Rumsey's allegations centered around Wisconsin's alleged falsification of compliance data on OJJDP grant forms between 2001 and 2004. Based on this information, on April 17, 2008 the OIG Investigations Division Chicago Field Office (CFO) opened an investigation and assigned the case to Special Agent Jill Semmerling. During the course of the CFO investigation, Rumsey provided information and documents to the OIG and communicated frequently with Semmerling. The information Rumsey provided to Semmerling related not only to the fraud and compliance issues in Wisconsin, but also to OJJDP's alleged failures in monitoring Wisconsin and alleged collusion by OJP employees in Wisconsin's receipt of grants. Semmerling stated that she sought to investigate the allegations of possible collusion by OJJDP and OJP OGC employees, but that her management did not permit her to do so.

In September 2008, Rumsey began complaining to Semmerling about alleged retaliatory acts by her OJJDP managers. On December 31, 2008, Rumsey filed a complaint with OSC alleging that these acts had been taken in retaliation for her protected disclosures to the OIG.

As described in more detail in Chapter Four, the OIG referred the criminal investigation to a U.S. Attorney's Office in June 2008 (it was reassigned by the Department in January 2009 to a different U.S. Attorney's Office), and Semmerling worked with prosecutors on the criminal investigation of Rumsey's allegations. As the investigation progressed, Semmerling came to view the retaliation against Rumsey as part of an OJJDP culture that prioritized protecting state formula grant recipients over compliance with the JJDP Act, and she sought to obtain information about OJJDP's practices for reviewing state compliance data during her investigation. Semmerling also began to investigate OJP OGC's involvement in the matter, and specifically its issuance of the 2008 VCO legal opinion. Semmerling was removed from the case by the OIG in October 2009.²⁸

When OSC did not act on her complaint within 120 days, Rumsey filed a complaint with the Merit Systems Protection Board (MSPB) on March 25, 2011, seeking corrective action.²⁹ In support of Rumsey's complaint, Semmerling submitted a 30-page Confidential Statement to OSC in May 2010 that provided a chronology of her Wisconsin OJA investigation, and testified in Rumsey's MSPB proceeding in July 2011.

²⁸ Two other OIG criminal investigators, with the assistance of two auditors from the OIG's Chicago Regional Audit Office, continued the investigation, and in 2014, the OIG issued a report of its findings.

²⁹ An administrative judge initially denied Rumsey's request for corrective action, finding no retaliation. On appeal in 2013, the MSPB issued a limited reversal of this determination. See *Rumsey v. Dep't of Justice*, 120 M.S.P.R. 259 (2013).

In May 2011, Semmerling's counsel wrote to the OSC that Semmerling sought an "investigation of misconduct by the OIG that she alleges has obstructed fact finding in an investigation to which she was assigned, and then subsequently removed," and an investigation of "unpublished DOJ legal opinions that were created and are relied on for the sole purpose of excusing liability of criminal defendants after the fact and covering up complicity" by the Department's Office of Justice Programs. Semmerling did not allege that she had been retaliated against for her disclosures.

On September 16, 2014, Special Counsel Carolyn Lerner sent a letter to then-Attorney General Eric Holder referring the allegations in Semmerling's statement to the Department for investigation. As described in Chapter One of this report, the Attorney General delegated to the OIG the requirement to conduct an investigation of Semmerling's allegations.

CHAPTER THREE: ALLEGED IMPROPER LEGAL OPINIONS ISSUED BY THE OJP OFFICE OF THE GENERAL COUNSEL AND ALLEGED IMPROPER DETENTION OF RUNAWAYS (ALLEGATIONS 3 AND 5)

I. Introduction

This chapter addresses the assertion that certain legal interpretations were issued by OJP's Office of the General Counsel (OGC) and OJJDP to improperly benefit Wisconsin. As explained in Chapter One, the JJDP Act provides the statutory requirements for states to receive federal grants to support juvenile delinquency prevention programs. Under the JJDP Act, states may face funding reductions if they do not comply with certain "core requirements." The main statutory provision discussed in this chapter is the Valid Court Order (VCO) exception to the Deinstitutionalization of Status Offenders (DSO) core requirement. The primary allegation we address is that OGC interpreted these provisions in a way that allowed Wisconsin to receive full JJDP Act funding during certain years even though the state detained dependent, neglected, or abused juveniles for violating valid court orders.

On May 23, 2011, Semmerling filed several whistleblower disclosures with the Office of Special Counsel (OSC). Among the allegations that OSC referred to the OIG to be investigated based on Semmerling's disclosures was the allegation that "[e]mployees at OJJDP and OJP issued legal opinions altering long-standing policy and in contravention of law, in order to enable Wisconsin's Office of Justice Assistance (Wisconsin OJA) to circumvent [JJDP Act] requirements." See Letter from Carol Lerner to Eric Holder, September 16, 2014. The OSC referral identifies two legal opinions from OJP OGC to OJJDP that are at issue: (1) a May 28, 2008 memorandum advising OJJDP that the VCO exception to the DSO core requirement in the JJDP Act may be applied to non-offenders and that a regulation to the contrary ("VCO non-offender regulation") is *ultra vires* and therefore unenforceable ("2008 VCO Opinion");³⁰ and (2) a July 9, 2008 e-mail stating that a facility that alternates between a juvenile detention facility and an adult jail does not violate the Jail Removal core requirement ("Jail Removal Opinion," appended to this report as Attachment D). These opinions are discussed at length below. Semmerling alleged that certain OJJDP employees "conspired to assist Wisconsin's OJA in circumventing JJDP Act requirements" and that, in connection with this conspiracy, after the legal opinions were issued, OJJDP and OJP OGC employees did not publish them,

³⁰ As explained in Chapter Two, non-offenders are juveniles who are not charged with any offense and who are either aliens or alleged to be dependent, neglected, or abused, while status offenders are juveniles who are charged with or who have committed an offense that would not be criminal if committed by an adult, such as running away. 42 U.S.C. § 5633(a)(11); 28 C.F.R. § 31.304. When we refer to a "non-offender," we include a juvenile whose only known offense was to violate a court order, including a VCO, unless otherwise indicated.

intentionally kept them “secret,” and discussed them “among only a handful of agency officials who wanted to keep the change in policy closely held.”³¹

The allegations OSC referred to the OIG also include an allegation that “Juveniles who have run away from state-ordered placements are being illegally detained in secure facilities, in contravention of statutory grant conditions.” This allegation is premised on both the 2008 VCO Opinion and the Jail Removal Opinion having been in contravention of law. The referral seeks to determine whether any states currently are improperly failing to report as violations of the JJDP Act the secure placement of non-offender runaways in reliance on those legal opinions. Because these two allegations are so closely related, we address both in this chapter.

As we describe in Chapter Four, Semmerling relied extensively on OJJDP Compliance Monitoring Coordinator Elissa Rumsey, the complainant in the underlying OIG criminal investigation, for information about OJJDP and its interactions with OGC. We therefore address the concerns that Rumsey raised to us about OGC’s legal opinions to the extent they overlap with Semmerling’s allegations to the OSC.

To investigate these allegations, O&R interviewed approximately 40 current and former OJP and OIG employees and reviewed draft legal memorandums, e-mails, handwritten notes, and other relevant documents to determine whether the legal opinions were written in contravention of law for the purpose of allowing Wisconsin to circumvent JJDP Act requirements. In addition to the 2008 VCO Opinion and the Jail Removal Opinion, we also considered a 2010 VCO Opinion, (appended to this report as Attachment C), which was written by OGC to respond to a request from the state of Colorado and to clarify the 2008 VCO Opinion. We examined OJP’s interactions with and oversight of Wisconsin OJA leading up to and following the issuance of the legal opinions and the communications among OJP employees (including between OJJDP and OGC personnel) regarding the legal opinions. We also reviewed the substance of the legal opinions to determine whether OGC’s legal reasoning was so implausible as to raise the possibility that the opinions were written for an improper purpose, such as favoritism toward a particular state – in this case, Wisconsin. In addition, we sought to determine whether there were any relationships between OJP employees and Wisconsin OJA employees that might have impaired OJP’s ability to impartially conduct its core requirements compliance monitoring functions. Finally, in connection with Semmerling’s allegation that the legal opinions were “secret,” we sought to determine whether OJP adequately publicized the legal opinions and whether any OJP officials intentionally sought to hide them from other states or the public.

In Section II, we provide legal background on the VCO exception to the DSO provision of the JJDP Act, the Jail Removal provision of the JJDP Act, and relevant provisions of administrative law. In Section III, we describe the relevant factual background to, and the contents of, the 2008 VCO and Jail Removal Opinions, as

³¹ For the remainder of this chapter, we will refer to OJP OGC as OGC.

well as the 2010 VCO Opinion written, in part, to clarify the earlier opinion. In Section IV, we provide our analysis of Semmerling’s allegations that OJJDP colluded with Wisconsin OJA to circumvent JJDP Act requirements, that OGC’s legal opinions were issued in contravention of law also to enable Wisconsin to circumvent JJDP Act requirements, and that certain OJJDP and OGC employees made efforts to keep the legal opinions “secret” and the change in OJP policy closely held. Section IV also addresses the closely-related allegation that certain juveniles are currently being detained in contravention of statutory grant conditions as a result of these legal opinions.

In sum, we did not substantiate the claims in this regard. We found no persuasive evidence that OJP employees conspired or colluded with Wisconsin OJA employees. The evidence showed that OJJDP employees scrutinized Wisconsin OJA as a result of its past noncompliance with JJDP Act requirements and appropriately sought OGC’s guidance when they discovered that Wisconsin OJA employees were applying the law in ways the same OJJDP employees believed might be improper. Similarly, we did not find persuasive evidence that OGC attorneys issued legal opinions altering long-standing policy and in contravention of law to enable Wisconsin to circumvent the requirements of the JJDP Act. The record contains no evidence that OGC attorneys did anything other than struggle in good faith with a complex statutory framework and ultimately issued opinions that were not pretextual or otherwise reflective of an intent to improperly interpret the law to benefit Wisconsin. Further, contrary to the notion that certain OJJDP officials and OGC employees intentionally kept the legal opinions secret, we found that OGC advised OJJDP to inform all states of the substance of the legal opinions through state trainings and updates to OJJDP’s Compliance Manual and that the OJJDP employees who resisted that guidance were those who opposed the opinions. Finally, because we did not find that the legal opinions were improper, we could not conclude that juveniles are currently being detained in contravention of statutory grant conditions as a result of them.

Although we did not substantiate the allegations, our review identified several areas where we believe OJP can make significant improvements in its administration of the JJDP Act. These include clarifying OJP’s guidance about the JJDP Act’s VCO exception and Jail Removal provision, developing a process for making “significant guidance” relating to the JJDP Act known to all states and other stakeholders, and considering measures to enhance communication within and among OJP components. We also believe improvements can be made to the compliance monitoring template used to collect information about states’ compliance with the JJDP Act requirements. At the end of this chapter, we make six recommendations to address these important issues.

II. Relevant Legal Background

To assist in understanding the events surrounding the issuance of the VCO and Jail Removal Opinions, we first describe relevant statutory provisions under the JJDP Act, the Administrative Procedures Act (APA), and applicable Executive orders.

A. VCO Exception to DSO Provision

As described in Chapter Two, the DSO provision of the JJDP Act provides that states must submit a plan that provides for the deinstitutionalization of status and non-offenders in order to receive formula grant funding. 42 U.S.C. § 5633(a)(11).

Under subsection A of the DSO provision (status offender subsection), the State plan must provide that:

(A) juveniles who are charged with or who have committed an offense that would not be criminal if committed by an adult, excluding—

(i) juveniles who are charged with or who have committed a violation of section 922(x)(2) of title 18 [federal law prohibiting juvenile possession of a handgun] or of a similar State law;

(ii) juveniles who are charged with or who have committed a violation of a valid court order; and

(iii) juveniles who are held in accordance with the Interstate Compact on Juveniles as enacted by the State;

shall not be placed in secure detention facilities or secure correctional facilities.

Thus, despite the DSO provision, states may receive full funding if they place in secure detention or correctional facilities (securely place) status offenders who violate valid court orders regulating their future conduct, such as orders to attend school or to stop running away. See 42 U.S.C. §§ 5633(a)(11)(A)(ii), (a)(23); 28 C.F.R. § 31.303(f)(3).

Under subsection B of the DSO provision (“non-offender subsection”), the State plan must provide that:

(B) juveniles –

(i) who are not charged with any offense; and

(ii) who are –

(I) aliens; or

(II) alleged to be dependent, neglected, or abused;

shall not be placed in secure detention facilities or secure correctional facilities.

Unlike the status offender subsection of the statute, the non-offender subsection does not list any exceptions.

The statute and regulations require state officials to abide by several procedural requirements in order to use the VCO exception and hold juveniles in secure facilities. First, the order that the juvenile is charged with violating or has violated must, in fact, qualify as a *valid* court order as defined by statute, which provides:

the term “valid court order” means a court order given by a juvenile court judge to a juvenile –

(A) who was brought before the court and made subject to such order; and

(B) who received, before the issuance of such order, the full due process rights guaranteed to such juvenile by the Constitution of the United States.

42 U.S.C. § 5603(16). The regulations set forth specific due process rights that are included, such as the right to a hearing before the Court and the right to legal counsel. 28 C.F.R. §§ 31.303(f)(3)(iii) and (v)(A)-(H).³²

Second, if a juvenile is taken into custody for violating a VCO, an appropriate public agency must be promptly notified and a representative of such agency must interview the juvenile within 24 hours and submit a report to the court regarding the juvenile’s immediate needs within 48 hours. 42 U.S.C. § 5633(23)(A).

Finally, in order to keep the juvenile in custody, the court must within 48 hours of the custody conduct a hearing to determine whether there is reasonable cause to believe the juvenile violated the VCO and to determine the appropriate placement of the juvenile pending final disposition of the alleged VCO violation. 42 U.S.C. § 5633(23)(B).

The terms “non-offender” and “status offender” are not defined in the statute. However, the regulations provide definitions for the relevant types of offenders and for a non-offender. A “juvenile offender” is an individual who is “subject to the exercise of juvenile court jurisdiction for purposes of adjudication and treatment based on age and offense limitations by defined as State law.” 28 C.F.R. § 31.304(f). Juvenile offenders are divided into “criminal-type offenders” and “status offenders.” *Id.* While a criminal-type offender is a juvenile offender who has been “charged with or adjudicated” for conduct that would be criminal if committed by an adult, a status offender is a juvenile offender who is “charged with or adjudicated” for conduct that would not be criminal if committed by an adult, such as truancy or running away from home. 28 C.F.R. § 31.304(g)(h). Notably, the status offender subsection in the statute, as quoted above, refers to a status offender as someone who has been “charged with or who has *committed*” a status

³² Some OGC attorneys told us that in their opinion the regulations go further than the statute permits and incorporate more “due process” protections than are actually protected by the Constitution. However, to date neither a court nor OGC has determined that the regulations regarding due process protections are *ultra vires*.

offense, while the regulations refer to a status offender as someone who has been “charged with or *adjudicated*” for a status offense. (Emphasis added). Neither the regulations nor the statute define the terms “charged,” “committed,” or “offense.”

A non-offender is a juvenile “who is subject to the jurisdiction of the juvenile court, usually under abuse, dependency, or neglect statutes for reasons other than legally prohibited conduct of the juvenile.” 28 C.F.R. § 31.304(i).

The regulations further provide that a “non-offender such as a dependent or neglected child cannot be placed in secure detention or correctional facilities for violating a valid court order.” 28 C.F.R. § 31.303(f)(3)(vii) (VCO non-offender regulation). This is the regulation that OGC advised OJJDP was *ultra vires* in the 2008 VCO Opinion. As explained in greater detail below, the 2008 VCO Opinion advised OJJDP that this regulation was *ultra vires* against the policy wishes of many OJJDP employees and provided little explanation of OGC’s legal rationale. As a result, the 2008 VCO opinion created significant confusion and dissatisfaction within OJJDP. Over 2 years later, however, OGC issued a second VCO opinion (2010 VCO Opinion) which similarly concluded, contrary to this regulation, that it was permissible to securely place a non-offender for violating a VCO. In the 2010 VCO Opinion, OGC provided a rationale for this determination that we concluded did not evidence favoritism, arbitrariness, or caprice.

B. Jail Removal Core Requirement and Collocated Facility Provision

As described in Chapter Two, pursuant to the Jail Removal core requirement, state formula grant plans must provide that “no juvenile will be detained or confined in any jail or lockup for adults.” 42 U.S.C. § 5633(a)(13).³³ However, the statute and regulations allow in certain circumstances for “collocated facilities” where juveniles and adults are housed in the same building or related complex of buildings located on the same grounds. 42 U.S.C. § 5603(28); 28 C.F.R. § 31.303(e)(3). A collocated facility is not considered an “adult jail or lockup” if the state ensures, through onsite inspection, that the facility meets four specific criteria: sight and sound separation of adults and juveniles assured either “architecturally or through time-phasing of common use nonresidential areas”; “separate juvenile and adult programs”; “separate staff for the juvenile and adult populations”; and licensing standards equivalent to those used for juvenile detention facilities.³⁴ 28 C.F.R. §§ 31.303(e)(3)(i)(C)(1)-(4).

³³ There are exceptions for juveniles charged with non-status offenses held for up to 6 hours in certain circumstances and for juveniles in rural areas held for up to 48 hours while awaiting an initial court appearance. 42 U.S.C. §§ 5633(a)(13)(A) and (B).

³⁴ After reviewing a draft of this report, OJP commented that, “Because the term ‘collocated facilities’ is defined in the JJDP Act at 42 U.S.C. 5603(28), OGC has advised OJJDP that it cannot alter that definition by imposing additional requirements.”

C. Relevant Administrative Law on Rulemaking

As described in greater detail in Section III of this chapter, OGC advised OJJDP that the non-offender VCO regulation was *ultra vires* because it found that the regulation conflicted with the plain meaning of the DSO provision of the JJDP Act. OGC's determination reflected its attempt to predict what a Court would do, applying *Chevron* analysis. See *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984). However, neither OGC nor OJJDP formally withdrew the VCO non-offender regulation through "notice-and-comment rulemaking" in the Federal Register or otherwise informed all states and interested parties of the determination that the VCO non-offender regulation was *ultra vires*.

For the reasons discussed in Section IV of this chapter, we concluded that OJP should have made this information known to all states and other interested parties, consistent with the APA, Executive orders, and an Office of Management and Budget (OMB) bulletin. In this subpart, we summarize the relevant provisions of these authorities.

1. Administrative Procedures Act: When Notice and Comment are Required

a. General Rulemaking Requirements

OJJDP has the authority to promulgate regulations consistent with the JJDP Act. 42 U.S.C. §§ 5611, 5633(a). The APA establishes the procedures that federal administrative agencies must follow for "rulemaking," which is defined as the process of "formulating, amending, or repealing a rule." 5 U.S.C. §§ 553, 551(5).

There are two generally recognized types of rules: legislative and interpretive. The rulemaking procedures that an agency must follow differ depending on whether the agency is promulgating a legislative rule or an interpretive rule. 5 U.S.C. § 553. Legislative rules must go through the process of "notice-and-comment rulemaking," which means that agencies must publish a notice of proposed rulemaking in the Federal Register to solicit and consider comments before legislative rules are officially promulgated. 5 U.S.C. § 553(b). Interpretive rules need not go through notice-and-comment rulemaking. 5 U.S.C. § 553(b)(A).

In general, an Office of the General Counsel opinion that represents an agency's reading of a statute or regulation is interpretive, not legislative. See *Splane v. West*, 216 F.3d 1058, 1063 (Fed. Cir. 2000). However, "agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance." *Perez v. Mortgage Banker's Ass'n*, 135 S. Ct. 1199, 1206 (2015). Thus, if an agency used notice-and-comment rulemaking to promulgate a rule, it must use notice and comment rulemaking to amend or repeal that same rule. *Am. Fed. of Gov't Employees v. Fed. Labor Relations Auth.*, 777 F.2d 751, 759 (D.C. Cir. 1985). The VCO non-offender regulation at issue in this chapter was promulgated using notice and comment rulemaking in 1982. See

<http://www.ojjdp.gov/compliance/d-08-16-82FedReg.pdf> (last accessed February 6, 2017).

Madan and Moses told us that determining that a rule is inconsistent with a statute – and thus unenforceable or *ultra vires* – is not the same as repealing a rule. However, as explained in the next two subsections, there is some indication in the case law that notice-and-comment rulemaking should be exercised in that circumstance, as well.

b. Determining that a Regulation is *Ultra Vires*: Chevron Analysis

Courts have the power to set aside agency actions that are “in excess of statutory jurisdiction, authority, or limitations.” 5 U.S.C. § 706. Thus, a court may deem a regulation *ultra vires* if it contradicts the plain language of its authorizing statute. See, e.g., *Hearth Patio & Barbecue Ass’n v. U.S. Dep’t. of Energy*, 706 F.3d 499 (D.C. Cir. 2013).

To determine whether a regulation is *ultra vires*, courts generally apply the two-step analysis articulated in *Chevron*, 467 U.S. at 842-43. First, a court will examine the statute to determine whether Congress’ intent is unambiguous from the text. “[I]f the intent of Congress is clear, the reviewing court must give effect to that unambiguously expressed intent,” and the inquiry ends there. *Hearth Patio*, 706 F.3d at 503. If the statute is ambiguous or “[i]f Congress has not directly addressed the precise question at issue,” the examining court will proceed to the second step, which is to determine whether the agency’s construction of the statute is reasonable, affording deference to the agency’s interpretation or existing regulation. *Id.* (quoting *Chevron*, 467 U.S. at 843).

Under *Chevron* step one, courts “first examine the statute *de novo*, employing traditional tools of statutory construction.” *Id.* There are two canons of construction that are particularly relevant to our review. First, courts consider the ordinary meaning of terms, if the statute does not define them, and attempt to interpret a statute to “give effect to every word . . . wherever possible.” *Id.* (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004)). Second, “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”³⁵ *Id.* (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). The court will not look to legislative history if legislative intent is unambiguous from the plain statutory text. *Zuni Pub. School Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 82 (2007).³⁶

³⁵ As explained later in this chapter, OGC relied exclusively on the first canon of construction listed in this paragraph in its analysis of the VCO exception. An OJJDP Senior Legal and Policy Advisor (Senior Advisor), who wrote a Response Memorandum to the 2008 VCO Opinion, built her analysis around the second canon of construction.

³⁶ Also relevant to our review, the Reenactment Doctrine, which presumes that Congress is “aware of an administrative or judicial interpretation of a statute and adopts that interpretation when
(Cont’d.)

If a court finds that an agency regulation conflicts with the plain terms of a statute under the first part of the *Chevron* analysis, the court will vacate or strike down the regulation. *Id.* at 167; *NW Evt'l Advocates v. Evt'l Prot. Agency*, 537 F.3d 1006, 1010 (9th Cir. 2011). In that case, the court will never reach the second step of *Chevron* referenced above and, thus, will not afford deference to the agency regulation. The court may strike down the regulation effective immediately or may, depending upon the circumstances, allow the agency a certain amount of time to amend the regulation. *See NW Evt'l Advocates v. Evt'l Prot. Agency*, 537 F.3d 1006 (9th Cir. 2008). In one case, the Ninth Circuit affirmed the District Court's decision to invalidate a regulation as of a date 2 years in the future, because the *ultra vires* regulation had been in place for 30 years and the Environmental Protection Agency faced a complicated task of replacing it with a new regulation and permit scheme. *Id.* at 1025-26.

c. What an Agency Must Do Upon Determining That the Agency's Own Rule Conflicts with a Statute

In general, agencies are bound by and must obey their own rules. *E.g.*, *Leslie v. Attorney Gen.*, 611 F.3d 171, 180 (3d Cir. 2010). However, an agency is not bound by its own rule when such rule is inconsistent with a statute. *Tunik v. Merit Sys. Prot. Board*, 407 F.3d 1326, 1345-46 (Fed. Cir. 2005); *Am. Fed. of Gov't Employees v. Fed. Labor Relations Auth.*, 777 F.2d 751, 760 (D.C. Cir. 1985); *Am. Tel. and Tel. Co. v. Fed. Comm'n Comm'n*, 978 F.2d 727, 733 (D.C. Cir. 1992) (rejecting FCC's argument that it was bound to apply rule that was inconsistent with statute until it accomplished planned future rulemaking to address problem).

An agency, like OJP, will often attempt to predict a court's interpretation of a statute to determine whether the agency is bound by – or alternatively must reject – its own rule. Courts have indicated that the proper course when an agency determines that a rule that went through notice-and-comment rulemaking is inconsistent with a statute is to expeditiously repeal or amend the rule through the rulemaking process. In *American Telephone*, the court suggested the following:

If the agency believed its rule was invalid and did not want to so hold in an adjudication . . . it immediately could have started a companion rulemaking to repeal the rule. The agency's own lawyers could have determined the rule was inconsistent with the statute and a Notice of Proposed Rulemaking would then have so stated.

Id. In *American Federation of Government Employees*, where the court ultimately determined that the Fair Labor Relations Authority was incorrect in its determination that its rule was inconsistent with a statute, then-Judge Scalia emphasized the importance of following the rulemaking process when possible:

it re-enacts a statute without change," cannot alter the plain meaning of a statute. *Fortis v. United States*, 420 F. Supp. 2d 166, 179 (S.D.N.Y. 2004).

[T]he Administrative Procedure Act clearly provides that a rule can only be repealed by rulemaking. . . . Perhaps there are situations in which we would be justified in looking beyond the defect of inconsistency, to affirm an adjudication on the ground that its result was mandated by statute and that the conflicting rule was simply unlawful. But that is surely not the ordinary course, since it fosters neither judicial efficiency nor orderly and predictable agency process.

777 F.2d at 760 (Scalia, J., concurring).

d. Treating Similarly Situated Entities Similarly

In addition, agencies must not act in ways that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). Thus, agencies should generally be consistent and treat similarly situated entities and individuals similarly. *See, e.g., id.* at 759, and *Marco Sales v. Fed. Trade Comm’n*, 453 F.2d 1, 7 (2d Cir. 1971), in which the court stated:

The variety of problems dealt with make absolute consistency, perfect symmetry, impossible. . . . But law does not permit an agency to grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case.

Id. (internal quotation marks omitted).

2. Executive Orders and OMB Guidance

Both the Executive and Legislative branches have, over the years, promoted transparency in the regulatory process. In 1993, President Clinton signed Executive Order (E.O.) 12866, which required each federal agency to submit a Regulatory Plan as part of the Unified Regulatory Agenda maintained by the Office of Information and Regulatory Affairs (OIRA) within OMB. The Regulatory Plan must contain, among other things, “[a] summary of each planned significant regulatory action.” A regulatory action is defined as “any substantive action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation.” Under E.O. 12866, a regulatory action is “significant” if it is likely to result in a rule that may:

. . .

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles as set forth in this Executive order.

In addition, agencies must have a plan for modifying or eliminating regulations that are, among other things, duplicative, unnecessary, overly burdensome, or incompatible with other regulations or the President's priorities. Regulations that agencies select to be reviewed for possible elimination or modification must be included in the Regulatory Plan submitted to OIRA. OIRA reviews all proposed significant regulatory actions to determine whether they are consistent with the statutory mandate. As stated in the preamble, one of the objectives of E.O. 12866 was to "make the [regulatory] process more accessible and open to the public."

President George W. Bush issued two E.O.s amending E.O. 12866, one of which is significant to O&R's review. On January 18, 2007, the President signed E.O. 13422, which subjected agency "guidance documents" and "significant guidance documents" to OIRA review under E.O. 12866. A guidance document is "an agency statement of general applicability and future effect, other than a regulatory action, that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue." A guidance document is significant if it meets one of the same four criteria that would make a regulatory action significant under E.O. 12866 (listed above). Shortly thereafter, on January 18, 2007, OMB issued a "Final Bulletin for Agency Good Guidance Practices ['Bulletin 07-02']," which established "policies and procedures for the development, issuance, and use of significant guidance documents" by federal agencies. 72 Fed. Reg. 3432. Bulletin 07-02 defines guidance document and significant guidance document in the same ways as E.O. 13422. It further provides that guidance documents can take many forms and are not limited to written documents. According to the Bulletin, "the term 'guidance document' encompasses all guidance materials," including memoranda, manuals, and even audio recordings.³⁷ Bulletin 07-02 requires agencies to have written procedures for the approval of significant guidance documents. Most significantly for purposes of this review, Bulletin 07-02 requires each agency to "maintain on its Web site . . . a current list of its significant guidance documents in effect," with a link to each. "New significant guidance documents and their Web site links shall be added promptly to this list, no later than 30 days from the date of issuance."³⁸

³⁷ OJP's list of significant guidance documents on its website contains links to memoranda, the OJJDP Guidance Manual, regulations in the Federal Register, and entire websites, among other materials. <http://ojp.gov/about/sgd.htm> (last accessed June 13, 2017).

³⁸ On January 30, 2009, the President issued E.O. 13497, which revoked E.O. 13422 and ordered OMB to rescind any regulations or guidelines implementing or enforcing E.O. 13422. General Counsel Madan told us that he believed Bulletin 07-02 had been rescinded as a result of E.O. 13497. However, an official from OMB's Office of General Counsel informed us by e-mail on April 15, 2016 that Bulletin 07-02 remains in effect and was not affected by E.O. 13497. This information is consistent with a March 4, 2009 memorandum from the Director of OMB to the heads and acting heads of executive departments and agencies. The memorandum stated that E.O. 13497 was intended to "restore the regulatory review process to what it had been under Executive Order 12866 between 1993 and 2007." The memorandum further stated that significant policy and guidance documents were subject to OIRA review during that period and that they would remain so subject. Indeed, in April 2015, the Government Accountability Office (GAO) issued a report regarding significant guidance documents and select agency procedures pursuant to Bulletin 07-02. See GAO-

(Cont'd.)

Finally, on January 18, 2011, the President issued E.O. 13563, entitled “Improving Regulation and Regulatory Review.” Section 1 provides that the U.S. regulatory system must, among other things, “allow for public participation and an open exchange of ideas,” “promote predictability and reduce uncertainty,” and “ensure that regulations are accessible, consistent, written in plain language, and easy to understand.” In addition, E.O. 13563 requires agencies to develop and submit to OIRA a plan under which the agency “will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency’s regulatory program more effective or less burdensome in achieving the regulatory objectives.”

III. Factual Background Related to the Legal Opinions and Other Relevant Issues

A. OJJDP’s Treatment of Wisconsin From 2000-2008

In this part we address OJJDP’s treatment of Wisconsin under the JJDP Act formula grant program from the early 2000s through April 2008, when OJJDP officials learned that Wisconsin was applying the VCO exception to non-offenders. We investigated this history in order to identify any evidence of favoritism or arbitrary or capricious actions in support of or in collusion with Wisconsin, and as a backdrop for the opinions and actions that followed.

1. Early 2000s Compliance Concerns

According to documents we reviewed, Wisconsin OJA submitted core requirements compliance monitoring reports indicating that it was in compliance with the core requirements of the JJDP Act from 2000 through 2003, allowing Wisconsin OJA to receive its full formula grant allocation through 2006. In Wisconsin’s 2004 and 2005 core requirements compliance monitoring reports, Wisconsin’s then-Compliance Monitor (Compliance Monitor 2) reported that Wisconsin’s DSO rate exceeded the allowable rate under the JJDP Act. As a result, OJJDP reduced Wisconsin’s funding by 20% for fiscal year (FY) 2007, and Wisconsin was required to spend 50% of the remaining award to achieve compliance with DSO. See 42 U.S.C. § 5633(c)(2)(A).

An internal Wisconsin OJA document entitled “Compliance Summary 8/5/2004” (2004 Compliance Summary) showed that in or about August 2004, Wisconsin OJA staff learned that there were significant problems with Wisconsin OJA’s data collection system, called the Juvenile Secure Detention Register (JSDR). The 2004 Compliance Summary also stated that there were many juvenile detentions for unknown reasons in previous years and that “[b]ased on a cursory

15-368, located at <http://gao.gov/assets/670/669688.pdf> (last accessed February 6, 2017). According to this GAO report, “[a]ll significant guidance documents . . . are subject to the OMB bulletin.” GAO-15-368 at 9.

review of the data . . . we are out of compliance and have been for some time.” OJJDP conducted an audit of Wisconsin OJA in February 2005, before Wisconsin had submitted the 2004 and 2005 core requirements compliance monitoring reports that showed them out of compliance, but after the internal 2004 Compliance Summary was written. The Compliance Monitoring Coordinator at the time (2005 Compliance Monitoring Coordinator), who led the audit, told us that he did not believe he had seen the 2004 Compliance Summary before his interview with us. He stated that OJJDP “always had issues with the JS DR,” including “the validity of the data in it and the functionality of it,” but that he could not remember whether he had been aware of the other issues described in the 2004 Compliance Summary. He further told us that he did not find the 2004 Compliance Summary to be especially concerning, because it indicated a data verification problem but not necessarily unreported violations. He stated that data verification problems were common among JJDP Act formula grantees.

According to the draft audit report that we reviewed, the OJJDP staff who conducted the 2005 audit found that Wisconsin had made improvements since the last audit, which was conducted in 1999. However, the staff also identified several concerns, such as that Wisconsin had improperly failed to include court holding facilities in its monitoring universe. OJJDP made recommendations as a result of the audit, including that Wisconsin submit a complete Compliance Monitoring Manual incorporating a description of Wisconsin’s VCO usage, submit a final plan for facility site inspections, and establish a process for identifying and monitoring court holding facilities. As far as the JS DR, the OJJDP staff noted that it was a “newly developed” system.³⁹

According to e-mails we reviewed, in 2006, Wisconsin OJA staff considered conducting an internal audit of the data they previously submitted for 2005 in the hope of finding discrepancies that would warrant an amended report to OJJDP. On October 11, 2006, the then-Juvenile Programs (JP) Director for Wisconsin OJA e-mailed the Juvenile Justice (JJ) Specialist, who at the time was attending an OJJDP core requirements compliance monitoring conference, the following suggestion:

[The Executive Director] has agreed on a high level description of a strategy for reviewing our 2005 data that we will talk about when you get back. A key element is not to ask for reconsideration – assuming that an audit shows significant discrepancies – but rather to submit an amended report based upon further review and clarification of the data.

The JJ Specialist wrote back later that day:

³⁹ After reviewing a draft of this report, Rumsey told us that the JS DR had been in existence since 1994 and that Wisconsin OJA staff had attempted to hide its problems with the JS DR from OJJDP. We did not confirm the year the JS DR was developed, as this was beyond the scope of our review. In addition, we were unable to corroborate Rumsey’s statement that Wisconsin OJA staff attempted to hide deficiencies in the JS DR from OJP.

Spoke with [the 2005 Compliance Monitoring Coordinator] – he seems to think that focusing on a new data set (like the end of 2006) may be the best strategy. Due to how far ‘over’ we were in 2005, he didn’t think we could find enough mistakes to believably fall into compliance.

By the time of these e-mails in 2006, Elissa Rumsey had taken over the role of Compliance Monitoring Coordinator at OJJDP. (Rumsey later became the complainant in the underlying OIG investigation of Wisconsin OJA that we describe in Chapter Four.) However, the 2005 Compliance Monitoring Coordinator told us that he still attended training conferences in 2006. He also told us that for a period of time after Rumsey took over the position, state employees of several states continued to occasionally seek his guidance on core requirements compliance monitoring issues. He stated that he did not remember the 2006 conversation with the Wisconsin JJ Specialist, but that he would not have used the language “believably fall into compliance,” and that he believes that those words were her characterization of what he had actually said. However, he also told us that the suggestion of using at least 6 months of more current data was guidance that he consistently provided to state grantees, consistent with OJJDP’s policy and practice for many years. He said that for that reason, he did not doubt having a conversation with the JJ Specialist in which he provided the guidance attributed to him.⁴⁰

In or about December 2007 Wisconsin Compliance Monitor 2 informed Rumsey that Wisconsin OJA had been submitting fraudulent core requirements compliance monitoring data for years. Rumsey told two employees with whom she was close at the time – the then-Research Coordinator and the employee who later became the Compliance Monitoring Liaison – about the allegations that Wisconsin OJA had submitted fraudulent data. According to the Compliance Monitoring Liaison, Rumsey told her not to disclose the allegations of fraud to OJJDP or OJP management, because Wisconsin Compliance Monitor 2 feared retaliation by Wisconsin OJA. Both the Research Coordinator and the Compliance Monitoring Liaison told us that they did not share the allegations of fraud with OJJDP management.

Rumsey and the two supervisors of SRAD, Associate Administrator Gregory Thompson and Deputy Associate Administrator Chyrl Jones, told us that Rumsey had informed her managers in or about the fall of 2007 that she had concerns about the accuracy of Wisconsin OJA’s data. According to Rumsey, she also told her managers about a conversation with Wisconsin’s JP Director in October 2007 in which he had said to her something to the effect of, “I wouldn’t believe it either” regarding then-recent core requirements compliance monitoring data that

⁴⁰ Semmerling found the language “believably fall into compliance” to be suspicious and possible evidence of collusion. As explained in more detail in our conclusions in Section IV of this chapter, we did not find that this language, which amounted to the JJ specialist’s interpretation of what the 2005 Compliance Monitoring Coordinator is alleged to have said, evidenced collusion. Also, as explained later in this section, OJJDP in fact ultimately allowed Wisconsin OJA to use more current data to support its 2008 formula grant award.

Wisconsin OJA had collected. However, she stated that she could not remember whether she specifically told management about the allegations that Wisconsin had submitted fraudulent data. Rumsey stated that she did not disclose any allegations about fraudulent conduct by Wisconsin OJA to OGC. Acting OJJDP Administrator Jeffrey Slowikowski, Deputy Administrator Nancy Ayers (who was Rumsey's immediate supervisor in the Policy Division), Thompson, Jones, and the OGC attorneys all told us that they did not become aware of the allegations that Wisconsin had submitted fraudulent data until after their interviews with Semmerling as part of the OIG's investigation.⁴¹

2. Heightened Scrutiny of Wisconsin OJA in 2007 and 2008

Wisconsin's 2004 and 2005 noncompliance, among other concerns, caused OJJDP to scrutinize Wisconsin's compliance more closely in 2007 and 2008, including a site visit to Wisconsin in April 2008 during which OJJDP employees first learned how Wisconsin was applying the VCO exception to non-offenders. We describe these events in this part, as well disagreements between Rumsey and other OJJDP staff about how to address Wisconsin's compliance issues and the decision by former OJJDP Administrator Flores to transfer many of Rumsey's duties. In addition, according to Semmerling's Confidential Statement, Rumsey told Semmerling that there were "secret meetings" between Wisconsin OJA staff and Flores and Thompson during this period. Thus, in this part we also describe meetings between Wisconsin OJA staff and OJJDP leadership. The allegation that these meetings were intentionally kept "secret" for Wisconsin's benefit will be discussed in Section IV of this chapter.

⁴¹ In March 2011, Rumsey filed a complaint with the U.S. Merit Systems Protection Board (MSPB) alleging that her OJJDP supervisors and managers had taken prohibited personnel actions against her. During the proceedings that followed, the court heard testimony from Rumsey that pertained to her conversations with the JP Director and Compliance Monitor 2. The court also heard testimony from Ayers, Thompson, and others. We reviewed the transcripts of Rumsey's MSPB hearing, the October 2011 MSPB "Initial Decision" denying Rumsey's request for corrective action (2011 MSPB Decision), and the October 2013 MSPB "Opinion and Order" affirming in part and reversing in part the 2011 MSPB Decision (2013 MSPB Opinion). See *Rumsey v. Dept. of Justice*, 2013 MSPB 82. Neither Rumsey nor any other witness testified before the MSPB that Rumsey told her managers about the allegations of fraudulent conduct, and Rumsey's managers denied knowing about such allegations until after the OIG investigation commenced in early 2008. Based on this testimony, the 2011 MSPB Decision did not find that Rumsey had disclosed fraud to OJJDP management. Despite this, the 2013 MSPB Opinion concluded, without citing to the record, that Rumsey had disclosed the fraud to Ayers when it determined that Rumsey had "shown by preponderant evidence that her disclosures to Ayers concerning the state of Wisconsin's alleged submission of fraudulent data were a contributing factor to Ayers's decision to cancel her telework agreement." 2013 MSPB 82 at 11. Consistent with the 2011 MSPB Decision, and based on witness testimony in the OIG's review, we found no evidence that OJJDP managers or supervisors were aware of allegations of fraudulent conduct by Wisconsin officials until after the OIG initiated its investigation in May 2008.

a. June 2007 Through September 2007: The Special Condition; Scrutiny of Wisconsin's DSO Plan; Contact with Senator Kohl's Staffer

In connection with the requirement to spend 50% of its 2007 FY allocation to address DSO compliance problems, Wisconsin OJA submitted a plan in March 2007 as to how it would achieve compliance with the DSO core requirement. Documents we reviewed indicate that OJJDP found this plan to be confusing and inadequate. As a result, between June and November 2007, there were several e-mail exchanges between OJJDP personnel – primarily Rumsey and the OJJDP State Representative assigned to Wisconsin (OJJDP State Representative) – and Wisconsin OJA personnel, through which OJJDP scrutinized Wisconsin's data and procedures. We found no evidence that OJJDP managers opposed this scrutiny. For example, on July 15, 2007, Rumsey e-mailed Jones and the OJJDP State Representative expressing concerns with a revised DSO plan that Wisconsin OJA had submitted earlier that month and listing several related questions for Wisconsin OJA. The next day, the OJJDP State Representative e-mailed Wisconsin OJA personnel asking Rumsey's questions and a few additional questions. Among other things, they asked Wisconsin OJA to explain why the state was out of compliance in 2005, whether 100% of its juvenile detention centers had been inspected, who from the state was tasked with inspecting lock-ups, and why the number of reported lockups was "so terribly low" given the size of the state. According to Thompson, this e-mail was unusually probing, but not inappropriate. On July 27, 2007, Wisconsin replied to these questions with approximately two and a half pages of responses.

Rumsey told us that she believed that the answers to her questions were inadequate and that she continued to believe that Wisconsin OJA's DSO plan was insufficient. On August 31, 2007, Jones sent an e-mail to Rumsey, the OJJDP State Representative, Thompson, Ayers, and a representative of OJP's Office of Communication (OCOM) summarizing Wisconsin's situation. In the e-mail, Jones wrote that Wisconsin "submitted a weak and confusing plan on how it would address coming into compliance with DSO," indicating that Jones and possibly others at OJJDP agreed with Rumsey that Wisconsin's DSO plan was inadequate. Jones further wrote that as a result of the concerns with Wisconsin's DSO plan, OJJDP restricted draw-down of the remaining 80% of Wisconsin's 2007 formula grant allocation pursuant to a "special condition." The special condition provided that OJJDP would not permit Wisconsin to draw down funds until it provided a "detailed, data-driven analysis of the State's DSO violations, including a breakdown of which facilities appear[ed] to be the most responsible for the most violations and a discussion of the circumstances that appear[ed] to be resulting in these violations." According to the OJJDP State Representative, the idea of a "data-driven" plan was that the state would examine data from a particular year and identify why violations were happening in particular facilities, in order to develop a

plan to improve compliance.⁴² The special condition did not specify what year was to be the source of the data for the plan.

In August 2007, a staffer for U.S. Senator Herbert Kohl of Wisconsin contacted Thompson questioning the time lag between the year of Wisconsin's noncompliance and the year that funding was reduced. According to the Compliance Monitoring Liaison, Senator Kohl had become involved because Wisconsin officials believed that OJJDP was handling Wisconsin's compliance situation unfairly. Upon receiving the call, Thompson stated that he followed the standard procedure of referring the issue to OCOM. Thompson stated that he had no prior relationship with Senator Kohl or his staff, and he assumed that the staffer contacted him because of his job title. In response to the inquiry, Deputy Administrator Ayers, Thompson, Jones and a representative from OCOM had a conference call with Senator Kohl's staffer. Jones stated that most of the call involved OJJDP educating the staffer about the core requirements compliance monitoring process.

According to Jones and contemporaneous e-mails, the outcome of the conference call with Senator Kohl's staffer was that OJJDP agreed to expedite its handling of Wisconsin's issues and provide an update to the staffer within a few business days. However, Jones told us and the e-mails indicate that OJJDP did not consider reversing the prior noncompliance determination or agree to make adjustments to its requirements for Wisconsin. OJJDP continued to require Wisconsin to submit a revised DSO plan meeting the requirements of the special condition. Both the release of Wisconsin's FY 2007 funding and Wisconsin's FY 2008 award depended upon the acceptability of that plan.

Rumsey stated that Senator Kohl's inquiry triggered an unusually panicked reaction within OJJDP. However, according to several witnesses, a Congressional inquiry would naturally raise OJJDP's level of responsiveness to a state and might cause OJJDP to expedite its handling of the state or at least provide a more definitive timeline. Additionally, Thompson stated that it is generally not unusual for OJJDP to agree to do something for a state by a certain date.

b. September 2007 through October 2007: Wisconsin and Other States Complain to Flores; Wisconsin Deemed Conditionally in Compliance Contingent Upon Additional Data Received and Site Visit

On September 4, 2007, Rumsey e-mailed Jones, the OJJDP State Representative, Thompson, and Ayers that she and the OJJDP State Representative reviewed what Wisconsin OJA had submitted as its revised DSO plan and determined that the state had in fact resubmitted prior written submissions. Thus, on September 6, 2007, the OJJDP State Representative sent Wisconsin OJA's Executive Director an e-mail finding that Wisconsin OJA's DSO plan did not meet

⁴² For example, if the problem was poor training of staff in a particular facility, that problem could be remedied by instituting a new training program.

the requirements of the special condition. The e-mail required Wisconsin to participate in technical assistance (TA) and then submit a more comprehensive DSO plan.⁴³ On September 13, 2007, Rumsey led a TA telephone conference with Wisconsin OJA. That same day, Rumsey sent Wisconsin employees a two and a half page, singled-spaced e-mail detailing seven concerns with Wisconsin OJA's 2006 core requirements compliance monitoring report and offering an in-person conversation to discuss the concerns. Thompson stated that the amount of clarification asked of Wisconsin OJA in this e-mail was "out of the norm," but he did not oppose it.

Also in September 2007, Flores and other OJJDP leadership met with the Executive Director of Wisconsin OJA in his capacity as President of the National Criminal Justice Association (NCJA), along with representatives of Delaware and a few other states.⁴⁴ Rumsey told us that she was not invited to this meeting but that she learned about it afterwards from an Arkansas JJ Specialist. According to a December 2007 e-mail from a NCJA representative to Flores' Administrative Assistant and other documentation, NCJA raised JJDP Act "state compliance issues" during the September 2007 meeting.

On October 1, 2007, OJJDP sent its annual determination letters to all states regarding their FY 2008 funding. Because Wisconsin's compliance was still in question, OJJDP sent Wisconsin OJA a letter finding the state "in compliance, contingent upon further information received" with respect to DSO. Specifically, OJJDP required Wisconsin to submit "a sample of 2006 admissions data from all secure institutions" and indicated that it would conduct a site visit in about 1 month to verify that data. (Emphasis in original). Wisconsin was one of a handful of states that received a conditional finding of compliance for FY 2008.⁴⁵

Later in October 2007, OJJDP held a training conference in Denver, Colorado. Flores held a meeting during this conference that was attended by representatives of approximately half of the states and several OJJDP employees, including Rumsey

⁴³ According to Thompson, "technical assistance" or "TA" is individualized training provided to a state participating in an OJJDP grant program. TA may be initiated at a state's request or at OJJDP's suggestion and may be provided by OJJDP staff or by contractors.

⁴⁴ As described in Chapter Two, NCJA is an organization that represents state, tribal, and local governments on crime control issues. According to Semmerling, this was the first alleged "secret meeting."

⁴⁵ OJJDP and OGC witnesses told us that OJJDP issued conditional findings of compliance for several states around that time. According to documentation we reviewed, American Samoa, Arkansas, and the Virgin Islands all received conditional findings on one or more core requirements that same year. According to an October 1, 2009 e-mail that was unrelated to Wisconsin from an OGC attorney to OJJDP leadership, the purpose of such conditional findings was to allow states to explain or correct problems. The e-mail advised OJJDP to more closely scrutinize the data of states that benefitted from the practice during future audits. Thompson told us that the practice generally allowed states to assemble and submit more recent data when OJJDP and state representatives believed that the newer data would likely demonstrate compliance. Thompson told us that OJJDP issued conditional findings of compliance for about 2 years, until OGC advised OJJDP that the practice was not legally permissible.

and Thompson. According to Thompson, the meeting was scheduled to address concerns with OJJDP's handling of core requirements compliance monitoring that had been raised by NCJA the previous month. Witnesses who attended the meeting told us that Wisconsin was particularly outspoken at this meeting, but that other states, including Utah, Idaho, Louisiana, and Iowa, also raised concerns and were particularly vocal. The states did not complain about Rumsey by name, but several witnesses, including Rumsey, told us that they understood the complaints to be about Rumsey since she was the Compliance Monitoring Coordinator at the time.

Following the Denver conference, state representatives from at least 12 states, including Wisconsin, formed a "Compliance Monitoring Working Group" to present the states' concerns to OJJDP and propose solutions. On December 5, 2007, the Wisconsin JJ Specialist sent an e-mail to Flores, copying Thompson, Jones, and 12 representatives of various states that attached a document prepared by the Compliance Monitoring Working Group. According to the e-mail, a member of the Compliance Monitoring Working Group from Montana had asked the Wisconsin JJ Specialist to send the document. The document stated that at least 37 states believed that OJJDP was imposing requirements on states that diverged from the requirements of the JJDP Act and its implementing regulations and identified 9 specific areas of concern.⁴⁶ According to the document, these areas of concern first surfaced during an OJJDP training conference in San Diego, CA, in March 2007. Rumsey was the Compliance Monitoring Coordinator at that time and had delivered a presentation at the San Diego training conference.⁴⁷

Flores sought guidance from OGC regarding the several issues raised by the state representatives, and OGC issued a series of opinions addressing these issues in late 2007. Based upon this guidance, on February 13, 2008 Administrator Flores issued a memorandum to state employees that partially supported and partially rejected the states' positions on the various issues.⁴⁸ The VCO exception was not among the issues raised by the states or addressed by OGC at that time.

⁴⁶ As examples, the states believed that OJJDP's guidance regarding the required scope of the universe of facilities for monitoring compliance with the core requirements and the frequency with which such facilities should be inspected were more expansive than the JJDP Act required.

⁴⁷ Witnesses told us that one of the JJ Attorneys (JJ Attorney 1) attended the San Diego training conference and, upon her return, also expressed concern that OJJDP had provided guidance that was inconsistent with the statute and regulations.

⁴⁸ For example, with respect to the frequency with which facilities should be inspected, Flores's guidance was that states should inspect at least 10% of the facilities in each type of classification category every year, that states should "strive to inspect" all secure facilities once every 3 years, and that states should spot check non-secure facilities to ensure they had not become secure. This guidance was less onerous than what Rumsey had previously informed the states, which was that 100% of most types of facilities must be inspected every 3 years. However, Flores's guidance still required the states to do more than they believed was required – specifically, the states argued that the regulations did not require any particular inspection frequency and that the original guidance provided by OJJDP was that the states need only inspect 10% of the entire universe (not of each type of facility) annually.

Wisconsin's JP Director also attended an individualized training session with Rumsey and the OJJDP State Representative on October 30, 2007. According to a timeline prepared by Semmerling, "OJJDP e-mails indicate that there are meetings by Thompson, [Programs Deputy Administrator Marilyn] Roberts, and Flores with" Wisconsin's JP Director in October 2007, as well. However, the only evidence we were able to find of meetings between Wisconsin's JP Director and OJJDP leadership in October 2007 was in the form of witness recollections that those individuals had conversations at the Denver training conference.⁴⁹

c. October 2007 through December 2007: Wisconsin Permitted to Use More Recent Data; November Site Visit Delayed

As explained in OJJDP's October 1, 2007, determination letter to Wisconsin, both the release of Wisconsin's remaining 2007 funding and Wisconsin's entire 2008 funding award were contingent upon Wisconsin OJA submitting to OJJDP an analysis of its 2006 data. However, Wisconsin OJA requested that it be permitted to use 2007 data for both purposes because of difficulties verifying the older 2006 data. According to e-mails we reviewed among Thompson, Jones, Rumsey, and the OJJDP State Representative in early November 2007, OJJDP sought and received approval from OGC to allow Wisconsin to use data from the first 6 months of FY 2007 to satisfy the FY 2007 special condition and data from the full 12 months of FY 2007 to qualify for its FY 2008 award. In a November 8, 2007 e-mail to Thompson, Rumsey indicated that she opposed this approach, stating that she believed that a discussion of the 2006 data was necessary to release the 2007 special condition. Thompson told us that he believed Rumsey was incorrect, because the special condition only generally required a "data-driven analysis" and did not specify a particular year. With respect to the 2008 award, Rumsey suggested in the same November 8, 2007, e-mail that Wisconsin clarify in writing its need to use 2007 data rather than 2006 data. Thompson followed this suggestion, and Wisconsin OJA submitted a revised DSO plan and a justification for its request to use 2007 data, on November 29, 2007 and December 18, 2007, respectively.

The November 29, 2007 DSO plan was approximately 20 pages and contained a section purporting to explain the reasons for the state's DSO violations. This section identified Milwaukee and Racine as the counties with the most DSO violations and stated that the remaining 70 counties showed "no pattern or practice of holding" status and non-offenders in violation of the DSO core requirement. With respect to Milwaukee County, where the most violations had occurred, the report explained that most of the violations resulted from detentions of minority girls who had engaged in "serious self-endangering runaway behavior" and for whom the state did not then have adequate treatment services. The report acknowledged that this was a problem and explained that efforts were already

⁴⁹ According to Semmerling, the second alleged "secret meeting" occurred in October 2007. The OJJDP State Representative told us that she attended an October 2007 meeting with Wisconsin's JP Director but said she could not remember who attended or what was discussed. We were unable to determine whether she was referring to the individualized training session discussed in the text.

underway to resolve it. The report was attached to an e-mail to the OJJDP State Representative, Rumsey, Thompson and Jones from the Wisconsin JJ Specialist who wrote that "a new compliance report based on the first six months of data for 2007" would be provided by December 31.

In the December 18, 2007 letter, Wisconsin OJA provided several reasons to support its request to use 2007 data, including: (1) the 2006 files for juveniles that had aged out of the system had been destroyed; (2) older data may have been inaccurate due to problems with the JS DR; (3) former Wisconsin Compliance Monitor 2 no longer worked for the agency, had taken certain files home with him, and was not available to discuss his procedures for obtaining and analyzing the data; (4) Wisconsin OJA may have misinterpreted the VCO exception at the time the 2006 data was collected; and (5) Wisconsin OJA had since taken action to correct problems that had caused high levels of DSO violations in Milwaukee. As a result of this submission, OJJDP agreed to allow Wisconsin OJA to use 2007 data, both for the "data-driven analysis" to release the special condition on the FY 2007 funds and to release the FY 2008 award, but with the caveat that the 2008 award would not be made until OJJDP visited Wisconsin to verify the 2007 data.

Rumsey told us that she believed that Thompson "implied" to Wisconsin personnel that they could "massage" the data to be in compliance. She stated that the data therefore was not only more recent, but also "substituted." However, Rumsey said she was not certain that this was the case and we did not find any documentation to support the assertion. We asked Rumsey why she believed that Thompson implied to Wisconsin personnel that they could massage the data. She responded that Thompson had once questioned why a different state did not just "get" the number down by four-tenths of a point when it was close to being in compliance.

Thompson and Jones both stated that in hindsight Wisconsin's multiple reasons for not being able to access the 2006 data may have been suspicious, especially given the fraud allegations about which they subsequently became aware through the OIG investigation being conducted by Semmerling. In addition, the Compliance Monitoring Liaison stated that it was unusual for a state to claim that an entire year's worth of data was unavailable. However, both Thompson and Jones told us that they had not thought that Wisconsin OJA's reasoning was suspicious at the time.⁵⁰ While there was no precedent for allowing a state to use the same year of data for two different purposes, allowing Wisconsin to submit more current data was consistent with OJJDP's policy as set forth in OJJDP's Guidance Manual, and Thompson and other OJJDP witnesses told us that the practice was routinely exercised with any state choosing to take advantage of it.⁵¹

⁵⁰ Thompson stated that he was more concerned about the allegation that the former compliance monitor had taken files home with him than Wisconsin OJA's request to use more recent data.

⁵¹ OJP and OJJDP leadership told us that OJJDP was eliminating the policy of allowing states to use more current data when older data would not allow a finding of compliance. On April 21, 2015, AAG Karol Mason testified before the Senate Judiciary Committee that, "Going forward, we will no longer accept supplemental data and we are working to shorten the gap between the submission of a
(Cont'd.)

According to Thompson, approximately four or five states per year took advantage of the opportunity to submit more current data. The practice of allowing states to use 6 months of data for a funding determination also was sanctioned by both the JJDP Act regulations and the Guidance Manual. Thus, Thompson said that he believed that OJJDP was giving Wisconsin the same opportunity that it would have afforded to any other state. While Rumsey believed that Wisconsin was receiving special treatment, Thompson stated that, to the contrary, Wisconsin has received more scrutiny than any other state during the 24 years that he has worked at OJJDP.

According to several OJJDP witnesses, Rumsey was more demanding of states that had complained about her, especially Wisconsin, than other states. The Compliance Monitoring Liaison told us that she believed Rumsey was especially demanding of Wisconsin, because Wisconsin's JP Director "was perceived as being somewhat of a ringleader of the states" in their complaints about the handling of core requirements compliance monitoring under Rumsey's leadership as Compliance Monitoring Coordinator. Thompson stated that Wisconsin OJA employees became very frustrated because Rumsey was never satisfied with their answers to her questions. Even Compliance Monitor 2, the Wisconsin OJA official who had reported the alleged fraudulent conduct by Wisconsin to Rumsey, complained about the treatment by OJJDP. In one e-mail he stated, "I don't mind putting in the time, however I do mind going in circles chasing a phantom solution. . . . Every time they ask for something, we provide it, then they ask for something else." As a result, the JP Director contacted Thompson by telephone and e-mail several times in an effort to seek clarification on what was needed to release the special condition.

d. January 2008: Internal OJJDP E-mails and Discussions Regarding the Adequacy of Wisconsin's Revised DSO Plan; Transfer of Rumsey's Duties; April 2008 Wisconsin Visit Scheduled

On January 9, 2008, the OJJDP State Representative e-mailed Rumsey, copying Jones and Thompson, and asked Rumsey to meet with her to review the 6 months of 2007 data that Wisconsin had submitted at the end of December 2007. Later that day, Thompson wrote back to Rumsey and the OJJDP State Representative:

Could you please let me know where we stand with releasing the special condition restricting drawdown of the FY 2007 allocation[?] [The Wisconsin JP Director] has called me twice now, and I would like to call him back and provide him with some information. I thought we

state's data and OJJDP's compliance determination based on that data." <https://www.judiciary.senate.gov/imo/media/doc/04-21-15%20Mason%20Testimony%20Updated.pdf> (last accessed February 6, 2017). In addition, the 2015 Policy Document provides, "OJJDP will only accept and review data to demonstrate compliance from the states from the applicable reporting period."

had all we needed to release the funds, but if this is not the case, I would like to know specifically what we still need, and if [Wisconsin (WI)] is aware of any continuing deficiencies.

Rumsey responded that she and the OJJDP State Representative “need to meet face to face to go over what was submitted because it came in multiple parts – and I still cannot see, where for example, it meets the special condition of ‘providing a detailed, data-driven analysis of the state’s DSO violations.’” Thompson wrote back:

Thank you for the update, much appreciated. After you and [the OJJDP State Representative] have met and discussed your concerns maybe we could all get together for an update. I know this has been going on for some time, and given that WI’s DSO rate is now below 5.8% [a DSO violation rate that would not require a reduction in funding under the JJDP Act regulations], I am concerned that we keep requiring the state to provide additional information.

Rumsey responded that she did not “necessarily have concerns or want additional information” but that she could not find where Wisconsin OJA had provided the information necessary to respond to the special condition, specifically “the description of in what facilities the violations occurred, why they occurred, etc.” However, the OJJDP State Representative had e-mailed Rumsey, Thompson, Jones, and the Compliance Monitoring Liaison the day before that Wisconsin had provided the information necessary to respond to the special condition in the November 29, 2007 revised DSO plan. Specifically, Wisconsin’s revised DSO plan indicated that Wisconsin’s DSO violations were caused by state laws that conflicted with the JJDP Act, but that only two counties had “a pattern of violating DSO.” As noted above, the plan also provided reasons for the DSO violations in Milwaukee and Racine counties and explained that efforts were underway to resolve the problems in those counties.

On January 25, 2008, Wisconsin’s JP Director contacted OJJDP staff seeking clarification on the status of Wisconsin OJA’s FY 2008 formula grant funding. Deputy Associate Administrator Jones responded by informing Wisconsin OJA that, among other things, OJJDP still planned to verify the state’s 2007 data with an upcoming visit in Wisconsin. The visit to Wisconsin ultimately was scheduled for April 2008 and is discussed in the next subpart.

Also in January 2008, Flores transferred many of Rumsey’s duties, including the duties that involved contact with state employees involved in the formula grant program, to a newly created position of Compliance Monitoring Liaison that was filled at the time by a SRAD State Representative.⁵² Several witnesses, including

⁵² On November 5, 2007, Thompson had submitted to Flores a memorandum in which he requested that many of Rumsey’s duties be transferred to a Compliance Monitoring Liaison position within SRAD. The memorandum outlined the duties that would be performed by the Liaison and the duties that could remain with the Compliance Monitoring Coordinator, Rumsey.

Rumsey, told us that Flores made this decision as a result of the complaints that had been made by Wisconsin and other states during and following the 2007 Denver training conference. According to Rumsey, Flores called her into a meeting and explained his decision to transfer her duties by stating, "people can criticize me all they want, but I will not let them criticize my staff."

On January 30, 2008, OJJDP leadership, including Flores, met with Wisconsin's JP Director and a North Carolina employee who were representing NCJA. On February 1, 2008, Wisconsin's JP Director sent an e-mail to Thompson and Flores stating,

Good afternoon;

Thank you for taking the time to meet with us on Wednesday. I truly appreciate the time and attention you have given to the issues we are concerned with.

During the meeting you requested a copy of the study of 17 year olds in the adult system in Wisconsin. The report was issued this morning. I am attaching a copy.

Thank you again.^[53]

3. April 2008 Wisconsin Visit

OJJDP's April 2008 visit to Wisconsin was conducted as a technical assistance, or TA, visit and lasted for 7 days, from April 4 through April 11, 2008. OJJDP witnesses told us that Rumsey did not attend because former OJJDP Administrator Flores had changed her duties and eliminated her direct contact with states by that time. Instead, the Compliance Monitoring Liaison who assumed many of Rumsey's responsibilities, the OJJDP State Representative, and then-SRAD Deputy Associate Administrator Jones (collectively the "OJJDP team") traveled to Wisconsin in April 2008. Jones stated that she normally did not attend TA visits; however, she attended this one to show Wisconsin that OJJDP was taking its issues seriously.⁵⁴ The Compliance Monitoring Liaison led the visit. Several witnesses told

⁵³ According to Semmerling, the meeting referenced in the e-mail was the third alleged "secret meeting" between Wisconsin OJA staff and OJJDP leadership.

Based upon a December 11, 2009 e-mail from JJ Attorney 2 to Moses and the two other JJ attorneys, it appears that OGC was examining whether OJJDP could legally require information from Wisconsin and other states on 17-year-olds, despite laws in those states that treated 17-year-olds as adults: "As I've been continuing to research the issue of defining juvenile for purposes of DSO, I've come across some language in the WI code that may support a request for information about 17 year olds in adult jails and lock-ups but would not run afoul of the state definition. This could mean we just have to narrow the requests to states, like WI, but could still request certain data."

⁵⁴ Jones told us that she was not as skilled or knowledgeable in core requirements compliance monitoring as others. Thus, Thompson and Jones divided their workload as supervisors such that Thompson handled more of the core requirements compliance monitoring matters. Jones and Thompson both stated that another reason Jones attended this visit was to gain more practice and expertise in core requirements compliance monitoring.

us that the Compliance Monitoring Liaison was particularly well-suited for this role because she was regarded as professional and perhaps the most competent at core requirements compliance monitoring in the office.

Thompson stated that the visit was originally scheduled as an audit. However, OJJDP management determined that a TA visit would be more productive than an audit, because everyone, including Wisconsin OJA employees, already agreed that there were deficiencies in Wisconsin's core requirements compliance monitoring system. In any event, records showed and witnesses told us that Wisconsin was audited in 2005 and, based on OJJDP's usual policy of conducting audits every 5 years, was not due for another audit until 2010.

The visit was structured as what several witnesses described to be a "mock audit" so that Wisconsin juvenile justice staff could gain a better understanding of the audit process while also receiving TA on compliance matters. The Compliance Monitoring Liaison said this meant that the OJJDP team took most of the same actions that they would have taken had they conducted an audit, including discussions with state employees regarding their policies and procedures, an inquiry into the adequacy of the state's core requirements compliance monitoring system, and verification of data, but without an audit-style report. The Compliance Monitoring Liaison and the OJJDP State Representative told us and documentation reflects that during the course of the visit, OJJDP staff verified Wisconsin's reported 2007 data by visiting and examining the records at a sampling of facilities.

There was some disagreement as to whether the "mock audit" style TA visit was a common practice. Thompson stated that it had not been done with other individual states, and had only been done previously with multi-state compliance monitor trainings at Rumsey's initiation. However, the Compliance Monitoring Liaison and the OJJDP State Representative told us that mock audits were common. In addition, Jones stated that "mock audits" had been conducted in at least two other states, Nevada and Alaska, before or at around the same time as Wisconsin.

One of the facilities that the team visited was the Milwaukee County Juvenile Detention facility. The Compliance Monitoring Liaison told us that OJJDP chose this facility because Wisconsin OJA staff had reported DSO problems there due to the detention of non-offenders. In addition, Jones told us that this facility was chosen because the Wisconsin Disproportionate Minority Contact (DMC) Coordinator had expressed concern that it housed a disproportionate number of African-American female juveniles.

We determined from our review of records and witness interviews that upon reviewing the Milwaukee County Juvenile detention facility's case files, the OJJDP team confirmed that the facility housed a large number of African-American female runaways in secure detention. Many of these juveniles had not been charged with or adjudicated of any juvenile offense. Rather, their files reflected that they were involved with the court system because of child abuse or neglect (in other words, "in the neglect system") and had repeatedly run away from foster placements or group homes. Instead of charging them as status offenders, judges issued orders requiring them to stay in their placements. Upon violating these orders, the

juveniles were placed by the judges in secure detention facilities, based upon the belief that the juveniles would be better protected in these facilities than on the streets. In its 2007 Compliance Monitoring Report, Wisconsin OJA did not report these instances as violations of DSO, based upon application of the VCO exception.

Both internal Wisconsin OJA e-mails and e-mails from Wisconsin OJA to OJJDP revealed that Wisconsin OJA based the decision not to report the non-offender runaway detentions as DSO violations on training that the Wisconsin OJA staff believed it had received from OJJDP. In an October 2007 e-mail, Wisconsin's JJ Specialist told her colleagues that she had described Wisconsin's Milwaukee situation to a Colorado Compliance Monitor (Colorado Monitor) during the Denver training conference. The Colorado Monitor contracted with OJJDP to provide compliance training to other states, and presented at the conference.⁵⁵ According to the JJ Specialist's e-mail, the Colorado Monitor, in the presence of OJJDP staff including Rumsey, responded, "You can use the VCO for that." The JJ Specialist told her colleagues that Rumsey concurred with this assessment. The JJ Specialist further explained to her Wisconsin colleagues:

The key points were, after a CHIPS [child in need of protection and/or services] kid runs away once and is brought in front of a competent court, and given due process rights, and the judge "finds" that they've run away and either amends or maintains their order which says "don't runaway," then the next time they come in for status type behavior (like runaway) they can be called a VCO. This was allegedly because – EVEN THOUGH THEIR STATUS DIDN'T CHANGE BY OUR STATE CODE, THEIR STATUS BASED ON THE FEDERAL DEFINITION HAD CHANGED TO "STATUS" OFFENDER. This is big-and we may not want to rush to share the answer with Milwaukee, but if it gets us in on DSO (which it would), I think we have to pursue it.

(Emphasis in original). Another Wisconsin OJA employee responded to this e-mail by stating that she had thought that the VCO exception could not be used for non-offenders, but added, "if OJJDP is actually interpreting something to our benefit, let's go with it." Following these e-mails, Wisconsin's JP Director attended the individual training session with Rumsey and the OJJDP State Representative in Washington, D.C. While he was in Washington, D.C. for the training, he e-mailed his staff stating that he "ran through" Wisconsin OJA's Milwaukee situation with Rumsey and that Rumsey agreed that the use of the VCO exception was acceptable. At that point, Wisconsin OJA staff made efforts to determine how many of the detained non-offenders in Milwaukee were, in fact, repeat runaways that had violated valid court orders. Additionally, on May 29, 2008, Wisconsin's JP Director stated in an e-mail to OJJDP staff, "We are confident that our approach to the VCO issue follows the training Elissa [Rumsey] provided in Denver and again during my visit to DC."

⁵⁵ The Colorado Monitor retired in June 2016.

Rumsey denied to the OIG having provided such guidance, and several of her OJJDP colleagues agreed that Rumsey would not have told the Wisconsin JP Director that the VCO could be used to detain non-offenders. The Colorado Compliance Monitor told us that she attended and delivered a presentation at the Denver training conference, but said she did not remember the alleged conversation with the Wisconsin JJ Specialist. She also said she did not remember being told about Wisconsin's particular VCO non-offender issue or providing any guidance to Wisconsin on the issue. However, she told us that it was not unusual for her to converse with employees from other states during OJJDP training conferences. She further confirmed to us that had she been asked the Wisconsin question – that is to say, whether it was a violation of DSO to securely place a runaway who was in the neglect system and had violated a VCO but had never been charged with a status offense – she would have responded that there was no DSO violation as long as the other statutory and regulatory requirements for issuing a VCO and securely placing a child were met.⁵⁶

Consistent with this view and with the guidance that the Wisconsin JJ Specialist wrote that she had received, the Colorado Compliance Monitor and her supervisor later submitted to OJJDP a similar request for guidance on the application of the VCO exception to juveniles in the neglect system. In this request, the Colorado Compliance Monitor acknowledged that since 1997 Colorado had not been reporting detentions of runaways in the neglect system who had not been charged with status offenses as violations of DSO, based on its application of the VCO exception. The Colorado request formed the basis of the 2010 VCO Opinion. We discuss the Colorado request and the resulting legal opinion from OGC later in this chapter.

The OJJDP personnel who conducted the April 2008 mock audit told us they were skeptical as to whether Wisconsin's interpretation of the VCO exception was correct, but that they did not believe that Wisconsin's assertion that it was allowed to use the VCO exception was insincere. The Compliance Monitoring Liaison advised Wisconsin OJA staff that she would need to consult with OGC as to whether the practice constituted an acceptable use of the VCO exception. The OJJDP team and Thompson told us that Wisconsin OJA staff did not ask OJJDP to seek guidance from OGC and we found no evidence to the contrary.

The OJJDP team also discovered during the TA visit that staff at the Milwaukee County Juvenile Detention Facility was not using OJJDP's VCO checklist of requisite due process safeguards ("VCO checklist"). This issue, combined with

⁵⁶ While the Colorado Monitor told us that she did not remember learning about how Wisconsin used and complied with VCO exception in 2008, she stated that when she provided training to Wisconsin employees 3 years later she noted problems with the verification system and forms Wisconsin used in 2011 to ensure compliance with the statutory and regulatory requirements for issuing a VCO and securely placing a child. She told us that she did not, however, review the court records to verify whether the requirements were met in individual cases. The Colorado Monitor's observations were similar to the concerns noted by OJJDP employees in 2007, 2010, and 2015, as described in the next footnote and accompanying text. In Part IV.B. we recommend that OJJDP collect additional data to ensure that Wisconsin and other states are complying with these requirements.

other problems with the way the facility maintained its files and the limited time the team had to conduct the verification process, made it difficult for the OJJDP team to confirm whether youth securely placed pursuant to the VCO exception were being afforded all due process protections required under the JJDP Act and its implementing regulations. As a result, the Compliance Monitoring Liaison told us that she did not have “100% confidence” that she could replicate the results of the data verification process at the Milwaukee facility. Nonetheless, she told us that she searched for evidence of due process safeguards during the verification process and that, given the limited time constraints of the review and the condition of the files that were examined, she found no unreported violations in the sample OJJDP had reviewed at the facility.⁵⁷

B. 2008 VCO Opinion

In this part, we describe OJJDP’s request to OGC for an opinion on Wisconsin’s use of the VCO exception for non-offenders, the substance of the 2008 VCO Opinion, OJJDP’s reactions to it, and a Response Memorandum written by OJJDP’s Senior Juvenile Justice Policy and Legal Advisor (Senior Advisor).⁵⁸ The Response Memorandum is appended to this report as Attachment B.)

1. OJJDP Request for VCO Opinion and Receipt of Opinion from OGC

The OJJDP team told us that they believed that Wisconsin’s VCO issue was a novel one and that they could not answer the question without legal guidance. According to the Senior Advisor’s Response Memorandum to the resulting 2008 VCO Opinion, neither OGC nor former OJJDP Legal Advisor John Wilson had issued any prior legal opinions dealing with this precise issue. The Compliance Monitoring

⁵⁷ The Compliance Monitoring Liaison said that she had similar difficulties verifying data during a 2010 audit of Wisconsin OJA, and Rumsey told us that she had similar problems during the most recent 2015 Wisconsin audit. According to Rumsey, Milwaukee was not even using the JSJR, making data verification very difficult. The Compliance Monitoring Liaison also told us that, of all the juvenile detention facilities she has visited, the Milwaukee County Juvenile Detention Facility was “by far the . . . most complicated and difficult to verify information.” Nonetheless, based upon witness interviews, data verification difficulties and inadequacies in OJJDP’s audit processes appeared to be problems that went beyond Wisconsin. In Chapters Four and Five, we discuss the OIG’s intent to conduct an audit of OJJDP’s formula grant program. One item this audit would likely address is whether OJJDP has adequate processes in place to ensure that compliance requirements are met, including the adequacy of OJJDP’s processes for verifying data in state facilities. In any event, according to the Compliance Monitoring Liaison, had OJJDP identified unreported violations during the April 2008 TA visit, the next step would have been to provide additional technical assistance and monitoring, not necessarily to reduce the state’s funding. Moreover, there is no reason to believe that the identification of unreported violations as a result of due process violations would have affected OJJDP’s decision to seek guidance from OGC more generally regarding the application of the VCO exception to non-offenders.

⁵⁸ As explained in Chapter Two, the Senior Advisor was an attorney who acted as a policy advisor to OJJDP and as OJJDP’s liaison to OGC on legal issues. However, unlike the OGC attorneys, she was not authorized to provide legal advice to OJJDP. Like Rumsey, the Senior Advisor expressed concerns about the 2008 VCO Opinion to Semmerling during the underlying OIG investigation of Wisconsin OJA.

Liaison and Thompson told us that when the team returned to Washington, D.C., the Compliance Monitoring Liaison discussed the issue with Thompson and together they agreed to seek guidance from OGC. Although Thompson told us he believed that Wisconsin could not, consistent with the JJDP Act, apply the VCO exception to non-offenders, he stated that the question was posed to OGC because Wisconsin had a different opinion and OJJDP wanted "formal, legal guidance." Thompson further stated that he seeks guidance from OGC any time there is a disagreement between a state and OJJDP regarding the interpretation of the JJDP Act or its implementing regulations. The Compliance Monitoring Liaison said that seeking an opinion from OGC on the Wisconsin VCO issue was her idea and that no one from Wisconsin OJA requested that OJJDP or OGC interpret the VCO exception in a way that would benefit Wisconsin. Other OJJDP employees told us that it was very common for supervisors to seek guidance from OGC on compliance-related and other issues.

The Compliance Monitoring Liaison drafted an e-mail that Thompson sent to OGC on April 22, 2008 ("April 2008 E-mail"). According to the e-mail, Thompson had contacted JJ Attorney 1, who wrote the subsequent 2008 VCO Opinion, by telephone to describe the Wisconsin VCO issue before sending the e-mail. The e-mail contained the following question:

It has recently come to our attention that a given State has been utilizing the VCO exception for adjudicated non-offenders (i.e. victims of child abuse and/or neglect) who repeatedly run away from a non-secure placement. These youth have been court ordered not to run, but have *not* been formally adjudicated as status offenders. Assuming all other process requirements have been met, would this constitute an acceptable use of the VCO exception or would these instances need to be counted as violations of DSO? Similarly, if an adjudicated non-offender is picked up as a runaway from non-secure placement, could this youth be held securely pursuant to the 24 hour exception (as an accused status offender)? Would the answer to this question change if the youth is never formally charged with a status offense?

There were three other questions contained in the same e-mail, only one of which also originated from Wisconsin.⁵⁹ Of the other two questions, one originated from Louisiana and is relevant to our review because some OJJDP staff believed that the 2008 VCO Opinion also was intended to respond to the Louisiana question. The Louisiana question involved an issue somewhat related to the VCO non-offender issue, which was whether state courts could use traditional contempt power to upgrade a status offender to a delinquent offender, without following the VCO violation process. The Compliance Manual indicated that the practice was impermissible, but cited no legal authority for this proposition.

⁵⁹ JJ Attorney 2 responded to the other Wisconsin question (which related to the meaning of "adult inmate" within the JJDP Act) with a separate formal opinion.

As noted in the above excerpt of the Compliance Monitoring Liaison's e-mail to OGC, the VCO question was posed in the context of a "given state." The Compliance Monitoring Liaison stated that she used this phrase and did not identify any particular states in her e-mail because the particular state at issue was not relevant and OJJDP wanted an answer that "could be applicable to any state with similar circumstances."⁶⁰

On April 29, 2008, OJJDP staff and OGC staff had a meeting to discuss the above-mentioned compliance issues, including the VCO non-offender issue posed in the April 22 e-mail. Thompson had sent an e-mail to Rumsey, the Senior Advisor, the Compliance Monitoring Liaison, and Jones the day before inviting them to the meeting and attaching the questions that had been posed to OGC. Rumsey responded the next day that she was unable to attend the meeting that afternoon, but in her response annotated the four questions that had been posed to OGC with comments and her own answers. In particular, regarding the question about applying the VCO exception to non-offenders, Rumsey wrote, "Comment/Answer: No. Not an acceptable use and need to be counted as violations of DSO." JJ Attorney 2, who later assisted JJ Attorney 1 with the 2008 VCO Opinion and also later wrote the Jail Removal Opinion, attended the meeting and told us that it lasted less than 1 hour. OGC informed OJJDP staff that it would research the issues and respond with a written opinion. OJJDP staff whom we interviewed about the meeting stated that they did not recall what if any follow-up questions OGC attorneys asked OJJDP staff or whether they asked any questions specifically related to the due process protections afforded to the juveniles who had been detained for violating VCOs. Likewise, the OGC attorneys told us they did not remember OJJDP staff providing much additional information during the meeting. They also said they did not recall OJJDP staff mentioning Wisconsin during the meeting.⁶¹

Rumsey told us that she believed it was inappropriate for Thompson to seek OGC's advice on the non-offender VCO issue because the answer to the question was obvious. However, other OJJDP witnesses disagreed that the issue was so

⁶⁰ While Rumsey and Semmerling told us that they found the use of the term "given state" suspicious, others did not believe that it was unusual for OJJDP to not mention the particular state in its requests to OGC for legal guidance. Madan and JJ Attorney 2 stated that they believed that the phrase "given state" was used to connote that the issue was live, not hypothetical. The Senior Advisor thought that it might have been helpful to identify the particular state, but she did not think that it was strange to exclude the state's identity. We also were told that it was not unusual that OGC did not mention a particular state in its response memo. Deputy General Counsel Moses indicated that if the issue is one that OGC believes will impact many states, OGC often will not limit its opinion to a particular state.

⁶¹ The OGC attorneys we interviewed all told us that they associated the non-offender VCO issue with Colorado, not Wisconsin, and that they either never knew or did not recall that the issue arose from a Wisconsin request. JJ Attorney 1 incorporated a reference to "WI" in the subject line of the e-mail sending the 2008 VCO opinion to OJJDP employees, though she told the OIG that she could not recall the basis for that reference. Nevertheless, based on the e-mail, it seems clear that at some point before OGC issued the opinion at least JJ Attorney 1 became aware that the issue involved Wisconsin, and JJ Attorney 1 acknowledged that this was a fair inference.

easily resolved.⁶² Rumsey further stated that she believed Thompson sought the opinion with the specific intent of obtaining a result that would be favorable to Wisconsin. Contemporaneous e-mail messages from Rumsey in 2008 also reflect this suspicion. For example, on April 29, 2008, Rumsey sent the following e-mail to the Senior Advisor:

This is all coming from Wisconsin – did u [sic] realize that? As usual [Thompson] is afraid to face the facts and find them out again with DSO so he is grasping at straws – while the kids of WI are suffering this absurdity.

The Senior Advisor told us that she did not know why Rumsey thought that Thompson was biased in favor of Wisconsin and that she believed it was appropriate for OJJDP to seek OGC's guidance on the VCO issue.

There is evidence that OJJDP sought a fast turn-around from OGC. Based on our review of the evidence, we believe this was due to Wisconsin OJA's expressed urgency and repeated requests for updates in e-mails and phone calls to OJJDP staff. However, despite our extensive review of documents and interviews of witnesses, we did not find evidence that any OJJDP employees requested that OGC answer the Wisconsin VCO question in a particular way or expressed to OGC the desire for a particular outcome. Similarly, the OJJDP witnesses we interviewed stated that Thompson had never told them the resolution that he expected or hoped to receive from OGC. Both Thompson and the OGC attorneys adamantly denied that Thompson expressed to OGC any desire for an outcome that would allow Wisconsin to be deemed in compliance with DSO or that would otherwise benefit Wisconsin, and other witnesses familiar with the request for the legal opinion provided no evidence to the contrary. To the contrary, OGC Attorneys told us they believed that OJJDP staff as a whole was opposed to a reading of the JJDP Act that would allow non-offenders or nonadjudicated runaways to be securely placed for violating VCOs.

On May 28, 2008, JJ Attorney 1 sent an e-mail to Thompson with the subject line "DSO/Contempt – WI issue." The e-mail attached a document entitled "DSOcontempt.pdf," and the body of the e-mail stated only, "Attached you will find OGC's advice on the issue that we discussed recently. Please let me know if you

⁶² For example, the Compliance Monitoring Liaison distinguished her views from those of Rumsey, stating, "I'm someone who is of the opinion that . . . this stuff is really, really, really complex. And that sometimes . . . mistakes are made when we write regulations. And there are errors and inconsistencies sometimes between what is in the regulation and what is in the statute. So I, I think it was a bit of an overstatement for [Rumsey] to say it was that clear-cut." Similarly, Jones told us that "every state will present you with some kind of weird scenario that – you think you've heard it all, and you're like, what? And so you have to go back and look at the actual, you have to go back and consult OGC and get their interpretation. . . . This is the confounding thing about compliance monitoring." She further described the JJDP Act as "complex and confusing."

have any questions.” Flores, Madan, Moses, and the Senior Advisor were copied on the e-mail, but the other JJ attorneys were not copied.⁶³

The attached 2008 VCO Opinion was addressed to Thompson, through Moses, and from JJ Attorney 1. While JJ Attorney 1 drafted the 2008 VCO Opinion, the JJ attorneys told us that the other JJ attorneys provided some input. According to the JJ attorneys, this opinion was intended to respond to the first question in the April 2008 E-mail. Moses confirmed that his initials on the 2008 VCO Opinion indicate that he reviewed and approved it. Madan, on the other hand, was only copied on the 2008 VCO Opinion. Madan told us that he did not write or edit the opinion and that it was not consistent with his writing style. However, he told us that he may have been involved with brainstorming or discussing the issue before the opinion was written (and, as discussed below, he supported the ultimate outcome when the issue was raised again in the context of the 2010 VCO opinion). In addition, after reviewing a draft of this report, Madan stated, “I wish to stress that I am well aware that, as General Counsel, I am responsible for the legal opinions that issue from my office” and that “[t]his responsibility extends even to the flawed ones.”

The most significant conclusion of the 2008 VCO Opinion, which we discuss in the next subpart, was that the VCO non-offender regulation “is *ultra vires* and, thus, cannot be enforced.” OJJDP understood this conclusion to mean that Wisconsin’s practice of securely detaining abused, neglected, or dependent juveniles for violating court orders not to run away from their foster placements was legally permissible – meaning, not a violation of the DSO core requirement – even though those juveniles were never charged with or adjudicated of an offense.

2. Substance of 2008 VCO Opinion, Including Critiques by Senior Advisor and Other OJJDP Employees

Because the 2008 VCO Opinion is at the core of Semmerling’s allegation that OGC intentionally reversed longstanding law in an improper effort to assist Wisconsin, we examine it in detail in this subpart. We also examine it in light of critiques by certain OJJDP staff, including the Senior Advisor who wrote a memorandum in response (“Response Memorandum”).

The 2008 VCO Opinion stated the issue presented to it from OJJDP as follows: “Is it a violation of §223(a)(11) of the Juvenile Justice and Delinquency Prevention Act for status offenders, such as runaways, to be securely detained for being held in contempt of court for violating a valid court order?” According to the Senior Advisor and other OJJDP employees, this statement of the issue did not

⁶³ The limited mention of Wisconsin is significant because, as described in Chapter Four and in more detail later in this chapter, Semmerling found it suspicious that Moses later indicated that the 2008 VCO Opinion did not relate to Wisconsin. For reasons explained in our findings in this chapter, we concluded that Moses’s statement was not an effort to conceal or mislead anyone about the connection of the opinion to an inquiry from Wisconsin, but rather was likely an honest mistake based on the fact that Colorado requested advice on a very similar legal issue approximately a month after the 2008 VCO Opinion was issued.

match the question set forth in the April 2008 E-mail. Specifically, the issue posed in the April 2008 E-mail was not whether *status offenders, such as runaways* could be securely detained for violating a VCO, but whether *runaways who are never formally charged or adjudicated as status offenders* could be securely placed for violating a VCO. During their O&R interviews, the JJ attorneys all agreed that the statement of the issue in the 2008 VCO Opinion did not match the question posed, but suggested that the question might have been modified at meetings subsequent to the initial e-mail.⁶⁴ JJ Attorney 1, who authored the opinion, stated that she could not remember why she wrote the issue this way.⁶⁵

As a result of the way the issue was framed in the 2008 VCO Opinion, the body of the opinion focused on whether *status offenders* could be securely placed for violating VCOs, rather than whether *non-offenders* could be so placed without violating the DSO provision. The 2008 VCO Opinion assumed that the juveniles at issue were status offenders, and did not address the fact that they were never so charged or adjudicated. In her Response Memorandum, the Senior Advisor expressed concern that the 2008 VCO Opinion quoted the entire text of the status offender subsection of the DSO provision, but did not quote or even cite the non-offender subsection. During his O&R interview, Moses acknowledged that the 2008 VCO Opinion “possibly should have” referenced the non-offender subsection if, in fact, it was intended to respond to the non-offender question posed in the April 2008 E-mail.

After setting forth the text of the status offender subsection, the 2008 VCO Opinion stated that DSO protection is eliminated once a juvenile “violates a court order or is otherwise held in contempt of court,” and that it is “of no consequence whether the matter that initially brought the juvenile into court was a status offense or delinquency offense. Any alternate interpretation would be too strained to withstand a plain reading of the statute.” The Senior Advisor told us that she believed this wording was not responsive to the question posed, because the Milwaukee juveniles were originally brought into court due to being victims of child abuse and neglect, not due to the commission of status or delinquency offenses. In addition, the Senior Advisor stated that the focus on the court’s contempt power seemed misplaced, given that the question from Wisconsin did not contemplate that judges were relying on their contempt power to securely place the youth at issue. Contempt is not mentioned anywhere in Title I of the JJDP Act, and the JJ attorneys told us that they had not researched contempt law before drafting the 2008 VCO opinion.⁶⁶

⁶⁴ Madan stated that there was a “gross disconnect” between the question posed in the April 2008 E-mail and the issue as presented in the 2008 VCO Opinion.

⁶⁵ However, as explained later in this chapter, the 2010 VCO Opinion accurately stated the issue as presented in the April 2008 E-mail and a later memorandum from Colorado.

⁶⁶ In her Response Memorandum, the Senior Advisor maintained that upgrading a juvenile from a non-offender to a status or delinquent offender through a finding of contempt is improper “bootstrapping” and undermines legislative intent to keep non-offenders and status offenders out of
(Cont’d.)

The 2008 VCO Opinion concluded:

Runaways are status offenders if they persist in running away from non-secure settings and, therefore, as status offenders, they cannot be held in secure detention for repeated runs. If however, a runaway has been made subject to a VCO prohibiting him from running away, and he violates that court order by running, he can be held in contempt of court which is a non-status offense. Once held in contempt of court, that juvenile can be held and in secure detention under [the VCO exception]. After a status offender violates a VCO, he is entitled to the protections set at § 223(a)(23), as applicable.

The Senior Advisor stated that this conclusion, once again, assumed that non-offenders become status offenders once they run away, without addressing whether the absence of a formal charge or adjudication affects the applicability of the VCO exception. According to the Senior Advisor, this was problematic because the formal acts of charging and adjudicating a juvenile assure that the juvenile receives certain due process protections.

We asked witnesses whether the assumption that the runaways at issue were status offenders was based on the language “committed” within the status offender subsection. Specifically, the status offender subsection of the JJDP Act provides for the deinstitutionalization of juveniles who have been “*charged* with or who have *committed*” a status offense, subject to certain exceptions, while the non-offender subsection provides for the deinstitutionalization of juveniles “who are not *charged* with any offense,” without exception. The regulations, however, define a status offender as a “juvenile who has been *charged* with or *adjudicated*” of a status offense. 28 C.F.R. § 31.304(h). As described Part II.A. of this Chapter, the terms “charged,” “committed,” and “adjudicated” are not defined in the JJDP Act or its implementing regulations and the witnesses stated that they had never considered the meanings of those terms. JJ Attorney 1 told us that she was not certain what the term “committed” meant and that she could not remember whether she relied on the term in determining that the juveniles at issue were status offenders subject to the VCO exception when she authored the opinion. However, both Madan and the Senior Advisor stated that they believed that the term “committed” was the functional equivalent of “adjudicated” and that a juvenile would at least have to be charged with an offense for the status offender subsection to apply.⁶⁷

Finally, the 2008 VCO Opinion ended with this paragraph:

secure detention and correctional facilities. She included language from two state cases as examples of strong language that state judges have used to oppose this approach.

⁶⁷ The disconnect between the wording of the question posed by OJJDP and the wording of the opinion (including the issue, the explanation, and the conclusion) initially caused us to question whether the memorandum was in fact intended to answer the Wisconsin question. Some witnesses believed that the opinion was designed to address both the Louisiana question and the Wisconsin question, because it seemed to not only determine that non-offender repeat runaways could be securely confined for violating a VCO, but also more broadly that non-offenders and status offenders could be upgraded to status and delinquent offenders, respectively, through contempt proceedings.

Please be further advised that given this conclusion, § 31.303(f)(3)(vii) of the current JJDP Act regulations is *ultra vires* and, thus cannot be enforced. The fact that a juvenile is abused, neglected or dependent does not insulate him or her from the DSO exception set forth in § 223(a)(11)(ii).

The regulation cited in the first sentence of this closing paragraph is the VCO non-offender regulation. The effect of this paragraph is to permit states to receive funding even if judges use the VCO exception to securely place runaway abused or neglected youth without formally charging them with offenses. The OGC attorneys stated that, in hindsight, this conclusion did not follow from the reasoning that had preceded it or the statement of the issue, and that the opinion should not have advised that a regulation was *ultra vires* without more explanation. According to Madan, determining that a regulation is *ultra vires* is a “big, fat deal,” and he would not have “tossed it in . . . for the first time . . . in the second to last sentence.”

According to a timeline written by the Compliance Monitoring Liaison, OGC attorneys explained during a subsequent meeting that the conclusion that the VCO regulation was *ultra vires* was premised on the notion that the term “committed” within the status offender subsection allowed non-offenders to become status offenders by the mere act of running away.⁶⁸ However, the OGC attorneys told us that, on the contrary, they did not believe that non-offenders become status offenders by the mere act of running away. Rather, they stated that the act of violating a VCO is the offense that makes the non-offender subject to secure confinement pursuant to the VCO exception. JJ Attorney 1 stated that this was the point she was trying to make, but conceded that this reasoning was not clear from the 2008 VCO Opinion. This point is made more directly in 2010 VCO Opinion, discussed later in this chapter.

The Senior Advisor expressed concern that the 2008 VCO Opinion did not specify the particular due process protections that states must observe before applying the VCO exception to non-offenders, but said only, “[a]fter a status offender violates a VCO, he is entitled to the protections set at §223(a)(23) as applicable.” Section 223(a)(23) sets forth only the protections that the juvenile must receive once taken into custody on a VCO violation. 42 U.S.C. § 5633(23). The 2008 VCO Opinion does not, however, address the due process protections that must be afforded to the juvenile upon receiving a VCO. These protections are contained in the section that defines a VCO as an order given by a juvenile court judge to a juvenile:

- (A) who was brought before the court and made subject to such order; and

⁶⁸ The timeline is dated February 24, 2009. The Compliance Monitoring Liaison told us that she believed she created the timeline at the request of Thompson and Jones in connection with the underlying OIG investigation of Wisconsin conducted by Semmerling.

(B) who received before the issuance of such order, the full due process rights guaranteed to such juvenile by the Constitution of the United States

42 U.S.C. § 5603(16). The particular due process rights are then listed in the regulations. 28 C.F.R. § 31.303.

Both the Senior Advisor and the OGC attorneys told us that it is very important for OJJDP to understand the definition of VCO because state employees and OJJDP must make a threshold determination of whether the court order is in fact “valid” within the meaning of the JJDP Act. If the court order at issue is not “valid,” then the juvenile may not be detained for violating it.⁶⁹ The Senior Advisor wrote in her Response Memorandum of her concern that dependency cases do not necessarily incorporate the same due process protections as delinquency and status offender cases. For example, in many states children are not even present in court when orders are issued in dependency cases and are not afforded attorneys to represent their interests. The Senior Advisor told us that in light of the complicated nature of the due process inquiry, if she were an OGC attorney she would have asked OJJDP specific questions to determine whether the rights of the juveniles at issue were protected. During his O&R interview, Moses similarly stated that it would have been prudent for OGC to have specifically asked OJJDP about the due process protections being afforded to the runaways in Wisconsin.

There was no dispute among the witnesses we interviewed that the 2008 VCO Opinion had flaws. Several OJJDP employees told us they believed that the

⁶⁹ Because states self-report their data to OJJDP – meaning that they determine their own ultimate violation rates based upon the statute, regulations, Compliance Manual, and other OJJDP guidance and subject to OJJDP monitoring – the states must make the initial threshold determination as to whether a court order has complied with all the due process and other statutory and regulatory requirements and thus is a *valid* court order under the JJDP Act. According to the 2007 Guidance Manual, “To use the VCO Exception, states must submit as part of their annual compliance monitoring report, the total number of status offenders held in any secure detention or correctional facility pursuant to the VCO exception.” In addition, “the state must have a system in place to verify whether court orders used to hold status offenders in juvenile detention centers comply with the” statutory and regulatory requirements. “At a minimum, the state must randomly verify 10 percent of all adjudicated status offenders held securely because of violating a valid court order; violations of the VCO process, where found, must be projected accordingly.” OJJDP has provided states with a “VCO checklist” of the procedural requirements to assist states with assessing whether court orders are “valid.” Thus, if a state determines that a court order does not meet the requirements of a VCO, the state should report a DSO violation for any juvenile secure placement based solely on a violation of such order.

As described in Chapter Two, OJJDP reviews states’ core requirements compliance monitoring reports to assess compliance. However, we found that OJJDP’s compliance monitoring report template does not require states to report information regarding compliance with the procedural requirements of the VCO exception, and we make a recommendation related to this finding in Part IV of this chapter. While OJJDP employees seek to assess compliance with the procedural requirements during 5-year audits, witnesses told us that it can be difficult to gather this information during the limited time frame of an audit. In addition, as discussed in parts A.3 and C of this section, OJJDP found during the April 2008 site visit that Wisconsin was not using the VCO checklist. Some OGC witnesses told us that they first became aware that Wisconsin had not been using the VCO checklist during their OIG interviews (discussed in part C of this section).

2008 VCO Opinion lacked clarity, did not fully answer the question posed, and called for follow-up discussions. The OGC attorneys likewise acknowledged that the 2008 VCO Opinion was not written clearly, may have conflated the separate issues raised in the initial e-mail request for OGC guidance, and could have resulted in confusion within OJJDP. Madan stated that the opinion was poorly written, which contributed to the lack of clarity as to its meaning. In addition, Moses and all three JJ Attorneys stated that the 2008 VCO Opinion would have benefitted from a statement of facts to help clarify the issues and the scope of the guidance provided.

3. OJJDP Reactions to the 2008 VCO Opinion, Meetings to Discuss the Opinion, and the Colorado Request

The conclusion reached in the 2008 VCO Opinion generated significant and passionate opposition within OJJDP. Every OJJDP employee we interviewed on this topic, including Thompson, expressed the belief that, from a policy perspective, the VCO exception should not be applied to non-offenders who had not been charged with or adjudicated of an offense prior to the VCO violation.

At first Rumsey and the Senior Advisor focused on arguing that *charging* abused and neglected children with status offenses or contempt was against best practices, because the juveniles would be “sent deeper into the” juvenile justice system. For example, in a July 2, 2008, e-mail to Thompson, Jones, the OJJDP State Representative, Rumsey, and the Compliance Monitoring Liaison, the Senior Advisor wrote:

In all the years that the JJDP Act has been in existence, has a state ever posed the arguments currently being presented by WI that the JJDP Act’s prohibition against placement of non-offenders in secure confinement can be circumvented by holding them in contempt for non-criminal misbehavior? . . . Correct me if I am wrong, I suspect that . . . most judges and others working in the dependency and delinquency court systems would never think of holding an abused or neglected child or status offender in contempt of court for non-criminal misbehavior in order to send them deeper into the juvenile and criminal justice system.

Also on July 2, 2008, the Senior Advisor e-mailed Roberts, Thompson, Rumsey, and the Compliance Monitoring Liaison recommending a meeting with OGC to address concerns about the 2008 VCO Opinion. The meeting with OGC was scheduled for July 23, 2008, and witnesses told us it was attended by, among others, Moses, the three JJ Attorneys, Deputy Administrator Roberts, Deputy Administrator Ayers, Thompson, Jones, Rumsey, the Compliance Monitoring Liaison, and the Senior Advisor. This meeting, and other later meetings between OJJDP and OGC regarding the proper interpretation of the VCO exception, involved what was described by OJJDP and OGC witnesses to us as “heated” discussion.

The OGC witnesses stated that OJJDP staff was united in its expressions of concern and disagreement with the 2008 VCO Opinion. While some OJJDP employees, including Thompson, Jones, and the Compliance Monitoring Liaison,

expressed their disagreement but still deferred to OGC's authority to interpret the law; others, including in particular the Senior Advisor and Rumsey, were more outspoken regarding their disagreement with OGC's position.

Before the July 23, 2008, meeting, Jones had sent an e-mail to Thompson, in which she stated that Rumsey and the Senior Advisor should be told that they should not discuss "what happened in Wisconsin, their data, or anything like that" at the meeting with OGC. Jones told us that she could not remember why she wrote this, but that she probably meant that she did not want to "rehash" information that had already been discussed. Thereafter, Ayers e-mailed Rumsey and the Senior Advisor to remind them of a prior discussion where they agreed not to "take OGC's time to discuss or revisit SRAD's Wisconsin compliance decision" and that a discussion about Wisconsin could happen at a separate meeting with SRAD staff. Ayers stated that her goal was to prevent a possibly contentious discussion regarding internal OJJDP matters in the presence of OGC. In an e-mail to Rumsey on July 23 following the meeting with OGC, Ayers stated that she was "fine with the Wisconsin discussion with SRAD" and that she "just did not want to get into all of that on OGC's time today as I knew we needed to really get through the basic issues of their decision first-which as we know took a while."

About 1 month before the July 23 meeting – on June 19, 2008 – OJJDP received a request from Colorado for guidance on application of the VCO exception to non-offenders. The Colorado Monitor and her supervisor forwarded to OJJDP a 5-page memorandum explaining Colorado's specific circumstances ("Colorado Memorandum"). According to the Colorado Memorandum, judges in Colorado were detaining juvenile runaways in the neglect system for violating court orders not to run away from their foster placements – a situation similar to that of Wisconsin. However, unlike in Wisconsin, the juveniles in Colorado could not possibly have been charged with the offense of running away, because running away was not a status offense under Colorado law. Rather, under Colorado law, a runaway fell under the dependency and neglect statutes, under which due process rights generally were afforded to parents rather than the juveniles themselves.

According to the Colorado Memorandum, the Colorado monitor had not reported the detained runaways as DSO violations from 1998 through 2007, provided the relevant procedural and due process requirements of the JJDP Act were in place, based upon guidance provided by a former OJJDP Compliance Monitoring Coordinator. The Colorado Monitor told us that the former Compliance Monitoring Coordinator provided this guidance through a lengthy conversation during a break at an OJJDP training conference and that she had a clear recollection of the conversation. She stated that no one else participated in the conversation. She told us that the guidance she received was contrary to guidance that a Colorado judge had told her he had earlier received from former OJJDP Legal Advisor and Acting Administrator John Wilson, but that she did not seek to clarify the discrepancy because she believed that the guidance provided by the former Compliance Monitoring Coordinator was "accurate based on everything [she] had read in the guidance manual and the formula grant regulations." She further told us that she did not remember why Colorado raised the issue again in 2008.

The Colorado Monitor who forwarded this request to OJJDP was considered by many within OJJDP, including Rumsey, to be one of the best state compliance monitors nationwide, and OJJDP contracted with her to provide core requirements compliance monitoring training to other states. Rumsey told us that she believed the statement in the Colorado Memorandum that the Colorado Monitor had not reported the secure placement of the runaways at issue as DSO violations since 1998 was inaccurate. Rumsey suggested that perhaps the Colorado Monitor's supervisor, who had less knowledge about core requirements compliance monitoring, "re-drafted" the Memorandum. Rumsey further told us that she believed the Colorado Monitor would agree with her that such uncharged runaways are not subject to the VCO exception and that it was unnecessary for OJJDP to seek guidance from OGC on Wisconsin's similar VCO issue. However, the Colorado Monitor told us that she and her supervisor wrote the Colorado Memorandum together and that nothing contained in it was inaccurate. She also indicated that while Wisconsin's question was not exactly the same as Colorado's question, she believed the answer should be the same – that the secure placements of the juveniles at issue did not constitute violations of DSO assuming all other procedural requirements were in place.⁷⁰

On July 23, 2008, the Compliance Monitoring Liaison forwarded the Colorado Memorandum to the expected attendees of the July 23, 2008 meeting, including Rumsey, Thompson, and the three JJ Attorneys. She stated, "Pursuant to our upcoming meeting it occurred to me that we might also consider the attached request for opinion from the State of Colorado in our discussions." She further stated in the e-mail that the issues set forth in the Colorado Memorandum were "very, very similar to those we have been discussing relative to Wisconsin."

According to witnesses who attended the July 23, 2008 meeting, including Jones, the Compliance Monitoring Liaison, and JJ Attorney 2, as well as an e-mail written by the Compliance Monitoring Liaison, OGC reiterated the position it had taken in the 2008 VCO Opinion despite the Senior Advisor's plea for OGC to change its position. The Senior Advisor told us that following the meeting she decided to research the issues and write the Response Memorandum. As described in the next subpart, the Senior Advisor's research caused her to change her position slightly:

⁷⁰ The Colorado Monitor told us that she viewed the runaways at issue as status offenders "according to federal definitions," even though they had not been charged with status offenses under Colorado law. Based on our review of the Colorado Memorandum, this view appears to be based on the fact that "running away" is listed as an example of a status offense in the OJJDP Compliance Manual. Because the Colorado Monitor considered these juveniles to be status offenders "according to federal definitions," she did not view Colorado's failure to report their secure placement as violations of DSO to be contrary to the VCO non-offender regulation. Thus, the Colorado Monitor's belief did not depend upon a conclusion that the VCO non-offender regulation was *ultra vires*.

Semmerling stated that she was not aware that Colorado had submitted this request. She told us she was surprised that Colorado had been using the VCO exception in this way for nearly 10 years and stated that she would have investigated this issue further if she had known.

Rumsey told the OIG that she believed that Thompson intentionally conflated the Wisconsin and Colorado issues to provide more "cover" for Wisconsin, but we found no evidence to support that belief.

instead of focusing on the policy argument that non-offenders should not be charged with status offenses when they run away or violate a court order, she argued that a plain reading of the DSO provision required a result contrary to OGC's reading and that the legislative history of the JJDP Act supported her interpretation.

4. The Senior Advisor's Opposing VCO Interpretation and OGC's Response

The Senior Advisor's Response Memorandum was dated September 5, 2008, and was directed to her supervisor, Ayers, with a cc to Rumsey. The Senior Advisor argued in the Response Memorandum that, contrary to OGC's interpretation, a plain reading of the non-offender subsection of the DSO provision was consistent with the VCO non-offender regulation because the non-offender subsection "expressly states that an abused and neglected child who has not been charged with an offense cannot be placed in secure detention or correctional facilities." She told us during her O&R interview that the drafters of the JJDP Act would not have created a separate section for non-offenders without listing any exceptions if they had intended non-offenders to be treated the same as – and subject to the same exceptions as – status offenders. (We refer to this line of reasoning as the "structural argument"). In that regard, in a section entitled "OJJDP Response to OGC Memorandum," she maintained that the OGC opinion "does not answer the question originally posed by SRAD involving the use of the VCO exception in dependency cases in which youth are not formally charged as status offenders."

The Senior Advisor further told us she believed that if her interpretation were not plain from the statutory text, it would mean that the statute was ambiguous, in which case it would be appropriate to consult the statute's legislative history to determine what Congress intended. She argued in her Response Memorandum that legislative history supported her interpretation of the text because the JJDP Act's protections for non-offenders became even stronger when the statute was reauthorized in 2002.⁷¹ For example, the Response Memorandum states that the

⁷¹ The JJDP Act has been amended several times. As originally enacted in 1974, the JJDP Act required state plans to provide that status offenders should not be placed in "juvenile detention or correctional facilities," but did not contain a VCO exception and did not specifically address non-offenders. See Pub. L. No. 93-415, 88 Stat. 1109 (1974). In 1977, the DSO provision was amended to provide that non-offenders such as "dependent and neglected children" also not be placed in such facilities, but addressed non-offenders and status offenders in the same subsection and paragraph. Pub. L. No. 95-115, 91 Stat. 1048 (1977). Pursuant to the 1980 Reauthorization of the JJDP Act, the DSO provision was further amended to add the VCO exception. Status offenders and non-offenders were still addressed in the same subsection and paragraph. Pub. L. No. 96-509, 94 Stat. 2750 (1980). When the JJDP Act was reauthorized in 1992, the DSO provision was amended to provide, in the same paragraph that addressed status offenders and non-offenders such as dependent or neglected children, that alien juveniles not be placed in "juvenile correction or detention facilities." Pub. L. No. 102-586, 106 Stat. 4982 (1992). The 1992 Reauthorization also added the definition of "valid court order." Finally, pursuant to the 2002 Reauthorization, the DSO provision was amended to eliminate the term "non-offender" from the subsection dealing with status offenders. The DSO provision was further modified to address juveniles "who are not charged with any offense" and who are either "aliens" or "alleged to be dependent, neglected or abused" in a separate subsection from status offenders. The 2002 version also for the first time modified the term "juvenile detention or

(Cont'd.)

reauthorized statute made changes to the definitions of "secure detention facility" and "secure correctional facility" that were designed to exclude from such facilities non-offenders who had not been "accused" or "adjudicated" of an offense. The Response Memorandum further notes that the corresponding House report included the following statement: "It is the Committee's view that non-offenders, such as abused and neglected children, should never be placed in any type of secure facility where they are in contact with juvenile offenders."

The Senior Advisor told us that after she submitted the Response Memorandum to Ayers in September 2008, she heard very little about it for over a month. On October 16, 2008, she sent an e-mail to Ayers reminding her about the Response Memorandum and letting her know that Thompson did not oppose her providing it to OGC. Ayers did not respond to this e-mail until after the Senior Advisor sent another e-mail on November 12, 2008 asking, again, whether she could discuss the Response Memorandum with OGC. Ayers replied, "Please hold off, we need to review this." Ayers did not explain to the Senior Advisor why she wanted the Senior Advisor to wait. However, she later asked the Senior Advisor to make some modifications to the Response Memorandum, especially a section that addressed how the JJDP Act could be amended to reflect OJJDP's policy goals. The Senior Advisor provided a new version to Ayers on December 1, 2008, and also forwarded it to Acting Administrator Slowikowski once he assumed his position following Flores's resignation. Ayers responded that same day that she would forward the memorandum to OGC the following day.

On February 6, 2009, the Senior Advisor sent an e-mail to JJ attorneys 1 and 3 stating that she understood that Ayers had forwarded them the Response Memorandum and asking if they had an opportunity to read it. JJ Attorney 3 responded that they would touch base with her early the next week. On May 1, 2009, the Senior Advisor sent another e-mail to JJ Attorney 1 stating, "I assume that OGC has not responded to my memo on the VCO/non-offender issue yet," and asking, "Any thoughts on when I will hear from OGC?"

OGC never provided a written response to the Senior Advisor's Response Memorandum, and according to the Senior Advisor, the only oral response she received from OGC was from General Counsel Rafael Madan, who responded only that the statute was "plain on its face" and, therefore, legislative history is not to be considered in the statute's interpretation. However, she told us that during meetings where Madan was present in 2009, she argued that the statute was plain the opposite way or, alternatively, that there was sufficient ambiguity in the statute to warrant an examination of its legislative history. The Senior Advisor told us that no one from OGC responded to these arguments and that she was frustrated that she received so little feedback from OGC and OJJDP leadership.

JJ Attorney 3 told us that she did not read the Response Memorandum closely because, "the times that I had conversations with [the Senior Advisor]

correctional facilities" to "secure detention facilities or secure correctional facilities." Pub. L. No. 107-273, 116 Stat. 1758 (2002).

about legal issues she seemed less concerned with what the statute said than what it should say or what she believed the intent to be . . . So I just felt that from a strictly legal standpoint, you know, she didn't always follow the law."

Madan stated that he read the Response Memorandum and responded orally. He told us that the Senior Advisor relied significantly on legislative history and various court opinions, and that "the general slant of it was that the words [of the statute] didn't mean what they say." He stated that he believed that the Senior Advisor was "very skillful in her discussion" and that he "well might have adopted just about everything she said if construction [that is, resort to outside sources, like legislative history, to construe the statute] were warranted," but that did not change his view that the statute plainly mandated the opposite result to what she proposed. Madan further stated that OGC did not consult legislative history because doing so is not warranted when a statute is plain on its face.

Moses similarly stated that he was not persuaded by the Response Memorandum because it relied too heavily on legislative history. Moses further stated that initially the OGC attorneys had planned to provide a written response to the Response Memorandum, but that ultimately they decided to work on a clarifying opinion instead. Simultaneously, they believed the best use of their efforts was working with OJJDP on changing their compliance procedures to be consistent with what the law required.

Given Madan's reliance on the "plain meaning" of the statute, we sought to understand OGC's views on the overall clarity of the JJDP Act. All of the OGC attorneys we interviewed stated that the JJDP Act as a whole lacks clarity. Madan stated that the JJDP Act is "one of the most obnoxiously badly written statutes ever written," and Moses stated that it is "a mess." Madan nevertheless insisted that the DSO provision itself was "clear enough" with regard to the question OJJDP had posed.⁷² JJ Attorneys 1 and 3, however, both stated during their O&R interviews that the DSO provision itself was unclear. JJ Attorney 1, who authored the 2008 VCO Opinion stated, "You would have me agree to that [that the DSO provision was unclear] as soon as I walked in the door" and "it certainly wasn't plain. We struggled with it for years. We discussed it . . . [W]e came up with different conclusions at different times."⁷³ In fact, during an in-depth discussion of the 2008 VCO Opinion during his interview, Moses told us that he favored an interpretation of the DSO provision that would require a juvenile to first be charged with or adjudicated of a predicate status offense before being subject to the VCO exception

⁷² The only other witness who told us that the DSO provision was clear was Rumsey. However, Rumsey interpreted the provision to say the opposite of what Madan believed.

⁷³ We asked JJ Attorney 1 to reconcile this view with her statement in the 2008 Opinion that "[a]ny alternate interpretation of the DSO provision would be too strained to withstand a plain reading of the statute." She responded that the 2008 statement was meant to respond to the argument that a non-offender can never be detained even if the non-offender commits an offense. However, she also stated that generally the opinion "could . . . have been written better" and that she was "scratching [her] head . . . trying to interpret" it at the time of her OIG interview.

– an interpretation that would have been contrary to the VCO opinion and would not make the VCO regulation *ultra vires*.⁷⁴

As a result of the Colorado memorandum, the meetings with OJJDP, and the Senior Advisor’s Response Memorandum, OGC agreed to draft a second opinion (2010 VCO Opinion) on the VCO issue to better explain its reasoning. The 2010 VCO Opinion will be discussed in Part III.E of this chapter.

C. Communications with Wisconsin

In this part, we describe communications between OJJDP and Wisconsin OJA regarding OJJDP’s 2008 compliance determination for Wisconsin, the 2008 VCO Opinion, and OJJDP’s findings and recommendations in relation to the April 2008 site visit.

After receiving the 2008 VCO Opinion from OGC on May 28, 2008, Thompson forwarded the opinion to Jones and the Compliance Monitoring Liaison and wrote, “Please take a look at this, and we can meet to discuss later. Please do not share this with WI at this time.” On May 29, 2008, Wisconsin’s JP Director e-mailed Thompson, Jones, the Compliance Monitoring Liaison, and the OJJDP State Representative to ask for an update on the VCO question. The JP Director expressed some urgency in receiving the information in light of Wisconsin’s need to make funding and other decisions. Jones responded to that e-mail the same day, but did not provide any substantive guidance on the VCO issue. Instead, Jones wrote, “Just yesterday, we received an interim response from OGC requiring further discussion – which Greg Thompson hopes to have resolution to prior to your [State Advisory Group] meeting.”

Based upon records we reviewed, it was over 1 month later when OJJDP advised Wisconsin OJA, consistent with OGC’s guidance, that the application of the VCO exception to non-offenders did not violate DSO. According to an e-mail sent by Wisconsin’s JP Director to his staff, Thompson told him during a July 8, 2008, phone call that OJJDP was preparing a letter finding that Wisconsin was in “full compliance for both DSO and jail removal for 2008.” The JP Director further advised his staff in the same e-mail that Thompson’s message:

. . . included a strong warning that this result was not without dissent within OJJDP and that depending on personnel changes in the future, the interpretations of their rules and our efforts at compliance [in] similar circumstances in the future could result in a finding of noncompliance. But for this year we are good to go.

Thompson stated that he did not remember having a conversation with Wisconsin officials about the VCO issue that had been posed to OGC, but he did not dispute that it could have “come up.” Thompson told us that “if I had had a conversation

⁷⁴ Moses noted though that he was not a part of certain conversations within OGC that led to the conclusion that a predicate status offense was not required.

with [the JP Director] about applying the VCO to non-offenders, I would have told him he couldn't do it." However, as we describe later, Thompson appeared confused about the meaning and import of the 2008 VCO Opinion during his O&R interview.

On January 28, 2009, OJJDP sent a letter to Wisconsin summarizing its observations and recommendations resulting from the April 2008 site visit.⁷⁵ The OGC attorneys told us that they did not generally review these types of letters to states and did not review this particular letter. In the letter, OJJDP first complimented Wisconsin for the state's "increased . . . commitment to the core requirements compliance monitoring function," and provided as examples the hiring of additional staff and the efforts made by Wisconsin OJA staff and management to "familiarize themselves with OJJDP regulation and monitoring guidance."⁷⁶ OJJDP went on to make several observations and recommendations regarding Wisconsin's compliance with the JJDP Act. As examples, OJJDP made recommendations regarding Wisconsin OJA's use of the Wisconsin Department of Corrections to conduct certain core requirements compliance monitoring functions, the adequacy of the JS DR system referenced earlier in this chapter, and the absence of signs in adult facilities to notify staff regarding procedures for handling juveniles.

Regarding the runaways being detained pursuant to the VCO exception in Milwaukee, OJJDP made the following observation:

In the course of this visit it was determined that many of the runaway youth in Milwaukee County were juveniles placed in group or foster homes pursuant to an abuse or neglect case. For a variety of reasons as noted above, when these youth committed a status offense by running repeatedly from their non-secure placements, a number were ultimately placed in secure detention and reported as uses of the Valid Court Order exception (VCO's) on the State's annual compliance monitoring report. In an attempt to avoid bringing abused and neglected youth into the justice system, these juveniles were never formally adjudicated as status offenders, raising questions regarding appropriateness of the State's VCO usage.

OJJDP's letter then included a recommendation advising Wisconsin OJA that, based upon OGC's guidance, applying the VCO exception to the non-offender youth at issue was acceptable. At the same time, the letter recommended that the use of secure detention for runaway non-offenders be avoided if possible, as a best practice. Specifically, the letter recommended:

⁷⁵ According to several witnesses, 9 months was not an unusual amount of time for a letter like this to be prepared and sent to a state.

⁷⁶ Jones, who supervised the staff members that prepared this letter, told us that her general approach to helping others improve is to complement their strengths before addressing their weaknesses. We found the complimentary language in the letter to Wisconsin to be consistent with this approach.

In response to questions raised during the course of this visit and in consultation with legal counsel, OJJDP has determined that use of the VCO exception in the above-noted circumstances does in fact comport with the Act and represents a valid usage of the VCO exception, assuming that all other VCO process requirements are followed and appropriately documented. It is OJJDP's position, however, that the placement of such youth in secure facilities should be avoided at all costs and it is strongly recommended that Wisconsin strive to eliminate its use of secure detention for abused and neglected youth who run from placement.

The letter further made the following recommendation with regard to Milwaukee Juvenile Detention Center staff failing to use the VCO checklist to ensure compliance with due process requirements for youth held pursuant to the VCO exception:

The Compliance Monitor and/or facility staff should complete the VCO checklist for each case when reviewing data. This checklist should then be included in the case file to document that conditions of the VCO have been met.

Finally, with regard to the DSO core requirement in the Milwaukee County Juvenile Detention Center, the letter stated that no unreported violations were discovered during the time period in question (the first half of 2007).

The Compliance Monitoring Liaison told O&R that she did not know what, if any, follow up was done with Wisconsin regarding the VCO checklist because she was no longer handling Wisconsin at the relevant time. However, she stated that Wisconsin would not have been required to respond to the letter or show that it made changes in response to the concerns raised because the visit was not an audit.

Some of the OGC attorneys we interviewed stated that they were concerned that OJJDP's letter found that Wisconsin's actions comported with the JJDP Act even though the VCO checklist was not being used. Moses noted that the absence of the VCO checklist calls into question whether the orders that were being violated were, in fact, *valid* court orders within the meaning of the JJDP Act. Moses told us that after the instant OIG review is completed, he would like to determine whether OJJDP failed to ensure that the court orders at issue were valid and whether this happened with any other states. He also stated that he would want to know how OJJDP followed up with Wisconsin to ensure that the state began using the VCO checklist following its receipt of the January 2009 letter. JJ Attorney 2 stated that the language of the letter did not appear to take into account that the violation of the valid court order itself is the offense that allows the children to be securely placed, not the act of running away.

D. 2010 VCO Opinion

According to witnesses and contemporaneous documents, OGC wrote the 2010 VCO Opinion both to clarify the 2008 VCO Opinion and to respond to the June 2008 Colorado Memorandum that sought guidance from OJJDP on the application of the VCO exception to non-offenders. OGC issued the 2010 Opinion to Acting Administrator Slowikowski on September 20, 2010 from the three JJ Attorneys through General Counsel Madan.⁷⁷ However, OGC attorneys worked on several drafts of the opinion during the approximately 2 years between the receipt of the Colorado Memorandum and the issuance of the opinion. During this time, OGC attorneys continued to provide guidance to OJJDP regarding their evolving understanding of the VCO issues and advised OJJDP to relay that guidance to state officials. Some OJJDP staff resisted that advice. In this section we describe the evolution and substance of the 2010 VCO Opinion; OJJDP's handling of OGC's VCO guidance while awaiting and after receipt of the 2010 VCO Opinion; issues that are not answered by the 2010 VCO Opinion and about which the OGC attorneys currently disagree; and continuing confusion within OJJDP regarding VCO issues following the issuance of the 2010 VCO Opinion.

1. Evolution and Substance of 2010 VCO Opinion

OGC became aware of the Colorado Memorandum as early as July 23, 2008, through an e-mail from the Compliance Monitoring Liaison to, among others, Thompson, Jones, the Senior Advisor, and all three JJ attorneys, and O&R reviewed drafts of the 2010 VCO Opinion dating as far back as November 2008. However, e-mail exchanges show that OGC did not complete the 2010 VCO Opinion and submit it to Acting Administrator Slowikowski until September 2010. The OGC witnesses stated that they could not remember why it took over 2 years to complete the 2010 VCO Opinion, and JJ Attorney 3 stated that such a time lag was highly unusual. While we found this time lag to be concerning, the evidence, as described below, showed that the OGC attorneys actively worked on the opinion, struggled with the issues, and had discussions with OJJDP throughout the intervening period.

Three early drafts of the 2010 VCO Opinion, which were circulated among the JJ Attorneys on November 24, 2008, January 6, 2009, and May 8, 2009, respectively, interpreted the DSO provision in a way that was inconsistent with the 2008 VCO Opinion's conclusion that the VCO non-offender regulation was *ultra vires*. These drafts were written and edited by the JJ attorneys, including JJ Attorney 1 who told us that OGC's understanding of the VCO issue "evolved." (O'Brien Tr. at 102) According to these drafts, a non-offender who runs away only once in violation of a VCO may not be securely placed. Rather, the drafts stated

⁷⁷ The 2010 VCO Opinion is not dated. On February 3, 2011, JJ Attorney 2 e-mailed JJ Attorney 3, asking whether she knew if the 2010 VCO Opinion and two other memorandums unrelated to Wisconsin were "ever signed and date-stamped." She further wrote, "I don't have date-stamped copies anywhere and I'm wondering if they perhaps, never were." We found no other correspondence related to this issue. However, we refer to the opinion as the 2010 VCO Opinion, because e-mails indicate that OGC both completed the opinion and forwarded it to Acting Administrator Slowikowski in September 2010.

that the first run and accompanying VCO violation serve as a “predicate offense” that renders the juvenile a status offender. Once a status offender, the juvenile could be securely placed for violating a VCO only if the juvenile runs away in violation of the court order again. The May draft further stated that this interpretation was consistent with the VCO non-offender regulation that OGC had advised was *ultra vires* in the 2008 VCO Opinion.

In the e-mail attaching the May draft, however, JJ Attorney 2 stated, “I began to make edits to the memo . . . but . . . it appears our conclusion is dramatically changed given [Madan’s] interpretation of the statute.” Madan and JJ Attorney 2 told us that around that time the attorneys had discussed whether a predicate offense was required, and a determination was made that there was no such requirement. Madan stated that the May draft was written without his input and that he did not agree with it, because it required a predicate offense before violation of a VCO would permit secure placement.

At least one later draft (from June 2009) and the final 2010 VCO Opinion eliminated the requirement of a predicate offense, and concluded that a juvenile who violates a VCO related to his or her status as a juvenile can be securely placed without having committed a prior offense.⁷⁸ This conclusion was based upon the premises that a violation of a VCO is an “offense” and that the exceptions within the status offender subsection of the JJDP Act are the types of status offenders that the statute excludes from the DSO requirement. In other words, in the words of the 2010 Opinion, juveniles who are “status offenders *by virtue* of being charged with/having violated [federal hand gun laws] or a VCO, or otherwise are held under the [Interstate Compact on Juveniles (ICJ)],” may be securely placed, again in the case of a VCO “*if they are charged with/have violated a VCO that relates to status as a juvenile.*” (Emphasis in original). Madan explained to us that he believed that “the very act of charging a juvenile with a valid court order [violation]. . . takes [the juvenile] out of the category of non-offenders,” because the non-offender subsection only applies to juveniles who are “not charged with any offense.” Further, the 2010 Opinion maintained that the violation of a VCO relating to one’s status as a juvenile is, in and of itself, not only a status offense, but the type of status offense that is excluded from DSO protection. The OGC attorneys all stated that the 2010 VCO Opinion, like the 2008 VCO Opinion but unlike some of the earlier drafts, continued to make the VCO non-offender regulation, which would otherwise prohibit placement of a non-offender such as a dependent or neglected child in secure placement for violating a VCO, *ultra vires*.

The conclusion reached in the final 2010 Opinion was not the only way in which the final opinion differed from its earlier drafts. Some of these differences

⁷⁸ The 2010 VCO opinion explains in a footnote that to be a status offender VCO violator, the VCO that was violated must relate to the juvenile’s “status as a juvenile,” in the sense that the prohibited conduct would only be illegal if committed by a child. The footnote goes on to state, “For example, a juvenile’s violation of a VCO requiring his in-court testimony would be insufficient to bring the juvenile within the scope of that section; but violation of a VCO related to his juvenile status (*e.g.*, truancy, underage driving, running away, curfew) could serve as a proper predicate offense for secure detention of a juvenile thereunder.”

were significant, and we discuss them in the next subpart. Given the drastic changes that were made during the drafting of the 2010 Opinion, we asked Madan whether the evolution of the opinion through various drafts evidenced that the statute was ambiguous. Madan responded that it did not and that, while there may have been disagreement along the way, in the end everyone who worked on it at OGC agreed on the interpretation reached in the final version. We also asked Madan several questions regarding his method of construing the statute, including why he did not defer to the agency's interpretation – as embodied in the longstanding VCO non-offender regulation – under the *Chevron* doctrine, why he did not consult legislative history, and why he did not apply the Reenactment doctrine (which, as noted above, assumes Congress is aware of prior administrative interpretation when, as with the JJDP Act, a statute is reenacted). Madan consistently responded that he believed the meaning of the statute was plain and that such construction was not warranted.

2. OJJDP's Handling of OGC's VCO Guidance While Awaiting and After Receipt of the 2010 VCO Opinion

While the OGC attorneys worked on drafts of what would become the final 2010 VCO Opinion, OJJDP was preparing for a state JJDP Act training conference in Austin, Texas. On October 2, 2009, Deputy Administrator Roberts told OGC that she was anxious to receive the final VCO memorandum before the upcoming training conference. On October 7, 2009, JJ Attorney 3 sent an e-mail to JJ Attorney 2 expressing frustration that the Senior Advisor and Rumsey were still "unsatisfied" with OGC's position on the VCO issue, despite a "large meeting, at which [Madan] explained [OGC's] legal reasoning." JJ Attorney 3 further stated that "there is little more we can do."

E-mails and other documents showed that the JJ attorneys reviewed the PowerPoint slides that were to be used during the training and made edits consistent with OGC's guidance to OJJDP up to that point on the VCO issue. Specifically, OGC attorneys edited the slides dealing with the VCO exception to make clear that the exception also applied to non-offenders. However, the OJJDP staff that were involved refused to incorporate the edits. In an e-mail message, then-Deputy Administrator of Policy Melodee Hanes suggested taking the disputed slides out completely and telling the states that "the VCO in relation to non-offenders is under review."⁷⁹ On October 13, 2009, the Senior Advisor sent an e-mail to Hanes and Rumsey suggesting that Slowikowski seek a "stay" of OGC's VCO guidance so that staff could bring the issue to the attention of the new OJP AAG, Laurie Robinson. On October 15, 2009, Hanes stated in an e-mail to Rumsey that OJJDP would not take responsibility for the slides with the OGC edits:

⁷⁹ Hanes is a former prosecutor who was presidentially-appointed in 2008 to be a Special Counsel to the Administrator of OJJDP. In June 2009, Hanes also assumed the duties of the Deputy Administrator of Policy after Ayers left on a detail to the Bureau of Prisons. In March 2013, Hanes became OJJDP's Acting Administrator, in which position she served for 14 months until Listenbee was appointed Administrator.

If by chance those slides end up going to the states, we are going to put OGC on the spot and under the bus, in front of everyone, and it won't be pretty. There is NO WAY we are going to own this one. We can get [the Colorado compliance monitor] and friends to ask the tough questions to OGC that will make them look very bad. I think in the end we can say. "OK, OGC now wants to have you examine each and every dependency record to determine if due process was afforded before you can invoke the VCO exception." Won't that upset the states?

Hanes told us that she felt that OJJDP should not have been required to defend OGC's opinion when it did not reflect OJJDP's policy position.

Rumsey responded to Hanes, "It is truly the twilight zone. . . . I can see the headline now, 'DOJ says abused and neglected kids are OK to lock up.' I don't want any part of that and am so grateful you are helping us get this right, when it is clearly so wrong." Later that day, Rumsey sent an e-mail to Hanes and the Senior Advisor expressing concern regarding OGC's edits to the slides:

I got most of the slides yesterday from SRAD. Unfortunately the VCO slides have nonoffender (apparently inserted by OGC) all over them. . . . [I] feel the need to say what a huge shame it is that SRAD (with [Thompson's] 18 years of compliance experience) appears to be letting OGC run the compliance program, mangling it quite badly, especially as it relates to nonoffenders.

Also on October 15, 2009, Rumsey and the Senior Advisor spoke with a Senior Advisor to then-AAG Robinson (OJP AAG Senior Advisor) to seek her assistance with the VCO issue and the upcoming training. Around this time, Rumsey forwarded several e-mails relating to concerns about the upcoming training and the VCO issues to Semmerling. As discussed in Chapter Four, according to a Memorandum of Interview (MOI) from Semmerling's OIG investigation, Semmerling spoke by telephone with Hanes on October 16, 2009, and told her that the 2008 VCO Opinion "was created specifically for Wisconsin and their compliance problem so that OJJDP could find them in compliance so they could receive funding," in response to which Hanes asked for additional information she could relay to AAG Robinson. Later that day, Semmerling sent e-mails to Hanes and the OJP AAG Senior Advisor expressing concerns about OGC's VCO position and its release at the upcoming training in Austin. OJJDP, however, never asked the AAG to overrule OGC's VCO opinion.⁸⁰ Hanes told us that ultimately the JJ Attorneys conducted the part of the training dealing with the VCO issues themselves and presented the interpretation that the VCO exception may be applied to non-offenders.

⁸⁰ The OJP AAG Senior Advisor told us that she never knew what to do to help the Senior Advisor and Rumsey, and that many of Rumsey's complaints were related to personnel issues. She said that ultimately Hanes took over handling the issue, and a decision was made to attempt to change the law rather than seek to have the AAG overrule the VCO Opinions.

According to OJJDP records, in 2010, the OGC attorneys began working on edits to the Guidance Manual to make it consistent with OGC guidance on various issues, including the VCO issues. However, Madan and Moses told us that, while OJJDP staff removed the Guidance Manual from the website for revision years ago, OJJDP has yet to make OGC's recommended edits and has continued to provide copies of the unrevised 2007 Guidance Manual to state grantee agency employees upon request.

In the summer of 2010, OJJDP conducted an audit of Wisconsin OJA. While staff was preparing the audit report following the audit, the Compliance Monitoring Liaison – the individual who had attended the April 2008 site visit in Wisconsin and sent the April 2008 e-mail requesting a legal opinion on the VCO issue – again sought OGC's guidance on Wisconsin's use of the VCO with non-offenders. On July 14, 2010, the Compliance Monitoring Liaison e-mailed JJ Attorney 2 to ask whether a particular provision of the JJDP Act might change OGC's guidance on the VCO issue. The provision, 42 U.S.C. § 5633(23), sets forth the steps that must be taken once "a juvenile is taken into custody for violating a valid court order issued for committing a status offense." (Emphasis included in the original e-mail sent to OGC). The Compliance Monitoring Liaison stated in the e-mail:

I think this is the section that Greg [Thompson] and I were most concerned with since, in the situation we discussed, the court order is issued at a dependency proceeding in response to a dependency case and prior to the juvenile committing his or her first status offense.

In other words, the Compliance Monitoring Liaison and Thompson were questioning whether the language "issued for committing a status offense" meant that the VCO exception could only apply to juveniles who had already committed their first status offense, not first-time VCO violators who were otherwise non-offenders.⁸¹ The OGC attorneys exchanged e-mails during July and August 2010, to discuss the issue, but ultimately did not change their interpretation to require a predicate offense to subject a non-offender to the VCO exception, as had been reflected in the earlier drafts of the 2010 Opinion discussed above.

Rather, on September 20, 2010, Madan forwarded the final 2010 VCO Opinion to Slowikowski by e-mail. On September 22, 2010, Slowikowski sent an e-mail to Madan in which he requested a follow-up discussion with OGC to understand the implications of the 2010 VCO Opinion (as well as two other then-recent OGC opinions unrelated to the VCO exception) and "work on solutions that will get us to where we want to be as a matter of policy." According to Slowikowski, subsequent discussion with OGC focused on ways to change the law to achieve OJJDP's policy goals.

In October 2010, OJJDP again resisted OGC's guidance to train state employees on OGC's interpretation of the VCO at an upcoming training conference, this time in New Jersey, and JJ Attorneys 1 and 3 agreed to speak at the conference

⁸¹ Rumsey raised this same issue during her O&R interview.

regarding the VCO nonoffender issue instead. JJ Attorney 3 told us that it was unusual for OGC to present at trainings. According to e-mails we reviewed, the JJ attorneys agreed with OJJDP not to distribute their talking points to the attendees. We reviewed the talking points, and they contained the ultimate conclusion reached in the 2010 VCO Opinion.

On October 18, 2010, Hanes sent an e-mail to Mary Lou Leary, the Principal Deputy AAG at the time, in which Hanes described a plan to put a “moratorium on further changes for compliance guidance for now” and instead “commit all necessary staff and efforts to review compliance . . . with OGC from beginning to end” so that changes could be communicated to the states “in one single effort.” The e-mail further indicated that OJJDP planned to tell the states about the OGC interpretation of the VCO, but also planned to tell states that OJJDP was working to “correct the statutory error” and that they should “keep monitoring just as they have been (because it reflects best practices).” Leary responded, “This is a sensible course of action. Nice work!” To this, Hanes replied, “I think [Madan] may not be happy we are advising states to stay the course for now, but it is the right thing to do until we sort out all of their changes.” Hanes stated that Moses concurred with the plan; however, Moses was not copied on the e-mail. Moses told us he did not remember the discussion or agreeing to this plan. Madan was not copied on the e-mail. However, both Madan and Moses stated that around this time they began working with Hanes to achieve a “legislative fix” – an amendment to the JJDP Act to clearly provide that the VCO exception does not apply to non-offenders.⁸²

On October 20, 2010, Acting Administrator Slowikowski issued a Memorandum to all State Agency Directors, Juvenile Justice Specialists, Compliance Monitors, and State Advisory Group Chairs (“Administrator’s Memorandum”) that

⁸² According to documents we reviewed, OJJDP and OGC employees worked together for years to achieve a legislative fix, either through an amendment in the expected Reauthorization of the JJDP Act or through an amendment attached to an appropriations bill. Although the 2002 Reauthorization of the JJDP Act expired on September 30, 2007, Congress has not passed legislation to reauthorize the JJDP Act since then. On April 30, 2015, Senators Charles Grassley and Sheldon Whitehouse introduced S. 1169, the Juvenile Justice Reauthorization Act of 2015, a bipartisan bill to reauthorize the JJDP Act, which would require states to phase out usage of the VCO exception over a period of 3 years. See S. 1169, 114th Cong. § 205 (2015). The bill was placed on the Senate Legislative Calendar under General Orders on December 15, 2015. <https://www.congress.gov/bill/114th-congress/senate-bill/1169> (last accessed June 13, 2017). On September 8, 2016, Representative Carlos Curbelo introduced a similar bill in the House of Representatives. This bill would require states to phase out usage of the VCO exception by September 30, 2020. The House passed this bill on September 22, 2016, and referred it to the Senate on September 26, 2016. <https://www.congress.gov/bill/114th-congress/house-bill/5963/text?resultIndex=6> (last accessed June 13, 2017). However, neither bill specifically addresses the potential use of contempt power to place status and non-offenders in secure detention or correctional facilities, an issue that is addressed in our recommendations in Part IV.B below. As far as an amendment attached to an appropriations bill, both OGC and OJJDP witnesses told us that OGC has assisted OJJDP in drafting such an amendment and “shopping it around” to Members of Congress. The Senior Advisor, who worked closely with OGC on this effort, and OGC witnesses told us that OGC and OJJDP have worked well together on this effort. Nonetheless, Moses told us that OJP has not been successful in its efforts to change the law thus far. According to Moses, advocating for an amendment to a reauthorization or appropriations bill is a long and uncertain process.

essentially echoed Hanes's October 18, 2010 e-mail to Leary. The Administrator's Memorandum explained that recent OGC reviews had "raised questions as to how the [DSO] core requirement should be interpreted, and what data should be reported to OJJDP." The Administrator's Memorandum further stated that OJJDP was proposing legislative changes to "ensure that status offenders and non-offenders are treated appropriately," including "clarifying language that would ensure that the [VCO] exception would not apply to non-offenders." In addition, the Administrator's Memorandum advised state officials that "no immediate changes for monitoring purposes" were required. However, the Administrator's Memorandum did not explain the content of the 2008 or 2010 VCO Opinions.

Slowikowski told us that "no immediate changes" meant that states should report any use of the VCO exception with non-offenders as violations of the JJDP Act, contrary to the guidance that had been provided to Wisconsin in January 2009 and, according to the Colorado Memorandum, to Colorado in 1998. However, he said he was not aware if any more specific guidance was provided to Wisconsin or Colorado.⁸³ In fact, the Colorado Monitor told us that Colorado never received a response from OJJDP regarding the Colorado Memorandum, and thus she understood "no immediate changes" to mean that Colorado should continue *not* reporting the secure placement of uncharged VCO-violating runaways as violations of DSO.⁸⁴ Slowikowski stated that he was not certain whether OGC was aware of the Administrator's Memorandum before or after he distributed it; however, he said he assumed that Hanes, based upon her earlier e-mails, had shared the plan with Moses and Madan and that there was "no significant push-back."

Madan and Moses stated that they had not seen the Administrator's Memorandum before their interviews with O&R, even though it is posted on OJJDP's website. <http://www.ojjdp.gov/compliance/102010Memo.pdf> (last accessed June 13, 2017). Madan told us that he did not and would not have approved the Administrator's Memorandum. Most significantly, he stated that he would not have agreed to the language "no immediate changes for monitoring purposes are required." Moses similarly told us that OGC never would have approved the same statement. Moses said he was concerned that OJJDP was requiring states to

⁸³ The Administrator's Memorandum also addressed how states should handle Minor in Possession of Alcohol (MIP) offenses. At the same time that OGC had provided the 2010 VCO Opinion to OJJDP, OGC also provided an opinion, contrary to past guidance provided by John Wilson, that MIP should not be considered a status offense to the extent that state law also prohibited alcohol possession for 18 to 21 year olds. As with the VCO non-offender guidance, OJJDP opposed this guidance from a policy perspective, and the Administrator's Memorandum similarly advised states that they should make "no immediate changes" with respect to how they reported MIP offenses. However, the Administrator then issued a follow-up memorandum, on March 17, 2011, advising states that, "[j]uveniles who have been accused of or adjudicated for alcohol violations, which would not be violations of the law if committed by an adult over the age of 21, will no longer be considered status offenders and would not need to be reported as violations of the DSO core requirement." http://www.ojjdp.gov/compliance/MIP_Memo3_17_2011.pdf (last accessed February 6, 2017). No similar change in guidance or clarification was provided with respect to the VCO non-offender issue.

⁸⁴ As noted previously, the Colorado Monitor viewed these juveniles as status offenders "according to federal definitions" even though they had never been charged with status offenses under Colorado law.

comply with a regulation that OGC had advised was *ultra vires*. According to Moses, the Administrator's Memorandum also gave the misimpression that the proposed legislative modification to the JJDP Act was simple and likely to be achieved quickly.

O&R also found specific instances in which OJJDP gave advice to state employees that was contrary to OGC's guidance's on the VCO issue and contrary to the advice that had been given to Wisconsin and Colorado. For example, when a state compliance monitor asked an OJJDP State Representative whether she was correct that, consistent with the Guidance Manual, only adjudicated status offenders could be subjected to the VCO exception, the OJJDP State Representative responded by e-mail, "You are correct in your quotation of the guidance manual." The Compliance Monitoring Liaison explained that there was a "general consensus" that OJJDP employees would avoid telling states that they could use the VCO exception for non-offenders, especially since OJJDP leadership was hoping to change the law.⁸⁵

According to witnesses and contemporaneous e-mails, certain OJJDP employees believed that refusing to implement or communicate to the states OGC's guidance was justified by their concern for children. Hanes wrote a summary of the VCO issue in October 2010 which includes an example that highlights the tension between OJJDP's policy concerns and OGC's legal guidance regarding the VCO Opinions:

Susie is sexually abused by Mom's boyfriend and reports to teacher. Teacher tells social workers who investigate and determine it is likely true. They file a case in dependency court to "remove" Susie from her home, because she is in danger of further abuse if boyfriend there. Susie goes to foster care. Because of her huge trauma issues as a sexual assault victim, she runs away (not atypical for these kids). If the judge told her to not run away when she was put in foster care, under the new OGC opinion, she could go to juvenile jail on the VCO violation.

⁸⁵ According to the OGC attorneys, there were several other instances in which OJJDP ignored or refused to follow OGC's guidance, and Hanes told us that she and Slowikowski were in a constant "battle" with OGC regarding the VCO issue and other compliance matters. For example, OGC witnesses told us and e-mails indicated that after the 2010 MIP opinion discussed above, OJJDP continued to propose holding states out of compliance for securely confining juveniles charged with MIP. The MIP issue did not come from Wisconsin. On September 29, 2010, JJ Attorney 3 sent an e-mail to Rumsey indicating that four proposed compliance determinations were legally indefensible because OJJDP failed to follow OGC's guidance on the MIP issue, the meaning of "jail or lock up for adults," and matters related to the identification and significance of the monitoring universe, all unrelated to the VCO issue.

3. Issues Not Addressed in Final 2010 VCO Opinion and Issues about which OGC Attorneys Disagreed in their Interpretations

Through our interviews with OGC and OJJDP witnesses about the 2010 VCO Opinion, we identified several issues that the opinion did not address that are related to the operation of the VCO exception and some issues about which OGC attorneys disagreed in their interpretations. The absence of or disagreement about these issues were not relevant to our assessment of whether OGC sought to help Wisconsin circumvent JJDP Act requirements, but it did inform our development of recommendations that we believe will help address some of the confusion and frustration within OJP about the VCO Opinion. We describe these issues below, and set forth the related recommendations in Section IV.

a. Meaning and Import of the Term “Charge”

The term “charged” is significant because an abused, neglected, or dependent child may only be removed from the protections of the non-offender subsection if he is “charged” with an offense. The 2010 VCO Opinion rested on an assumption that the VCO violator at issue was “charged” with or adjudicated of the offense of a VCO violation, because in order to fall within the VCO exception the juvenile must have been charged with or have committed (that is to say, adjudicated of) a VCO violation.⁸⁶ As Madan explained in his OIG interview, “the very act of *charging* a juvenile with violating a valid court order . . . takes them out of the category of non-offenders” (emphasis added). However, the opinion did not explain what it means to be “charged” with an offense within the meaning of the JJDP Act, and Madan told us he had not previously considered that issue. The May draft, on the other hand, specifically stated that the juvenile must be charged with an offense in order to be securely confined.

There was a difference of opinion among the OGC attorneys regarding the meaning of the term “charge.” Some, including Madan, said they believed that an oral declaration from the bench that the judge’s order had been violated was tantamount to being “charged” for purposes of the VCO exception. Another OGC attorney told us that she believed the charge would have to be formal and written. The May draft stated that OJJDP should consult state law to determine what constitutes a charge. In a footnote, the author of the draft explained that under Colorado law the term “‘charge’ means a formal written statement presented to a court accusing a person of the commission of a crime. The charge may be made by complaint, information or indictment.” The draft further suggested that OJJDP personnel request “evidence of ‘offense charges’ whenever they locate a runaway who is placed in secure detention or secure correction facilities,” and provided guidance as to how to identify such evidence in Colorado.

⁸⁶ The 2010 VCO Opinion also did not explain the meaning of the term “committed.” As noted above, Madan told us that he had not previously considered the meaning of this term, but that he believed it was functionally equivalent to the term “adjudicated.”

Madan and JJ Attorney 3 told us that they did not know why the references to Colorado law – including the explanation that a formal written statement would be required to satisfy the “charge” requirement under Colorado law – were excluded from the final 2010 VCO Opinion. However, they speculated that OJJDP may have changed the question to be more general than specific to Colorado following the initial request. We were unable to determine whether OJJDP had changed its question, because, as discussed below, most of the OJJDP witnesses we interviewed did not even recall having seen the 2010 Opinion prior to their OIG interviews.

b. Meaning and Import of the Term “Offense”

The 2010 VCO Opinion also assumed that a VCO violation was “an offense” without addressing the meaning of that word. This term is significant because an abused, neglected, or dependent child can only be removed from the protections of the non-offender subsection if he is charged with an “offense.” However, we received no clear or consistent responses from the OGC attorneys we interviewed regarding whether a VCO violation is an offense within the meaning of the JJDP Act.

The OGC attorneys told us that they relied on contempt law in considering a VCO violation to be an offense, consistent with the suggestion in the 2008 VCO Opinion. However, the 2010 VCO Opinion did not distinguish between direct contempt – the type of contempt that occurs in a judge’s presence and warrants the judge exercising his inherent authority to detain the contemnor; and indirect contempt – the type of contempt that occurs outside the court’s presence, such as running away in violation of a court order, and that generally must be charged through the normal charging process. 3A Fed. Prac. & Proc. Crim. § 705 (4th ed.). In this regard, the May 2009 draft helpfully explained that under Colorado law “charging by ‘motion’ supported by affidavit” would be required in the case of indirect contempt, but this was not included in the 2010 VCO Opinion. Again, the OGC attorneys told us that they did not know why the references to Colorado law were removed.

c. Due Process Protections

Both the May and June drafts of the 2010 VCO Opinion highlighted the due process protections that OJJDP employees must consider in their assessment of whether a state appropriately applied the VCO exception to non-offenders, a concern that the Senior Advisor had raised in her Response Memorandum to the 2008 VCO Opinion. The June draft explained that the VCO violator falls within the exception “only if in fact he was made subject to a *valid* court order, as defined by the JJDP Act.” In a footnote, the draft provided guidance to OJJDP regarding the particular due process issues in Colorado, including that Colorado runaways were “routinely not afforded due process rights.”

Moses told us that he believed that clarifying the due process protections to OJJDP employees was very important, especially after he observed that the January 2009 letter to Wisconsin determined that Wisconsin had not been using the VCO checklist. However, the 2010 VCO Opinion did not discuss these due process

protections, and the OGC witnesses said they could not recall why the discussion of due process protections was not included in the final draft.

d. Relating to Status as a Juvenile

The requirement that the VCO be related to the child's status as a juvenile was addressed in both a draft of the 2010 VCO Opinion and the final opinion; however, the OGC attorneys we interviewed disagreed about the import of this requirement. JJ Attorney 2 stated that whether the VCO was related to the child's status as a juvenile was a "threshold issue," because if the VCO is not related to the child's status as a juvenile, the VCO exception does not apply. Consistent with this interpretation, JJ Attorney 2 advised Deputy Administrator Melodee Hanes and the Senior Advisor during an October 9, 2009 meeting that a juvenile who violates a VCO unrelated to his status as a juvenile (such as failing to appear for a court proceeding) cannot be securely confined. She further told Hanes and the Senior Advisor that this aspect of OGC's opinion might actually reduce confinement of status and non-offenders in certain circumstances. On October 13, 2009, Hanes e-mailed Rumsey and the Senior Advisor as they were preparing for a state training later that month: "The good news is that [OGC's position on the VCO issue] has narrowed some."

However, in 2013 JJ Attorney 3 gave conflicting advice to OJJDP. JJ Attorney 3 told OJJDP staff that a juvenile who commits a VCO violation unrelated to his status as a juvenile can be securely confined as a criminal-type of offender, under a contempt-type theory. Madan told us that he agreed with JJ Attorney 3's interpretation.⁸⁷ JJ Attorney 2 acknowledged during her O&R interview that JJ Attorney 3's guidance conflicted with her own guidance to OJJDP on this issue. The Senior Advisor stated that she recalled OGC advising her that the VCO had to relate to the juvenile's "status as a juvenile," but she never understood what that meant.

e. Reference to State Law

Unlike the May and June drafts, the 2010 VCO Opinion did not include any reference to Colorado law. As with the due process discussion, Madan stated that it was not his decision to remove references to Colorado. He questioned whether OJJDP staff had changed the question to be more general rather than specific to Colorado. He stated that it would have been helpful to include the state-specific information if the question was solely about Colorado; however, if the question was made more generic in nature, a discussion of Colorado's specific laws or due process issues may have made the opinion confusing. Moses stated that the application of the JJDP Act is often a very fact-intensive inquiry and that he has learned through practice that the analysis for one state may be very different from the analysis for another state.

⁸⁷ According to Madan, the VCO exception was included in the DSO provision to clarify that a child may be securely confined for violating a VCO in any situation, even if the VCO relates to the child's status as a juvenile.

f. Moses's Disagreement with the Ultimate Conclusion

Moses told us that he believed that the better interpretation of the DSO provision of the JJDP Act was one that required a predicate offense, a position starkly at odds with the final 2010 VCO Opinion and with which Madan told us he disagreed. In other words, he believed, consistent with earlier drafts of the opinion, that when a non-offender violates a court order related to his status as a juvenile, the non-offender should move to the status offender subsection with DSO protection and only be subject to the VCO exception after committing a second VCO violation. However, he emphasized that he was not involved with the discussions that preceded the final 2010 VCO Opinion and that his view might be different with the benefit of those discussions.

Notwithstanding the discrepancies and unaddressed issues we described, Madan, Moses, and the three JJ attorneys all said they believed that the September 2010 VCO Opinion was written in such a way that OJJDP staff could understand it. Madan told us that no one from OJJDP had complained to OGC that OJJDP staff did not understand the opinion.

4. Continued Confusion Within OJJDP Following the 2010 VCO Opinion

As noted earlier in this chapter, the 2010 VCO Opinion was written, in part, to clarify some of the confusion generated by the 2008 VCO Opinion. However, during the course of our review we determined that confusion and a general lack of awareness remain, even now, in relation to OGC's interpretation of the VCO exception as applied to non-offenders. In this section, we describe what witnesses told us about their current understanding on this subject and the poor communication among OJP personnel both before and after the VCO opinions were issued.

Both Administrator Listenbee and his Chief of Staff, Shanetta Cutlar, told us that they were not aware of the 2008 or 2010 VCO Opinions and did not know that OGC had determined that the VCO non-offender regulation was *ultra vires*. Listenbee stated that he was not familiar with the term "non-offender" and was not aware that under OGC's interpretation of the JJDP Act the VCO exception could be applied to abused, neglected, or dependent children who had not previously been charged with juvenile offenses apart from violating court orders by, for instance, running away in violation of a court order.

Slowikowski told us that he received the 2010 VCO Opinion in 2010. However, he stated that he did not know why OGC issued a second opinion on the VCO non-offender issue and that he did not fully understand the opinion. Ayers told us that she could not remember having seen the 2010 VCO Opinion. She also stated that she did not remember much about the 2008 VCO Opinion and did not recall that it advised that a regulation was *ultra vires* or had any impact on non-offenders.

Rumsey told us that Hanes had shared the 2010 VCO Opinion with her, but that she found the opinion to be unclear and not helpful. She stated, "when you look at individual cases this memo is just not helpful because it doesn't get at the permutations of what is actually happening in the field." The Compliance Monitoring Liaison told us that she could not remember whether she had seen the 2010 VCO Opinion before her O&R interview in 2016. However, after reviewing it, she stated that it "was written in such legalese" that it was difficult to understand, even for someone who had an understanding of the formula grant program and associated legal requirements.

E-mails we reviewed showed that the 2010 VCO Opinion was not shared with the Senior Advisor until April 5, 2011. The Senior Advisor told us that she had only a vague recollection of receiving the opinion on this date. Upon reviewing the opinion during her O&R interview, she stated that she found it to be confusing. Both in an October 2009 e-mail after meeting with OGC to discuss OGC's reasoning on the VCO issue and at the time of her O&R interview, the Senior Advisor stated that she did not understand OGC's reasoning and believed that OGC had not provided a legal justification for determining that the VCO non-offender regulation was *ultra vires*.

Thompson and Jones, the two individuals who led SRAD during the period relevant to our review, both stated that they were unaware that OGC had concluded that the VCO exception was applicable to non-offenders. Jones stated that she was unsure whether OGC ever provided a final answer to that question. Upon reviewing the 2008 VCO Opinion during her O&R interview, she stated that she was unsure whether the opinion answered the question of whether a non-offender who was never formally charged or adjudicated with a status offense could be placed in a secure detention or correctional facility for violating a VCO. She also stated that she did not remember that the opinion advised that a regulation was *ultra vires*. She told us that she did not recall the Colorado issue and, upon being shown the 2010 VCO Opinion during her interview, stated that she did not recall having seen it before. After reviewing the 2010 VCO Opinion, Jones said she did not understand the opinion and thought it seemed contrary to the 2008 VCO Opinion. Regarding OGC's legal opinions generally, Jones stated, "They're all like this." She further stated that OJJDP either receives nothing in writing from OGC or a written opinion that is only comprehensible to a lawyer.

Thompson appeared particularly confused about the VCO issue. Upon reviewing the 2008 VCO Opinion during his O&R interview, Thompson stated that he did not believe that it concluded that non-offenders could be placed in secure detention or correctional facilities for violating VCOs. When we pointed out the wording of the question that was posed to OGC in the April 2008 e-mail, namely whether it was a violation of the JJDP Act for states to securely place non-offenders who had been court ordered not to run and violated such orders but had never been formally charged or adjudicated as status offenders for running away, he stated that the answer to that question was, no. He told us that that a non-offender can only be subject to the VCO exception after being "formally charged" with a status offense and that he did not believe that any OGC opinion had provided otherwise. After reviewing OGC's conclusion that the VCO non-offender regulation

was unenforceable, Thompson said he believed that OGC merely viewed the regulation as “moot” in light of the 2002 JJDP Act reauthorization which contained the same information as the regulation.⁸⁸ Thompson stated that he could not recall the Colorado Memorandum or the 2010 VCO Opinion.

Thompson acknowledged that his interpretation of the 2008 VCO Opinion meant that OGC did not answer the question that had been posed from Wisconsin. His apparent misunderstanding of the status of the VCO issue is also reflected in an October 22, 2008 e-mail he sent to Ayers in which he expressed concern and surprise that Rumsey had “alleged” that OJJDP was “allowing the use of the VCO for non-offenders.” He further stated in that e-mail, “I would like to make it clear that neither SRAD [nor] OJJDP has ever said that the VCO exception may be used for non-offenders, and to imply otherwise is misleading and very disconcerting.” This e-mail was sent before the January 2009 letter notifying Wisconsin that the application of the VCO to non-offenders was acceptable under the JJDP Act. Upon reviewing that letter, Thompson stated that he did not agree with the guidance as described in the letter, but acknowledged that as Associate Administrator of SRAD, he would have reviewed the letter at the time that it was prepared.

The 2005 Compliance Monitoring Coordinator also told us that he was unaware that OGC had advised that the VCO non-offender regulation was *ultra vires* and said that he believed that placing non-offenders in secure detention or correctional facilities for violating VCOs violated the JJDP Act. He further stated that he could not remember having read either the 2008 or the 2010 VCO Opinions before his O&R interview, even though he was one of the OJJDP employees that conducted the most recent 2015 audit of Wisconsin OJA and had received guidance from OGC before the audit.

Based upon a review of e-mails, as well as our interviews of Thompson and the OGC attorneys, we concluded that some of the confusion surrounding the VCO opinions appears to have resulted from a perception that Rumsey and the Senior Advisor believed non-offenders should never be upgraded to status offenders, even when they are charged with status offenses. After reviewing drafts of this report, both Rumsey and the Senior Advisor told us they did not, in fact, espouse this view. Thompson stated that the disagreement within OJP was between those who believed that a non-offender could be upgraded to a status offender and subject to

⁸⁸ As outlined in footnote 71 above, the 2002 Reauthorization amended the DSO provision to address status offenders and non-offenders (the latter referring to juveniles who are not charged with any offense and who are either aliens or were previously alleged dependent, neglected or abused) in separate subsections, with the non-offender subsection not referencing the VCO exception. Applying the “structural argument” advanced by the Senior Advisor as discussed above – in substance that the Legislature would not have addressed non-offenders in a separate subsection from status offenders and the VCO exception if it had intended non-offenders to be subject to the VCO exception – this change could support an argument that the reauthorized statute made the VCO non-offender regulation redundant or “moot,” as Thompson stated. However, OGC witnesses told us that the 2008 and 2010 VCO Opinions concluded that the VCO non-offender regulation was *ultra vires* because it was inconsistent with the substance of the statute, not because a contrary conclusion would render it superfluous.

a VCO after being adjudicated for a status offense (what he understood to be OGC's view), and those who believed that a non-offender could never be upgraded to a status offender (what he understood to be Rumsey's and the Senior Advisor's view). Similarly, the JJ attorneys stated that that the Senior Advisor's and Rumsey's – and possibly even the Compliance Monitoring Liaison's – primary argument was "once a non-offender, always a non-offender," and that a non-offender could never be securely placed even after being adjudicated of an offense.⁸⁹ According to Moses, the view that he believed to be held by some OJJDP staff that a non-offender could never become a status or criminal-type offender "muddled" the issues.

An October 2011 e-mail exchange highlights the confusion within OJJDP. On October 28, 2011, one of the OJJDP State Representatives received an e-mail from a Louisiana state employee asking whether the VCO exception only applied to adjudicated status offenders. The OJJDP State Representative sought the Compliance Monitoring Liaison's guidance. The Compliance Monitoring Liaison, based upon the belief that Thompson's position was to follow OGC's legal guidance, responded:

The bottom line is that . . . [t]he Act doesn't require anywhere that a juvenile be adjudicated for the VCO to apply. This is an issue that went to OGC for a ruling several years ago and OGC concurred that adjudication is not required. [Rumsey] disagreed and refused to have the language modified in the Guidance Manual. So essentially [Thompson] would give one response to this question and [Rumsey] would probably say something completely different.

The OJJDP State Representative responded, "Oh, great. We are always so clear in our guidance."

Other e-mails we reviewed showed that the guidance provided by OJJDP to state employees on the proper application of the VCO exception was similarly unclear. For example, on September 9, 2008, an Alabama employee e-mailed an OJJDP state representative seeking clarification as to when the VCO exception may be used:

We have one question on [the VCO flowchart] and would appreciate your perspective. The chart does not address one major step – adjudication. An "accused status offender" with a "valid court order" does not make much sense. If I remember correctly, the [DOJ's] Guidance Manual states that "The VCO Exception provides that adjudicated status offenders found to have violated a valid court order may be securely detained. . . ." Can you provide to us your input???

⁸⁹ Consistent with this dichotomy, JJ Attorney 1 stated that when she said, "any alternate interpretation would be too strained to withstand a plain reading of the statute," in the 2008 VCO Opinion, she was referring to the alternate interpretation that a non-offender could never be converted to a status or delinquent offender, even if the non-offender was adjudicated of an offense.

We found that the OJJDP state representative's response was confusing and appeared to imply, inconsistent with OGC's interpretation and the guidance that had been provided to Wisconsin, that the VCO exception could only be applied to juveniles that had already been adjudicated as status offenders:

Thanks for the question. The intention of the chart is to point out for compliance monitors where they need to verify that certain actions have taken place . . . in regards to the use of VCO. You are correct in your quotation of the Guidance Manual. The adjudication is assumed within the 3rd box.

Moreover, as noted previously, the Colorado Monitor told us that Colorado never received a response to the Colorado Memorandum. She told us that no one ever suggested to her that the VCO non-offender regulation was *ultra vires* or that non-offenders could be securely placed pursuant to the VCO exception because the act of violating a court order in itself was a status or criminal-type offense. The Compliance Monitoring Liaison told us that there was a "general consensus" within OJJDP that staff would avoid telling states about OGC's interpretation of the VCO exception if possible, because the staff did not agree with the interpretation and hoped that it would be changed legislatively.

In sum, there has been and continues to be considerable miscommunication and misunderstanding within OJP regarding the VCO issues, resulting in unclear guidance to – or in some cases a failure to respond to requests for guidance from – state grant recipients.⁹⁰ In Part IV we provide recommendations to address these problems.

E. Circumstances Surrounding and Substance of 2008 Jail Removal Opinion

Semmerling alleged that in addition to the 2008 VCO Opinion, OGC issued a legal opinion concerning the Jail Removal core requirement that was similarly improperly intended to be favorable to Wisconsin. As noted below, the wording of the Jail Removal Opinion was materially different from the wording used to describe it in the OSC referral. In this part we describe the circumstances surrounding OJJDP's request to OGC for the Jail Removal Opinion as well as the content and import of the opinion.

As discussed earlier, the jail removal core requirement mandated that state formula grant plans provide that "no juvenile will be detained or confined in any jail or lockup for adults." Shortly after the April 2008 site visit to Wisconsin in which the VCO issues surfaced, OJJDP also discovered that Wisconsin had potential Jail Removal violations that might have warranted additional reductions in funding.

⁹⁰ After reading a draft of this report, both Madan and Moses commented that they would have been happy to answer questions regarding OGC's legal opinions, had OJJDP employees asked. Indeed, Madan stated that he takes "pride" in his "ongoing effort" to make himself personally available to OJP employees to discuss OGC's legal opinions.

Wisconsin justified at least some of these violations by explaining that some of the adult jails used to hold juveniles became juvenile detention facilities when adults were not occupying the facilities.

According to the OJJDP State Representative and Thompson, Wisconsin was proposing to convert facilities back and forth between adult jails and juvenile detention facilities. They told us that the state was not proposing to utilize these facilities as collocated facilities, where both juveniles and adults would be housed at the same time.

Rumsey told us that she did not believe that it was possible, as a factual matter, that there were times when the adult jails at issue did not house any adult inmates. She stated that she has never visited a state with unoccupied adult jails. We asked Thompson whether he believed that the situation that Wisconsin described was factually possible. He responded that it was and told us that he has visited facilities in smaller communities in some states where "there could be a month where there's no one being held."

However, Thompson also told us that his initial impression was that Wisconsin's Jail Removal proposal was unacceptable under the JJDP Act. He indicated that Wisconsin's practice was unusual and he had concerns about it. For example, he and other OJJDP employees told us that they were concerned that staff at the adult jail might not be properly trained to work with juveniles and that the physical construction of the building might not be appropriate for juveniles. Thompson also stated that he was concerned that the facility might not have the appropriate programming for juveniles. A May 30, 2008 e-mail from the OJJDP State Representative to Jones and the Compliance Monitoring Liaison appears to corroborate that Thompson had this initial impression and communicated it to staff: "It is my understanding that (per Greg [Thompson] I think) it is not possible for a facility to go from being an adult facility one day to being a juvenile facility the next."

Thompson sought guidance from OGC regarding whether Wisconsin's practice would constitute a violation of the JJDP Act's Jail Removal core protection. The OJJDP State Representative told us that Wisconsin did not request that OJJDP seek OGC's guidance and we found no evidence that any OGC official spoke to any Wisconsin personnel in advance about doing so. According to JJ Attorney 2, who handled the inquiry, neither Thompson nor any other OJJDP staff told OGC that OJJDP hoped for a particular outcome on this issue. Thompson told us that he does not specifically remember but believes that he likely would have shared his concerns with OGC.

On July 2, 2008, JJ Attorney 2 sent an e-mail to Thompson stating, "You asked for an opinion about whether or not WI's attempt to invoke the substantive de minimis standard meets the requirements of the regulation." Under the JJDP Act regulations, states may be in compliance with the DSO and Jail Removal core requirements even if they report some violations, provided the number of violations does not exceed the regulatory "de minimis" standards. JJ Attorney 2's e-mail concluded that Wisconsin's requested use of the de minimis standards to excuse its

potential Jail Removal violations was not permissible under law. JJ Attorney 2 then told Thompson that she would research Wisconsin's alternative proposal that some of the alleged violations were not actual violations based on a theory that "county jails can be used as secure detention facilities" for juveniles under certain circumstances. Based upon the fact that her e-mail did not attach an original e-mail from Thompson, JJ Attorney 2 told us that Thompson likely posed these Jail Removal questions orally rather than in writing. She stated that she could not recall whether he provided any additional information during their conversation.

On July 9, 2008, JJ Attorney 2 sent a second e-mail to Thompson stating:

After reviewing Wis. Stat. 938.209(1), it appears that there is no statutory bar to WI's proposal regarding jails that under some circumstances become secure detention facilities. *Presuming all other statutory and regulatory requirements are met*, the mere fact that the physical building serves at other times as a jail, does not preclude it from meeting the definition of secure detention facility at a point in time. If you have any further information about the criteria used by WI that you think may inform this opinion, please forward it to me.⁹¹ (Emphasis in original.)

Upon reviewing the e-mail during her O&R interview, JJ Attorney 2 stated that the issue was not complex and that her advice was accurate. She stated that when she wrote and emphasized "*presuming all other statutory and regulatory requirements are met*," she meant to include all of the regulatory requirements of a collocated facility, referenced earlier in this chapter, such as "juvenile programming" and staff that are "trained and certified to work with juveniles." She added, "Otherwise, it's an adult jail or lockup . . . [a]nd you can't hold kids there."

However, according to Thompson, Wisconsin was not proposing to categorize the facilities at issue as collocated facilities. As he stated: "They wouldn't hold juveniles and adults there at the same time. So they wouldn't even try and set up some form of . . . collocated type system. They would, if the facility was empty, they could use it for juveniles." Thompson's concern with Wisconsin's proposal, in essence, was that the requirements of a collocated facility were not being met. Thus, Thompson did not appear to understand that part of JJ Attorney 2's presumption was that the regulatory requirements of a collocated facility were met.

JJ Attorney 2 stated that she reviewed the Wisconsin statute to understand better what Wisconsin law allowed and what Wisconsin was proposing.⁹² She said

⁹¹ Rumsey told us that she agreed with this conclusion from a legal perspective, although she thought that the factual scenario forming the basis of the opinion was "ludicrous."

⁹² The Wisconsin statute provides that a county jail may be used as a juvenile detention facility if "the criteria under either par. (a) or (b) are met:

- (a) There is no other juvenile detention facility approved by the department or a county which is available and all of the following conditions are met:

(Cont'd.)

she was not necessarily opining that the Wisconsin statute in its entirety was consistent with the JJDP Act.⁹³

JJ Attorney 2 said she was not certain whether her opinion had the effect of allowing Wisconsin or any other state to be in compliance with the JJDP Act. JJ Attorney 2 forwarded the opinion to Moses. Moses told us that he was not involved at all with the researching and drafting of the opinion; however, he said he did not have any concerns with it and believed it seemed correct. Madan told us that he did not remember being involved with the Jail Removal Opinion at the time the issue came up or when JJ Attorney 2 wrote the e-mail. Upon reading the e-mail during his O&R interview he stated that he believed it was correct. He further stated that JJ Attorney 2 would not have been required to seek his input or approval before providing the opinion to OJJDP staff.

According to the Compliance Monitoring Liaison, the Jail Removal Opinion had the effect of placing Wisconsin in compliance with the Jail Removal core requirement.

F. Allegation of a “Secret Legal Opinion” and OJP’s Failure to Publicize OGC’s VCO Interpretation

According to the OSC referral, “Semmerling maintains that the [2008 VCO Opinion] was a secret, unlawful attempt by OJP and OJJDP to effect a legal decision that would find Wisconsin in compliance with the JJDP Act even though Wisconsin had obvious and significant compliance problems.” In support of her allegation that the

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1. The jail meets the standards for juvenile detention facilities established by the department.
 2. The juvenile is held in a room separated and removed from incarcerated adults.
 3. The juvenile is not held in a cell designed for the administrative or disciplinary segregation of adults.
 4. Adequate supervision is provided.
 5. The court reviews the status of the juvenile every 3 days.
- (b) The juvenile presents a substantial risk of physical harm to other persons in the juvenile detention facility, as evidenced by previous acts or attempts, which can only be avoided by transfer to the jail. The conditions of par. (a)1. to 5. shall be met. The juvenile shall be given a hearing and may be transferred only upon a court order.” Wis. Stat. 938.209.

⁹³ We note that the OSC referral to the OIG contained what appears to be an inaccurate description of the July 9 e-mail, which it indicates provided that “presuming all other statutory and regulatory requirements are met, the mere fact that a physical building serves as a jail at some point in time does not preclude it from meeting the definition of a ‘secure detention facility’ at all points in time.” (Emphasis added.) As described in the text, the e-mail at issue opined that, “[p]resuming all other statutory and regulatory requirements are met, the mere fact that the physical building serves at other times as a jail, does not preclude it from meeting the definition of secure detention facility at a point in time.” (Emphasis in italics in original; emphasis in underline added.) Thus, the question essentially was not whether a facility that was sometimes a jail that housed adults could always house juveniles, but whether a facility that was sometimes a jail that housed adults could house juveniles at other times.

2008 VCO Opinion was “secret,” she referred us to a June 15, 2009 e-mail in which JJ Attorney 2 advised OJJDP not to publish OGC’s legal opinions externally and stated that the opinion was not published in the Code of Federal Regulations.⁹⁴

The e-mail referenced by Semmerling, which is also discussed in Chapter Four of this report, advised OJJDP not to share OGC’s actual written opinions, or the fact that OGC provided particular opinions, with individuals outside of OJP. The e-mail did not relate specifically to the VCO opinions. According to the OGC attorneys, this guidance was based upon attorney-client privilege concerns, and both OJJDP and OGC witnesses told us that OGC had provided this guidance consistently over time with regard to all its legal opinions.⁹⁵ OGC attorneys told us that they have never discouraged OJJDP from sharing the substance of their opinions with states and other interested parties and, according to Madan, OGC has always advised OJJDP on the importance of transparency. Madan told us that he advised Hanes that OJJDP should be transparent with respect to the 2010 VCO Opinion and two other OGC opinions that were issued around the same time, in response to her opposition to sharing the substance of those opinions publicly. Similarly, in an e-mail that Semmerling brought to our attention, OGC provided examples of ways OJJDP could share OGC’s guidance without jeopardizing attorney client privilege. For example, instead of stating, “We have consulted with OGC and their response is as follows: . . .,” the e-mail suggested stating, “We have consulted with counsel, and OJP’s conclusion is that. . . .”

We asked nearly every OJJDP witness whether anyone from OGC told them to keep the substance of the VCO opinions secret or to not share the substance of the opinions with states other than Wisconsin. All of these witnesses, including Rumsey and the Senior Advisor, answered “no” to these questions. We also did not find any evidence that OGC told OJJDP staff to keep secret the fact that the 2008 Opinion originated from a Wisconsin request. Madan stated that it is “illegal” to have different rules for different states or to treat states differently for no reason. He also told us that he never knew that OJJDP had followed OGC’s VCO guidance with respect to Wisconsin or any state and, thus, was not aware that OJJDP was treating states differently by providing inconsistent guidance on use of the VCO exception.

⁹⁴ Semmerling also said she referred to the 2008 VCO Opinion as a “secret” opinion because her supervisor, SAC John Oleskowicz, did not allow her to investigate the opinion. For reasons explained in Chapter Four, we did not substantiate that aspect of her claim.

⁹⁵ This is consistent with what we found on OJJDP’s website. While we found no OGC opinions published on OJJDP’s website, we found links to policy and guidance documents created by OJJDP in response to guidance provided by OGC. For example, in response to OGC’s guidance regarding the meaning of “detain or confine” within the Jail Removal and Separation core requirements, Administrator Listenbee published a July 2014 guidance document and a list of frequently asked questions on the website. Each document incorporated OGC’s guidance, but neither stated that the guidance had been provided by OGC nor otherwise referenced OGC. <http://www.ojjdp.gov/compliance/Memo-DSAs-on-DetainConfine-July15.pdf> (last accessed February 6, 2017); <http://www.ojjdp.gov/compliance/FAQs-detainconfine-Aug11.pdf> (last accessed February 6, 2017).

However, we do note that OJP has not yet taken the step of publicizing the substance of the VCO Opinions to all state grantees and other interested parties, despite more than 8 years having passed since OGC determined the VCO non-offender regulation was *ultra vires*, and almost 6 years having passed since the related 2010 Opinion. The VCO non-offender regulation, which was originally posted for notice and comment in 1982, still appears in the Code of Federal Regulations as a current regulation and there is still a link to it on OJP's website. <http://www.ojjdp.gov/compliance/d-08-16-82FedReg.pdf> (last accessed February 6, 2017). Further, OJJDP has not updated its Guidance Manual to incorporate the substance of the VCO opinions. The link to the Guidance Manual on OJJDP's website connects to a page that indicates that the Guidance Manual has been "temporarily removed for updates." <http://www.ojjdp.gov/compliance/guidancemanual2010.pdf/> (last accessed February 6, 2017). Moses told us that the Guidance Manual has been "under review" for 6 years, in part as a result of OGC's advice to update it to reflect the VCO Opinions and other OGC opinions. However, Madan and Moses told us that OJJDP still provides the most recent version of the Guidance Manual – which does not reflect OGC's interpretation of the VCO non-offender regulation as *ultra vires* – to state employees upon request, even though OGC has counseled against this. Thus, OJJDP's only notification to all states on the VCO issue was the October 20, 2010 Administrator's Memorandum advising the states that "no immediate changes for monitoring purposes" were required, which memorandum remains posted under "Guidance and Resources" on the Core Requirements Monitoring page on OJJDP's website at <http://www.ojjdp.gov/compliance/102010Memo.pdf> (last accessed February 6, 2017).

OGC witnesses told us they believed that OJJDP should have informed all states and territories receiving grants under the JJDP Act of OGC's conclusion that juvenile non-offenders may be subject to the VCO exception for DSO compliance purposes and that the VCO non-offender regulation had been deemed unenforceable. Consistent with this belief, OGC advised OJJDP to train states on the VCO guidance, sent OGC attorneys to conferences to provide such training, and advised OJJDP to update its Guidance Manual. In addition, according to an e-mail sent by Moses to Hanes on April 12, 2011, OGC repeatedly advised OJJDP that the VCO non-offender regulation should not be included in updated JJDP Act regulations, unless the JJDP Act is amended in a manner consistent with the VCO non-offender regulation.

Despite these efforts, OJJDP did not heed OGC's guidance, and OGC stopped short of advising OJJDP employees that they were legally required to publicize the information or in what form the publication should be made.⁹⁶ The OGC attorneys

⁹⁶ O&R sought to determine whether OGC brought OJJDP's failure to follow OJJDP's guidance to the attention of the AAG, especially given OJP Order 1001.5A, which provides that "[n]o OJP officer or employee may take any action in contravention of legal advice from the [General Counsel], without the approval and concurrence of the [AAG]." According to Madan, he has repeatedly complained to OJP AAGs, including Robinson, Leary, and current AAG Karol V. Mason, that OJJDP generally does not heed his advice; however, he stated that he could not remember whether he made such a complaint (Cont'd.)

told us that they did not specifically advise OJJDP whether the substance of the VCO opinions should be posted on OJP's website, published in the Federal Register, or directly communicated to all states through a letter from the Administrator. Madan stated that he never told OJJDP employees that they were legally required to communicate the substance of the VCO opinions to all states because he never considered that issue.

Several OJJDP and OGC witnesses told us that OJP does not have a procedure in place for officially informing the public when a regulation is determined to be *ultra vires* or inconsistent with a statute. Madan stated that OGC itself had no obligation to publish to all states and interested parties that the regulation was *ultra vires*. Slowikowski stated that the states probably should have been made aware that the 2008 VCO Opinion advised that a regulation was *ultra vires* through a letter from the Administrator (Flores at the time). However, he acknowledged that he never considered drafting such a letter after he became Administrator.⁹⁷ Slowikowski also stated that he did not know the process for publishing information in the Federal Register, but believed that it would involve OGC.

In 2015, OJP began taking more concrete action to update the JJDP Act regulations to be consistent with the VCO opinions. According to the Office of Information and Regulatory Affairs' (OIRA) website, OJP issued a Notice of Proposed Rule Making (NPRM) to update the former JJDP Act regulations with a complete set of updated JJDP Act regulations in 2016. <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201604&RIN=1121-AA83> (last accessed June 13, 2017). Based upon a review of e-mails, these regulations were developed over a period of several years, with input from both OJJDP and OGC employees. The public was invited to comment on the proposed regulations, which are located at <https://www.regulations.gov/document?D=OJP-2016-0003-0001> (last accessed February 6, 2017), and the comment period closed in October 2016. Consistent with OGC's determination in the 2008 and 2010 VCO Opinions that the VCO non-offender regulation is *ultra vires*, the proposed updated regulations did not include the VCO non-offender regulation.

Nonetheless, on January 17, 2017, OJP issued a final rule, effective February 16, 2017, that does not eliminate, amend, or otherwise address the VCO non-offender regulation. 82 Fed. Reg. 4783 - 4793. According to the posting in the Federal Register, OJP decided to issue only a partial final rule due to the number and complexity of comments received on the proposed rule. 82 Fed. Reg. 4783. The Federal Register posting further indicated that OJP would address other aspects of the proposed rule in a future final rule, after further consideration.

in the context of the VCO non-offender issue and we did not identify any documentation indicating that he had done so.

⁹⁷ On May 20, 2009, the Senior Advisor sent an e-mail to Slowikowski, copying Rumsey, in which she asked, "if OGC finds that the current regulation addressing the applicability of the VCO to the non-offender is *ultra vires*, will DOJ not have to so state in the federal register?" Slowikowski stated that he did not recall the e-mail from the Senior Advisor. We searched for a response to this e-mail but were unable to find one.

Moreover, as further discussed in Section IV of this chapter, even the proposed regulations alone may not have effectively informed interested parties of OJP's conclusion that the VCO exception may be applied to non-offenders. The NPRM included sections entitled "Summary of the Major Provisions of the Proposed Regulatory Action" and "Discussion of Changes Proposed in This Rulemaking." These sections indicated that provisions of the existing regulations were eliminated for the following reasons:

- "Text Repetitive of Statutory Provisions"
- "Requirements Not Specific to the Formula Grant Program"
- "Describe Recommendations Rather Than Requirements"
- "Unnecessary or Duplicative of the Formula Grant Program Solicitation"

While the NPRM listed several examples of provisions of the former regulations that were eliminated for each of these reasons, the VCO non-offender regulation was not among them. Indeed, the NPRM did not specifically explain that the VCO non-offender regulation was removed or why. <https://www.regulations.gov/document?D=OJP-2016-0003-0001> (last accessed June 13, 2017).

We also asked several witnesses, including the Senior Advisor and all of the OGC attorneys, whether they were familiar with OMB's Bulletin requiring federal agencies to post links to "significant guidance documents" on their websites, and whether the advice that the VCO regulation was *ultra vires* rose to the level of significant guidance within the meaning of the Bulletin.⁹⁸ Only Madan and Moses stated that they were familiar with the Bulletin.

Madan told us that OJP does not have a process in place for identifying and publishing significant guidance consistent with the OMB Bulletin. According to Madan and Moses, when the OMB Bulletin was first published in 2007, the OGC attorney advisor assigned to handle regulatory matters oversaw the process of identifying significant guidance documents, forwarding them to OMB, and ultimately publishing the list of guidance documents with links on OJP's website. However, Madan and Moses stated that they were not certain whether there was any subsequent effort to identify significant guidance documents originating in later years and Madan said he did not believe that he had any duty to do so. Instead, Madan told us that he believed that the ongoing effort to identify significant guidance documents would be handled on a Department-wide basis.⁹⁹ OJP's

⁹⁸ As explained in Part II.C.2. above, Bulletin 07-02 defines a "guidance document" as "an agency statement of general applicability and future effect other than a regulatory action that sets forth a policy on a statutory, regulatory or technical issue or an interpretation of a statutory or regulatory issue." A guidance document is "significant" if, among other things, it "[m]aterially alter[s] the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or . . . [r]aise[s] novel legal or policy issues arising out of legal mandates."

⁹⁹ Moses stated that the Obama administration placed less emphasis on significant guidance documents and Madan stated that he believed the OMB bulletin was rescinded by E.O. 13497.

(Cont'd.)

website currently contains 13 links to significant guidance documents, 4 of which relate to OJJDP. One of the links is to OJJDP's Core Requirements Monitoring page, which itself provides a list of links to numerous documents. However, none of these links include a description of OGC's guidance on the application of the VCO exception to non-offenders, or a link to the 2008 or 2010 VCO Opinions.¹⁰⁰ <http://ojp.gov/about/sgd.htm> (last accessed June 13, 2017).

Upon reviewing the OMB bulletin during their interviews, Madan, Moses, JJ Attorney 2, the Senior Advisor, and Slowikowski all told us that they believed the substance of the 2008 and 2010 VCO Opinions – specifically, the guidance that a regulation was *ultra vires* – amounted to “significant guidance” within the meaning of the bulletin. These witnesses all said they believed that, consistent with the OMB bulletin and in the interest of transparency and fairness, the guidance should have been posted on OJP's or OJJDP's website. Nonetheless, no one we interviewed in OJJDP or OGC said they could recall having any discussions about whether to publish notice in the Federal Register or on OJP's or OJJDP's website and no one said they knew who had the responsibility to make that determination.

IV. Conclusions and Recommendations

In this section, we provide our analysis of Semmerling's allegations that OJJDP employees conspired with Wisconsin OJA to circumvent JJDP Act requirements, that OGC attorneys issued legal opinions altering long-standing policy and in contravention of law for the same improper purpose, and that these legal opinions were intentionally kept secret by certain OJJDP officials and OGC attorneys. We also provide our analysis of the related allegation that certain juveniles are currently being detained in contravention of statutory grant conditions as a result of these legal opinions.¹⁰¹

In sum, we did not substantiate the allegations. The record demonstrates that OGC attorneys struggled in good faith with complex legal issues and ultimately issued opinions that were within the range of plausible interpretations of the

However, an official from OMB's OGC told us on April 15, 2016, that the OMB guidance is “still in effect” and “was not rescinded in association with” E.O. 13497.

¹⁰⁰ OJJDP has added significant guidance documents to its website since the OIG initiated its review. However, none of the newly added significant guidance documents relate to the application of the VCO exception to non-offenders.

¹⁰¹ On April 21, 2015, the Senate Committee on the Judiciary held a hearing entitled “Improving Accountability and Oversight of Juvenile Justice Grants” in which it addressed concerns regarding OJJDP's administration of and OGC's interpretations of the JJDP Act, including the DSO provision and VCO exception. Rumsey and OJP Administrator Mason, among others, testified before the committee. While Mason acknowledged problems in the way OJJDP has administered the JJDP Act and the fact that the JJDP Act regulations are outdated, she did not express concern with OGC's legal opinions. See <http://www.judiciary.senate.gov/meetings/improving-accountability-and-oversight-of-juvenile-justice-grants> (last accessed February 6, 2017). In the Department's September 22, 2015 responses to “Questions for the Record” associated with this hearing, the Department similarly did not express concern with OGC's opinions and denied that OGC's interpretation of the VCO exception was a departure from past guidance.

statute. We do not endorse the opinions and indeed found that many people disagreed with them. However, we did not see any indications that the opinions were crafted to benefit Wisconsin or for any other improper purpose. We found no persuasive evidence that OJP employees conspired or colluded with Wisconsin OJA employees. The evidence showed that OJJDP employees scrutinized Wisconsin OJA as a result of its past noncompliance with JJDP Act requirements and appropriately sought OGC's guidance when they discovered that Wisconsin OJA employees were applying the law in ways the same OJJDP employees believed might be improper. Similarly, we did not find persuasive evidence that OGC attorneys issued legal opinions altering long-standing policy and in contravention of law for an improper purpose. Further, contrary to the notion that certain OJJDP officials and OGC employees intentionally kept the legal opinions secret, we found that OGC advised OJJDP to inform all states of the substance of the legal opinions through state trainings and updates to OJJDP's Compliance Manual and that the OJJDP employees who resisted that guidance were those who opposed the conclusions reached in the opinions. Finally, because we did not find that the legal opinions were necessarily improper, we could not conclude that juveniles are currently being detained in contravention of statutory grant conditions as a result of them.

Although we did not substantiate the allegations, our review identified several areas where we believe OJP can make significant improvements in its administration of the JJDP Act. These include clarifying OJP's guidance about the JJDP Act's VCO exception and Jail Removal provision, developing a process for making "significant guidance" relating to the JJDP Act known to all states and other stakeholders, and considering measures to enhance communication within and among OJP components. We also believe improvements can be made to the compliance monitoring template used to collect information about states' compliance with the JJDP Act requirements. We make several recommendations that are designed to address these important issues.

A. Conclusions

We divide our analysis into four parts. We first examine the allegation that OJJDP staff conspired with Wisconsin OJA staff to circumvent JJDP Act requirements pertaining to the DSO and the Jail Removal core requirements. We then examine whether OGC attorneys issued legal opinions that interpreted the JJDP Act in a manner that altered longstanding OJP policy and that was in contravention of law to enable Wisconsin OJA to circumvent JJDP Act requirements. Next, we address the allegation that the legal opinions were "unpublished" and discussed only among a small number of agency officials in order to keep the policies "secret." Last, we provide our analysis of the allegation that certain juveniles are currently being detained in contravention of statutory grant conditions as a result of the legal opinions.

1. Alleged Conspiracy Involving OJJDP and Wisconsin OJA to Circumvent JJDP Act Requirements

Semmerling alleged that OJJDP staff conspired or colluded with Wisconsin OJA officials to circumvent JJDP Act requirements. According to the OSC's referral

to the OIG and to our interview of Semmerling, this allegation is grounded in a series of allegedly suspicious statements and actions by certain OJJDP staff that culminated with the 2008 OGC opinions on the DSO and Jail Removal core requirements. Semmerling asserted that these statements and actions, combined with the fact that the legal opinions had the effect of sustaining Wisconsin's compliance with both the DSO and Jail Removal core requirements, were evidence of favoritism for Wisconsin. We found Semmerling's interpretation of events not altogether unreasonable based on the circumstances as she understood them, but, as explained below, ultimately unsupported by the facts.

By late 2006, Wisconsin had fallen under scrutiny for being out of compliance with the JJDP Act's DSO core requirement. Consistent with the requirements of the JJDP Act, OJJDP reduced the state's funding by 20% for FY 2007 and required it to spend 50% of the remaining award to achieve compliance. Rumsey had taken over the role of Compliance Monitoring Coordinator in 2006 and over the next year made significant demands on Wisconsin to explain why violations were occurring and to set forth an adequate plan for future compliance. Though Thompson considered some of Rumsey's demands of Wisconsin to be unusually probing, he did not consider them inappropriate and did nothing to oppose Rumsey's efforts. Indeed, it was as a result of Rumsey's efforts that in August 2007 OJJDP imposed a "special condition" on Wisconsin's use of the remaining 80% of its award for FY 2007.

Semmerling identified several events that occurred prior to and shortly after the special condition was imposed that she considered suspicious and evidence of OJJDP's collusion with Wisconsin OJA. For example, Semmerling highlighted an October 11, 2006 e-mail written by Wisconsin's JJ Specialist that purported to describe an earlier conversation between the specialist and Rumsey's predecessor. The conversation related to Wisconsin OJA's proposal to search for errors in its 2005 data that might warrant an amended core requirements compliance monitoring report to OJJDP for the state's FY 2008 funding. The specialist wrote to her supervisor, Wisconsin's then-JP Director:

Spoke with [the 2005 Compliance Monitoring Coordinator] – he seems to think that focusing on a new data set (like the end of 2006) may be the best strategy. Due to how far 'over' we were in 2005, he didn't think we could find enough mistakes to believably fall into compliance.

The 2005 Compliance Monitoring Coordinator told us that he did not recall the conversation with the JJ Specialist, but also said that he would not have used the language "believably fall into compliance." After reviewing the e-mail exchange, he told us that he probably had not thought it was worthwhile for Wisconsin employees to reassess the 2005 data and therefore had recommended that Wisconsin submit more current data, a corrective action that was permitted under OJJDP policy and routinely accepted. Thompson told us that each year approximately four or five states took advantage of the option to submit more current data, and Wisconsin in fact later exercised this option for its FY 2008 funding.

In another e-mail Semmerling characterized as suspicious, Wisconsin's JP Director told his staff on July 8, 2008 – just over 1 month after OGC issued its 2008

VCO Opinion – that Thompson had advised him that Wisconsin was in “full compliance for both DSO and jail removal for 2008,” but that “this result was not without dissent within OJJDP and that depending on personnel changes in the future, the interpretations of their rules and our efforts at compliance [in] similar circumstances in the future could result in a finding of noncompliance.”¹⁰² Thompson stated that he did not recall this conversation or any conversation with the Wisconsin JP Director regarding the VCO non-offender question that had been posed to OGC.

Even assuming Thompson stated exactly what is reflected in the Wisconsin JP Director’s July 8, 2008 e-mail, we did not find the statement improper or suspicious. On the contrary, the content of the Wisconsin JP Director’s e-mail is consistent with what openly happened within OJP. Based upon OGC’s guidance, OJJDP leadership concluded that Wisconsin OJA’s VCO practices were legally permissible. However, many OJJDP staff opposed this result from a policy perspective and hoped to change the outcome in the future, either through convincing OGC to change its interpretation or convincing Congress to amend the law. We found the possibility that unspecified “personnel changes in the future” may lead to changes in how the VCO exception is interpreted to be an unremarkable observation.

Semmerling also asserted that Rumsey told her that OJJDP leadership did not permit her to attend what Semmerling characterized as several “secret meetings” with Wisconsin OJA officials, including a September 2007 meeting with the Executive Director of Wisconsin OJA, one or more October 2007 meetings with Wisconsin’s JP Director, and a February 2008 meeting with Wisconsin’s JP Director. However, as we described in Section III.A.2., the September meeting was with the National Criminal Justice Association (NCJA), and though the Executive Director of Wisconsin OJA attended in his capacity as the association’s president, representatives from several other states also attended the meeting. Similarly, the February 2008 meeting was attended by Wisconsin’s JP Director along with representatives of other states on behalf of NCJA. We did not find evidence that OJJDP officials sought to conceal either the September 2007 or the February 2008 meeting from Rumsey, or that she was improperly barred from attending them. The only October 2007 events we identified were a training conference held in Denver, Colorado, that Rumsey attended and a training session that Rumsey conducted at the end of the month. In fact, then-OJJDP Administrator Flores included Rumsey in a meeting that was held during the Denver conference to address the very same concerns that had been raised by state representatives at the September 2007 meeting that Rumsey did not attend.

Semmerling additionally cited the circumstances surrounding the transition of several of Rumsey’s duties in January 2008 – and the related decision that individuals other than Rumsey would conduct the April 2008 visit to Wisconsin – as further evidence of OJJDP leadership’s special treatment of Wisconsin. According to

¹⁰² The OSC referral states that Thompson wrote the e-mail that contains this quote. In fact, as with the first e-mail, this second e-mail is a paraphrase of what Thompson allegedly said.

the OSC referral, Semmerling alleged that Wisconsin officials “requested that Ms. Rumsey be removed and lobbied for changes in the JJDP Act guidelines,” including “in particular” the VCO issue. We found that Flores changed Rumsey’s duties following complaints from numerous states, including Wisconsin, that OJJDP was imposing requirements on states that diverged from the requirements of the JJDP Act and its implementing regulations. These complaints were first raised to OJJDP officials in September 2007, reiterated at the October 2007 meeting that Rumsey attended, and identified more formally in a December 2007 document prepared by the multi-state “Compliance Monitoring Working Group.” Based upon guidance provided by OGC, Administrator Flores issued a memorandum to state employees in February 2008 that partially supported and partially rejected the states’ complaints. The VCO issue was not addressed in the memorandum, nor was it raised by the working group. Indeed, the issue was not identified by SRAD leadership until April 2008, several months after the alleged “secret” meetings with Wisconsin officials and Flores’s decision to redefine Rumsey’s responsibilities.¹⁰³

Through our extensive review of the available documentation and our interviews with the relevant participants in the events at issue, we did not find any evidence of improper collusion between OJJDP leadership and Wisconsin OJA officials. And, even assuming both the 2006 e-mail drafted by the Wisconsin JJ Specialist and the 2008 e-mail drafted by Wisconsin’s JP Director accurately reflected the statements in them, neither evidenced an effort to favor Wisconsin in light of our review of OJJDP policy, the way OJJDP treated other states, and the facts revealed through our investigation. We further did not find evidence that OJJDP leadership sought to exclude Rumsey from meetings or that the meetings in question led to favoritism for Wisconsin. Finally, there is no evidence that Rumsey’s change in duties reflected special treatment for Wisconsin. While it is not disputed that Flores took this action in response to complaints about Rumsey, those complaints were expressed by numerous states – as many as 37, according to the document submitted to OJJDP by the states’ “Compliance Monitoring Working Group.” Regardless of the number, the change in Rumsey’s duties can hardly be said to reflect OJJDP leadership’s special treatment of, much less collusion with, Wisconsin OJA officials.

OJJDP staff’s actual treatment of Wisconsin after Rumsey’s duties were changed further undercuts the allegation of collusion to circumvent JJDP Act requirements. As described in Section III.A.3 of this Chapter, OJJDP staff continued to be concerned about Wisconsin OJA’s noncompliance with the statute, and in April 2008 conducted a technical assistance (TA) visit even though the state was not due

¹⁰³ As described in Section III.A.2.d., in late 2007 and early 2008, Wisconsin officials indicated in internal e-mails that they believed Rumsey had “concurred” that secure placements of non-offender runaways qualified for the VCO exception. While Rumsey disputed that she concurred with Wisconsin OJA’s approach, we found that the e-mails, based upon their content, their tone, and the fact that they were internal, reflected a good faith belief on the part of Wisconsin officials. In accordance with this belief, we found it unlikely that Wisconsin officials would have intentionally excluded Rumsey from meetings regarding the VCO issue.

for a regular audit until 2010.¹⁰⁴ The TA visit was referred to as a “mock audit,” but witnesses told us that the same approach had been used with other states and that it is an effective way to teach states about the audit process while at the same time verifying states’ JJDP Act compliance data.

The TA visit was led by a highly regarded Compliance Monitoring Liaison. In addition to validating the 2007 data Wisconsin submitted to satisfy the “special condition,” the OJJDP team provided assistance to help state employees resolve problems in the state’s core requirements compliance monitoring system. While examining the specific detention center that was the source of most of the state’s past DSO violations, the OJJDP team discovered that Wisconsin was using the VCO exception to avoid reporting what would otherwise be additional DSO violations. The OJJDP team was skeptical of Wisconsin’s interpretation of the statute, and for that reason decided to seek guidance from OGC.¹⁰⁵ OJJDP expressed similar skepticism in May 2008 when Wisconsin OJA proposed to overcome concerns about the state’s compliance with the Jail Removal core requirement by categorizing certain adult jails as juvenile detention facilities during time periods when the facilities did not house adult inmates. OJJDP sought OGC guidance on this issue as well. We did not find any evidence that a member of the OJJDP team, or any other OJJDP employee, attempted to obtain answers from OGC that would help Wisconsin, let alone do so improperly, or that there was any improper influence exerted or attempted to be exerted upon OGC in reaching its decisions. Indeed, as described in Part III.B.3. of this chapter, OJJDP staff was unanimous in its disappointment with the legal interpretation that would allow Wisconsin to be in compliance despite the serious concerns that many at OJJDP maintained throughout this period. In short, based on our review of the record and interviews with all the relevant participants in the events at issue, we found no evidence that OJJDP conspired with Wisconsin OJA or anyone else to improperly benefit Wisconsin or circumvent JJDP Act requirements.¹⁰⁶

¹⁰⁴ In fact, it appears that Wisconsin was audited more frequently than many other states. The Atlanta Regional Audit Office concluded, in its review of other allegations referred to us in the 2014 OSC referral, that OJJDP did not always follow the policy of conducting audits every 5 years. According to the audit report, “20 states received only one audit during the 13-year time period of 2002 and 2014.” Wisconsin was audited twice during that time period, in 2005 and 2010, and then again in 2015.

A 2015 OJJDP policy document indicates that the current policy is to audit states for compliance with the JJDP Act formula grant program every 3 years. See OJJDP Policy: Monitoring of State Compliance with the Juvenile Justice and Delinquency Prevention Act <http://www.ojjdp.gov/compliance/monitoring-state-compliance-JJDPA-policy.pdf> (last accessed February 6, 2017).

¹⁰⁵ Notably, the Compliance Monitoring Liaison took the identical step of seeking OGC’s guidance approximately 2 months later when she received a very similar VCO question from the Colorado Monitor, further undercutting the idea that this step reflected an effort to give preferential treatment to Wisconsin.

¹⁰⁶ As part of our examination, we asked every witness a series of questions related to their connections to Wisconsin and their knowledge of other employees’ connections to Wisconsin. All witnesses told us that they have never interacted socially with any Wisconsin government employees – other than occasional friendly interactions at conferences and other work-related encounters – and

(Cont’d.)

2. Legal Opinions Alleged to be in Contravention of Law to Favor Wisconsin

According to OSC's referral of Semmerling's allegations to the OIG, the May 2008 OGC opinion about the VCO exception was a continuation of the favoritism Wisconsin had been receiving from OJJDP. The opinion allegedly "altered the manner in which the VCO exception had been understood for years, and indicates an attempt to change the rules after the fact in order to ensure that Wisconsin would not lose grant funding." The referral reflects that Semmerling alleged that the Jail Removal opinion provided "further evidence that OJJDP officials failed in their oversight responsibilities and colluded with Wisconsin officials to secure grant funding."

We examined these allegations from two angles. We first considered any evidence indicating bias favoring Wisconsin even before the opinions were drafted, such as OJJDP's handling of the VCO or Jail Removal issues arising in other states, the circumstances surrounding OJJDP's request for OGC's assistance in Wisconsin's case, and whether there were any contacts or relationships between OGC attorneys and Wisconsin government officials or U.S. Congressional staff for Wisconsin that could potentially compromise OGC's impartiality. We then examined the legal opinions themselves and the steps taken by OGC attorneys to draft them. We examined not only the 2008 VCO Opinion and the Jail Removal Opinion but also the 2010 VCO Opinion, because OGC employees relied upon the reasoning contained in that opinion to help explain the 2008 VCO Opinion.

In short, we did not substantiate the allegation that OGC attorneys issued legal opinions that were in contravention of law in order to favor Wisconsin. We also did not conclude that the OGC interpretations contained in the opinions were the only plausible interpretations of the law, or that they were the correct ones. Rather, we concluded that the legal interpretations contained in the VCO and Jail Removal opinions were not implausible readings of the relevant complex statutory provisions, and that there was no evidence to support a conclusion that OGC chose a particular statutory interpretation in order to favor Wisconsin.

a. Alleged Favoritism Underlying the Legal Opinions

We start chronologically by examining the claim that OGC's April 2008 VCO opinion altered long standing OJJDP policy. As described in Section III.B.3., approximately 10 years before the 2008 VCO opinion was issued, an OJJDP Compliance Monitoring Coordinator told the Colorado Monitor that Colorado could apply the VCO exception to runaways who had never been charged with status offenses. As a result, the Colorado Monitor – who was considered by many within OJJDP to be one of the best state compliance monitors nationwide – wrote in the June 2008 memorandum in which Colorado sought additional OJJDP guidance on this issue that she had not been reporting the secure confinement of uncharged

that they did not have personal knowledge of any other OJP employees who have done so. We did not find any evidence that contradicted this testimony.

VCO-violating runaways as DSO violations since 1998. The Colorado Monitor confirmed to us that this memorandum was accurate and further told us that Colorado's core requirements compliance monitoring practices remained unchanged as of her retirement in June 2016.

We believe Colorado's long-standing application of the VCO exception casts significant doubt over the claim that OGC's opinion on the subject altered long standing OJJDP policy. However, to fully evaluate this allegation, we also considered any evidence that OJJDP's request for OGC guidance sought a result that enabled Wisconsin to be compliant with the JJDP Act's requirements, or that OGC was for any reason predisposed to provide such guidance. We found no evidence on either score. As discussed earlier, the OJJDP team that conducted the April 2008 site visit of Wisconsin was in fact skeptical of Wisconsin's interpretation of the VCO exception, as well as its proposal to satisfy the Jail Removal requirement. There is no evidence the team sought guidance from OGC that would benefit Wisconsin, or for that matter, guidance that would validate the team's skepticism of Wisconsin's statutory interpretations.

Similarly, we found no evidence that OGC was requested by Wisconsin officials or otherwise motivated to reach a particular result in Wisconsin's favor. There is no indication that any OGC attorneys spoke directly with any Wisconsin OJA officials regarding the VCO non-offender issue, the Jail Removal issue, the requests for opinions on those issues, or the opinions themselves. In addition, we found no evidence that any OGC employee knew any particular Wisconsin OJA employees or had any significant direct contact with them. We also found no evidence that any OGC employees had relationships with any U.S. Congressional staff for Wisconsin, including Senator Kohl's staff that made inquiries in August 2007 regarding OJJDP's handling of Wisconsin following the 2006 noncompliance finding and associated 2007 special condition.

Another significant consideration in our analysis of whether OGC attempted with its VCO opinion "to change the rules" for Wisconsin's benefit was the testimony of the OGC attorneys that they associated the non-offender VCO issue with Colorado, not Wisconsin, and did not even recall that the issue first arose from Wisconsin. As described in Section III.B.1. and 2, neither the April 2008 e-mail posing the VCO non-offender question nor the 2008 VCO Opinion itself referenced Wisconsin or any other state. The OGC attorneys all told us that they had not seen the January 2009 letter to Wisconsin before their O&R interviews, and we found no evidence that they were provided copies of the letter. In addition, the OGC attorneys were not copied on the 2007 e-mail exchanges regarding Wisconsin's past noncompliance and the special condition that led to the 2008 site visit and the discovery of the VCO issue.

Colorado, on the other hand, was closely connected with the VCO issue, from OGC's perspective. Within less than 1 month of the 2008 VCO Opinion, Colorado submitted a written memorandum requesting similar guidance. On July 23, 2008, the Compliance Monitoring Liaison forwarded the Colorado Memorandum to the JJ Attorneys and OJJDP staff for discussion at their first large meeting to discuss VCO issues later that day. The OGC attorneys then spent over 2 years working on the

2010 VCO Opinion, and they analyzed Colorado's specific laws and circumstances in drafts of the opinion. All of the OGC attorneys told us that they associated the VCO Opinions with Colorado and either never knew or did not remember that the original request came from Wisconsin.

Semmerling pointed out that JJ Attorney 1 incorporated a reference to "WI" in the subject line of the e-mail sending the 2008 VCO opinion to OJJDP employees. We agree that the subject line is evidence that JJ Attorney 1 – and possibly Madan and Moses who were copied on the e-mail – knew at that time that Wisconsin had submitted the request that led to the 2008 VCO Opinion. However, the body of the e-mail does not mention Wisconsin, and based upon the testimony of the OGC attorneys and the other evidence detailed above, we concluded that those OGC attorneys who at one time knew about Wisconsin's request did not find the identity of the state to be significant and thereafter did not recall the connection.¹⁰⁷

¹⁰⁷ Semmerling was concerned by Moses's statement during a May 2009 telephone conference that the 2008 VCO Opinion had "nothing to do with Wisconsin," because she believed that Moses was "not being truthful." Semmerling, who participated in the telephone conference, told us that she found Moses's statement to be "bizarre," especially when considered in light of certain other statements made by Moses, including an assertion during the same conversation that Semmerling should not have had access to the Senior Advisor's Response Memorandum and an earlier inquiry as to the identity of the whistleblower. As discussed in Chapter 4 of this report, Moses told O&R he had inquired as to the identity of the whistleblower because he was the Deputy Designated Agency Ethics Officer for OJP and was accustomed to whistleblowers making disclosures to him first. Regarding the statement that the 2008 VCO opinion had nothing to do with Wisconsin, Moses told us that he said this because, like the other OGC attorneys, he thought that the opinion pertained to Colorado. We did not find Moses's denial that the opinion concerned Wisconsin to be evidence of an effort to conceal preferential treatment for Wisconsin. Rather, for the reasons discussed in the text accompanying this footnote, we believe that Moses's statement likely was an honest mistake. Moreover, while we disagree with any assertion made by Moses that Semmerling should not have had access to the Senior Advisor's Response Memorandum, we did not find that such assertion evidenced an intent to hide favoritism for Wisconsin. Like the 2008 VCO Opinion, the Response Memorandum did not mention the fact that the VCO issue arose from a Wisconsin site visit.

After reviewing a draft of this report, Rumsey's counsel identified ten e-mail communications that he believes "indicate that the VCO memorandum owed its origin to claims related to WI OJA's compliance failures." We agree that the 2008 VCO Opinion originated from a Wisconsin compliance question. However, these e-mail communications do not undermine our conclusion that OGC attorneys came to associate the VCO issues more with Colorado than Wisconsin. OGC attorneys were copied on only two of the ten e-mail communications identified by Rumsey's counsel. One of these communications is the May 28, 2008 e-mail from JJ Attorney 1 sending the 2008 VCO Opinion to OJJDP employees, which we address in the text accompanying this footnote. The second is a July 23, 2008 e-mail from the Senior Advisor to the three JJ Attorneys and several OJJDP employees that attaches a proposed agenda for a meeting to discuss VCO nonoffender issues. The attached agenda includes as one agenda item, "OGC Opinion Dated 5/28/08 Status Offenders/Contempt of Court/VCO. Wisconsin Background and update." However, we received no evidence to indicate that the OJP OGC attorneys paid close attention to the reference to Wisconsin in the attachment. Moreover, less than 2 hours after the Senior Advisor sent the July 23 e-mail, the Compliance Monitoring Liaison replied to the e-mail attaching the Colorado Memorandum and suggesting that it be discussed at the same meeting. In sum, based on these e-mails and other evidence we reviewed, we have no reason to infer that OGC was attempting to hide that the 2008 VCO opinion originated from a Wisconsin question or otherwise favor Wisconsin.

b. Steps Taken to Draft and Reasoning Underlying the Legal Opinions

(1) VCO Opinions

In order to arrive at our conclusion that OGC's legal interpretation of the VCO exception was not pretextual or in contravention of law in order to enable Wisconsin to circumvent JJDP Act requirements, we examined both the 2008 and the 2010 VCO Opinion. The OGC employees we interviewed told us that, in hindsight, the 2008 VCO Opinion was confusing and not fully responsive to the question posed by OJJDP, and they therefore relied on the reasoning contained in the 2010 VCO Opinion to help explain the 2008 guidance. We agreed with this assessment of the 2008 VCO Opinion and found it problematic in a number of respects. Although we concluded in conjunction with the 2010 VCO Opinion that OGC arrived at an interpretation of the VCO exception that was not implausible, we also believe OGC should clarify certain aspects its guidance. We make several recommendations to this effect in Part B of this section.

The main conclusion of the 2008 VCO Opinion is that it is not a violation of the JJDP Act to securely place "*status offenders*, such as runaways," for violating VCOs. However, this main conclusion did not respond to the question posed by the OJJDP team that conducted the April 2008 Wisconsin site visit, which was whether it is a violation of the JJDP Act for states to securely place *non-offenders*, who have never been charged or adjudicated with status offenses, for violating VCOs. The only part of the opinion that responded to the non-offender issue was the additional conclusion that the non-offender VCO regulation prohibiting the secure placement of non-offenders for violating VCOs is *ultra vires*. According to OGC attorneys, this additional conclusion was meant to convey that the violation of a VCO not to run from a placement in itself constitutes an offense warranting secure placement of abused and neglected juveniles. However, the OGC attorneys themselves stated that this additional conclusion was not adequately explained and did not necessarily follow from the rest of the opinion. We agreed with this assessment, and believe that the strong objection to the 2008 VCO Opinion by certain OJJDP staff was attributable, at least in part, to these deficiencies.¹⁰⁸

Within months of issuing the 2008 VCO Opinion, OGC attorneys began working on what ultimately became the 2010 VCO Opinion. The 2010 Opinion was written to clarify the 2008 VCO Opinion and to respond to the June 2008 Colorado Memorandum to OJJDP seeking guidance on the VCO exception. The many drafts of the 2010 VCO Opinion, including early drafts that contained conclusions contrary to the 2008 VCO Opinion, evidence that the OGC attorneys struggled with the complex legal issues presented by the VCO exception, and it appears from the evidence before us that they endeavored in good faith to resolve them. Several witnesses told us that the JJDP Act is a complicated, poorly written statute and that compliance matters can be very difficult to navigate. In any event, we saw no

¹⁰⁸ As described in Section III.B.1., Madan told us that he was not involved in the drafting of the 2008 VCO Opinion. We found no evidence contradicting this.

evidence of an improper effort to tilt the opinion to favor Wisconsin, Colorado, or any one state.

Under the final 2010 VCO Opinion's interpretation of the DSO provision, once a judge determines that a juvenile has violated a VCO, the juvenile is no longer "not charged with any offense" and thus cannot be considered a "non-offender." Instead, the juvenile is now either a criminal-type offender or, if the VCO violation was related to his or her status as a juvenile, a status offender. If the latter, the opinion provides that because the juvenile is a status offender "by virtue of being charged with/having violated . . . a VCO," he or she fits squarely within the VCO exception and can be securely placed without violating the DSO core requirement.¹⁰⁹ (Emphasis in original 2010 VCO Opinion).

This interpretation reflects what OGC attorneys considered the "plain meaning" of the DSO provision of the JJDP Act, meaning the ordinary understanding of the statutory language as aided by traditional tools of statutory construction but without consultation of extraneous sources like legislative history. As explained in Chapter Two, Madan told us that when OGC attorneys provide guidance to OJP components, they seek to predict how a court would resolve the issue and provide guidance accordingly. In this situation, if a state were to argue on appeal of an out-of-compliance determination that the VCO regulation was *ultra vires*, a court would likely apply the Supreme Court's *Chevron* analysis and first look to the statutory text to determine whether its meaning is plain. See 467 U.S. at 842-43; *Shalom Pentecostal Church v. Acting Sec'y U.S. Dep't Homeland Sec.*, 783 F.3d 156, 164 (3d Cir. 2015). If the court, like OGC, interpreted the plain language of the DSO provision to allow the secure placement of non-offenders who violate VCOs, the court would go no further under *Chevron*. The court would not defer to the conflicting agency regulation under step two of *Chevron* and would not consult legislative history. See *id.*; *Zuni Pub. School Dist.*, 550 U.S. at 82. Instead, in this hypothetical situation, the court, like OGC, would deem the VCO non-offender regulation – which prohibits the secure placement of non-offenders for violating VCOs – *ultra vires* because it conflicts with the plain meaning of the statute.

We did not find any evidence that OGC's methodology for reaching its conclusion on the VCO issue was anything other than a good faith effort to analyze

¹⁰⁹ Rumsey told us that this interpretation was illogical because a VCO, by definition, only can be issued to a juvenile who is already a status offender. However, the provision of the JJDP Act that sets forth the definition of a VCO provides only that a VCO is "a court order given by a juvenile court judge to a juvenile – (A) who was brought before the court and made subject to such order; and (B) who received, before the issuance of such order, the full due process rights guaranteed to such juvenile by the Constitution of the United States." 42 U.S.C. § 5603(16). Rumsey told us that the definition of "juvenile court judge" varies by state. We identified no other section within the JJDP Act that explicitly states that a VCO may not be issued to a non-offender for whom the relevant due process protections are provided. In any event, OGC considered whether a predicate status offense, apart from the VCO violation itself, was required in order to subject an otherwise non-offender to the VCO exception, and some drafts of the 2010 VCO Opinion even incorporated this requirement. However, OGC ultimately concluded that a predicate status offense was not required by the plain meaning of the statute.

a complex issue of statutory interpretation and, in that regard we did not find OGC's interpretation of the plain meaning of the statute to be pretextual or in contravention of law with the intent to enable Wisconsin to circumvent the requirements of the JJDP Act. Of course the 2010 VCO Opinion does not represent the only plausible interpretation of the VCO issue, and as we described in Section III.B.4., the OJJDP Senior Advisor wrote a memorandum in response to the 2008 Opinion persuasively arguing that the plain meaning of the statute is the exact opposite of OGC's interpretation. Hence, while we cannot say that the opinion reached by OGC was pretextual or plainly in contravention of law, we do believe OGC's guidance can be clarified in several important respects and we make a recommendation to this effect in Part B of this section.¹¹⁰

(2) Jail Removal Opinion

We also did not substantiate the allegation that the Jail Removal Opinion was intentionally written in order to enable Wisconsin to contravene the requirements of the law. The allegation states that, "[a]ccording to [the Jail Removal Opinion], Wisconsin could define the juvenile section of an adult jail as a juvenile detention facility." However, according to witnesses, Wisconsin was using certain adult jails as juvenile detention facilities when no adult inmates were present, and this was the practice as to which OJJDP asked OGC to opine. In response, JJ Attorney 2 provided the following guidance on July 9, 2008:

There is no statutory bar to WI's proposal regarding jails that under some circumstances become secure detention facilities. *Presuming all other statutory and regulatory requirements are met*, the mere fact that the physical building serves at other times as a jail, does not preclude it from meeting the definition of secure detention facility at a point in time. (Italics in original, underline added).

¹¹⁰ Semmerling's attorney provided us a memorandum prepared by Howard Sribnick, who was General Counsel for the Department's OIG from 1991 to 2005, and the Inspector General of the U.S. Federal Trade Commission from 2005 through 2008. Sribnick argued in the memorandum, consistent with our observation as explained above, that the 2008 VCO Opinion provided little to no support for its conclusion that the VCO non-offender regulation is *ultra vires*. He further argued, consistent with the Senior Advisor's Response Memorandum, that the DSO provision itself plainly provides that non-offenders cannot be securely confined for violating a VCO. Robert Burka, Rumsey's counsel, submitted a separate letter supporting Sribnick's analysis. While we do not disagree with Sribnick's and Burka's assessment of the 2008 VCO Opinion, Sribnick's and Burka's submissions did not discuss the 2010 VCO Opinion, likely because they had not seen it. As we explain in this part, the 2010 VCO Opinion, which was intended to clarify the 2008 Opinion, provided a not implausible legal rationale for the conclusion that the VCO non-offender regulation is *ultra vires* and it further supports our conclusion that the prior opinion was not pretextual or that it contravened the law with the intent to enable Wisconsin to circumvent its requirements.

JJ Attorney 2 told us that when she said “*presuming all other statutory and regulatory requirements are met,*” she was referring to the requirements governing collocated facilities.¹¹¹

We concluded that JJ Attorney 2’s guidance presented a good faith interpretation of the statute as applied to Wisconsin’s reported situation, and there was no evidence that it was pretextual or an effort to interpret the Jail Removal requirement to enable Wisconsin to evade the requirements of the JJDP Act. The Jail Removal provision provides that “no juvenile will be detained or confined in any jail or lockup for adults.” If, as indicated by Wisconsin, no adult inmates were present in the facilities when juveniles were housed in them, and all other “statutory and regulatory requirements” were met, JJ Attorney 2’s conclusion that there was no Jail Removal violation is not unreasonable or illogical. Madan and Moses told us that they believed the guidance JJ Attorney 2 provided was correct and, although Thomson and the OJJDP State Representative at first believed that Wisconsin’s practice would not be permissible, their concerns were not with the opinion, but rather with whether Wisconsin was following the relevant “statutory and regulatory requirements.” In light of this and the absence of any evidence that JJ Attorney 2 sought to benefit Wisconsin, we cannot conclude that the Jail Removal opinion was written in contravention of law in order to enable Wisconsin OJA to circumvent the Jail Removal core requirement. However, similar to the VCO opinions, we also believe JJ Attorney 2’s guidance lacked clarity and therefore recommend in Part B of this section that OGC issue clearer guidance on the subject.¹¹²

3. Secret Legal Opinions

Semmerling alleged that OGC and certain OJJDP employees intentionally hid the legal opinions from the public and even other OJP employees. According to the OSC referral, Semmerling alleged that the May 2008 legal opinion was “discussed among only a handful of agency officials who wanted to keep the change in policy closely held.” We did not substantiate this allegation.

As we described at length in Section E.2., the 2008 VCO Opinion was the subject at large, contentious meetings during which several OJP employees, including Rumsey and the Senior Advisor, expressed their disagreement with OGC’s guidance on the VCO exception’s application to non-offenders. We also found that

¹¹¹ As explained in Part II.B. of this chapter, collocated facilities are not considered adult jails or lockups provided they meet certain criteria, such as maintaining separate staff for juveniles and adults and incorporating special programming for juveniles. See 28 C.F.R. § 31.303(e)(3).

¹¹² According to the OSC referral, Semmerling “noted that at least one other state had attempted to use this theory in the past and was not successful in obtaining compliance.” During her OIG interview, she clarified that Rumsey had told her that Wyoming had attempted the same approach but was unsuccessful. When we asked Rumsey about this, she told us that she could not remember whether there was a prior OGC opinion that conflicted with the Jail Removal opinion but agreed to search for one following her interview. Rumsey has not been able to identify such an opinion and we have not otherwise identified one.

OGC attorneys advised OJJDP employees to train all states on OGC's interpretation of the provision at national training conferences, and to update the Guidance Manual consistent with OGC's guidance. However, Rumsey, Hanes, and others resisted taking these steps. In fact, OJJDP employees who strongly opposed OGC's VCO guidance refused to incorporate revisions to certain training slides that were recommended by OGC to make clear that the VCO exception applied to non-offenders. Hanes suggested removing the affected slides altogether and told Rumsey that OJJDP would not take responsibility for the OGC revisions. Ultimately, OGC attorneys attended the national training conference in order to address the VCO issue themselves.

We found these and other relevant facts to be at odds with the allegation that the VCO guidance only was discussed among a small number of officials in order to keep it closely held. Similarly, with respect to the Jail Removal Opinion, we found no evidence that any OGC or OJJDP employees, or any other OJP employees, intentionally kept it hidden from other OJP staff or the public.

Although we did not substantiate the allegation that OGC attorneys or certain OJJDP officials sought to conceal the legal opinions, we did conclude that the substance of the VCO opinions was not adequately publicized. Based on our review of the facts and circumstances, we believe this was attributable at least in part to some OJJDP employees' resistance to training all states on OGC's guidance, as well as to OJP's inadequate procedures for notifying the public when regulations are determined to be *ultra vires*. We address these concerns and make related recommendations in Part B of this section.

4. Juveniles Detained in Contravention of Statutory Grant Conditions

As a corollary to the contention that the VCO and Jail Removal opinions were issued in contravention of law in order to enable Wisconsin to circumvent the requirements of the JJDP Act, Semmerling alleges that certain juveniles securely placed as status offenders or housed in adult facilities are being "illegally" detained in contravention of statutory grant conditions related thereto. Because we did not substantiate the premise of this allegation – that these legal opinions were unlawfully issued to help Wisconsin evade the law – we necessarily did not substantiate the allegation that states acting in reliance on them are necessarily acting in contravention of the underlying statutory grant conditions. As discussed above, we found no evidence to suggest that OGC, which is charged with interpreting the law in this area, was acting in anything other than good faith in reaching its conclusions regarding the interpretation of this complex statutory scheme.

Nonetheless, in Part B of this section, we recommend changes to OJJDP's compliance monitoring report template to allow OJJDP to gather more specific information regarding state VCO usage in general and as to non-offenders in particular. This information will become particularly important in the event that either OJP chooses to revisit its interpretation of the VCO exception or the exception is modified or eliminated from the JJDP Act as we note is contemplated

by pending legislation to reauthorize the JJDP Act. See S. 1169, 114th Cong. § 205 (2015).

B. Recommendations

For all of the reasons stated above, we did not substantiate Semmerling's allegation that OJJDP and OJP employees issued legal opinions altering long-standing policy and in contravention of law in order to enable Wisconsin's OJA to circumvent JJDP Act requirements. However, consistent with the concerns raised by Semmerling, our review did identify several areas where we believe OJP can make significant improvements in its administration of the JJDP Act. In this part, we set forth six recommendations to help address the following areas: clarity in OGC legal opinions, processes for publicizing OGC guidance, communications within and among OJP components, and the type of information collected to monitor states' statutory compliance.

Recommendation 1: OGC should consider issuing guidance clarifying its interpretation of the VCO exception, either by amending the 2010 VCO Opinion or providing supplemental guidance.

Through our interviews and our review of relevant documents, we identified several important issues that were not addressed in the 2008 and 2010 VCO Opinions. We found that this led to confusion within OJJDP about the reasoning behind OGC's conclusions and undermined the usefulness of the guidance provided. We believe OGC should consider issuing guidance clarifying its interpretation of the VCO exception and its reasoning therefor, in order to improve its guidance to OJJDP and the states. We identified several particular issues that we believe merit additional attention.

- **Plain Meaning Interpretation of DSO Provision**

As described in our analysis above and in detail in Section II.B.4., some OJP employees espoused a plain-meaning interpretation of the JJDP Act that yields the opposite result as the plain meaning interpretation in the final 2010 VCO Opinion. The alternative plain meaning interpretation is based upon the structure of the statute: Congress would not have created separate sections to address status offenders and non-offenders, incorporating exceptions under the former but not the latter, if it had intended status offenders and non-offenders to be treated exactly alike and subject to the same exceptions. This alternate reading is not addressed in the final 2010 VCO Opinion, though Moses told us that he believed the better interpretation of the DSO provision requires that the non-offender first be charged with a predicate status offense before the VCO exception may apply and this view had formed the basis for early drafts of the 2010 VCO Opinion. The OGC witnesses generally agreed that the JJDP Act lacks clarity and some told us that they believed the DSO provision is itself unclear. We believe that under these circumstances, OGC should consider whether it should clarify its interpretation of the VCO exception to take into account the competing views as to the plain meaning of the statute, and whether that analysis should lead to giving deference to the agency regulation or consultation of legislative history on this issue.

- **Meanings of “Offense” and “Charge”**

We found that another source of confusion about the VCO opinions stems from their failure to fully analyze the terms “offense” and “charged” as used in the DSO provision. The meanings of these terms are significant because the 2010 VCO Opinion is premised on the assumption that being determined by a judge to have violated a court order constitutes being “charged with [an] offense” within the meaning of the non-offender subsection. Yet OGC attorneys told us that their office had not previously discussed the meanings and imports of the terms “offense” and “charge” under the JJDP Act. Further, when we asked the attorneys to answer questions regarding the meaning of these terms – such as whether a formal charge against a juvenile who violates a court’s order is required to satisfy the DSO provision, or whether a judge’s declaration from the bench would be sufficient – the responses we received were unclear and inconsistent. These terms have important implications for how states apply the VCO exception, and OJJDP must have a clear understanding of these issues in order to properly monitor the states’ compliance with the JJDP Act.¹¹³

In addition, the meaning of “offense” may be a particularly timely issue to clarify in light of pending House and Senate initiated bills to reauthorize the statute. One of the provisions of both the House and Senate bills would require states to phase out their use of the VCO exception over the next several years. <https://www.congress.gov/bill/114th-congress/house-bill/5963/text?resultIndex=6> (last accessed June 13, 2017); <https://www.congress.gov/bill/114th-congress/senate-bill/1169/text> (last accessed June 13, 2017). However, Madan stated that a judge could securely confine a juvenile after finding that the juvenile violated a court order, even absent the VCO exception, without violating the DSO core requirement. He reasoned that a VCO violation is in the nature of contempt, and contempt is a criminal-type “offense.” Thus, even if the VCO exception is phased out, this interpretation conceivably could permit states to securely confine juveniles who violate court orders but are otherwise non-offenders without losing funding. Without the VCO exception, such juveniles could be detained as offenders without the additional protections afforded by the current VCO exception, such as the submission by a representative of “an appropriate public agency” of a report regarding the “immediate needs” of the juvenile. 42 U.S.C. § 5633(23)(A). The pending bills do not address the possibility that judges could use contempt power to detain status and non-offenders, notwithstanding the eventual elimination of the

¹¹³ One of the drafts of what became the 2010 Opinion stated that formal charges were needed before a juvenile could be detained for violating a VCO, at least under Colorado law, and suggested that OJJDP seek “evidence of offense charges.” Similar information may have been particularly useful in Wisconsin, where the law could be read, at least based on the OIG’s review, to allow an intake worker to place a juvenile in secure custody without first securing a formal charge or court order. W.S.A. 938-208. While it is, of course, OGC’s responsibility to interpret the law on behalf of OJP, we note that the notion that a formal charge is required is consistent with some basic research we did on contempt law, which indicated that an actual charging document is typically required when a juvenile is charged with indirect contempt. See, e.g., 3A Fed. Prac. & Proc. Crim. § 705 (4th ed.). Indirect contempt is the type of contempt that occurs outside the judge’s presence, like running away from a placement in violation of an order not to run. See *id.*

VCO exception and its associated protections. Thus, OGC should consider providing guidance to OJJDP on the practical impact of pending legislation.

Once OGC clarifies its guidance on the VCO exception, OJJDP can make better informed decisions regarding whether it wishes to advocate for additional changes to the DSO provision, the precise language that would meet the agency's policy preferences, and how to approach Congress with its proposals. The House passed its version of the proposed reauthorized statute, including eventual elimination of the VCO exception, and referred the bill to the Senate on September 26, 2016. In light of these legislative developments, we believe that it would be helpful for OGC to expeditiously clarify its guidance so that policymakers within the Department and in Congress may consider any appropriate response.

- **Consideration of Facts, State Law, and Due Process Protections**

Moses and all three JJ attorneys told us that a recitation of the underlying facts about how Wisconsin was applying the VCO exception would have clarified and improved the 2008 VCO Opinion. Moreover, JJ Attorney 3 told us that OJJDP has at times taken advice given by OGC based on a particular set of facts and assumed that the same legal advice would apply to a different set of facts. We think such a recitation of facts would have been equally helpful in the 2010 VCO Opinion.

We also believe that the opinions would have been more useful to OJJDP employees if they had addressed the relevant state laws. For example, the Colorado Memorandum submitted to OJJDP indicated that Colorado law did not afford juveniles due process rights in dependency proceedings. This is significant because OGC attorneys told us that a "valid court order" under the JJDP Act by definition requires that a juvenile subject to the order be afforded due process rights.

Earlier drafts of the 2010 VCO Opinion addressed the specific facts in Colorado, Colorado law, and the due process protections that OJJDP must consider in evaluating compliance. Based on what OJJDP witnesses told us, we believe that this type of specific information and guidance would be helpful to OJJDP staff in applying OGC's guidance to the various circumstances they encounter in their core requirements compliance monitoring activities.

Recommendation 2: OGC should consider issuing guidance clarifying the circumstances under which juveniles may be confined in unoccupied adult jails consistent with the Jail Removal core requirement.

We found that the Jail Removal Opinion lacked clarity in at least one respect. While it stated, "*presuming all other statutory and regulatory requirements are met,*" it did not specify *which* statutory and regulatory requirements must be met. JJ Attorney 2 told us that she was referring by this phrase to the statutory and regulatory requirements governing collocated facilities. However, it was apparent to us that OJJDP employees did not understand this reference. For example, Thompson stated that Wisconsin was not seeking to classify the facilities at issue as collocated facilities. He further expressed concern that the Jail Removal Opinion

would allow Wisconsin to house juveniles in facilities that did not have staff that were properly trained to work with juveniles or programs designed for juveniles, two of the requirements to classify a facility as collocated. 28 C.F.R. §§ 31.303(e)(3)(i)(C)(1)-(4).

We recommend that OGC consider providing clarifying guidance to OJJDP as to the particular statutory and regulatory requirements that must be met in order for adult jails to become juvenile detention facilities or collocated facilities in particular instances.

Recommendation 3: OJJDP should expeditiously notify all states and other interested parties that the VCO non-offender regulation has been determined to be *ultra vires*.

As explained in our conclusions, we did not substantiate the allegation that OGC or certain OJJDP officials intentionally hid the VCO opinion from states other than Wisconsin. However, we did find that OJP has not published the substance of OGC's VCO guidance to all states and interested parties and that OJJDP has been inconsistent with its guidance to states on the VCO issue.

We previously described how certain OJJDP employees have refused to share OGC's interpretation of the VCO exception with state juvenile justice staff because they disagree with the interpretation from a policy perspective, while other OJJDP employees informed Wisconsin, and previously had informed Colorado, that the VCO exception may be applied to non-offenders. Moreover, on October 20, 2010, Acting Administrator Slowikowski issued an Administrator's Memorandum advising state officials that "no immediate changes for monitoring purposes" were required in reference to the VCO exception, which memorandum is available on OJJDP's website. However "no immediate changes" may well have had a different meaning for Wisconsin, Colorado, and possibly other states than it did for states that had not been told that the VCO non-offender regulation was *ultra vires*.¹¹⁴ Indeed, the Colorado Monitor told us that she believed "no immediate changes" meant that Colorado should continue *not* reporting the detention of VCO-violating runaways in the neglect system as violations of DSO.

Because states self-report their data to OJJDP – meaning that they determine their own ultimate violation rates based upon the statute, regulations, Compliance Manual, and other OJJDP guidance and subject to its monitoring – it is difficult to determine how many states may have reported instances where non-offenders were detained for violating VCOs as violations of the JJDP Act causing funding reductions. However, the mere fact that many states were told to report these

¹¹⁴ While OJP OGC trained on the VCO interpretation at two national training conferences, JJ Attorney 2 told us that not every state attends each national training conference. According to witnesses, the Guidance Manual has still not been revised. OJJDP's website states that the Guidance Manual is "temporarily removed for updates." <http://www.ojjdp.gov/compliance/guidancemanual2010.pdf/> (last accessed February 6, 2017). However, we learned that OJJDP employees still provide the unrevised Guidance Manual to states upon request.

instances as violations, and potentially incurred monitoring and violation costs associated with that guidance, reflects a significant potential for inequity. Moreover, the failure to publicize the substance of the VCO opinions may have deprived other non-grantee entities, such as juvenile justice interest groups, an opportunity to comment or seek further action based on the reported results.

We did not find that anyone at OJP intended this result. Indeed, we found no evidence that the OJP employees we interviewed did anything other than act in good faith with regard to the VCO issue. For example, certain OJJDP employees clearly were strongly motivated by a desire to protect children and promote what they believed to be the original intent of the legislators who drafted the JJDP Act, while other OJJDP employees believed that it was appropriate to follow OGC's guidance regarding the meaning of the Act. The OGC attorneys themselves believed that their interpretation was faithful to the plain meaning of the statute and advised OJJDP to train all states accordingly and did so themselves as well.

To ameliorate the potential arbitrary outcome of similarly situated states being treated differently, we believe OJJDP should expeditiously notify all states and other interested parties that the VCO non-offender regulation has been determined to be *ultra vires*, either through posting a notice in the Federal Register or publishing a guidance document on OJP's website, unless and until it may choose to revisit that determination.¹¹⁵

In Section II of this Chapter, we described how agencies must go through the process of notice-and-comment rulemaking before withdrawing or amending a legislative rule that went through notice-and-comment rulemaking. *Am. Fed.*, 777 F.2d at 759. OGC attorneys told us that this requirement applies only when an agency makes a policy decision to withdraw or amend a rule, but not when an agency determines that its rule is inconsistent with a statute. While we agree with OGC that an agency may not legally abide by a regulation that is inconsistent with a statute, we believe that OJP, consistent with the spirit of the APA's transparency principles, should have vacated or amended the non-offender VCO regulation through notice-and-comment rulemaking as a best practice in this situation. States, interest groups, and others relying on a regulation should be aware that an agency is no longer enforcing it, because such knowledge may affect their use of resources. In addition, the determination that the VCO non-offender regulation was *ultra vires* could only decrease a state's reportable violations of DSO and, thus, would never result in an out-of-compliance determination for an otherwise compliant state. As a result, without the opportunity for notice and comment,

¹¹⁵ We take no position on the merits of OGC's assertion that publicly attributing a legal position to OGC will jeopardize the attorney-client privilege, as that issue is beyond the scope of our review. However, we believe, consistent with the advice OGC itself gave at the time, that the substance of OGC's legal guidance can be made publicly available without implicating any privilege concerns.

parties affected by OGC's determination would never have the opportunity to challenge OGC's legal reasoning through an appeal.¹¹⁶

The case law appears to support our belief that OJP should have published the determination that a regulation was *ultra vires* for notice and comment as a best practice in this situation. For example, in *American Telephone*, where the court rejected an agency's defense that it was bound by a rule that the court determined was inconsistent with a statute, the court suggested the following procedure when an agency believes its rule is invalid:

If the agency believed its rule was invalid and did not want to so hold in an adjudication . . . it immediately could have started a companion rulemaking to repeal the rule. The agency's own lawyers could have determined the rule was inconsistent with the statute and a Notice of Proposed Rulemaking would then have so stated.

978 F.2d at 733.

At minimum, we believe OJP should have posted a guidance document on its website notifying states and other interested parties of the VCO opinions. Several OGC attorneys and OJJDP employees we interviewed told us that they would characterize the substance of the VCO opinions as "significant guidance" within the meaning of OMB Bulletin 07-02, which we described in Sections II.C.2. and III.F. Specifically, the substance of the opinions constituted an "agency statement of general applicability and future effect" that set forth "an interpretation of a statutory or regulatory issue," and that both "materially altered the . . . obligations of grant recipients" and raised "novel legal or policy issues arising out of legal mandates." Accordingly, we believe that even if publication in the Federal Register was not required, the substance of the VCO opinions should have been posted on OJP's website as a "significant guidance document," pursuant to OMB Bulletin 07-02. 72 Fed. Reg. 3432.¹¹⁷

¹¹⁶ Rumsey's counsel, Robert Burka, submitted a letter to the OIG arguing that OJP OGC acted in violation of the APA when it advised OJJDP that a regulation was *ultra vires* without going through the rulemaking process to withdraw or amend it. As stated in the text accompanying this footnote, we agree with the general proposition that an agency must use the same procedure to withdraw or amend a rule as it did to issue the rule. However, none of the cases cited by Burka deal with the situation where an agency's counsel determined that an existing rule was inconsistent with a statute. See *Voyageurs Region Nat'l Park Ass'n v. Lujan*, 966 F.2d 424, 428 (8th Cir. 1992); *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1025 (9th Cir. 1985); *Nat'l Family Planning and Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992). We make no finding on whether OGC violated the APA as that issue is not necessary for us to resolve the issues before us in this review, but we agree that notifying the public through the rulemaking process generally would be a best practice in this situation. Burka also points out that the rulemaking process may be the only opportunity for interested parties to weigh in on a legal determination that a rule is contrary to the JJDP Act, because some courts have held that the JJDP Act does not create a private right of action.

¹¹⁷ Further, pursuant to Executive Orders 12866 and 13563, OJP is obligated to identify to OIRA in the Department's regulatory plan all regulations that it believes should be repealed. We searched OIRA's Unified Agenda of Federal Regulatory and Deregulatory Actions from 2008 through the present and found no evidence that OJP did so with respect to the VCO non-offender regulation.

OJP never formally withdrew the VCO non-offender regulation through notice-and-comment rulemaking or published OGC's determination that the regulation was *ultra vires* as a significant guidance document. OJP instead chose to draft an entirely new set of regulations implementing the JJDP Act. However, OJP still has not issued a complete final rule. Instead, in January 2017 OJP issued only a partial final rule that did not eliminate, amend, or otherwise address the VCO non-offender regulation, and indicated that additional amendments would be "addressed in a future final rule." 82 Fed. Reg. 4783 - 4793. OGC first advised that the VCO regulation was *ultra vires* over 8 years ago.¹¹⁸ Given that courts declaring regulations *ultra vires* typically vacate those regulations effective immediately, we believe that more than 8 years is an unreasonable delay. *Fortis*, 420 F. Supp. 2d at 167.¹¹⁹

Moreover, we do not believe that it would be sufficient for OJP to eliminate the VCO non-offender regulation in a future final rule, without first specifically explaining that the VCO non-offender regulation had been excluded and why, and without first allowing the public to comment on the exclusion as informed by such an explanation. Since many people interpret the statute itself to prohibit the application of the VCO exception to non-offenders, this explanation is critical for interested parties to be adequately notified of the change in OJP's application of the VCO exception.

Recommendation 4: OJP should develop standard procedures for determining what should be published in the Federal Register for notice and comment and for identifying significant guidance documents to be posted on OJP's or OJJDP's websites.

None of the OJJDP and OGC witnesses provided a clear explanation of who should be responsible for identifying "significant guidance" documents and determining whether or how they should be published. Some OJJDP staff said that they believed publishing regulations and significant guidance documents was OGC's job. Madan, on the other hand, stated that OGC was not itself responsible for advising the states of the VCO legal interpretation. We believe that clear procedures for identifying and publishing significant guidance with clear assignment of responsibilities for those important functions are needed. These procedures should be consistent with the requirements of current Executive orders and OMB guidelines. In particular, Bulletin 07-02 requires agencies to have written procedures regarding the approval of significant guidance documents. We also urge OJP to consult the April 2015 GAO Report to Congressional Requesters regarding Regulatory Guidance Processes, which contains recommendations regarding agency processes for identifying significant guidance documents, choosing between rulemaking and the issuance of a guidance document, and effective dissemination of guidance documents. Among other things, these procedures should ensure

¹¹⁸ We searched but found no NPRMs related to the JJDP Act from 2008 through fall 2015.

¹¹⁹ In one case, a court gave an agency 2 years to replace a longstanding regulation that involved a complicated regulatory and permitting scheme. *NW Env't'l Advocates*, 537 F.3d at 1010.

expeditious notification to the public – including states, other grant recipients, and interest groups – when regulations are determined to be *ultra vires*.

Recommendation 5: OJP should develop a plan to improve communications within and among OJP components.

We found significant communication failures among OJP components, primarily between OJJDP and OGC, that resulted in or contributed to many of the problems we identified in this chapter. While our investigation focused on the 2008 through 2010 period when the opinions central to our review were issued, witnesses told us that the communication concerns that we identified continue to exist. These include insufficient initial discussions among components about an issue or problem requiring attention, and resulting guidance that is either incomplete or unresponsive. For example, we believe that it would have been helpful if OJJDP had provided more factual information, and if OGC had asked more questions to gather such information, when OJJDP sought guidance on the VCO and Jail Removal issues. With respect to the 2008 VCO Opinion, OGC did not know that Wisconsin was not using the VCO checklist; and with respect to the Jail Removal Opinion, OGC did not understand that Wisconsin was not seeking to qualify the facilities as colocated facilities. In both cases, the missing information would have allowed OGC to provide more helpful guidance to OJJDP.

We also identified communication problems that stemmed from recipients of OGC opinions not understanding the guidance being provided or not requesting clarification from OGC to gain such understanding, or from staff never having been made aware of relevant guidance. We found in our interviews during this review that OJJDP employees do not always understand OGC's opinions because of the "legalese" they contain and are critical of the opinions' lack of direction about how OGC's guidance should be applied. As Rumsey observed, "If we as the so-called program implementers and compliance monitors don't understand what the memo actually says, and they can't explain it to us in sort of a real world way, then it seems sort of pointless." Equally problematic is the situation with the 2010 VCO Opinion not having been circulated to all OJJDP employees with state compliance responsibilities. This predictably led to examples of OJJDP staff not knowing how to respond to questions from state employees because they were unaware of guidance that had been provided by OGC, and instances where OJJDP staff provided guidance to states that conflicted with OGC opinions or conflicted with guidance provided to other states. In that regard, we found that employees who currently hold and/or previously held some of the most senior management positions within OJJDP and SRAD, including Listenbee, Slowikowski, Ayers, Thompson, and Jones, were either unaware of or fundamentally misunderstood OGC's interpretation of the DSO provision. In our view, this reflects a serious communication problem that should be addressed by both OGC and OJJDP employees.

In addition, we found general communication issues that appeared to be attributable, at least in part, to a lack of regular dialog and interaction, particularly between OJJDP and OGC. We believe this situation helps to explain complaints from OGC attorneys that they believe some OJJDP staff do not respect their role in interpreting the law and refuse to follow their guidance, and frustrations expressed

by OJJDP witnesses about OGC attorneys not appearing to consider their viewpoints. Fortunately, there is agreement that this is an area in need of improvement. For example, Moses told us that it was important for OGC to have “regular, robust conversations” with OJJDP staff to ensure that the OJJDP State Representatives are properly applying the law and monitoring the states. He further suggested that OGC play a role not only in reviewing determinations of non-compliance but also in reviewing determinations of compliance. OJJDP witnesses told us that it would be helpful for OGC attorneys to have a more practical understanding of juvenile justice issues and the core requirements compliance monitoring function. One OJJDP witness told us that he believed it would be helpful for OGC to explain its opinions to staff directly, rather than through senior management. Administrator Listenbee told us that he believed OJJDP staff would benefit from regular briefings from OGC on legal issues, and Moses told us that OJJDP staff are always welcome to attend meetings between OGC and the Administrator, at the discretion of the Administrator.

With this background in mind, we believe OJP should consider including the following suggestions as part of any plan it develops to address communication problems we identified:

- OJJDP employees seeking OGC’s guidance on significant or potentially controversial matters prepare written memoranda, including descriptions of both the legal questions and the factual circumstances that brought about those legal questions.
- Before OGC responds to OJJDP’s questions on significant or potentially controversial matters, OGC and OJJDP have in-person meetings to discuss the legal questions and factual circumstances.
- OGC provides written legal opinions that avoid or, when it is required, explain legal terminology, contain statements of facts, provide practical guidance, and define the scope of the guidance provided, including whether it should be applied beyond the specific factual circumstances described by OJJDP.
- OJJDP guidance to states in reliance on OGC opinions is done in writing and maintained in OJJDP’s record system;
- OJJDP provides to OGC and OGC reviews guidance provided to states based on OGC’s legal opinions (such as the January 2009 letter to Wisconsin) to ensure that the guidance is communicated correctly.
- OGC staff and OJJDP personnel have regular meetings during which OGC explains updates in the law and significant recent legal interpretations and during which OJJDP staff describe to OGC recent developments in the juvenile justice field and issues and dilemmas they have encountered in core requirements compliance monitoring.

Recommendation 6: OJP should consider revising its compliance monitoring report template to gather additional information about states’ use of the VCO exception and compliance with certain procedural requirements.

As explained in our conclusions, we did not substantiate the allegation that certain juveniles are currently being detained in contravention of statutory grant conditions based upon OGC guidance. Nonetheless, we recommend that OJJDP consider revising its compliance monitoring report template (“the template”) to gather additional information regarding state VCO usage in general, and as to non-offenders specifically, to better assess whether states are following proper procedures with respect to juveniles. The template currently requires states to report the total number of status offenders placed in secure detention or correctional facilities in reliance upon the VCO exception. However, the template does not require states to report the total number of non-offenders securely placed in reliance upon the VCO exception. In light of the significant policy concerns described in this chapter, the possibility that OJP may decide to revisit its interpretation of the VCO exception, and the potential for future legislative changes regarding the VCO exception, we believe it would be prudent for OJP to collect such information. Accordingly, we recommend that OJP consider amending the template to require states to report the total number of non-offenders placed in secure detention or correctional facilities for violating VCOs.¹²⁰

The template also does not require states to report information regarding compliance with the procedural requirements of the VCO or collocated facility exceptions. While OJJDP employees seek to assess compliance with the procedural requirements during 5-year audits, witnesses told us that it can be difficult to gather this information during the limited time frame of an audit, especially given poor recordkeeping in many states. Thus, we also recommend that OJJDP consider amending the template to gather information regarding compliance with the various procedural requirements of the JJDP Act and its implementing regulations.

¹²⁰ OJJDP has done something similar to this with respect to minors in possession (MIP) of alcohol offenses. OJJDP requires states to submit data on the secure placement of minors charged with MIP offenses, even though OGC advised that such secure placement does not violate the DSO core requirement. In a memorandum from Acting Administrator Slowikowski, OJJDP advised states to continue reporting this data, in light of OJJDP’s policy concerns regarding the detention of juvenile alcohol offenders and efforts to change the law in this regard. See http://www.ojjdp.gov/compliance/MIP_Memo3_17_2011.pdf (last accessed February 6, 2017).

CHAPTER FOUR: ALLEGED OBSTRUCTION OF FACT FINDING IN THE OIG INVESTIGATION

On May 23, 2011, Semmerling filed a whistleblower complaint with the Office of Special Counsel (OSC). Among the allegations that OSC referred to the OIG to be investigated based on Semmerling's disclosures was the claim that "DOJ OIG employees obstructed fact finding in an investigation of the Wisconsin OJA for concealment of non-compliance," by "limiting her investigation and ultimately reassigning her from the case." See Letter from Carolyn Lerner to Eric Holder, September 16, 2014. Semmerling further alleged "that the matter is not being pursued consistent with professional standards for investigations," and asserted that both the OIG special agent and auditor who also worked on the investigation would support her allegation that the OIG attempted to influence the investigation in a manner favorable to the Wisconsin OJA.

These allegations were referred by the Department to the Inspector General, who assigned them for review to the OIG's Oversight and Review Division (O&R), which is a Division separate from the OIG's Investigations Division (INV). As noted previously, O&R handles many of the OIG's most sensitive matters, including allegations against personnel from other OIG Divisions. When asked by O&R specifically which OIG officials obstructed the investigation, Semmerling identified Assistant Special Agent-in-Charge (ASAC) Kimberly Thomas and Special Agent-in-Charge (SAC) John Oleskowicz, both of the Investigations Division's Chicago Field Office (CFO), Deputy Assistant Inspector General for Investigations George Dorsett, and former Senior Counsel to the IG and current General Counsel William Blier. O&R interviewed all four officials Semmerling identified as responsible for obstructing the investigation and reviewed their e-mails, personal notes, and other relevant information. In addition, we more broadly sought to determine whether any OIG official in a position of authority over Semmerling improperly attempted to obstruct or impede Semmerling's ability to investigate not only the Wisconsin OJA's alleged concealment of non-compliance, but also actions taken by OJJDP and OJP OGC officials that she believed may have contributed to Wisconsin's alleged fraudulent receipt of federal grant funds.

We concluded that as a result of her tenacious investigative efforts, Semmerling identified significant problems with OJJDP's handling of grants awarded to the Wisconsin OJA over several years, as well as other more systemic deficiencies in OJJDP and OJP OGC operations. And while we had concerns, as detailed below, with how Semmerling was personally treated by her management in certain instances, we did not substantiate her allegations that OIG officials improperly obstructed the OIG's investigation or attempted to influence the investigation in a manner favorable to the Wisconsin OJA. We further found that, contrary to Semmerling's belief, the OIG special agent and auditor who Semmerling cited as supporting her allegations denied having any information that would substantiate them.

Below we describe the investigative steps Semmerling took in the Wisconsin OJA matter, significant management actions taken during the course of the

investigation, and Semmerling's interactions with senior OIG officials following her removal from the case in October 2009. The descriptions are based on our interviews of witnesses, and our review of e-mail messages, relevant documents and records, and witnesses' notes, including a Confidential Statement (Confidential Statement) that Semmerling drafted in May 2010 in support of a whistleblower retaliation claim that Rumsey filed with the OSC. We then provide our analysis of Semmerling's allegation that OIG officials obstructed her investigation.

I. Summary of Semmerling's Allegations of Obstruction

As detailed below, from June 2008 to October 2009, Semmerling was assigned to investigate allegations that officials in the Wisconsin OJA had committed grant fraud by submitting false or incomplete compliance data pursuant to the JJDP Act. Semmerling sought to expand the investigation to encompass allegations that officials in OJJDP and OJP OGC either failed to enforce the mandates of the JJDP Act, resulting in improper grant awards, or colluded with Wisconsin officials to ensure that Wisconsin received grant awards to which it was not entitled. After Semmerling was removed from the investigation, she alleged that senior officials in the INV and the former Senior Counsel to the IG and current OIG General Counsel William Blier had obstructed or impeded her investigation of Wisconsin grant fraud. In the course of our investigation Semmerling identified at least the following alleged incidents as evidencing obstruction of her investigation:

- After receiving complaints about Semmerling's conduct of the investigation from OJP General Counsel Madan, Oleskowicz bullied and harassed Semmerling at a meeting on May 5, 2009, in which he questioned Semmerling about her contacts with OJJDP and OJP officials.
- During a July 23, 2009 meeting about Semmerling's work performance, Oleskowicz and Thomas instructed her to limit her investigation to the "lowest level" Wisconsin OJA subject and not to focus on any problems with OJJDP or OJP, including the OJP OGC's 2008 Valid Court Order (VCO) Opinion.
- During the July 23 meeting, Oleskowicz and Thomas threatened and intimidated Semmerling. The next morning, Thomas attempted to intimidate her from pursuing the investigation by providing her a list of FBI employees who were terminated for insubordination or lack of candor.
- The OIG removed Semmerling from the investigation on October 23, 2009, thereby preventing further investigation of OJP OGC and OJJDP officials' role in the alleged grant fraud.
- After being informed of Semmerling's concerns, OIG General Counsel William Blier failed to take corrective action to address problems Semmerling had identified to him about OJJDP and OJP.

We examine these allegations in detail below.

II. Timeline of Significant Events

April 21, 2008	OIG INV opens a grant fraud investigation of Wisconsin OJA, based on allegations from OJJDP employee Elissa Rumsey. Semmerling is assigned to the matter.
June 17, 2008	Semmerling interviews a former Wisconsin OJA compliance monitor, who alleges that Wisconsin submitted false compliance data to OJJDP during 2001-2004.
August 2008	An Auditor from the Chicago Regional Audit Office is assigned to assist Semmerling.
Sept 4, 2008	Semmerling receives approval from then-IG Glenn Fine to serve a subpoena on Wisconsin OJA. Semmerling later asserts that what she perceived to be Fine's initial hesitation to approve the subpoena was the beginning of the alleged interference with the conduct of her investigation.
Oct 3, 2008	Semmerling interviews a former Wisconsin OJA compliance monitor (Compliance Monitor 1), who Semmerling reports admitted that Wisconsin's JJDP Act core requirements compliance monitoring data for 2000-2004 was "made up."
Dec 31, 2008	Rumsey files a complaint with the OSC alleging she suffered reprisal for cooperating with the OIG's investigation. Rumsey's counsel also contacts the OIG about investigating Rumsey's claim. According to Semmerling, her OIG managers become critical of Rumsey at this point.
Jan 28, 2009	Because of a potential conflict in the USAO for the Western District of Wisconsin, the grant fraud investigation is assigned by the Department to the USAO for the Northern District of Iowa.
Mar 4, 2009	After INV officials meet with Rumsey and her counsel, OIG refers Rumsey's retaliation claims to OSC, which has already opened an investigation.
April 9, 2009	After a Wisconsin official is invited to participate in an OJJDP focus group, Rumsey objects that the official is a "party" to the OIG investigation. After Semmerling requests information about whom else has been invited to the event, the Acting Administrator withdraws the invitation to the Wisconsin official.
April 30, 2009	Semmerling requests that OJP submit nationwide JJDP Act compliance data to the OIG by May 8, a request her OIG managers later oppose as burdensome and unnecessary.

May 3, 2009 Semmerling sends an e-mail to OJP OGC with several questions about the validity of the May 2008 VCO Opinion.

May 4 & 5, 2009 OJP OGC complains to the OIG about Semmerling's alleged "bullying manner" with OJP personnel and interference in OJJDP operations.

May 5, 2009 CFO SAC Oleskowicz meets with Semmerling to discuss her contacts with OJP personnel. The next day, Semmerling sends him an e-mail accusing managers of bullying and harassing her.

May 7, 2009 The Assistant U.S. Attorneys (AUSA) in the Northern District of Iowa inform Oleskowicz and Semmerling that they will review the May 2008 VCO Opinion and another legal memorandum drafted by an OJJDP Senior Advisor to rebut OJP OGC's conclusions.

May 9, 2009 A second Special Agent (SA 2) from the CFO is added to the investigation team.

May 11, 2009 Semmerling [REDACTED]. A Special Agent in the CFO is assigned to assist her on the investigation.

June/July 2009 Second Auditor from the Chicago Regional Audit Office is added to the investigation team.

July 7, 2009 Semmerling returns to work [REDACTED].

July 23, 2009 Oleskowicz and Thomas meet with Semmerling to discuss concerns about what they perceive as a general decline in her performance over the past year, including failure to document investigative activity and lack of progress on her cases. They also accuse Semmerling of lacking candor and mischaracterizing facts.

Oct 13, 2009 Semmerling learns from Rumsey that OJJDP plans to discuss the VCO exception issue at an upcoming national training conference using materials edited by OGC to reflect the conclusions reached in the 2008 VCO Opinion.

Oct 16, 2009 Semmerling sends an e-mail message to senior OJJDP and OJP officials indicating in substance that the 2008 VCO Opinion was created to allow Wisconsin to receive grant funds despite compliance problems and as a result, OJJDP and OJP OGC staff involved in the opinion are part of the criminal investigation. Semmerling copies the AUSAs on the message but does not include her co-case agent, or her immediate supervisors Thomas or Oleskowicz.

- Oct 19, 2009 Semmerling advises the senior OJJDP and OJP officials that her e-mail of October 16, 2009 was not to imply that OJJDP and OGC staff are targets of the criminal investigation.
- Oct 21-23, 2009 After learning of the October 16 e-mail from Semmerling, Oleskowicz confers with then-INV Assistant Inspector General Thomas McLaughlin, who decides to remove Semmerling from the Wisconsin investigation. Semmerling is told that she is being removed, and a Senior Special Agent from the CFO is assigned to replace her on the matter, and begins to work on the investigation along with SA 2 and the Auditors.
- Nov 10, 2009 Semmerling contacts Inspector General (IG) Fine about the 2008 VCO Opinion. Fine refers the matter to Senior Counsel to the IG William Blier. In the weeks that follow, Semmerling sends Blier several e-mail messages complaining about how the Wisconsin investigation is being handled and asking to be put back on the case.
- May 2, 2010 Semmerling files a 30-page Confidential Statement with the OSC in connection with Rumsey's whistleblower retaliation matter.
- March 25, 2011 After exhausting her administrative remedies with OSC, Rumsey files an appeal to the Merit Systems Protection Board (MSPB).
- April 22, 2011 Semmerling alleges to Blier that she was "obstructed from properly investigating" the Wisconsin case and that "prohibited personnel actions" had been taken against her.
- October 25, 2011 The MSPB Administrative Judge denies Rumsey's request for corrective action. On appeal, the full Board issues a limited reversal of this determination on October 28, 2013.
- August 2012 Semmerling medically retires from the OIG.
- January 2014 OIG provides OJP with a draft Report of Investigation of its findings in the Wisconsin matter for review and comment per standard OIG procedures. The final ROI is posted on the OIG's website in September 2014.

III. Detailed Chronology of Investigative Activities and Other Relevant Events

A. Background Regarding Jill Semmerling

Semmerling began her law enforcement career in 1988 as a special agent and criminal investigator with the OIG of the Department of Agriculture. She joined the OIG of the Department of Justice in 1997, also as a special agent and criminal

investigator, and retired from the OIG in August 2012. According to Semmerling's resume, Semmerling conducted several complex criminal investigations using a variety of law enforcement techniques, including witness interviews, undercover work, and financial analysis. Semmerling received numerous awards from the DOJ IG, an award from a USAO for her work on a grant fraud investigation, and an award from the Counsel of Inspectors General on Integrity and Efficiency for her work on an investigation of a grantee of Department funds.

B. Initiation of the Investigation in Early 2008

On February 3, 2008, Elissa Rumsey visited her neighbor, George Dorsett, at his home to raise concerns about the then-Administrator of OJJDP, Robert Flores. At the time, Dorsett was Deputy Assistant Inspector General for the OIG's Investigations Division. Dorsett stated that he told Rumsey that he would have someone from his office get in contact with her. Rumsey was interviewed by a Special Agent in the Investigation Division's Fraud Detection Office (FDO) on March 19, 2008. Based on a memorandum of the interview (MOI), the interview focused exclusively on Wisconsin OJA's alleged submission of fraudulent data to OJJDP.¹²¹ Rumsey's statement to the FDO Special Agent was based on information she had learned from a former Wisconsin OJA employee who had been a compliance monitor from 2005 through 2007 (Compliance Monitor 2). The MOI of Rumsey's interview states that Compliance Monitor 2 had told Rumsey that Wisconsin OJA had been "cooking the books" for years to hide Wisconsin's high rates of noncompliance with the Deinstitutionalization of Status Offender (DSO) core requirement from OJJDP in order to qualify for grants.

FDO referred the Wisconsin matter to the CFO, where it was assigned to Semmerling. According to an entry in the Investigations Division's case management tracking system (known as the Investigation Data Management System or IDMS), the matter was officially opened as an investigation on April 21, 2008. At the time of the referral and initiation of the investigation, Semmerling's first line supervisor was ASAC John Oleskowicz, and her second line supervisor was SAC Ed Dyer. Dyer retired in September or October 2008, and Oleskowicz replaced him as SAC of the CFO at that time. Kimberly Thomas took over the ASAC position in October 2008 and became Semmerling's first line supervisor on the Wisconsin matter.¹²²

According to Semmerling's notes in IDMS, Semmerling contacted Rumsey on May 14, 2008 to request additional information. A week later, Rumsey advised

¹²¹ According to the Inspector General Manual (IGM), MOIs are used to report the result of an investigative activity, such as a witness interview or document analysis. MOIs are supposed to be completed within 5 workdays of the investigative activity and are to be approved by an ASAC or SAC. IGM III-207.8. All MOIs should be maintained in the case file, and relevant MOIs are to be included as exhibits to Reports of Investigation (ROI). *Id.*

¹²² Kimberly Thomas was promoted from Special Agent to Senior Special Agent (SSA) in the CFO in June 2006. Semmerling told us that she had also applied for the SSA position. Semmerling also stated that she had applied for the position of ASAC in 2000 that was given to Oleskowicz before he was promoted to SAC in 2008.

Semmerling that she would provide more information and requested that her identity remain confidential. In a letter to Semmerling dated June 13, 2008, Rumsey expanded on the allegations she made during her March 19 interview with the FDO Special Agent. She also forwarded to Semmerling various internal OJJDP e-mail messages, which she annotated with Post-It notes. In addition to alleging that Wisconsin OJA had submitted fraudulent data to OJJDP to qualify for grant funds, Rumsey's letter stated:

- The regulations for determining compliance and assessing noncompliance with the JJDP Act are "extremely complicated." Typically, compliance determinations are made based on data submitted 2 calendar years prior to the fiscal year for which funds are to be allotted.
- In FY 2007, Wisconsin was assessed a 20 percent reduction in funds due to noncompliance with the DSO core requirement. Although required by the JJDP Act to spend half of the remaining 80 percent of the funds on compliance with the DSO core requirement, Wisconsin obligated the funds to non-DSO programs. This fact was brought to the attention of senior OJJDP officials, including Greg Thompson, at the time Associate Administrator in charge of OJJDP's State Relations and Assistance Division (SRAD), who did not pursue the matter.
- Rumsey was "not permitted" to travel to Wisconsin in April 2008 to verify Wisconsin OJA's data collection procedures, and did not have access to any written findings from the OJJDP team that went on the site visit. (Rumsey did not mention in the letter that OJJDP Administrator Flores had removed her from her core requirements compliance monitoring role to a policy function several months prior.) Rumsey recommended that Semmerling gather information about this visit.¹²³
- Wisconsin has "consistently demonstrated an inadequate system of monitoring facilities as required by Section 223(a)(14) of the JJDP Act," even though grant funds are provided for states to ensure an adequate system of core requirements compliance monitoring.
- OJJDP personnel provided "inadequa[te] or conflicting responses" to Wisconsin OJA officials "that may have contributed to Wisconsin's pattern of submitting incomplete or fraudulent data, resulting in grant awards exceeding the amount to which they would have been entitled."

¹²³ This April 2008 site visit to Wisconsin has come to be referred to by several witnesses as a "mock audit." According to the OJJDP employees who participated, the purpose of the visit was not to conduct an actual audit of Wisconsin, but rather to provide technical assistance on how data should be collected and maintained for future OJJDP audits.

- It is an “open secret in the field that OJJDP is not serious about enforcing the mandates of the JJDP Act” and, as to Wisconsin in particular, OJJDP’s monitoring efforts “appear[] to approach purposeful deception.”

Although not discussed in Rumsey’s letter, her submission to Semmerling appears to have included a copy of the May 2008 VCO Opinion prepared by OJP OGC, described in Chapters Two and Three of this report. (The 2008 VCO Opinion is appended to this report as Attachment A.) As detailed elsewhere in this report, this opinion interpreted the VCO exception to the DSO core requirement in a way that allowed Wisconsin to reduce the number of DSO violations it had to report to OJJDP, thereby enhancing Wisconsin’s ability to qualify for a formula grant. CFO records indicate that Rumsey gave Semmerling several binders of additional material in June and July 2008.

On June 16, 2008, the matter was assigned to an AUSA in the Criminal Division of the USAO for the Western District of Wisconsin, and according to Semmerling’s entry in IDMS, a criminal and civil case was opened in that office.

On June 17, under the terms of a proffer letter provided by the AUSA, Semmerling and another OIG agent interviewed former Compliance Monitor 2.¹²⁴ According to the MOI of the interview, Compliance Monitor 2 stated that he became a compliance monitor for Wisconsin OJA in 2005 and left the agency in 2007. He further stated that Wisconsin OJA provided false core requirements compliance monitoring reports to OJJDP prior to 2005. Consistent with Rumsey’s initial disclosure to the OIG, Compliance Monitor 2 told Semmerling that from 2001 through 2004, Wisconsin OJA submitted false DSO rates that were below the legal maximum noncompliance rate of 5.8 violations per 100,000 youth, thereby allowing Wisconsin to receive JJDP Act grants to which it was not entitled. Compliance Monitor 2 said that his predecessor at Wisconsin OJA, Compliance Monitor 1, had been responsible for submitting the false data to OJJDP. Compliance Monitor 2 stated that in 2005 and 2006, when he was responsible for compiling this data, he truthfully reported the DSO rates as being significantly above the maximum noncompliance rate. According to the MOI, Compliance Monitor 2 also told Semmerling that the Wisconsin Director of Justice Programs (JP Director 2) wrote a letter to OJJDP that falsely claimed that the state’s 2006 core requirements compliance monitoring data was not available and could not be recreated. Compliance Monitor 2 provided Semmerling with an internal Wisconsin OJA e-mail message purporting to show that an OJJDP employee had suggested to a Wisconsin OJA official that Wisconsin OJA rely on data from the end of 2006 in order to avoid being found out of compliance.

¹²⁴ In the criminal law context, a proffer agreement is “a written agreement between federal prosecutors and individuals under criminal investigation which permit these individuals to give the government information about crimes with some assurances that they will be protected against prosecution. Witnesses, subjects or targets of a federal investigation are usually parties to such agreements.” See <http://definitions.uslegal.com/p/proffer-agreement/> (last accessed February 6, 2017).

C. Role of the Criminal AUSAs

Generally speaking, a referral of a matter to a federal criminal prosecutor is a significant step in INV's investigations. The OIG managers involved in this case told us that they generally stressed the importance of agents' coordination with prosecutors during investigations. Oleskowicz told us that he repeatedly directed Semmerling to keep the prosecutors advised of her investigative activities and to seek the prosecutors' opinion on the evidence she was gathering, particularly with respect to legal issues. Dorsett stated that once a matter has been referred to a prosecutor, the prosecutor "has a leading role in what will be done" because the prosecutor is responsible for moving the case through the judicial process. Dorsett stated that while an agent has some discretion in deciding what information to seek, the general rule is that an agent should coordinate with the prosecutor, even with respect to informal requests for information from a witness or component.

The importance of agent coordination with the prosecutor in criminal matters is underscored in the IG Manual (IGM) as well. For example, with respect to conducting interviews in criminal cases, the IGM states that "discussion with the prosecutor before the interview is critical to establish what is needed to prove the case, including specific elements of the crime." See IGM at III-207.16. Agents also must seek the prosecutor's guidance in deciding whether to seek a sworn statement from a witness. *Id.*

D. Activities during Mid-2008

According to the case file, following the June 2008 interview of Compliance Monitor 2, Semmerling did not conduct another substantive witness interview until September 2008. The case file reflects that between the Compliance Monitor 2 proffer in June and the resumption of interviews in September, Semmerling requested and received numerous documents from Rumsey, an OJP OGC attorney, and others. Semmerling told us that she used this mid-2008 period to learn how the JJDP Act program operated and to review the materials she had obtained. She stated that she was also winding down work on another complex grant fraud investigation that involved another component within OJP. Significant investigative activities and other relevant events during this period are summarized below.

1. Semmerling Initial Contacts with OJP OGC Officials

Semmerling stated that on either July 8 or 9, 2008, at the suggestion of FDO SAC Elise Chawaga, she contacted OJP General Counsel Rafael Madan and Deputy General Counsel Charles Moses to establish them as her points of contact for obtaining documents. On July 9, Semmerling sent an e-mail message to Moses and another OGC official, copying Oleskowicz and her SAC, who at that time was Ed Dyner, summarizing the substance of her telephone conversation with Moses and the other OGC official. In the message, Semmerling described some of the allegations under investigation and advised that the allegation that Wisconsin submitted false data had been "corroborated." She wrote that Wisconsin "has been out of compliance regarding DSO rates, and possibly Jail Removal and Separation since 1999." She advised that she was coordinating the investigation with the

USAO as a criminal matter. She wrote that OJJDP and Wisconsin OJA did not know that she was conducting the investigation, and requested that these offices not be told. She also requested the OGC officials provide her with various materials, including grant applications, core requirements compliance monitoring reports, audit reports, site visit reports, and correspondence from 1999 through the date of the e-mail message. Lastly, she told the officials that she believed "no decision should be made" about Wisconsin's JJDP Act funds, which had been frozen for 2008, and requested that she be notified before any decision was made to release the funds.

Oleskowicz told O&R that he disagreed with Semmerling's instruction to OJP OGC not to tell OJJDP about the investigation, stating that if Wisconsin were committing grant fraud, the OIG would want OJJDP's help in identifying and putting a stop to it. He noted that Semmerling had not yet corroborated the fraud allegation at this point. He stated that she should have discussed this strategy with him before sending the July 9 e-mail to Moses, adding that the incident was one of several examples of what he characterized as Semmerling's unduly "compartmentalized" approach to the investigation and her failure to discuss case strategy with him.

At some point on July 9 – the sequence of events is not clear from the documents – Semmerling had a second telephone conversation with Moses. Also on the call were two OJP OGC line attorneys who were assigned to provide legal guidance to OJJDP. This second telephone conversation is significant for several reasons. First, it was during this call that Semmerling first raised her interest in OJP OGC's legal opinions directly with OJP OGC attorneys. In her Confidential Statement, Semmerling wrote that she specifically requested from Moses the 2008 VCO Opinion. Semmerling wrote, "I did not disclose to Moses that allegations were made about the legal opinion, just that I heard the legal opinion existed." It is not clear how or when Semmerling first received an allegation that the 2008 VCO Opinion was improper, although she told us the allegation was made to her by Rumsey.

Second, Semmerling also wrote that on the day of this telephone call one of the line attorneys on the call had e-mailed OJJDP Associate Administrator Greg Thompson a legal opinion concerning Wisconsin's compliance with the jail removal core requirement. The legal opinion, which is discussed in Chapter Three, approved Wisconsin's practice of using an adult jail facility as a juvenile detention facility at times when it is not being used to house adult inmates, without violating the JJDP Act's jail removal core requirement. Semmerling wrote in her Statement that the OGC attorneys "never told me about this finding," and that she only learned of the opinion later, when she reviewed Thompson's e-mails.

Semmerling told us that even though she did not specifically request legal opinions about the jail removal core requirement, she believed that the OGC attorneys should have brought the July 9, 2008 e-mail to her attention, and the fact that they did not do so "just raised another red flag" for her. The line attorney who authored the July 9, 2008 legal opinion e-mail to Thompson also forwarded the message to Moses on July 9, writing, "To the extent that the [OIG] investigation

goes into core requirements other than DSO, advice like that provided recently (see below) may need to be given to the investigator as well.” Moses responded the next day, “I don’t think we are there yet.” This exchange suggests that OGC officials did not perceive the jail removal legal opinion to be relevant to Semmerling’s investigation at that point in time.

The July 9 telephone conversation was significant for a third reason. According to Semmerling, during the telephone call, Moses asked Semmerling for the identity of the OJJDP employee who had made the allegations to the OIG. Semmerling stated that she was “shocked” and “taken aback” by Moses’s request, and that she told him she could not provide him with that information.¹²⁵ Moses told O&R that he recalled asking Semmerling for the identity of the complainant during one of his many conversations with her, but that he could not remember when he asked. He stated that he asked for the complainant’s identity because he is the Deputy Designated Agency Ethics Officer for OJP and was accustomed to whistleblowers making disclosures to him first. He stated that he asked Semmerling for the complainant whistleblower’s identity so that, in his capacity as an ethics officer, he could ensure that the whistleblower was protected, help direct her to the appropriate office to file her complaint, and avoid duplicating efforts if the same allegations had been made by a prior complainant. However, Moses told us that he understood why the complainant did not make her disclosure to him, given that aspects of her allegations touched on OGC activities.

Semmerling stated that Moses’s request for the whistleblower’s identity heightened her concern about Rumsey’s well-being and that from that point forward she “began to regularly ask Rumsey if she was okay.”

2. OIG and USAO Consider Audit of the JJDP Act Grant Program

In late July and early August 2008, the issue of whether the Wisconsin matter should be converted from a criminal investigation to an audit was actively discussed among Semmerling, Oleskowicz, OIG headquarters officials, and the AUSA. On July 29, Semmerling wrote to Oleskowicz that she wanted to discuss with the AUSA the possibility of turning the Wisconsin matter over to the OIG’s Audit Division. Semmerling sent Oleskowicz excerpts of an e-mail the AUSA had sent her on July 11 discussing his thoughts on the audit option. The AUSA had written that unless there was “a specific falsehood we could focus on,” an OIG audit would be necessary to address the broader issue of whether Wisconsin was in actual compliance with the JJDP Act. The AUSA’s message to Semmerling continued:

¹²⁵ Such disclosure would generally be prohibited by law. Section 7(b) of the Inspector General Act states, “The Inspector General shall not, after receipt of a complaint or information from an employee, disclose the identity of the employee without the consent of the employee, unless the Inspector General determines such disclosure is unavoidable during the course of the investigation.”

Here, however, is the rub. Even after doing all of that work, if the federal agency [OJJDP] monitoring the program waived certain requirements or did not consider any of the “falsehoods” material, then our case against Wisconsin gets vitiated, even if Wisconsin was not in compliance. Of course, at that point, we will then be trying to determine if there was hanky-panky in DC. The case starts to expand exponentially and there is no end, without an audit of the entire program.

The AUSA’s July 11 message concluded, “I know all of this is premature because you are still at the nascent stages of the investigation, and you may already be doing this, but I think we should try, as quickly as possible, to focus in on the specific falsehood(s) we think Wisconsin made in reporting the figures.” The AUSA also expressed concern about scoping the investigation too broadly, writing, “I understand the scope of the overall compliance issue with the program, but I am concerned that it will be very easy for us to get bogged down in a land war in Southeast Asia (to use an out-dated metaphor).” This concern about getting “bogged down” in an overly-broad investigation was also expressed by Oleskowicz and other INV officials as the investigation progressed, and formed at least part of the basis for the decision to remove Semmerling from the case in October 2009, as discussed later in this chapter. Oleskowicz forwarded Semmerling’s e-mail with the first excerpt from the AUSA’s e-mail (quoted above) to Dorsett and Roger Williams, who at the time was SAC for Operations for the INV.

On July 31, Williams wrote to Semmerling, Oleskowicz, Dorsett, and Assistant IG Thomas McLaughlin to advise that he had discussed the Wisconsin matter with the Assistant IG for the Audit Division, and that he (Williams) was unclear whether IG Fine wanted the matter handled as a “full audit.” We interviewed Fine, who told us he recalled that there was an issue about whether the case should have been conducted as a full audit or as a criminal investigation, but said he did not remember anything more about the issue. Williams asked Semmerling to get the AUSA’s views on “putting the criminal/civil case on hold” while an audit was conducted. Semmerling responded on August 1 that she had spoken with the AUSA. She wrote that although an audit of the program would be ideal, the AUSA said that “we really don’t have a choice now” because the criminal investigation was already underway. She said that the OIG must avoid even the appearance of using an audit to obtain information for the criminal investigation, although it is not clear from the August 1 e-mail whether Semmerling was conveying the AUSA’s advice or her own views. She therefore recommended that the best course of action was to continue the criminal investigation with assistance from auditors.

IG Fine visited the CFO and the Chicago Regional Audit Office (CRAO) on a periodic office visit on August 8, 2008.¹²⁶ In preparation for his visit, the Regional Audit Manager (RAM) for the CRAO, Carol Taraszka, sent Fine an e-mail on August

¹²⁶ The CFO and CRAO are located in the same building.

4 with a summary of audits pending in CRAO. Her message contained a note that she had discussed the Wisconsin matter with Semmerling and planned to provide Semmerling with audit assistance. Taraszka assigned a CRAO auditor (Auditor) to work with Semmerling. The Auditor told us that her role was to support Semmerling's investigation and lend her knowledge of grant cases because Semmerling did not have as much subject matter expertise as she did. She was not assigned to the matter to conduct an independent audit. The Auditor worked on the Wisconsin matter through August 2010. Contrary to Semmerling's assertion in her complaint to the OSC, the Auditor told the OIG that she had no information to substantiate Semmerling's allegations that OIG officials improperly failed to pursue evidence of collusion between OJJDP and the Wisconsin OJA or that OIG officials attempted to influence the investigation in a manner favorable to the Wisconsin OJA, OJJDP, or OJP.

In her August 1, 2008 e-mail to Oleskowicz and other INV officials, Semmerling wrote that in early June 2008 she had suggested to Taraszka that a "national audit should be conducted of other states" while the Wisconsin investigation was ongoing. The national audit was not conducted, although as described in this chapter, senior OIG officials raised the idea of a programmatic audit of OJJDP from time to time in the years that followed.

We found that, for every year between 2008 and 2014, the Audit Division considered including in their annual work plan proposals to audit the JJDP Act grant program.¹²⁷ The Audit Division included this audit proposal in its work plan for Fiscal Year (FY) 2012. The Audit Division's annual work plan consists of numerous proposed audits which may or may not be conducted that fiscal year depending upon OIG priorities and resources, and the proposed JJDP Act audit was never conducted. However, as discussed in Section H of this chapter, audits of other OJJDP grant programs were conducted.

3. IG Subpoena Issued to Wisconsin OJA

In the summer of 2008, Semmerling prepared a comprehensive IG subpoena for Wisconsin OJA seeking records, internal e-mails, raw data regarding juvenile detentions, and other materials from 1999 through the date the subpoena was issued. Semmerling consulted with Rumsey and the Wisconsin AUSA on which documents to request, and Oleskowicz told us he did not have any concerns with Rumsey's involvement at that time.

Oleskowicz stated that he personally believed the case should be pursued as a criminal investigation, but that IG Fine initially hesitated on authorizing the subpoena because he questioned whether the allegations amounted to a criminal matter and deliberated for "a good period of time" about whether the case was more appropriately handled as an audit. McLaughlin similarly stated that Fine was reluctant at first to authorize the subpoena. In an October 2009 e-mail message from McLaughlin to Dorsett and other senior INV officials containing an update on

¹²⁷ The Audit Division develops a work plan each fiscal year.

the Wisconsin investigation, McLaughlin referred to the matter as “the case where the IG did not want to issue subpoenas.” Fine told us that he carefully weighed the decision to issue the subpoena because it was “an unusual if not unprecedented” step to take. Regarding the perception that was later asserted by others that he was reluctant or hesitant to authorize aggressive investigative steps in the Wisconsin case, Fine stated, “I don't know where the perception came from or who had it, [but] I believe that the OIG was willing to and did take aggressive actions towards investigating misconduct by OJP.”

Semmerling wrote in her Confidential Statement that Williams had told her on July 31, 2008 that Fine “did not want me walking into a state agency, with a gun and a badge and serving a subpoena.” Fine told us that he did not recall ever making such a statement and that it did not sound familiar to him. Semmerling stated that she had found what Williams told her “very odd,” because she had “received a lot of support for the case” from Dorsett during a visit he had made to the CFO 3 weeks earlier. Semmerling wrote that “in hindsight” she wondered whether what she perceived to be Fine’s reluctance to authorize a subpoena had resulted from discussions with OJP OGC officials, whom she believed were very concerned about the OIG investigating a state.¹²⁸ Semmerling further wrote that she shared this “new development” with Rumsey and told her “not to be dismayed,” and that the OIG was “separate and apart from OJP and we report to Congress, not OJP or the Attorney General.” When we asked why she shared this information with a witness, Semmerling responded that Rumsey was a “cooperating witness” and had helped to draft the subpoena.¹²⁹

Fine visited the CFO on August 8, 2008 and discussed the Wisconsin case with Semmerling and Oleskowicz. According to Semmerling, Fine denied ever telling Williams or Dorsett that he would not sign the subpoena. Fine told us that he did not recall this specific conversation with Semmerling, though he did recall Semmerling talking with him about issues in the office more generally. As noted above, Fine denied being reluctant to issue the subpoena, or having ever expressed any reluctance to do so to others. He told us that the OIG issues subpoenas “all the time,” but usually only to individuals and companies. He stated that it “is a rare thing” to issue a subpoena to a state agency or government, and that he was not sure it had ever been done before. Fine told us that although he had no independent recollection of authorizing this particular subpoena to Wisconsin OJA, he was certain that it “was a factor” and an “important consideration” that the

¹²⁸ Semmerling told us that she was unable to provide any substantiation for her belief that OJP officials may have tried to dissuade senior OIG leadership from approving the subpoena because “[n]o one would tell me anything.” She stated that Oleskowicz’s reluctance to share with her what he had learned about the investigation from OJP officials was a recurring problem for her. Fine strenuously denied that he was reluctant to issue the subpoena or was pressured not to issue it, and we found no evidence to the contrary.

¹²⁹ The IG Manual states in the context of witness interviews that “the OIG agent will provide to the witness only the information concerning the investigation necessary for the interview to proceed (that is, the allegation of the investigation and, if pertinent, the subject of the investigation).” IGM III-226 F.

recipient was a state agency. He stated that he never received any pressure from any OJP official to not issue the subpoena, noting that “pressuring [him] to change the conduct of an investigation by a DOJ official would be very memorable and unprecedented.”

Fine signed the IG subpoena on September 2, which Semmerling received on September 4. Semmerling’s notes in IDMS indicate that Wisconsin OJA was served with the subpoena on October 2. The notes show that the subpoena had a return date of October 13, which at Wisconsin OJA counsel’s request was extended to November 7, 2008. Semmerling told O&R that what she perceived to be OIG management’s initial reluctance to issue the IG subpoena was the beginning of the alleged interference with her conduct of the investigation.

E. Activities in Late 2008 through Early 2009

With the decision made by August 2008 to handle the Wisconsin matter as a criminal investigation supported by assistance from the Chicago Regional Audit Office, Semmerling proceeded to schedule interviews of Wisconsin OJA and OJJDP employees. Semmerling conducted most of these interviews in October 2008. By this time, the case had been opened for approximately 180 days, although it is not unusual for investigations to extend beyond 180 days if they have been referred to a U.S. Attorney’s Office for possible criminal action, as was the Wisconsin matter.¹³⁰ Other significant issues during the late 2008 through early 2009 period include Semmerling’s growing concern with alleged instances of OJJDP officials’ retaliation against Rumsey for making her disclosures to the OIG, and the reassignment of the case to a new USAO due to a potential conflict of interest.

1. Semmerling Interviews Wisconsin OJA and OJJDP Employees

Semmerling documented in MOIs approximately 61 in-person interviews and telephone contacts during her 18 months working on the investigation. Seventeen of these interviews and telephone contacts were conducted in early October 2008, and included at least 13 witnesses from the Wisconsin OJA and OJJDP. The MOIs we reviewed show that of the 61 documented interviews and contacts, 17 were with Rumsey or Rumsey’s attorney. Semmerling documented a total of 5 contacts with OJP OGC attorneys.

The MOIs from the October 2008 interviews show that Semmerling used these interactions with witnesses to familiarize herself with the key officials in Wisconsin OJA and OJJDP, how the JJDP Act grant program operated, and the history and organization of the relevant offices. The MOIs further show that

¹³⁰ During this late 2008 through early 2009 timeframe, the IG Manual specified 180 days as the period in which all investigations should be completed, “except in unusual circumstances.” IGM III-200.9 E. The IG Manual also specified that “[c]riminal cases with more complex and extenuating circumstances may reasonably take longer, but will be worked expeditiously.” IGM III-207.5 B. Lastly, a formal presentation of a matter to a prosecutor changes the status of the investigation to “Open in Judicial Proceedings,” which tolls the 180 day clock. *Id.*

Semmerling's substantive focus was on Rumsey's allegations that Wisconsin had falsified the data it had submitted to OJJDP and that the state did not have an adequate system for core requirements compliance monitoring, as required by Section 223(a)(14) of the JJDP Act. She also asked Rumsey and other OJJDP witnesses about the VCO exception issue. As described below, some OJJDP employees emerged from their interviews with Semmerling with negative impressions of her approach to the investigation, while others characterized her interviews as straightforward and factual.

In her interview of OJJDP Associate Administrator Gregory Thompson, Semmerling asked about OJJDP operations, but also gave particular attention to the reassignment of many of Rumsey's duties in early 2007. According to the MOI, Thompson stated that then-Administrator Robert Flores had made the reassignment in response to complaints about Rumsey by Wisconsin and other states during an October 2007 OJJDP National Conference in Denver. Thompson told us his interview with Semmerling was "very hostile," stating that it seemed to him that Semmerling "came in already with her mind made up on everything." Thompson contrasted Semmerling's approach to the investigation with that of the two agents who later replaced Semmerling on the case, stating that the later agents' approach was "more of a fact-finding mission than a gotcha mission," and that he "didn't get the sense that they had predetermined what had already occurred."

Thompson stated that it was during his interview with Semmerling that he learned for the first time of the allegation that Wisconsin had submitted fraudulent data to OJJDP. He stated that Semmerling pressed him on why he had not followed up on the allegation, to which he said he replied that he had not been privy to the allegation before the interview. Thompson also stated that during the interview Semmerling showed him internal documents, including e-mails, from the Wisconsin OJA, and that she "alluded to the fact that . . . she wasn't really supposed to share it with me, but she showed it to me anyway."¹³¹

Another witness, Nancy Ayers, the OJJDP Deputy Administrator for Operations and Rumsey's supervisor told us that she was not aware of Rumsey's fraud allegation prior to being interviewed by Semmerling, yet was questioned by Semmerling about why she had not acted on this information. Ayers stated that Semmerling "seemed to have bought into [Rumsey's] allegation." Ayers described Semmerling as "aggressive" but professional.

Semmerling also interviewed an OJJDP employee who at the time was the state representative assigned to Wisconsin. The employee had been one of three OJJDP employees to visit Wisconsin in April 2008 for what has been termed a "mock audit." According to the MOI, this employee denied telling anyone at the Wisconsin OJA to falsify data on compliance reports or being told that Wisconsin OJA's data had been "made up." The employee described Semmerling as "rough" and "very

¹³¹ Thompson stated that the internal Wisconsin OJA e-mails may have included references to statements by an OJJDP state monitor to a Wisconsin OJA employee suggesting that the state could not "believably fall into compliance" with the data it was using and should use a different dataset.

demanding.” The employee told O&R that she thought Semmerling “was determined to find something.”

Another OJJDP employee who was interviewed by both Semmerling and the agents who replaced her stated that the two newer agents seemed “a little bit less personally invested in the case” than Semmerling, who gave the witness the impression that she (Semmerling) “already had her mind made up about . . . the case.”

Other witnesses described Semmerling as thorough and factual in their interviews and conversations with her. For example, an OJJDP Senior Advisor told us that Semmerling was “professional” and “very detail oriented,” adding that she felt very comfortable talking with her. Former senior advisor and Acting OJJDP Administrator Melodee Hanes stated that Semmerling was “very knowledgeable” and had “a very good understanding of what the law was and . . . a pretty comprehensive command of what the facts were.” Another official who held the position of Compliance Monitoring Coordinator before Rumsey stated that Semmerling was “professional,” and that he recalled nothing unusual about her interview of him.

Of particular significance was Semmerling’s October 3, 2008 interview of Compliance Monitor 1, the Wisconsin OJA employee alleged to have falsified the 2000 through 2004 compliance data that was submitted to OJJDP. According to the MOI, Compliance Monitor 1 admitted to Semmerling that the numbers were “‘made up’ to falsely show that the state of Wisconsin was in compliance with the core requirements of the JJDP Act.” The MOI states that Compliance Monitor 1 told Semmerling he was not instructed by anyone to falsify the data and that he could not remember if he had told his immediate superior what he had done. The MOI states that the interview was concluded “around lunchtime,” and that upon returning after lunch, “it was discovered that [Compliance Monitor 1] had gone home for the day.” The MOI states that Compliance Monitor 1 later declined Semmerling’s requests to meet again and to provide a signed sworn statement regarding the information he had provided in the interview.

Oleskowicz told us he was frustrated with Semmerling’s handling of Compliance Monitor 1. He stated that Semmerling should have locked in his admission during his interview by having him sign a sworn affidavit. Oleskowicz said that he had asked Semmerling why she did not get Compliance Monitor 1’s admission in writing and that she “just glared” at him. He stated that the incident caused tension and “a bit of a strain” in their relationship.¹³² Semmerling told us

¹³² In or around the time Semmerling conducted this initial round of interviews, Oleskowicz had replaced Ed Dyer as SAC, and shortly thereafter, Kimberly Thomas became ASAC. Thomas told O&R that although she technically was Semmerling’s first line supervisor, she was busy with a criminal prosecution in Pittsburgh and was frequently out of the office. Thus, she stated that she had “minimal” involvement with the Wisconsin investigation while Semmerling was assigned to it. Thomas provided O&R with a spreadsheet that she stated represented the amount of time she spent in the CFO between October 26, 2008, when she became ASAC, and January 2, 2010. According to this

(Cont’d.)

that it was not necessary to obtain a written admission from Compliance Monitor 1 and that she and the Auditor, who was also present for the interview, simply could have testified under oath to his admission.

According to Semmerling's entries in IDMS, by November 2008 she had received 10 boxes of material from Wisconsin OJA in response to the IG subpoena, and 5 boxes of material from OJJDP. She wrote that she and the Auditor needed to work on discovery for another "priority matter" through mid-December, and would then turn their attention to reviewing the materials in the Wisconsin investigation. Semmerling also wrote that she had met with Oleskowicz on November 19 to discuss her next investigative steps, which included requesting the AUSA to give Compliance Monitor 1 a target letter in the hope of obtaining a proffer; meeting with Rumsey to receive training on core requirements compliance monitoring; and visiting detention facilities throughout Wisconsin to review detention logs. Semmerling concluded the entry by noting that "this case's complexity requires an understanding that this investigation will take from this point at least a year to investigate."

2. OIG Senior Management is Briefed on Recent Developments

On October 9, 2008, while Semmerling was in Washington, D.C. conducting interviews of OJJDP staff, Deputy Assistant IG for INV George Dorsett sent then-Deputy IG Paul Martin an e-mail message summarizing Semmerling's recent findings about the Wisconsin fraud allegation. Dorsett wrote that a Wisconsin OJA employee admitted to Semmerling in an interview that he had submitted false data to OJJDP in core requirements compliance monitoring reports from 2000 through 2004; that his managers were aware that Wisconsin's core requirements compliance monitoring system was inaccurate; and that a former Wisconsin OJA employee stated in an interview that a letter from Wisconsin OJA to OJJDP in 2007 contained false representations about the availability of 2006 data. Dorsett wrote that Semmerling and the CRAO Auditor recommended that OJP be notified of the fraudulent activity in a program administered by one of its components (OJJDP) and contacted to discuss the possibility of freezing Wisconsin's funding until the false reporting stopped. Dorsett noted that INV's Fraud Detection Office had raised similar issues with OJP in the past in other cases. Dorsett advised that "we are attempting to schedule a meeting with OJP officials tomorrow to discuss these matters," and that freezing Wisconsin's funding "may generate inquiries from the State of Wisconsin." Martin responded that he approved the proposed actions.

An e-mail message from Oleskowicz to INV SAC Roger Williams and Acting SAC of INV Operations Michael Tompkins on October 10, 2008 indicates that Semmerling tried to reach OJP OGC by telephone, but that officials in that office had not returned her calls. It is not clear whether Semmerling or any other OIG

spreadsheet, Thomas was at the CFO for only 112.5 workdays out of a total of 296 workdays due to travel on other cases.

official in fact discussed freezing Wisconsin's funds with OJP OGC at this time.¹³³ However, a review of e-mails exchanged among senior INV and OIG officials shows that these officials were supportive of Semmerling's recommendation to request OJJDP to freeze Wisconsin's funds.

3. Rumsey Files Retaliation Complaints with OSC and the OIG

Beginning in late 2008, Rumsey raised allegations that her supervisors suspected that she had made complaints to the OIG and were retaliating against her as a result. In her Confidential Statement, Semmerling wrote that Rumsey told her of several actions that Rumsey's supervisors took against her during mid- to late 2008, including being pressured to accept details to different offices and not being allowed to attend a core requirements compliance monitoring training event. Rumsey told Semmerling that these incidents suggested Rumsey's superiors were aware that she was the complainant.

Rumsey contacted Semmerling in December 2008 to complain about her treatment by her supervisor, OJJDP Deputy Director Nancy Ayers. According to a contemporaneous e-mail that Semmerling wrote, Ayers left a note on Rumsey's chair on December 9 denying Rumsey's request to continue teleworking from home every Friday. Ayers's note stated that her decision was based on Rumsey's failure to demonstrate "good time management skills" and to keep Ayers updated on the status of Rumsey's progress on her assignments, among other concerns about Rumsey's performance. Rumsey told Semmerling that she believed Ayers took this action in reprisal for Rumsey's disclosures to the OIG. Semmerling told Oleskovicz and Thomas that she had been contacted by Rumsey's attorney, who advised Semmerling that she intended to file a complaint with the OSC. The attorney also told Semmerling that she first intended to contact IG Fine to request that he ask the Attorney General to have Rumsey's telework privileges reinstated. Fine told us that he did not recall ever being contacted by Rumsey's attorney and that he did not believe this had happened, as he thought he would have remembered this if it had occurred.

Rumsey filed a complaint with the OSC on December 31, 2008 alleging that various prohibited personnel actions were taken against her in retaliation for, among other activities, her cooperation with the OIG in its investigation of Rumsey's allegations of grant fraud by Wisconsin.

¹³³ However, an OJJDP employee who created a timeline of events covering this period noted that on October 9, 2008 OIG had "unofficially suggested" that OJJDP should delay its release of a letter to Wisconsin advising the state of the results of OJJDP's April 2008 technical assistance visit until after the OIG's investigation was concluded. That letter summarized OJJDP's findings concerning Wisconsin's core requirements compliance monitoring practices, but did not directly address Wisconsin's ongoing eligibility for funding. The timeline is dated February 24, 2009. The OJJDP employee told us that she must have created it at the request of Gregory Thompson and Chyrl Penn, and that it "probably had something to do with the OIG investigation."

Rumsey's counsel also contacted the Investigations Division (INV) around this time, evidently to determine whether an OIG investigation would be a viable alternate or parallel option to the OSC complaint. INV's Washington Field Office (WFO) opened an investigation of Rumsey's whistleblower retaliation complaint and assigned it a case number on January 14, 2009. INV Assistant Inspector General (AIG) McLaughlin told us that there were several reasons that he assigned the matter to WFO rather than to Semmerling or the CFO. First, he said that it made sense geographically to have the WFO investigate OJJDP's alleged retaliation against Rumsey since the alleged retaliation occurred in Washington, D.C.¹³⁴ Second, McLaughlin indicated that he did not view Rumsey's retaliation matter to be sufficiently related to the Wisconsin grant fraud allegations to warrant having the two cases investigated by the same agent. Third, McLaughlin indicated that he was concerned that Semmerling was not moving the Wisconsin investigation along quickly and did not want her to be "distracted" by a whistleblower retaliation matter. Finally, he also said that he recalled there being a concern at the time that Semmerling was "too close" to Rumsey, although he said he could not pinpoint the source of the concern.

Oleskowicz stated that Semmerling repeatedly voiced to him her disagreement with McLaughlin's decision to assign the retaliation matter to WFO and told him she did not believe WFO knew how to handle whistleblower cases and had "messed up previous whistleblower cases." McLaughlin also told us that he believed either Semmerling or Rumsey wanted Semmerling to conduct the investigation of Rumsey's whistleblower retaliation matter. However, Semmerling told us that she never asked to do so, and denied that she opposed the decision to assign the matter to the WFO.

On February 11, 2009, Semmerling sent IG Fine a 5-page memorandum entitled "Addressing a Problem," requesting in the transmittal e-mail message that the memorandum be kept confidential. In the memorandum, Semmerling described her concerns about "a trend of focus by the Investigations Division on numbers and measurements rather than quality investigations." The memorandum discussed Semmerling's belief that "timeliness measurements are not an appropriate way to measure [agents'] performance," and that "at the [CFO] over the past 3 years agents have been told to close viable cases because of the timeliness factor." Semmerling also summarized specific concerns related to her cases, including the Wisconsin investigation, about which she wrote:

¹³⁴ IGM III-207.4 provides:

The field office responsible for the geographic area where the majority of relevant witnesses or evidence are located will generally open and conduct the investigation. This is generally where the predicated incident or event occurred. If there is sufficient reason for a different field office (including the OIG Fraud Detection Office) to conduct the investigation, the special agent in charge (SAC), Operations Branch or Special Operations Branch, INV Headquarters, will coordinate with the field office SACs involved.

In the Wisconsin JJDP Act grant fraud, there is a lack of a holistic view, unreasonable concern about timeliness, and failure to understand program fraud cases by Investigations management. There is also a failure to understand whistleblowers, and the fact that they are "an important resource to the OIG" in fraud cases. The mindset is that the whistleblower is a tattle-tale once they claim retaliation, and forget the fact that it is actually the DOJ employee's duty to bring forward complaints of waste, fraud and abuse. Instead of understanding that retaliation complaints can happen as part of dealing with whistleblowers, and Investigations needs [to] establish a policy on what steps should be taken. Other OIG's [sic] address confidentiality and retaliation publicly on their websites.^[135]

Fine thanked her for the message and wrote that he would "review this carefully." We found no indication that Fine responded further to Semmerling's message while she was assigned to the case, and he told us that he did not recall whether he took any specific actions as a result of Semmerling's memorandum. However, after reviewing a draft of this report, Fine stated that he repeatedly stressed to OIG employees, "based on this as well as other discussions, the need to focus both on timeliness and thoroughness, and that while some cases would and should take longer than others, all cases should be handled with timeliness and a sense of urgency."

Rumsey and her counsel met with INV Washington Field Office ASAC Eric Johnson and Senior Special Agent Mike Fletcher on February 19, 2009 to discuss the retaliation claim and the OIG's investigative process. According to Semmerling, Rumsey called Semmerling on February 19 after the meeting and told her that Fletcher had said "the OIG is not your [Rumsey's] friend" and would not be able to help Rumsey because "the OIG did not have the power to make a component follow the rules or apologize for its wrong-doing." Semmerling told Oleskowicz about the call from Rumsey, and Oleskowicz appears to have conveyed this information to Johnson or other senior officials in the Washington Field Office. Aware of Rumsey's call to Semmerling, Johnson wrote an e-mail the next day to Tompkins and copied Dorsett, McLaughlin, and Oleskowicz, to provide the details of Rumsey's grievances as he understood them. According to Johnson's e-mail, Rumsey and her attorney had asked the OIG officials to have OJJDP immediately restore Rumsey's job responsibilities, cease further retaliation, and write a letter of apology, and to help Rumsey recover her attorney's fees. The e-mail states that Rumsey also "questioned Mike Fletcher's demeanor" during the meeting and a comment Fletcher had made to the effect that the OIG would serve as a "fact finder" and would not act as an "advocate" for Rumsey. The message further states that although Rumsey said Johnson was "nice," she "questioned [his] motives."

¹³⁵ The DOJ OIG added a "Whistleblower Protection" page to its website in 2013.

AIG McLaughlin responded that he did not think IG Fine would be pleased with how the meeting went and perhaps should be briefed about it. McLaughlin also wrote:

Maybe we are not an "advocate" for the complainant but let's remember . . . this person reported misconduct to the OIG and then has claimed retaliation. We should be concerned about [OJJDP's] actions . . . we must "protect" employees who bring matters to us.

I am not sure WFO has approached this case with that in mind.

McLaughlin told O&R that he may have discussed the matter with Fine, but stated that he did not recall what, if any actions Fine may have taken. Fine similarly stated that he did not recall this matter.

On March 4, 2009, after learning that the OSC had already designated Rumsey a whistleblower and assigned an attorney to investigate her claim, Tompkins wrote a letter to Rumsey's counsel advising that the OIG was referring the retaliation matter to the OSC and would take no further action on her complaint. In the letter Tompkins noted that "the OIG has no authority to impose any specific course of action upon any component," and that in view of the OSC's authority to "address complaints by federal employees of prohibited personnel practices such as Ms. Rumsey has described, . . . we believe that the OSC is the appropriate venue to handle Ms. Rumsey's complaint."

4. OIG Management's Growing Concerns Over Semmerling's Interactions with Rumsey

According to Semmerling, Rumsey's complaints about her treatment by her supervisors and her filing of her whistleblower retaliation complaint in December 2008 marked the beginning of a change in how Rumsey was viewed by Semmerling's managers, both at the CFO and OIG headquarters. Semmerling told O&R that it was at this time when she "got the impression that I was supposed to stay away from [Rumsey]," adding, however, that she was never explicitly directed to do so. Semmerling stated that Oleskowicz, Thomas, Dorsett, and other INV managers began to express their dislike of Rumsey and their skepticism that Rumsey had in fact been retaliated against. Semmerling wrote in her Confidential Statement that on January 7, 2009, Oleskowicz made several disparaging comments about Rumsey, such as, "There is something wrong with her." She said he also warned that "she is using you to bolster her case." Semmerling wrote that later that day, Oleskowicz asked her to participate in a conference call with Dorsett and Tompkins, during which she said that Dorsett and Tompkins stated that the revocation of Rumsey's telework privileges did not constitute retaliation.

Semmerling also wrote that in mid-January, CFO ASAC Kimberly Thomas criticized Rumsey to her as well for claiming that termination of Rumsey's telework privilege amounted to retaliation. Semmerling wrote that she told Thomas that Rumsey's disclosures were important to the CFO's grant fraud investigation and had been "corroborated through other sources," but that the retaliation issues would be

handled by the OSC rather than by the CFO. Semmerling told us that she had intended to convey in her Confidential Statement that it was not appropriate for her superiors at CFO and in INV to opine on the validity of Rumsey's retaliation claims since those allegations were being investigated by the OSC and not by her superiors.

Oleskowicz denied making disparaging remarks about Rumsey. However, he told O&R that he had concerns about Rumsey's role in the investigation soon after it was initiated. He stated that Semmerling wanted to use Rumsey as the sole expert witness in the case, which Oleskowicz believed was inappropriate, in part because Rumsey was the complainant and her allegations needed to be investigated independently. He also stated that he and Thomas were concerned that Semmerling was in frequent contact with Rumsey and her attorney, both by telephone and e-mail, but was not documenting these exchanges as he had instructed.¹³⁶ He added that this became of particular concern once Rumsey filed her whistleblower complaint, stating, "You've got to be careful the position that you're in as an investigator." He said he cautioned Semmerling to be careful what she said to Rumsey or any witness because the conversation could be taped. Regarding the frequency and nature of Semmerling's contacts with Rumsey, Oleskowicz said:

I think that they would some days speak more than once. Other times I wouldn't notice anything for days. The next week, all of a sudden there's this unusual door closed, and then Jill is telling me something that Elissa said. Some of it . . . was absurd. Some of it was so-and-so walked into the office today and normally so-and-so and says hi to them. But they didn't say hi today, and they walked by. And then when she saw the other person, that person didn't ask her to go to coffee.

Oleskowicz said that Semmerling was sometimes "very, very secretive" about what she was discussing with Rumsey, yet other times would rush to tell Oleskowicz what Rumsey had just told her, which he said often amounted to little more than "gossip." He stated that Semmerling's failure to document her "continual" contacts with Rumsey and her counsel led him to worry that Semmerling was inappropriately providing Rumsey with information about the investigation.

Thomas stated that she was not in Chicago for much of this period due to her involvement in an out-of-town criminal prosecution, but said she recalled learning from Oleskowicz that Semmerling "won't let go of this whistleblower thing" and

¹³⁶ O&R determined that Semmerling documented in MOIs a total of 14 non-interview contacts with Rumsey. These contacts were either by telephone or e-mail. According to Oleskowicz and Thomas, these MOIs were added to the case file long after the contacts had taken place. Rumsey told us that between May 2008 and September 2009 she was in "frequent communication" with Semmerling, and that these contacts were sometimes daily and sometimes weekly. Semmerling said she was unable to estimate how often she was in telephonic contact with Rumsey, but stated that it was probably at least once a week.

continued to press for involvement in the whistleblower retaliation investigation. Thomas stated that Oleskowicz told her that he had to continually “rein [Semmerling] in” and “tell her to keep her nose out of that.” Thomas stated that she fully supported Oleskowicz’s effort to keep Semmerling out of the whistleblower retaliation investigation. Semmerling denied to O&R that she ever pressed her superiors to allow her to investigate Rumsey’s claim of retaliation, but stated that she believed Rumsey’s removal from her core requirements compliance monitoring duties was relevant to the Wisconsin investigation because Wisconsin “was lobbying to get her removed.”¹³⁷

Similar to Oleskowicz, Thomas expressed concern that Semmerling was having regular contact with Rumsey but was not documenting it. She stated that if the communications were about the case, they should have been memorialized in an MOI; if the communications were not about the case and the two were merely developing a friendship, Semmerling’s objectivity may have been compromised and she should have asked to be reassigned.¹³⁸ Thomas stated that she questioned whether Rumsey had in fact been retaliated against, but said she did not recall voicing her views on the matter to Semmerling.

Dorsett told O&R that he recalled discussing Rumsey’s retaliation allegation, but only in the context of raising it to Fine for a decision on whether the allegation should be investigated by OIG or OSC. He stated that Fine thought the matter should be handled by OSC.¹³⁹ Dorsett told us that he did not recall the January 7, 2009 conference call about Rumsey’s retaliation claim or making any comments about the merits of the claim. He stated he recalled that Oleskowicz and Thomas grew increasingly concerned over Semmerling’s frequent interactions with Rumsey, but said he believed that they only began expressing this concern later in the case.¹⁴⁰

¹³⁷ As discussed in Chapter Three, Wisconsin was one of several states that had complained to OJJDP officials about OJJDP’s core requirements compliance monitoring activities after Rumsey became the Compliance Monitoring Coordinator.

¹³⁸ INV case agents are required to document all investigative activities, including witness interviews, in MOIs. See IGM III-207-8; 226.4.

¹³⁹ Dorsett’s recollection is supported by an undated timeline of the Wisconsin OJA case, which states that on February 23, 2009, Fine “directs us to let OSC investigate the retaliation claim.” Fine told us that it made sense to have OSC handle Rumsey’s whistleblower retaliation claim based on its jurisdiction over such matters and its expertise.

¹⁴⁰ We learned that during September or early October 2009, Rumsey came to Chicago for an OJJDP conference and stopped by the CFO to drop off a binder of documents related to the case. According to Semmerling, Rumsey had asked to meet Oleskowicz, and both he and Thomas refused to meet her. However, Rumsey stated that she never asked to meet Semmerling’s supervisors. Oleskowicz stated that Semmerling wanted to give Rumsey a tour of the office and pressed Oleskowicz to meet her, telling him that he would find her very impressive. He said he told Semmerling to receive the documents from Rumsey and to meet with her in the conference room if it was necessary for the two to discuss the material, but to keep the meeting brief and professional. Oleskowicz stated that it was not the office practice to give witnesses tours and introduce them to managers, and stated that he told Semmerling that it would be inappropriate to do so for Rumsey. Oleskowicz told us that in any event he was not in the office when Rumsey arrived.

5. Wisconsin Case is Transferred to the U.S. Attorney's Office for the Northern District of Iowa

In January 2009, the AUSA from the USAO for the Western District of Wisconsin who had been assigned to the Wisconsin investigation informed the OIG that his office was seeking recusal from the matter due to a potential conflict of interest. The conflict of interest issue concerned Wisconsin OJA's role in administering Federal grant funds for Project Safe Neighborhood, a crime reduction program that includes state and local law enforcement officials who serve on task forces headed by the U.S. Attorney in each participating judicial district. According to e-mails we reviewed, a senior Wisconsin OJA official knew a prosecutor in the Wisconsin USAO, causing the USAO to raise the recusal issue with the Executive Office of U.S. Attorneys (EOUSA). EOUSA reassigned the Wisconsin matter to the USAO for the Northern District of Iowa on January 28, 2009. The Iowa USAO First Assistant United States Attorney (FAUSA) assigned the Wisconsin investigation to himself, another criminal AUSA, and a paralegal.¹⁴¹

This reassignment at first did not appear to delay progress in the Wisconsin investigation, which by this point had been open for nearly 1 year. As described below, however, INV managers at CFO and headquarters eventually grew frustrated with the pace of progress on the case. The FAUSA stated that any delays attributed to his office were caused by extrinsic factors, such as the press of other cases and his co-counsel taking maternity leave, and that Semmerling did nothing to delay the USAO's development of the case.

The FAUSA stated that he did not believe the case was ready for more formal criminal investigative steps when he first took it over from the Wisconsin USAO. He said he viewed the case as complex and somewhat sensitive because "there were a number of layers to it," and that it would be difficult to prove criminal wrongdoing within what he described as a "problematic" statutory and regulatory scheme. He stated that he was not an expert in grant fraud matters and was "astounded by the way this whole program operated and how people could do things that, to my common man way of looking at stuff seemed crazy and out of line. And yet, they could continue to get money, and . . . have every expectation that they're going to get money."

The FAUSA's work on the case overlapped with Semmerling's involvement for a period of approximately 7 months prior to Semmerling's removal from the investigation in October 2009. The FAUSA described Semmerling as an "inquisitive agent," a "self-starter," and a "go-getter." He said that she was very thorough and "looked at everything," including issues that he did not necessarily consider significant. He added that if there were anything important that needed to be done

¹⁴¹ The OIG was unable to interview the other assigned AUSA. The AUSA later became an Iowa state court judge and stated through counsel that her voluntary participation in an interview with the OIG would violate Rule 51:3.2 of the Iowa Code of Judicial Conduct, which states that a judge "shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official" except in certain circumstances that did not appear to her counsel to be present in this review.

on the case, Semmerling did not hesitate to do it. As discussed later in this chapter, the FAUSA told us that he was disappointed when she was removed from the case.

The FAUSA's only negative views of Semmerling concerned her interactions with Rumsey. He told us that at some point he became concerned that Semmerling had grown too close to Rumsey and was inappropriately sharing information with her about the case. The FAUSA said he recalled cautioning Semmerling, "hey, you better watch out. This woman, she's a witness. We can't be telling her or her attorney what's going on with the case." The FAUSA stated that he was unable to recall specifically what may have triggered this warning to Semmerling. He stated that Semmerling saw Rumsey's retaliation claim as more "connected" to the Wisconsin matter than he did, and worried that "if [Rumsey is] getting information from us, is that affecting what she's telling us as a potential witness." Semmerling told us that she did not believe Rumsey's status as a whistleblower complainant presented any conflict with her role as an objective witness or subject matter expert in the Wisconsin matter, although she said that her managers disagreed with her on this point.

F. Activities in Mid-2009

During April through early July 2009, there were several consequential incidents that raised OIG management's concerns about Semmerling's conduct of the Wisconsin investigation. As described below, Semmerling's efforts to influence OJJDP's management of Wisconsin's formula grants and certain of her contacts with OJJDP and OJP OGC witnesses resulted in criticisms and complaints from senior managers in these offices, which were then conveyed to OIG senior managers. Also during this period, Semmerling [REDACTED], and two additional people were added to the team working on the investigation during her absence.

1. DMC Focus Group Incident

In early April 2009, OJJDP personnel sought to organize a meeting with various state representatives who were responsible for overseeing their state's compliance with the Disproportionate Minority Contact (DMC) core requirement of the JJDP Act. The purpose of the meeting, referred to by some as a "focus group" or "listening session," was to gather insights from these representatives about strategies for reducing disproportionate minority contact with the juvenile justice system. An April 9, 2009 e-mail from a Deputy Associate Administrator to OJJDP staff involved in the planning included a list of proposed invitees. On the list was a state representative from Wisconsin. OJJDP witnesses, including DMC Coordinator Andrea Coleman, told O&R that the Wisconsin DMC coordinator was highly-regarded in the DMC field. Coleman stated that the Wisconsin DMC representative had a "stellar reputation" and had been instrumental in improving Wisconsin's DMC program.

Rumsey was not among the OJJDP staff who received the list of invitees, but the message was immediately forwarded to her by one of the recipients. Rumsey

then sent an e-mail to Jeff Slowikowski (at the time OJJDP's Acting Administrator) and copied Semmerling, writing in part, "You may not be aware, but [the Wisconsin DMC coordinator] has been involved with the State's compliance monitoring program for all core requirements over the past few years and is a party to the ongoing OIG investigation of the State's compliance monitoring efforts." Shortly thereafter, Semmerling wrote to Slowikowski, "Can you determine if there are other compliance focus groups and who is on them? This would be important to know before any invites are sent."

Slowikowski sent Semmerling a lengthy response, writing, "I am not sure I understand this but will do whatever you think is best," adding that the Wisconsin DMC coordinator would not be invited to the DMC focus group. His message went on to express frustration over the incident, and to reveal that he had been contacted about it not only by Rumsey, but by a senior OJJDP legal and policy advisor (Senior Advisor) as well:

While this is a minor issue of not inviting one person to a listening session, I feel others in this office know far more about this investigation and that they are no longer unbiased and a presumption of guilt now exists. I am not sure what your contact with [the Senior Advisor] has been or what she has added to the investigation in Wisconsin. You have told me that Elissa [Rumsey] was working with you. [The Senior Advisor] sent me an e-mail stating "Alert: please be aware that the Wisconsin DMC Coordinator has been invited to this meeting. In light of the OIG investigation into WI, I would recommend against inviting this individual at this time." What does [the Senior Advisor] know and how did she find out?

Semmerling responded on April 10, this time copying the AUSAs, writing in relevant part, "As discussed before, the integrity of this investigation, which includes ensuring that it is fair and impartial, is foremost. I believe this information was brought to our attention, yours and mine, out of that concern, and out of concern for OJJDP and the DOJ."

Slowikowski told us that he was bothered by the incident for several reasons. First, he stated that he did not understand why the Wisconsin official, whom he described as the "foremost subject matter expert" in the DMC field, could not attend a meeting that was "totally unrelated" to the Wisconsin investigation. Second, he said he believed that Semmerling was overstepping her bounds and inhibiting his office's ability to do its work. Third, he told us that Rumsey was "using Jill . . . and the authority of the OIG" to remove the Wisconsin official from the list of invitees. Fourth, he stated that the involvement of the Senior Advisor was contrary to his understanding that Semmerling's investigation was limited to "only a couple of people," and that he was "surprised when [the Senior Advisor] chimes in with obvious knowledge of an ongoing investigation of Wisconsin."

Slowikowski stated that he did not recall raising this matter with the OJP OGC, but as described later in this section, the incident appears to have been made known to OJP General Counsel Rafael Madan, who in early May 2009 brought it to

Oleskowicz's attention. Oleskowicz and other senior OIG officials would later conclude that Semmerling had inserted herself into OJP and OJJDP management decisions to an extent that was not consistent with the OIG's investigative role in a matter of this type.

2. Rumsey's Fundraiser

In an MOI dated April 22, 2009, Semmerling documented a conversation she had that day with Rumsey in which Rumsey informed her that she and some friends had organized a "defense fund party" to help raise money to pay Rumsey's legal fees in the whistleblower retaliation case. The MOI stated that the event, scheduled for the following evening, was publicized on "'an unofficial website' that cannot be found via a search engine." According to the MOI, Rumsey apologized to Semmerling for not telling her about the event sooner.

On April 24, 2009, after Rumsey provided the web address for the fundraising promotion material, Semmerling forwarded the material to Oleskowicz and the AUSAs. The material is entitled "Champion for Children" and subtitled "Supporting a DOJ Whistleblower." The accompanying narrative states that in 2007 Rumsey "became aware of serious violations of law on the part of a DOJ grantee," and continues, in relevant part:

When her concerns were ignored and frustrated within the Department, in 2008, Elissa contacted the DOJ's Office of the Inspector General (OIG) to report the matter. The OIG, almost immediately, began a formal investigation, confirming the original reports made by Elissa, and revealing additional irregularities.^[142]

The material stated that Bob Edwards, a radio host on National Public Radio, would serve as master of ceremonies for the event.

Oleskowicz stated that when Semmerling told him about the fundraiser, she said that it was being publicized on the "deep web," which she described as a mode of communication typically used by reporters to communicate with their sources.¹⁴³ Oleskowicz stated that this concerned him and said he told Semmerling that it sounded "dangerous" and did not sound "very above-board." He stated that Semmerling dismissed his concerns. He said that he also instructed Semmerling to document her exchange with Rumsey in a MOI. Semmerling denied telling

¹⁴² As noted above, Section 226.6(F) of the IGM contains the common admonition in the context of interviews that agents should not provide a witness more information than necessary for the interview to continue.

¹⁴³ The "Deep Web" refers to "any Internet information or data that is inaccessible by a search engine and includes all Web pages, websites, intranets, networks and online communities that are intentionally and/or unintentionally hidden, invisible or unreachable to search engine crawlers." See <https://www.techopedia.com/definition/15653/deep-web> (last accessed February 6, 2017).

Oleskowicz that the fundraiser promotional material was on the deep web, and stated that she did not know what the deep web was.¹⁴⁴

Oleskowicz forwarded a copy of Semmerling's MOI and Rumsey's event promotion material to Dorsett on April 24. Dorsett stated that he did not recall Oleskowicz raising specific concerns about the matter, and just wanted to keep Dorsett apprised of developments in the case. Dorsett forwarded the materials to McLaughlin, noting that Rumsey's husband was the producer of one of Edwards's shows. McLaughlin responded that Dorsett should let IG Fine know. Dorsett stated that he raised the issue with McLaughlin, and most likely with Fine as well, because Rumsey's materials publicized the event and mentioned the OIG investigation.

Rumsey told O&R that she did not receive any contributions from Semmerling toward her legal fees and that Semmerling did not attend the event. Semmerling told us this as well.

3. Semmerling Requests OJJDP to Provide Compliance Monitoring Reports for all States and Territories

According to an MOI by Semmerling, on April 30, 2009 she spoke by telephone with an OJP OGC attorney who Semmerling said was assigned to be OJP OGC's point of contact for the OIG in the Wisconsin investigation (OJP OGC Contact). Semmerling's MOI states that she contacted this attorney "to determine the proper procedure to obtain records and information regarding policy and regulations at OJP." The MOI indicates that Semmerling sought regulations governing data collection for core requirements compliance monitoring with state formula grants, a request apparently related to Semmerling's review of Wisconsin's 2009 grant application, which contained only 6 months of data rather than a full year of data. The MOI states that Semmerling had had a prior exchange with OJJDP Associate Administrator Greg Thompson about this issue and suggested that Thompson had either been misapplying or misunderstanding the applicable regulations governing data collection. The MOI states that she "told [the OJP OGC Contact] that she wanted to convey that it appeared that there may be a misconception that the OIG was looking at OJJDP," and that she was merely trying to bring this data collection issue to OJJDP's attention.

Later on April 30, Semmerling followed up her telephone conversation with the OJP OGC Contact with an e-mail to Thompson, copying Slowikowski. In the e-mail message she requested "the 2007 data Compliance Monitoring Reports for all states and territories [emphasis omitted]," noting that she already had this data for Wisconsin. She requested this information to be provided by May 8, 2009.

The AUSAs were not copied on this request. The FAUSA said he recalled very little about the request. He stated that he had an interest in knowing "what other

¹⁴⁴ We were unable to resolve this factual discrepancy; however, an auditor who was later assigned to assist in the investigation told us that he had "tried to do a Google search" for the material but was unable to recall if he could find it using Google or any other search engine.

states were doing" and how OJJDP was handling them, but did not recall that his interest extended beyond "a handful of states that they'd had problems with." He stated that the request struck him as "more broad than what we would have done," and he likely would have considered whether the request was burdensome to OJJDP as weighed against what was likely to be learned through the request. The FAUSA stated that he was unable to recall with certainty whether he had supported or even discussed with Semmerling her request for 2007 compliance data for all states and territories covered under the JJDP Act.

On May 4, Semmerling told Oleskowicz about her April 30 request for compliance data for all states and territories for 2007. Oleskowicz told O&R that he had not been aware of the request before this May 4 conversation with Semmerling, and that he would have questioned her need for the data had he known about the request in advance. Oleskowicz's notes of the conversation state that Semmerling told him she requested the data because Associate Administrator Thompson was "cagey" and she did not trust what he would say.

A May 5 e-mail from Semmerling to Oleskowicz sheds further light on their earlier conversation about her data request. The message indicates that Oleskowicz challenged Semmerling's need for the compliance data and the short deadline she had given in the request. Semmerling wrote that the USAO "is aware of this request" and that the AUSA "concur[s] with the reasoning for asking for the records."¹⁴⁵ Semmerling defended the 8-day deadline on two grounds. First, she wrote [REDACTED] and wanted the Auditor to have "additional work to do" so that the documents could be provided to the AUSAs and be scanned into CaseMap during [REDACTED].¹⁴⁶ Second, she wrote that Thompson did not respond to her document requests unless she provided him with a deadline. She closed her message with a defense of the request, writing, "I am not going off on a tangent or obtaining unnecessary documents. . . . I have spent weeks going through these boxes of documents, and I have an understanding of what records I need. I am not arbitrarily asking for records."

4. OJP General Counsel Contacts OIG Officials with Concerns about Semmerling's Investigation

On Sunday, May 3, 2009, Semmerling sent an e-mail message to one of the three OJP OGC attorneys with responsibility for advising OJJDP (JJ Attorney 1). Semmerling wrote that she, in coordination with the USAO, was conducting a criminal investigation of Wisconsin's submission of false compliance data in order to

¹⁴⁵ We were unable to confirm this statement with the line AUSA, who for the reason explained above declined our request for an interview. As discussed above, the FAUSA was unable to recall if or when he discussed the core requirements compliance monitoring data request with Semmerling, though he said he thought he would have questioned it if he had.

¹⁴⁶ As discussed later in this chapter, on May 4, 2009 Semmerling notified Oleskowicz [REDACTED]. Semmerling returned to the office on July 7, 2009.

receive approximately \$7 to 8 million in formula grant funds, and needed “some clarifications on policy and regulations.”

The message contained several questions about the 2008 VCO Opinion that JJ Attorney 1 had authored in response to a question that had been raised by Wisconsin. As previously noted, the 2008 VCO Opinion interpreted Section 223(a)(11) of the JJDP Act, 42 U.S.C. § 5633(a)(11), to allow the “valid court order exception” to apply to non-offenders, thereby allowing non-offenders, such as children in the abuse and neglect system, to be securely detained if they are charged with or commit a violation of a valid court order, such as a court order not to run away from their foster home or other placement. Under the OJP OGC’s interpretation of this statutory provision, such secure detentions would not be counted as a violation of the DSO core requirement for compliance purposes under the JJDP Act. The 2008 VCO Opinion also stated that, given its conclusion, “Section 31.303(f)(3)(vii) of the current JJDP regulations is *ultra vires* and thus, cannot be enforced.”¹⁴⁷ The conclusion reached in the 2008 VCO Opinion was opposed by several OJJDP personnel, and the OJJDP Senior Advisor had written a legal memorandum that she sent to her manager Nancy Ayers on September 5, 2008 in rebuttal to the 2008 VCO Opinion.¹⁴⁸

As described in Chapter Three, Semmerling told us that she believed the 2008 VCO Opinion was written specifically for Wisconsin’s benefit and suspected that some level of collusion existed between OJP OGC and Wisconsin OJA to improperly secure grant funds for Wisconsin. She told us she was unable to substantiate her suspicions because Oleskowicz ordered her not to investigate this issue.

Semmerling’s e-mail message to JJ Attorney 1 stated, “It is my understanding that per the JJDP, the VCO cannot be applied to the detention of abused and neglected non-offenders.” Her message attached the rebuttal memorandum, and asked whether the memorandum had been reviewed by OJP OGC. Semmerling also asked whether any new regulations had been “approved and released” since the JJDP Act had been reauthorized in 2002, and why other provisions of the regulations, such as those governing data collection to measure compliance with the JJDP Act, were not similarly unenforceable. Semmerling also asked whether the VCO opinion had “been brought to the attention of the new administration, since [both the VCO Opinion and the rebuttal memorandum] were written in 2008 prior to the transition.”¹⁴⁹ Semmerling’s message concluded, “[I]n

¹⁴⁷ 28 C.F.R. § 31.303(f)(3)(vii) provides that “[a] non-offender such as a dependent or neglected child cannot be placed in secure detention or correctional facilities for violating a valid court order.”

¹⁴⁸ Although an attorney, the Senior Advisor told us that her role was to serve as a policy advisor and as OJJDP’s liaison to OJP OGC on legal issues. She stated that the OGC attorneys always made “very clear” to her that they, and not she, were the lawyers for OJP.

¹⁴⁹ Semmerling stated in an interview with O&R that by “new administration” she meant the new Attorney General and the Assistant Attorney General for OJP. Rumsey, who as noted below brought the allegation about the 2008 VCO Opinion to Semmerling, similarly told us she thought it was “outlandish . . . that the regulations that they say are *ultra vires* were promulgated by the Clinton
(Cont’d.)

order to maintain the integrity of the investigation, please ensure that this e-mail and my questions remain within OJP OGC."¹⁵⁰ Semmerling copied another OJP OGC attorney on the message, but did not copy any of her managers or the AUSAs.

On May 4, 2009, JJ Attorney 1 forwarded Semmerling's message to OJP General Counsel Madan, Deputy General Counsel Moses, and the two other OGC attorneys assigned to advise OJJDP, writing, "Please let me know your thoughts/how you would like me to respond."

Also on May 4, Madan contacted FDO SAC Elise Chawaga, with whom he interacted on OIG grant fraud matters on a fairly regular basis, to complain about Semmerling's "bullying manner in the Wisconsin case." This contact is memorialized in a 3-page document entitled "Wisconsin Case Timeline."¹⁵¹ Oleskowicz said that he spoke with Chawaga on that date and that she relayed Madan's concerns about Semmerling. Referring to his notes of the conversation with Chawaga, Oleskowicz stated that Madan's complaints included: "Jill bullied them not to have this guy at the conference" – an apparent reference to Semmerling's intercession in OJJDP's plan to invite the Wisconsin DMC representative to the DMC focus group in Washington, D.C. (discussed above). The notes also show that Chawaga relayed Madan's concern that "we're trying to work with her and be cooperative," and that "we work with a lot of other offices and agents and this is our only problem." Chawaga separately told us that she recalled that Madan had also complained about Semmerling's "huge request" for 2007 compliance data for all states and territories.

Administration, which is the same party as our current Administration." We understand Rumsey to be suggesting that because the regulation at issue in the 2008 VCO Opinion was promulgated under a Democratic administration, it should not have been deemed *ultra vires* during the tenure of another administration of the same political party.

¹⁵⁰ Rumsey had been in contact with Semmerling about the 2008 VCO Opinion multiple times before May 2009, most notably in January 2009, when Rumsey alerted Semmerling to OJJDP's January 28, 2009 letter to Wisconsin advising that OJJDP, "in consultation with legal counsel," had determined that for purposes of compliance with the DSO core requirement, Wisconsin's use of the VCO exception to securely detain juveniles who had run away from their group or foster homes comported with the JJDP Act. Semmerling also had exchanged several e-mail messages with the OJJDP Senior Advisor about the VCO issue, including just a few hours before sending her message to JJ Attorney 2 on May 3, 2009. In the May 3 message, Semmerling asked the Senior Advisor about certain language in the Federal Register and Code of Federal Regulations pertaining to the VCO provision of the JJDP Act, and about whether there had been any further discussions with OGC about the rebuttal memorandum. The Senior Advisor responded the next day that Semmerling's legal references supported the conclusion reached in the rebuttal memorandum that OJP OGC's interpretation of the VCO exception was incorrect.

¹⁵¹ Although no witnesses we interviewed said they knew who drafted the document, O&R located it in both Oleskowicz's and Dorsett's e-mails from April 2011, and both said that to the best of their recollection the timeline appeared to be accurate. The wording of certain entries in the Timeline suggests that it was written by an INV official who had access to details of events that we confirmed to be accurate through e-mail exchanges between and among Dorsett, Oleskowicz, and other senior INV officials, as well as through Oleskowicz's contemporaneous notes.

Oleskowicz told us that he called Dorsett and told him what Chawaga had said, and that Dorsett told him to call Madan directly to get the details of the concerns.

Oleskowicz spoke by telephone with Madan, Moses, and an OJP Senior Advisor on May 5. It is unclear whether the OJP OGC Contact was also present on the phone call. Semmerling, who interviewed the OJP OGC Contact a few months later, told us that he "made it sound like he was part of that conversation" and that she remembers him "sounding like he was there." However, the OJP OGC Contact told us he did not recall participating in or being present for the call.

Madan, Moses, and the OJP Senior Advisor all said they could not remember the May 5 telephone conversation with Oleskowicz. However, Oleskowicz said he recalled the conversation, and also consulted the contemporaneous notes he took of the conversation during his interview with O&R. According to Oleskowicz, Madan stated that he was not asking for details about the OIG's investigation, but was concerned that it was interfering with OJJDP's ability to meet its programmatic obligations under the JJDP Act. The notes show that Madan said Semmerling was "discouraging us from talking to Wisconsin," that she "wants every call to have witnesses," and to be told about any phone calls to or from Wisconsin officials. The notes show that Madan raised Semmerling's May 3 e-mail to JJ Attorney 1 about the 2008 VCO Opinion, stating that Semmerling "asked a really dense legal question," was questioning whether the Senior Advisor's rebuttal memorandum had been reviewed by his office, and whether the new administration was going to revisit the VCO exception issue. The notes indicate that Madan questioned whether Semmerling was trying to "target" him, and that Semmerling's conduct of the investigation was having "a chilling effect on me and my staff as well as Wisconsin." According to the notes, Madan said that his office "deals with Elise Chawaga all the time - we are happy to work - dramatically different relationship with [Semmerling] we haven't seen." The notes show that Madan also complained about the request for all 2007 compliance data by May 8, stating that it was "a lot of information in virtually no time frame," was "extremely disruptive," and his office was "not used to these kinds of demands." Madan referred to another case involving OJP that Semmerling had investigated that had a "successful outcome," but according to the notes he distinguished her handling of the Wisconsin investigation by its "secrecy," her instructions to "do this don't do that," and a sense that she was "trying to trap us." Oleskowicz said that Madan never asked for Semmerling to be removed from the case.¹⁵²

Just after the May 5 telephone call, Madan forwarded to Oleskowicz Semmerling's May 3, 2009 e-mail message to JJ Attorney 1 containing questions about OGC's VCO Opinion, along with the attorney's message to Madan asking how

¹⁵² We asked Oleskowicz why he did not document his May 5 contact with Madan and other OJP officials in an MOI or otherwise memorialize it in IDMS. He stated that he did not believe it was necessary to do so because the conversation was about management issues, not substantive investigative activity that affected the case.

she should respond. Oleskowicz forwarded the exchange to Dorsett later that evening.

For a better understanding of the context in which this discussion occurred, we asked Madan and Moses to describe the relationship between the OIG and OJP during INV grant fraud investigations. Madan stated that, from OGC's standpoint, the objective is to avoid "crashing," by which he explained he meant that the two offices need to coordinate so that the work of one office does not undercut or cause embarrassment to the other office or the Department. He stated, by way of example, that he would not want OJP to give grant funds to a grantee that, unbeknownst to OJP, is the target of an OIG grant fraud investigation. He said he understood that OIG had "a job to do" and that it is not his business to know about its investigations, yet added that "I need to know enough so that I can try to help you if I can, or at least not run into you."

Moses cited the Wisconsin investigation directly, stating that it represented a departure from an otherwise cooperative working relationship between OJP and INV. He told O&R that Semmerling asked OJP to freeze Wisconsin's funding, but refused to provide any information that would have given OJP a substantive basis for doing so. He stated that in the Wisconsin matter, "it just became a very problematic work relationship."

In her Confidential Statement, Semmerling wrote that she learned of the May 5 telephone conversation between Oleskowicz and Madan from the OJP OGC Contact in July. She wrote that the OJP OGC Contact stated that Oleskowicz told Madan that OJP OGC "only was responsible to answer written questions directly coming from [Oleskowicz], and they could respond in writing." Semmerling wrote that this practice was unprecedented in her experience, gave the "appearance of preferential treatment to certain witnesses," and "obstructed my ability to determine why the VCO legal memorandum was written, who was involved, and the role that Wisconsin OJA played." However, Semmerling's July 2009 MOI documenting a telephone conversation with the OJP OGC Contact made no reference to such an instruction. Instead, it states that during the May 5 call:

It was agreed that OJP, OGC would not take "any guidance" about the case unless it was in writing. It was decided that "absent any written guidance," no action would be taken.

We asked Semmerling which document more accurately described the May 5 telephone call, her Confidential Statement or the MOI. Semmerling responded that both were accurate. She stated that she intentionally omitted from the MOI Oleskowicz's instruction that OJP OGC need only respond to written questions from Oleskowicz, because she did not want to "throw [Oleskowicz] under the bus" or be "confrontational."

Oleskowicz stated that he never told OJP OGC that it need only answer written questions directly from him and indeed that he never set such a requirement in any cases he supervised. He further stated that he did not recall agreeing that guidance concerning the Wisconsin case had to be in writing. There

are no references to this issue in Oleskowicz's notes. Both Madan and Moses also said they did not recall being told at any time that OJP OGC only had to respond to written questions from the OIG. The OJP Senior Advisor stated that she had no recollection of the meeting. As noted, the OJP OIG Liaison stated that he had no recollection of any involvement in the May 5 call. He also stated that he did not recall Semmerling's conversation with him in July in which he purportedly described what was said during the May 5 conference call. We therefore did not substantiate Semmerling's assertion that Oleskowicz and Madan agreed to any terms for how the OIG would interact with OJP OGC on the Wisconsin matter in the future.

We found evidence of only two oral communications between OIG and OJP OGC personnel concerning Wisconsin during the May 5 through October 21, 2009 period. The first is a May 11, 2009 e-mail message from an OGC attorney to Semmerling stating, "Please find the High Risk Grantee Designations Order, discussed and requested during our recent conference call, attached." The reference to the "recent conference call" is likely to a call among Semmerling, Oleskowicz, the AUSAs, OJJDP managers, and OJP OGC attorneys on May 7, discussed below. We also determined that Semmerling had a conversation with the OJP OGC Contact in July 2009, which is when she claims to have learned of Oleskowicz's alleged instructions to Madan about the conditions under which OJP OGC and the OIG would communicate about the Wisconsin case. We found no e-mails from Oleskowicz to any OJP OGC attorneys during this period. As described later in this chapter, we also found no evidence that Oleskowicz's alleged instructions to the senior OJP OGC officials in any way hindered Semmerling's subsequent efforts to investigate the VCO legal opinion.

5. Semmerling Meets with Oleskowicz about Investigations Division Senior Management Concerns

Oleskowicz called Dorsett after the conversation with Madan and the other OJP officials to tell him about OJP OGC's concerns. Oleskowicz said that Dorsett directed him to pose three questions to Semmerling about the case (described below). Oleskowicz met with Semmerling on May 5, 2009. Based on the multiple accounts of the meeting O&R obtained through e-mails, contemporaneous notes, and interviews, the substance of what was said at the meeting is in considerable dispute; however, according to both Oleskowicz and Semmerling, the meeting was tense and confrontational.

Oleskowicz told us that he went to Semmerling's office, possibly more than once, to ask her to meet with him in his office, and that she "stalled for a good while," stating that she had other work to do. Semmerling told us that she was on a personal telephone call regarding her medical situation when Oleskowicz initially asked to meet with her. Ultimately, however, the two met in Oleskowicz's office later that same afternoon.

According to Oleskowicz's summary of the meeting in an e-mail to Dorsett the next day, he began the meeting by explaining to Semmerling that he wanted to discuss the case with her, including her contacts with OJP personnel, before she left [REDACTED]. He stated that when the meeting began, Semmerling

immediately started to take notes, in an overly deliberate manner that he characterized as "bizarre." Oleskowicz wrote that he asked the first of three questions to Semmerling – had she given any "instructions, guidance or advice to personnel in OJP regarding their contacts with Wisconsin OJA personnel?" – and that Semmerling responded by asking whether a complaint had been filed against her and whether she was being "compelled" to answer. Oleskowicz wrote that Semmerling also asked to have AIG McLaughlin participate in the meeting by telephone, and said she would not answer his questions until he answered hers. Oleskowicz wrote that he advised Semmerling that "if she declined to answer my questions regarding the case, she was dismissed and could leave my office." However, as reflected in Oleskowicz's e-mail to Dorsett, and as substantiated by Oleskowicz's contemporaneous notes, Semmerling eventually answered the question, stating that she had told "them" that "it would be helpful if their contacts with Wisconsin were limited" and to keep Wisconsin "at [arm's] reach because in the past grant managers have been blamed for grantees wrongdoing." Semmerling also stated that a few weeks prior she had recommended to OJJDP Deputy Administrator Thompson that he have someone witness his conversation with a senior Wisconsin OJA official and that he document the contact.

Oleskowicz said he then asked whether Semmerling had "given any instructions, guidance, or advice to OJP personnel regarding their compliance or site visits to Wisconsin." According to Oleskowicz's e-mail summary and notes, Semmerling responded that she did not know and did not understand the question, and that Oleskowicz was "not making sense." She then responded that a site visit "creates the letter and provides the potential for [Wisconsin] to use the letter." There was no further explanation of this response, although it suggests that Semmerling was concerned that a site visit from OJJDP could provide Wisconsin with a written defense to the fraud allegations in the form of a letter from OJJDP that the state was in compliance with the JJDP Act.

The third question Oleskowicz said he asked Semmerling was whether she had "given any instructions, guidance, or advice to OJP personnel regarding what they should do about the funding for Wisconsin." According to Oleskowicz's e-mail summary and notes, Semmerling responded that she had had contact with Thompson, Moses, and other OJP officials to ask what they intended to do about freezing Wisconsin's funding, and told them that she "can't tell them what to do."¹⁵³

Also discussed during the meeting was Semmerling's April 30 request for 2007 compliance data for all states and territories. E-mails indicate that by this point Dorsett had told Oleskowicz that he believed Semmerling's request was "overly burdensome" and violated INV's policy of making such requests through the Fraud Detection Office, and that Oleskowicz shared Dorsett's statements with Semmerling. Oleskowicz's summary e-mail to Dorsett indicates that Semmerling

¹⁵³ As discussed above, in October 2008 Semmerling had recommended to Dorsett that OJP be notified of Wisconsin's alleged fraudulent activity and contacted to discuss the possibility of freezing Wisconsin's funding until the false reporting stopped, and the then Deputy IG Paul Martin had concurred with the recommendation.

challenged Oleskowicz on Dorsett's characterization of the request and asked to see a copy of the policy to which Dorsett referred. The e-mail shows that Oleskowicz told her that his office was not the appropriate venue for questioning Dorsett's judgment and opinion.

O&R was unable to find any formal policy requiring document requests from INV field offices in grant fraud or other cases to be made through FDO. Chawaga told O&R that there had been an informal policy through 2007 or 2008 to that effect, but that document request practices "morphed" as the components established regular points of contact for handling INV's requests, and agents in the field were free to ask for documents without first consulting or coordinating with FDO.¹⁵⁴ Chawaga opined that as of April 2009, Semmerling's request "should have probably gone through FDO" due to the volume of documents being requested. However, she added that Semmerling "probably wasn't wrong" in making the request directly to OJP, though she said she understood why Dorsett had concerns about the scope of the request.

Oleskowicz wrote to Dorsett the next day that Semmerling had been "extremely contentious" throughout the meeting and had interrupted him repeatedly. He told us that her behavior at the meeting was "so off the wall" that it amounted to insubordination and misconduct.

Semmerling provided a very different account of the meeting. In her Confidential Statement she wrote that Oleskowicz never explained to her the purpose of the meeting, and that "[s]ome of the questions were so vague that without the context I did not know how to answer." She also likened Oleskowicz's treatment of her to that of a criminal investigator questioning a subject, such as asking her whether she was going to answer his questions or wanted to leave the meeting. O&R read Semmerling the three questions as Oleskowicz told us they had been phrased to her. She stated that Oleskowicz had not phrased them that way, and that even using that phrasing, the questions were only marginally less vague. She stressed that Oleskowicz was "trying to intimidate me and trying to get me upset." She stated that although she was tired and not feeling well at the time, her [REDACTED] did not in any way impair her ability to understand Oleskowicz's questions.

¹⁵⁴ Oleskowicz provided us with a June 14, 2011 e-mail from Dorsett to all INV Field Office SACs and ASACs requiring field agents to notify INV Headquarters before meeting with or requesting documents from component headquarters. This requirement appears to have been instituted based on recent "situations in which our headquarters liaison ASACs were not aware of such meetings or document requests occurring and were questioned by the component managers about the activity of OIG agents in their headquarters." The message states, "In order to maintain these important relationships, it is essential that we be informed of your activity involving component headquarters entities." Oleskowicz forwarded Dorsett's message to all CFO staff. The message does not reference any pre-existing policy regarding coordination with FDO prior to requesting documents in grant fraud or other cases, or suggest that there was a prior policy that all such requests had to be made through FDO.

On May 6, Semmerling sent Oleskowicz and Thomas (who was out of town and had not been at the meeting) a lengthy e-mail message describing her feelings about the meeting with Oleskowicz, and further defending her April 30 request for compliance data. According to Semmerling's message, the request was prompted in large part by internal Wisconsin OJA correspondence indicating that other states had been out of compliance with the JJDP Act, yet found to be in compliance by OJJDP, and that OJJDP does not question other states' data even though "other states report fraudulently."

Semmerling concluded her message:

This is not the first incident where I have been harassed, and singled out. There have been similar incidents where I was subjected to this same type of bullying/harassment when trying to do my job. I also find it alarming that this would occur a day after I [REDACTED]. . . . [M]y goals in this case is [sic] to have an accurate understanding of what transpired with Wisconsin. We, [the Auditor] and I, need to know how the program was handled for the AUSAs to determine any prosecutorial problems, and the OIG also needs to ensure that it is not accused of whitewashing or ignoring any irregularities with OJJDP.

Oleskowicz forwarded Semmerling's message to Dorsett shortly after receiving it on the afternoon of May 6. Dorsett replied that Oleskowicz should have a discussion with the AUSAs "to determine the prosecutorial status of this case and what exactly is needed to move forward." He added that he continued to believe that Semmerling's request for the 2007 compliance monitoring reports "is an overly broad and unduly burdensome request of OJP," and asked why a "random sampling" wouldn't suffice.¹⁵⁵

Also on May 6, Oleskowicz wrote to Semmerling to ask whether she had drafted MOIs to memorialize the conversations she said she had with Thompson, the OJP OGC Contact, and other OJP officials with whom she had discussed the issues raised during their meeting the day before, including core requirements compliance monitoring, funding, and OJJDP's contacts with Wisconsin officials. According to Oleskowicz's notes, Semmerling had not to that point drafted the MOIs. Of this request, Semmerling wrote in her Confidential Statement, "It was not usual for him to ask for my reports, and I did not understand his sudden urgency for the reports."

We asked Oleskowicz and Dorsett about why they handled OJP's complaint about Semmerling as they did rather than asking Semmerling to respond directly to OJP's allegations. Oleskowicz stated that he handled OJP's complaint the same way that INV would handle any complaint – by gathering information and not disclosing

¹⁵⁵ Thompson told us that he regarded Semmerling's request as "a little aggressive," but said that it would not have been "overly burdensome" to satisfy. Semmerling stated that the compliance data she ultimately received was between 10 and 20 pages per state or territory.

the identity of the complainant. He also said that he was operating under his superior's instructions to ask Semmerling what Oleskowicz believed to be legitimate, work-related, and non-confrontational questions. Dorsett told us that he had consulted with McLaughlin on the matter, and that it was typical to first gather information from the complainant – in this case OJP General Counsel Madan – before addressing the allegations with the agent.

6. Discussions among INV, USAO, and OJP Officials Regarding the Wisconsin Investigation

On May 7, a conference call was held among officials from the CFO (including Semmerling and Oleskowicz), the USAO (the FAUSA and the line AUSA), OJJDP (including Thompson), and OJP OGC (including Moses and at least two OGC attorneys responsible for advising OJJDP) to discuss issues relevant to the Wisconsin investigation. Oleskowicz told us that the conversation was primarily between the AUSAs and the OJP and OJJDP officials. Oleskowicz's and the FAUSA's notes show that the OJJDP officials provided a general overview of the JJDP Act and how funding may be withheld based on evidence justifying a finding that the state failed to comply with a core requirement. Also discussed were issues specific to Wisconsin, such as OJJDP's acceptance of 6 months of data from the state to find it in compliance with the Deinstitutionalization of Status Offenders (DSO) core requirement for 2007, which Thompson said was allowed under the regulations.¹⁵⁶

The notes show that the FAUSA emphasized the importance of not disclosing certain information to Wisconsin due to the ongoing investigation, and that OJJDP should conduct "business as usual" with the state. It was noted that Wisconsin had been placed on a "High Risk Grantee" list by OJJDP due to the OIG's investigation, but that Wisconsin had not yet been told of this. The FAUSA told us that during the call he told OJJDP not to place the state on the list solely on the basis of the OIG's investigation. The FAUSA stated during the call that the investigation was progressing more slowly than he wished, and that it would be "several months" before any decision would be reached.

The issue of the 2008 VCO Opinion also was discussed. Someone (not specified in Oleskowicz's notes) stated that the VCO opinion "has nothing to do with Wisconsin." According to Semmerling's Confidential Statement, it was Moses who made this comment about the VCO opinion. Although we determined that the VCO opinion in fact stemmed from a legal question first raised by Wisconsin OJA officials, similar legal questions about application of the VCO exception had also been raised around the same time by at least one other state. As discussed in Chapter Three, we determined that several OJP OGC attorneys, including Moses, remained uncertain about which state the 2008 VCO Opinion was associated with even during their interviews with O&R during this review. However, Moses's statement disassociating the VCO opinion from Wisconsin was significant to Semmerling, who

¹⁵⁶ Consistent with Thompson's statement, the regulations provide that "[t]he length of the reporting period should be 12 months of data, but in no case less than 6 months." 28 C.F.R. § 31.303(f)(1)(i)(D).

wrote that Moses was “not being truthful.” Oleskowicz told us that Semmerling saw Moses’s statement as “a huge point.”

According to the FAUSA’s notes during the call, Moses questioned how Semmerling had obtained the rebuttal memorandum to the VCO opinion, asserted that she was not entitled to have it, and that in any event the memorandum was wrong.¹⁵⁷ Oleskowicz’s notes show that the rebuttal memorandum was referred to as an “internal OJP document” that “does not represent the agency.” The FAUSA told us that Moses’s comments caused him to be suspicious that Moses may have been attempting to “close off that source of information” to Semmerling, although he added that he had no evidence to support his suspicion.

The conference call was immediately followed up by another call among Oleskowicz, Semmerling, the OIG Auditor, and the two AUSAs. According to Oleskowicz’s notes, the FAUSA stated that the OJJDP and OJP officials were “potentially subjects until we can rule them out – facilitating [the fraud] either overtly or through lack of oversight – maybe not criminally.” The participants also agreed to narrow Semmerling’s request for core requirements compliance monitoring data to only four other states that had been found out of compliance, plus a small sampling of states that had been found in compliance. Oleskowicz’s notes reflect that the FAUSA stated that narrowing down the request will “keep them [OJJDP] happy at the end of the day.”

Lastly, according to Oleskowicz, as supported by his notes, the AUSAs agreed during this follow-up call to “handle the competing legal opinions,” meaning the 2008 VCO Opinion and OJJDP Senior Advisor’s rebuttal memorandum. Oleskowicz said that Semmerling had raised the VCO legal issue with him “a number of times,” and that he would tell her, “You’re not a lawyer, I’m not a lawyer, make sure the lawyers go through this.” He stated that he directed Semmerling to find out what the prosecutors’ thoughts were on the opinions and how they affected the case, and whether they had any instructions for “what direction we should go.” He stated that he had asked Semmerling what the prosecutors thought about the legal opinions but that she never responded. Oleskowicz told us that if the AUSAs thought “there was something going on, some obstruction thing” involving OJP OGC, he would have supported expanding the criminal investigation “into that realm.” Semmerling stated that Oleskowicz never told her to have the AUSAs

¹⁵⁷ To the extent Moses asserted that the OIG was not entitled to have access to the legal memorandum drafted by the OJJDP Senior Advisor in rebuttal to the 2008 VCO Opinion – or any other OJP or OJJDP document related to the program under review – we strongly disagree. The Inspector General Act of 1978, as amended, unequivocally provides that the Inspector General is authorized:

to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities under this Act[.]

Inspector General Act, Section 6(a)(1).

review the legal memorandums and that she did not recall him ever asking her what the AUSAs thought of them.

Oleskowicz called Dorsett on May 8 to report the outcome of the discussions with the OJP officials and the AUSAs. According to Dorsett's notes, Oleskowicz told him that the AUSAs considered OJJDP officials to be "potential subjects," and that Semmerling is "pushing criminal conspiracy." Dorsett's notes also state, "Need to keep OJP/OJJDP happy," which Oleskowicz told us was a reference to the FAUSA's comment after the conference call that the narrowed-down compliance data request would keep OJJDP "happy at the end of the day." Oleskowicz told us that he was merely relaying the FAUSA's comments to Dorsett. Oleskowicz's statement is generally consistent with what Dorsett told us. Dorsett stated that he did not remember why he wrote "Need to keep OJP/OJJDP happy" in his notes. He stated that he normally would not write down his own statements in his notes but that he could not remember who made the statement. He noted, though, that his notes seemed to primarily be based upon what Oleskowicz told him the FAUSA had said.

According to Dorsett and his notes, he and Oleskowicz also discussed Semmerling's behavior during the earlier May 5 meeting between Semmerling and Oleskowicz. Dorsett wrote phrases such as "crossed the line," "defiant," "was not candid," "disrespectful," and "getting worse and worse."

Oleskowicz told us that as was agreed during the May 5 conference call with Madan, he had a brief follow-up call with Madan on May 15 about the status of the request for core requirements compliance monitoring data. Oleskowicz's notes reflect that Madan requested that Deputy General Counsel Moses be copied on the list of states for which compliance data was sought. According to Oleskowicz's notes, Madan said he initially was concerned by Semmerling's request for the compliance data, fearing that the data "would be misunderstood," but was now "relieved to hear that you're asking for an explanation as to how the data works, and not only for all the raw material."¹⁵⁸

7. Semmerling [REDACTED]

Semmerling [REDACTED], and returned to the office on July 7. According to Oleskowicz's notes, Semmerling first broached the issue of [REDACTED] by at least March 17, 2009. Oleskowicz's notes from March 17 and later that month indicate that Semmerling had appeared to Oleskowicz to be under a great deal of stress. According to his notes, Semmerling had told him that perhaps after [REDACTED] she would not be "the way I've been." Semmerling told the OIG that any stress Oleskowicz claimed to have observed in her behavior was due to Oleskowicz's and Thomas's "continued harassment" of her that she alleges she endured. Semmerling also denied telling Oleskowicz that perhaps after [REDACTED]

¹⁵⁸ Oleskowicz told us that other than his handwritten notes, he did not memorialize his May 15 conversation with Madan in IDMS or the case file because he considered the discussion to be about a "management issue."

██████ she would not be "the way I've been," and stated that she believes Oleskowicz claimed she said this to bolster his assertion that her work performance had been poor and to justify his alleged harassment of her in the May 5 meeting and at a later meeting on July 23, 2009 (described below).

Oleskowicz told us that, at McLaughlin's direction, he called Harry Baldauf, the Director of Human Resources within the Management and Planning Division of the OIG, on May 21 to discuss Semmerling's recent behavior and solicit Baldauf's guidance regarding the situation. Oleskowicz said that he described Semmerling's behavior and offered his view that she was "under tremendous pressure."¹⁵⁹ He said that Baldauf recommended suggesting to Semmerling that she contact the Department's Employee Assistance Program (EAP), although, as a less desirable option, a disciplinary letter may be necessary. According to Oleskowicz's notes of the conversation, Baldauf stated that the EAP approach would put the matter "in the employee's hands" and give Semmerling "the benefit of the doubt and a chance to address it." The notes show that Baldauf said that Semmerling was in a "position of extreme trust and sensitivity," and that the matter was "especially important since an outside agency called regarding her behavior." As discussed later in this chapter, Oleskowicz did in fact meet with Semmerling after her return to the office and suggest that she contact EAP.

Semmerling wrote in her Confidential Statement that ██████████, she called a Senior Special Agent in the OIG's Oversight and Review Division (O&R) to ask whether OJJDP staff could report the 2008 VCO Opinion to him and to complain about Oleskowicz's treatment of her before she ██████████. The Senior Special Agent told us that he did not recall receiving such a telephone call from Semmerling, but did not definitively rule out the possibility that she had called.¹⁶⁰ He also searched his archived e-mail messages at our request and found no referral of the VCO issue from anyone.

On July 9, two days after returning to the office ██████████, Semmerling wrote an MOI memorializing a telephone conversation she had with Rumsey that day. According to the MOI, Rumsey told Semmerling that Rumsey had heard from the Compliance Monitoring Liaison and another OJP employee that Semmerling had been reassigned from the Wisconsin case and that another investigator had been assigned to it. Rumsey told the OIG that she believed it was in September 2009 when she had learned from the Compliance Monitoring Liaison that Semmerling had been removed from the case and had conveyed this information to Semmerling, and that "sure enough, shortly later she was moved off the case." Semmerling's MOI places the date of her conversation with Rumsey in July 2009, not September 2009. The Compliance Monitoring

¹⁵⁹ As noted above, Semmerling told the OIG that any stress Oleskowicz claimed to have observed in her behavior was due to Oleskowicz's and Thomas's alleged "continued harassment" of her.

¹⁶⁰ The O&R Senior Special Agent stated that he knew Semmerling from various special agent training events and may have spoken with her on other occasions about general personnel issues within the INV, but stated that he did not recall Semmerling ever raising the Wisconsin matter to him.

Liaison stated that she did not recall having this conversation with Rumsey and was not “on speaking terms” with Rumsey during the summer and fall of 2009. Oleskowicz told us that by July 2009 he had discussed with Assistant IG McLaughlin the possibility of replacing Semmerling on the case but had decided not to do so. He said no one other than McLaughlin and him would be aware of that conversation. In any event, Rumsey’s belief that Semmerling had been removed from the case in either July or September 2009 was unfounded, as Semmerling was not removed from the case until late October 2009.¹⁶¹

8. OJP OGC Issues Guidance about Attorney-Client Privilege

During her absence from the office, Semmerling stayed in contact with Rumsey. Semmerling stated that in late June or July 2009 Rumsey told her that OJP OGC had “sent out an e-mail saying, you’re not to discuss any type of legal opinions or . . . any correspondence from us with anybody outside of the agency.” Semmerling told us she understood OGC’s message to mean that “any communications [OGC attorneys] had with any employees was privileged, and that they could not talk about it.” Semmerling stated that she “just thought it was fishy and strange,” because the OGC message was issued “right after I started asking questions about their legal opinions,” a reference to her May 3 e-mail message to JJ Attorney 1 about the VCO legal opinion.

As discussed below, Rumsey did not forward to Semmerling the actual e-mail message from OJP OGC until September 25, 2009. Our review of the message suggests that Rumsey and Semmerling did not have an entirely accurate understanding of what it said.

The message was sent on June 15, 2009, from one of the three OGC attorneys responsible for advising OJJDP (JJ Attorney 2) to Nancy Ayers, with a copy to Moses. The e-mail message, entitled “guidance regarding advice received from [OGC],” states:

As a rule, OJP staff should not make statements that identify OGC . . . as the source of particular information, advice, analyses, concerns, or conclusions. If OJP staff does make such statements, we risk waiving the attorney-client and attorney work-product privileges, which can be a very serious matter. The approach followed should instead be to discuss or present OJP’s (or the component’s) position (however much

¹⁶¹ Rumsey appeared to attach great importance to this alleged conversation with the Compliance Monitoring Liaison about Semmerling’s removal from the Wisconsin case. She stated that the Compliance Monitoring Liaison “probably knows the truth” about Greg Thompson’s intention to have OGC write a favorable legal opinion for Wisconsin on the VCO issue because the Compliance Monitoring Liaison “knew that Jill Semmerling was off the case before Jill Semmerling knew.” However, the evidence shows that Rumsey told Semmerling of her conversation with the Compliance Monitoring Liaison in July 2009, several months before the decision was made to remove Semmerling from the case. We believe that Rumsey and the other OJP employee may have mistakenly believed that Semmerling had been permanently removed from the case in July 2009 due to Semmerling’s extended absence from the office and the assignment of an additional OIG investigator beginning in May 2009.

it may derive from OGC's advice), without referring to OGC. This is true for both oral and written communications.

(Emphasis in original.) The message goes on to suggest various examples of how communications that involve OGC advice may be phrased to avoid directly attributing language to OGC. The examples allow referring to OGC, such as by stating, "We have consulted with counsel, and OJP's (or the office's, or the bureau's) conclusion is that . . ." (Emphasis in original). The message cautions to be careful not to forward messages that contain correspondence with OGC in the string. The message encourages OJP personnel to consult with OGC attorneys when asked legal questions, and to refer inquiries from non-DOJ attorneys directly to OGC. In sum, the guidance does not preclude discussing OJP OGC legal advice, but discourages attributing the advice to OGC based on privilege concerns.

The attorney who drafted the message told us that her guidance to Ayers was compiled from earlier guidance given by General Counsel Madan "for leadership," and that she believed the guidance predated her employment with OGC in January 2008, before the Wisconsin investigation was initiated.¹⁶² Madan stated that the June 2009 guidance appeared to be in his style of writing, and that it was intended to address a "perennial concern" over waiver of the attorney-client privilege. He stated that he did not recall when this concern first arose.

O&R was unable to locate any earlier e-mails from Madan or any of the three JJ Attorneys containing the type of guidance that was provided in the June 15, 2009 message to Ayers regarding waiver of attorney-client privilege concerns. However, we found that since at least 2006, some line attorneys in OJP OGC routinely included a "Notice" in all of their e-mail correspondence advising that the material in the message "may be confidential and protected by the attorney-client privilege," and that the message should not be further disseminated without the consent of the sender.

9. Personnel Are Added to the Wisconsin Investigation Team

Two staffing changes were made to the CFO's Wisconsin investigation team in mid-2009. First, a second CFO Special Agent (SA 2) was assigned to the matter on May 9, 2009, just prior to Semmerling's [REDACTED]. SA 2 told us he was assigned to the matter to assist Semmerling. SA 2 stated that he had been hired by the OIG for less than a year when he was assigned to this matter and had

¹⁶² The attorney who drafted this message was the same attorney who had told Moses a year earlier that her advice concerning a Wisconsin jail removal core requirement issue may have to be given to Semmerling if the OIG's investigation expanded to include that core requirement. We believe this suggests that she understood the need to provide relevant information to the OIG and that the guidance she provided to Ayers on June 15, 2009 was not intended to encompass disclosures to the OIG. We are not aware of a circumstance where the Department has asserted that the attorney-client privilege would be waived by providing documents to the OIG.

not yet had any grant fraud training.¹⁶³ He described the Wisconsin case to us as “complex” and involving “voluminous documents.” He stated that by the time he was assigned, Semmerling had spent approximately a year learning about the JJDP Act formula grant program. He told us that he had very limited discussions with Semmerling about Rumsey, but had “inferred” from his review of Semmerling’s notes in IDMS and things Semmerling had said that Semmerling “was having an extreme amount of contact” with Rumsey and was not documenting the discussions in MOIs. He stated that he “started questioning, well, is [Rumsey] trying to use the OIG in order to, I don’t know, influence decisions or to influence problems that she might have been having with her management in . . . her own agency.” He said he never raised his concern with Semmerling.

SA 2 remained on the case through the completion of the investigation and wrote the final ROI that was submitted to OJP in January 2014. Contrary to Semmerling’s statement in her complaint to the OSC, SA 2 told the OIG that he had no information to substantiate Semmerling’s allegations that OIG officials improperly obstructed the OIG’s investigation or attempted to influence the investigation in a manner favorable to the Wisconsin OJA, OJJDP, or OJP.

Oleskowicz told us that when Semmerling began [REDACTED], INV Headquarters officials were “unhappy” with the pace of the investigation and concerned that there was no progress being made on the case. He said that through regular status calls and notes in IDMS, INV Headquarters officials knew that the OIG had obtained incriminating evidence from Wisconsin OJA officials in October 2008, and yet there had been no movement on the case. Oleskowicz told us that his superiors were aware that the AUSAs were busy on other cases, but were nonetheless concerned that no one had been criminally charged yet. He stated he remembered one status call with his superiors at headquarters in which they said that the case “seems to have stalled and is not going anywhere and is going out in different directions.”

Oleskowicz stated that at this time, serious consideration was given to removing Semmerling from the Wisconsin matter entirely. He said that he discussed this idea with McLaughlin, who deferred to Oleskowicz on the decision. Oleskowicz told us that he was reluctant to remove Semmerling, who had been on the case since the start and had a lot of knowledge about it. He said he decided that the better course was to add SA 2, whom he described as “a straight shooting guy who will keep things on track.”

The second staffing change was to add a second Auditor (Auditor 2) from the Chicago Regional Audit Office (CRAO) in June or July 2009 to assist the first

¹⁶³ However, SA 2 was an experienced agent, having served with the Secret Service for approximately 8 years before joining the OIG. SA 2’s abilities as an OIG agent were praised highly by Oleskowicz, Dorsett, and McLaughlin. SA 2 told us that most if not all of the grant fraud cases investigated by the CFO had been assigned to either Semmerling or a Senior Special Agent who later was assigned to the Wisconsin matter after Semmerling was removed. Semmerling’s resume indicates that she had taken at least two grant fraud training courses related to her prior work as a criminal investigator in the Department of Agriculture OIG.

Auditor. Auditor 2, who was a Certified Fraud Examiner, was new to the CRAO. Auditor 2 said that his involvement in the case was limited to combing through Wisconsin OJA's budget data to identify any suspicious transactions, such as misusing grant funds. He stated that he identified a few trips that Wisconsin OJA officials took to Washington, D.C. that appeared to be paid for out of funds designated for monitoring expenses. He told us that the travel may have been for meetings with OJJDP officials, which he said would have been appropriate, but that the funds for the travel should not have come out of the monitoring expenses portion of the budget. He stated that he was never asked to examine whether Wisconsin officials had used incorrect data in their compliance monitoring reports to OJJDP.

G. Activities in Late 2009

In this section we describe several significant developments in the Wisconsin investigation following Semmerling's return to the CFO [REDACTED]. Many of these developments were driven by OIG headquarters officials' increasing concern with the pace of the investigation, which by this time had been open for well over a year. During the period described below, Semmerling met with Oleskowicz and Thomas to discuss management concerns about Semmerling's work performance. She thereafter continued to gather information about OJP OGC's involvement in the application of the VCO exception to the DSO requirement, an issue Oleskowicz contended he had directed her to leave for the AUSAs to analyze. We also describe Semmerling's communications with a senior OJP official, which became a significant factor in OIG management's decision to remove her from the case in late October 2009.

1. Semmerling Returns to the CFO

SA 2 told us that during Semmerling's absence from the office he examined the issue of whether Wisconsin had been accurately reporting its monitoring universe (the universe of facilities that were subject to monitoring under the JJDP Act) to OJJDP.¹⁶⁴ Notes in IDMS show that SA 2 also served an IG subpoena on the Director of the Wisconsin OJA for certain records, and that he and the Auditor met with the AUSAs to "discuss CaseMap and tagging of documents." A review of SA 2's e-mails during this period shows that he had sporadic contact with the line AUSA and Semmerling about the Wisconsin case, and that he devoted substantial time to

¹⁶⁴ Semmerling told O&R that Rumsey had brought this issue to her attention, and IDMS records show that Semmerling had begun "drafting analysis of monitoring reports regarding lock-ups and inspections" [REDACTED]. This issue was addressed in the OIG's final Report of Investigation that was released in September 2014. In sum, the OIG found that from 2001 through 2008, Wisconsin OJA had not included in its compliance monitoring universe several facilities that had construction fixtures, such as cuffing rails, designed to securely detain individuals and that could have been used to detain a juvenile. See 42 U.S.C. § 5603(12), (13); 28 C.F.R. § 31.304(b) (defining the term "secure" to include facilities that have construction features designed to physically restrict the movements and activities of persons in custody.") Because these facilities had not been inspected, any violations of the JJDP Act core requirements that had occurred in these facilities would not have been reported to OJJDP in Wisconsin's annual core requirements compliance monitoring reports.

at least one other case to which he had been assigned before being assigned to the Wisconsin matter.

Semmerling resumed work on the Wisconsin investigation when she returned to the CFO on July 7, 2009, now with the assistance of SA 2 and a second auditor. She told us that she was on "light duty." According to Oleskowicz, Semmerling continued to pursue issues that he regarded as beyond the scope of the fraud allegations against Wisconsin. For example, Semmerling learned that several years prior, Rumsey had uncovered mismanagement in Puerto Rico's use of various grant funds awarded by OJP between 1998 and 2002. Semmerling wrote to FDO officials on July 13, 2009 to ask whether OJP had ever referred any cases to the OIG concerning Puerto Rico, copying Oleskowicz and Thomas on the message. She also forwarded them on that same date two documents that she said were from OJJDP Associate Administrator Thompson's computer H: drive: an undated memorandum that Rumsey had written about Puerto Rico's compliance issues, and an undated memorandum recommending Rumsey for an award based on her work on the matter. A few days later, Oleskowicz attached Semmerling's message in an e-mail to Thomas, writing, "I am hopeful that [SA 2] can help keep the case moving forward and more focused on the allegations against Wisconsin OJA, instead of the [Rumsey]/OJP intrigue." Oleskowicz told us that he questioned why Semmerling was "getting involved in this." After reviewing a draft of this report, Semmerling commented that she forwarded the Puerto Rico information to the FDO because she believed it was important for that office to be aware of this alleged past fraud and the fact that it had never been reported to that office by OJP.

Notes in IDMS show that on July 13, the CFO received 5 boxes of documents in response to the subpoena that SA 2 served on Wisconsin OJA during Semmerling's absence, and that additional documents would be forthcoming. The notes also show that the next day, Semmerling received information from Wisconsin concerning over 5,000 foster children who had been detained during the period from January 2006 through early June 2009. As discussed in Chapter Three, this information was relevant to the VCO exception issue about which OJP OGC had written a legal memorandum in May 2008.

2. Status of OJP and OJJDP Officials in the Criminal Investigation

As senior INV officials pressed the CFO to move the Wisconsin investigation forward, they also sought more precise information from the USAO about who was under criminal scrutiny. As described above, the FAUSA had told Oleskowicz during their May 7, 2009 discussion that OJP and OJJDP officials were "potentially subjects," although perhaps "not criminally." Oleskowicz told us that during one of his status calls with INV Headquarters, Tompkins or another senior INV official told him to "find out who exactly are the subjects that the U.S. Attorney's Office considers to have some exposure in this case." Oleskowicz said he discussed this with SA 2, who later that day told him that he had just spoken with the line AUSA and that she did not consider any DOJ employee to be a potential subject. Oleskowicz said that a few hours later, Semmerling came to his office to tell him that the FAUSA said "we have to be careful because there are still some potential

targets in DOJ.”¹⁶⁵ Oleskowicz told us that he “believed SA 2 to be credible” regarding his discussion with the line AUSA. He added that based on the totality of what the FAUSA had told him in May, he did not think that the FAUSA regarded anyone in OJP or OJJDP to be a subject of the criminal investigation. Oleskowicz stated that both AUSAs viewed OJJDP’s administration of the grant program to be “very loose,” which would make “a criminal prosecution of the state very difficult.”

SA 2 echoed Oleskowicz’s understanding of the FAUSA’s position on the OJP and OJJDP officials. He told us that although the FAUSA would have “loved to” put the Department officials “in the hot seat and really ask them hard questions about this stuff, . . . as far as criminally prosecuting one of those guys . . . I don’t believe [the FAUSA] ever told me that, you know, he viewed Charlie Moses or any other OJJDP employees as potential targets of an investigation. I perceived, [the FAUSA’s] conversation with me, it’s just flat-out negligence on their part [rather than criminal conduct].”

The FAUSA told us that OJP and OJJDP officials were of interest to him as witnesses, describing them as “subjects” in the investigation in the sense of “being integral players in what was going on in Wisconsin and . . . what Wisconsin was being told, and . . . why Wisconsin was doing things.”¹⁶⁶ He said that the OJP and OJJDP officials were “never really targets as far as we were concerned,” and that if they were targets, “that would have had to be, in my mind, a whole other investigation.” He distinguished the DOJ officials from the Wisconsin OJA officials, stating that “there were people who were employed in that office [Wisconsin OJA] that certainly we were going to investigate and figure out what they knew, and potentially could become targets” based on providing false information to OJJDP. The FAUSA stated that he “might have” discussed with Semmerling that in his judgment no OJP or OJJDP officials were targets of the investigation, but said he was not certain.

¹⁶⁵ Although certain witnesses appeared to use the terms “subject” and “target” somewhat interchangeably during the Wisconsin investigation and in O&R’s review, the terms have different definitions in the U.S. Attorneys’ Manual (USAM). The USAM provides:

A “target” is a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant. An officer or employee of an organization which is a target is not automatically considered a target even if such officer’s or employee’s conduct contributed to the commission of the crime by the target organization. The same lack of automatic target status holds true for organizations which employ, or employed, an officer or employee who is a target.

A “subject” of an investigation is a person whose conduct is within the scope of the grand jury’s investigation.

USAM Section 9-11.151.

¹⁶⁶ The FAUSA later interviewed several OJP and OJJDP officials in Washington to determine whether they would be of help to the prosecution or to the defense in a criminal prosecution. As discussed later in this chapter, he concluded that the Department officials would have been more helpful to the prospective Wisconsin defendants due to OJJDP’s lax oversight of the grant program.

The FAUSA stated that he was never pressured by Oleskowitz or any other OIG official not to pursue any potential targets of the criminal investigation.

3. Oleskowitz and Thomas Meet with Semmerling to Discuss Her Work Performance

On July 23, 2009, just over 2 weeks after Semmerling returned from [REDACTED], Oleskowitz, and Thomas met with her to discuss what Oleskowitz characterized as a decline in Semmerling's work performance. Oleskowitz stated that the meeting was prompted by his discussion with Baldauf in late May about counseling Semmerling to contact EAP, and by the opportunity to "clear the air and move forward" with Semmerling now that [REDACTED]. The following account of the meeting is drawn from the testimony of Semmerling, Oleskowitz, and Thomas, as well as Oleskowitz's contemporaneous notes and a memorandum he drafted for Dorsett the next day summarizing the meeting.

Semmerling told O&R that on July 23, while she and the Auditor were going through boxes of documents in the Wisconsin case, Thomas asked her to come to Thomas's office. Semmerling said that Oleskowitz was already in Thomas's office when she arrived. According to Semmerling's Confidential Statement, Thomas opened the meeting by stating words to the effect, "Contrary to what you think, we are not out to get you." Thomas told us she did not recall saying this, but added that Semmerling "always thought everyone was out to get her." Oleskowitz told us that the comment "rang a bell," and that he did not think the comment was appropriate. He told us that he had met with Thomas before the meeting with Semmerling to review what would be covered during the meeting, but that several times during the meeting Thomas said things "that hadn't been in the plan."

All participants to the meeting agree that Oleskowitz and Thomas raised concerns about [REDACTED]. Also discussed was what Oleskowitz described as the concern expressed by some of Semmerling's colleagues in the CFO about her emotional well-being. Oleskowitz and Thomas suggested that Semmerling consider contacting EAP. According to Oleskowitz's memorandum to Dorsett, he gave her a print-out from the DOJ website containing information about the program and told Semmerling that he would be willing to provide her administrative time if needed to consult with EAP.

The discussion then turned to Semmerling's work performance and conduct. According to Oleskowitz's notes and memorandum, Semmerling was told that he and Thomas had "observed a steady decline in her work performance over the past year," citing her failure to document investigative activity in her case files, and mistakes on her timesheets. They also noted that no new cases had been assigned to Semmerling since August 2008 because of her slow progress on the cases already assigned to her, despite being given additional personnel to assist her. She

was told that she was the only agent in the CFO in this situation.¹⁶⁷ Semmerling responded that her cases were more complex than those assigned to other agents, an assertion that Oleskowicz disputed.

Oleskowicz's memorandum of the July 23 meeting shows that Thomas specifically complained about Semmerling's frequent use of the telephone and Internet, and that Semmerling "often sent news articles to other employees."¹⁶⁸ According to the memorandum, Thomas "asked that Semmerling first complete her case work and her MOIs before spending significant time on phone conversations and searching the Internet for articles of interest." Semmerling, by contrast, wrote in her Confidential Statement that she "was told not to do any research on the

¹⁶⁷ Semmerling generally disputed Oleskowicz's characterization of her work performance during this period to the OIG, citing [REDACTED]

¹⁶⁸ A review of Semmerling's e-mails indicates that she frequently circulated newspaper articles, government reports and other materials to colleagues, supervisors, and associates. These materials appeared relevant to issues in her cases, and in our assessment did not appear to represent frivolous activity on government time. However, we also determined that Semmerling sometimes took the unusual step of sending articles to witnesses in the Wisconsin investigation. On June 19, 2008, Semmerling sent Oleskowicz, Thomas, and 10 other CFO and CRAO employees an article from *The Washington Post* entitled, "Investigators Look for Favoritism in Justice Department Grants." The article did not involve Wisconsin, but rather concerned allegations that the Bureau of Justice Assistance, a component within OJP separate from OJJDP, had awarded grants based on improper criteria. Semmerling then forwarded the entire e-mail, with the names of the OIG personnel to whom she had sent the article, to Moses, writing that "allegations such as these, especially if proven, are what create problems for those of us trying to get grant fraud cases prosecuted," adding, "We also encounter problems when fraud is ignored by OJP staff and irregularities are not reported." Moses forwarded Semmerling's e-mail and the article to Madan and another colleague in the OGC, prompting the colleague to respond: "Incredible statements by Ms. Semmerling. I hope that she is less naïve and more discerning as an IG investigator than these statements suggest. I guess she conducts her investigations by only reading the morning newspaper." Oleskowicz told us he was unaware that Semmerling had forwarded the article, along with the initial e-mail to multiple OIG employees, to Moses. He questioned why she would have done this and stated that it was not "completely professional" of her to do so. On February 10, 2009, Semmerling also sent Acting OJJDP Administrator Slowikowski an Associated Press article entitled, "Some States Disregard Juvenile Justice Law." We did not determine whether Semmerling's managers were aware that Semmerling had sent articles to witnesses in the Wisconsin investigation. However, we found at least one instance, on February 5, 2009, in which Semmerling first sent an article to OJJDP Acting Administrator Slowikowski and an OJP OGC attorney, and then forwarded the message and link to the article to ASAC Thomas. The article appeared in the *Baltimore Business Journal* on January 12, 2005, and concerned Federal prosecutors' decision to move to dismiss criminal grant fraud charges against a state agency official "after learning in December of a 1989 legal opinion by the Office of Justice Programs that could affect its case." See <http://www.bizjournals.com/baltimore/stories/2005/01/10/daily20.html> (last accessed September 6, 2016).

internet regarding my cases and fraud," noting that if she followed this directive, it would make her "vulnerable to an unacceptable evaluation."¹⁶⁹

According to the memorandum, Semmerling's alleged "repeated displays of open hostility," particularly toward Thomas, were also addressed at the meeting. Based on our interviews of INV personnel, it was widely perceived that Semmerling and Thomas did not get along well. It is relevant to note, however, that several CFO witnesses were critical of Thomas's management style, including Oleskowicz himself, who stated that several people in the office had "strained relationships" with her and had complained to him about her "volatility."¹⁷⁰ Dorsett also told us that Thomas had arguments with "pretty much every agent in the office," but particularly had problems getting along with Semmerling. He stated that Thomas was one of the best agents in INV, but not well suited to be a supervisor, describing her as "explosive and volatile and difficult because she's very demanding."

Oleskowicz and Thomas raised other conduct issues, including Semmerling's alleged insubordination, mischaracterization of facts, and lack of candor. Oleskowicz's notes and memorandum show that he cited his May 5 meeting with Semmerling, among other examples, to support these allegations. In the memorandum to Dorsett, Oleskowicz noted that "twice during this present conversation with Semmerling on July 23, 2009, she mischaracterized statements we had just made during our discussion, and we had to stop her and correct her mischaracterizations." Oleskowicz also wrote in the memorandum:

We briefly discussed a pattern with Semmerling in her casework, whereby we gave her direction in an investigation and she subsequently did something different, claiming that the AUSA "wanted" it that way instead. We told her that we were concerned that she may be mischaracterizing to us her conversations with the

¹⁶⁹ We understood Semmerling to be arguing that her Internet research was critical to her job performance and that her performance would suffer if she followed Thomas's directive. Our review of Semmerling's e-mails between July 23, 2009, when Semmerling was allegedly told to limit or cease her use of the Internet, and October 23, 2009, when Semmerling was removed from the Wisconsin matter, shows that Semmerling sent several messages with attachments that appear to have been accessed from the Internet, including many articles and other documents related to the Wisconsin investigation. For example, on October 2 Semmerling sent the AUSA a newspaper article about a Wisconsin OJA employee. On September 28, 2009, Semmerling sent a message to her CFO colleagues and managers, including Thomas and Oleskowicz, forwarding an Internet link to a "good source to locate contact information for numerous companies that manage email, run social networking sites, and provide internet access" for use in investigations that involve Internet service providers.

¹⁷⁰ Thomas stated that she and Semmerling had been personal friends until approximately 1999 or 2000, when Semmerling began to dislike her as a result of an internal office administrative matter. Thomas said that Semmerling also was unhappy about Thomas being chosen over her for a Senior Special Agent position in 2006 and the ASAC position in 2008. Thomas told us that she stepped down from her ASAC position in late 2013 to return to investigating cases as an SSA. Semmerling told us that her relationship with Thomas "changed over time," and that she ended her friendship with Thomas when she learned about some personal behavior by Thomas that bothered her. Semmerling described Thomas as "scary" and "volatile."

AUSAs, or mischaracterizing to the AUSAs our conversations with her. We told her that we did not want to have to check with the AUSAs regarding what was actually said.

According to Oleskowicz's memorandum, Thomas also cited as an example of Semmerling's lack of candor a series of exchanges among Semmerling, Thomas, and an AUSA with whom Semmerling was working on another matter. The exchanges appear to revolve around differing descriptions of what the AUSA had said to Thomas and Semmerling about an issue that did not involve the substance of the case.

Semmerling stated that Thomas told Semmerling during the meeting that she could be fired for lack of candor, and that a list of FBI employees who had been fired for this had just been issued. Semmerling said that the next morning, Thomas came to her office and provided Semmerling with the list, which Thomas said she had just received from OIG's liaison to the FBI a week earlier while in Washington, D.C. Semmerling told us she regarded Thomas's action as a threat to fire her, and a way of intimidating Semmerling and hindering her from "being thorough in fact-finding in all the allegations" in the Wisconsin OJA case.

Thomas stated that she did not recall providing Semmerling with information about employees who had been fired for lack of candor. She told us she had never seen such a list, and questioned where she would even obtain one. However, Semmerling said she kept the document and provided it to O&R. The document is dated July 1, 2009, and provides examples of FBI Office of Professional Responsibility disciplinary adjudications during the prior 3 months. The list contained several examples of FBI employees who were dismissed for insubordination and lack of candor, among other types of behavior for which some form of disciplinary action was taken. Moreover, a document that Thomas provided to us showed that she was in Washington, D.C. between July 6 and 10, 2009, when Semmerling said Thomas claimed to have been given the list by the OIG's liaison to the FBI in Washington, D.C. We concluded that Thomas in fact did provide the list to Semmerling.

Oleskowicz's memorandum shows that Oleskowicz and Thomas disclosed to Semmerling the nature of the complaint he had received from the OJP OGC officials that had precipitated his meeting with Semmerling on May 5. He wrote that the OJP OGC officials did not make a formal complaint against her but rather expressed concerns about her sometimes "bullying" and "inappropriate" behavior. He wrote that the OJP OGC officials had told him that they routinely work with OIG agents and had never experienced these problems.

Semmerling wrote in her Confidential Statement that she was told that OJP OGC had "informally complained" about her for "harassing and bullying them, and telling them how to run their program." She wrote that she had never treated OJP or OJJD personnel "rudely," and that if they were being defensive, "it was because I would not back off in asking the hard questions." She wrote that, unlike in other instances when complaints had been made against her, she was not given an opportunity to address the specific allegations against her in this matter.

Semmerling told us that during the meeting she asked for details about the complaint against her, in part because “the AUSAs would also like to know,” but that Oleskowicz told her that it was “confidential.” Oleskowicz denied ever telling Semmerling that the complaint against her was confidential. He stated that he “avoided getting into specifics” about the complaint during the meeting, and only discussed it because Semmerling brought it up. When asked why he avoided providing Semmerling details about Madan’s complaint, Oleskowicz stated that he “thought that she could begin to view the investigation in a different light after hearing details about their concerns,” and that she “may think that they’re trying to stop her from looking at something, and see, they really are targets, they really are subjects. They’re up to no good. And . . . I’ll use this in a loose term. She might want to retaliate in some way against them for making this complaint.”

Semmerling also wrote in her Confidential Statement that she was told “not to focus on any problems with OJJDP or OJP” or “OJP’s involvement in the case,” and to limit her attention to the “lowest level” Wisconsin OJA subject. This directive does not appear in Oleskowicz’s memorandum or notes. Oleskowicz told us that he did not recall the Wisconsin case “coming up in the conversation in any substance,” although he said he thought that Semmerling had raised this particular subject. When asked whether he or Thomas ordered Semmerling not to investigate OJP or OJJDP, Oleskowicz stated, “Absolutely not.” Semmerling said that although she opposed Oleskowicz’s direction not to investigate OJJDP or OJP officials’ possible involvement in the Wisconsin matter, she did not challenge him on this point or ask him for his reasons because she was “scared” and “intimidated.” She stated:

I thought I was going to be fired. And I, I knew that I wouldn't be, and I knew that that was bullshit. But . . . when somebody says that to you, you need to . . . be quiet.¹⁷¹

Oleskowicz also denied ever telling Semmerling to focus her investigation only on Compliance Monitor 1, the Wisconsin OJA employee who had, according to Semmerling, admitted during his interview to falsifying core requirements compliance monitoring data that was submitted to OJJDP. Oleskowicz told us that he did not order Semmerling to limit her investigation in this way because he believed Compliance Monitor 1’s superiors had knowledge of Compliance Monitor 1’s falsification of data, and “we had every incentive . . . to make as big a case as we could.” He stated that he believed Compliance Monitor 1 and at least his immediate supervisor had “criminal exposure,” and that the strategy was to get them charged and, if possible, to cooperate in the investigation, and then pursue the “higher ups, possibly to D.C., if need be.”¹⁷² He stated that it would be up to the AUSAs to

¹⁷¹ After reviewing a draft of this report, Semmerling commented that she knew she could not be fired because she had not lacked candor and had due process rights through the MSPB.

¹⁷² For example, Oleskowicz stated that Semmerling believed that the Wisconsin OJA Executive Director was a potential criminal target and, after she explained her reasoning to him, he agreed with her. He said that “the way you get to him is lock in [Compliance Monitor 1], lock in [Compliance Monitor 1’s immediate supervisor]. Keep moving up the line. And she seemed to agree with that. But then she would go and take other investigative steps that we hadn’t discussed. And maybe I would find out about it afterwards.”

expand the investigation to include OJP or OJJDP officials, and that “by all means, you know, we would make a case as large and as big as we could that we could prove beyond a reasonable doubt.”

Oleskowicz stated that he discussed this investigative strategy with Semmerling “during the course of the case, at various times in various conversations and various contexts.” He stated that he did not recall Semmerling indicating whether she agreed or disagreed with him about this approach, and that she had told both him and others in the office that she had a lot more experience with grant cases than Oleskowicz. Semmerling told us that Oleskowicz never shared this strategy with her, and that she believed she was the one who may have brought it up to Oleskowicz.¹⁷³ Semmerling stated that the strategy made sense, but that because the claims against the Wisconsin OJA compliance monitor were nearing the statute of limitations, she also wanted to pursue “newer stuff,” such as false statements by the compliance monitor’s supervisors and conspiracy to defraud the government.

Oleskowicz sent his memorandum summarizing the meeting to Dorsett on July 27, 2009.

4. Semmerling Continues Developing the Criminal Case against Wisconsin OJA while Simultaneously Examining the VCO Legal Opinion

Following the July 23, 2009, meeting with Oleskowicz and Thomas about her work performance, Semmerling continued to work on the Wisconsin matter. She continued gathering information from OJJDP employees, primarily Rumsey and Melodee Hanes, an advisor to the Administrator of OJJDP who joined the office in August 2009 and briefly became Acting Administrator in 2012. She also pursued her investigation into the issuance of the VCO opinion, even though Oleskowicz told us that he had told her to make sure the prosecutors reviewed the issue. As noted, Oleskowicz’s notes reflect that the FAUSA had agreed to “handle” the 2008 VCO Opinion and the rebuttal memorandum during a May 7, 2009 conversation with Oleskowicz and Semmerling.

In early August, Semmerling sent the AUSAs a case investigation summary, as well as documents that Semmerling claimed established Wisconsin’s fraudulent receipt of formula grant funds at a time that was “within the statute of limitations” for grant fraud.¹⁷⁴ According to notes in IDMS, Semmerling spoke with the line AUSA on August 25 and was told that the FAUSA was engaged in preparing for a

¹⁷³ As described below, the two OIG agents who continued the investigation after Semmerling was removed from it appeared to have a clear understanding of this strategy, at least as to the Wisconsin OJA employees and supervisors, and conducted the remainder of the investigation in accordance with it.

¹⁷⁴ As discussed later in this chapter, the issue of whether the government’s criminal action against Wisconsin was time-barred became relevant to the Northern District of Iowa USAO’s decision to decline prosecution of the case in 2013.

“lengthy complex trial pending in September” and therefore not available. The line AUSA, who appears to have served as Semmerling’s primary point of contact during this period, asked Semmerling in late August to focus on the allegations against Wisconsin OJA employees concerning false statements and conspiracy to defraud the United States by misrepresenting the monitoring universe. The AUSA advised Semmerling that she would explore the local rules for more formal criminal investigative steps in Wisconsin and seek to schedule such activities there. An August 26 entry in IDMS states that the AUSA further advised “that she did not want to share any findings with OJP OGC because the criminal investigation was on-going.”¹⁷⁵

In September, Semmerling sought guidance from the OIG Office of General Counsel on whether the attorney-client privilege applies to communications between OJP OGC and OJP employees, and whether she could obtain documents containing such communications from OJP. On September 24, 2009, Semmerling received an e-mail message from an OIG Attorney Advisor, concluding that no privilege applied to such communications. The OIG Attorney Advisor also wrote that under the Inspector General Act, “OJP is required to provide you with the documents that you request.” She added:

As for your question as to whether you can investigate the circumstances surrounding the creation of the OJP opinions that you believe are incorrect, there is no legal reason why you can’t, and why you can’t interview witnesses about these opinions and how/why they were written. However, I suggest you speak with your ASAC and/or SAC as to whether you should proceed with this – are you likely to uncover criminal activity?

The next day, Rumsey e-mailed to Semmerling the June 15, 2009 OJP OGC guidance to Ayers regarding protection of the attorney-client privilege when discussing legal advice received from OJP OGC. Semmerling forwarded this guidance to the OIG Attorney Advisor on September 29, noting that the guidance had been issued “after I had asked some questions in May.” Semmerling told us that she had no further communication with Hirschfield about this issue.

Our review of MOIs and e-mails shows that during this period Semmerling continued to request and receive information from Rumsey and others about the VCO exception and other matters. During this time, Rumsey and the Senior Advisor forwarded to Semmerling dozens of internal OJJDP e-mail messages about the VCO issue and other OJJDP activities. Many of these messages were in response to Semmerling’s questions about when certain events occurred.

The VCO exception issue took on increasing importance for Semmerling in late September and October 2009, apparently due in large part to a heightened focus on the issue within OJJDP. According to e-mail messages from Rumsey to

¹⁷⁵ Because we were unable to interview the AUSA, we were unable to obtain her account of this conversation.

Semmerling, in early 2009 Rumsey and others in OJJDP had been pressuring OJP OGC to reconsider its 2008 VCO Opinion. Rumsey told Semmerling in mid-October 2009 that OJP OGC was working on a "final draft" of a revised opinion, that it would be ready "soon," and that OJJDP would have an opportunity to comment on the draft before it was finalized.¹⁷⁶

5. Semmerling Communicates her Views on the VCO Opinion to Senior OJP Officials

During September and October 2009, Semmerling continued to collect information about the circumstances of the VCO opinion, primarily from Rumsey and Hanes. As described below, Semmerling also communicated her views about the opinion to Hanes and told Hanes and a senior OJP policy advisor that OJJDP and OGC officials involved in the opinion were "part of our investigation."

On October 13, Semmerling learned from Rumsey that OJJDP planned to discuss the VCO exception at an upcoming core requirements conference in Austin, Texas. Rumsey sent Semmerling a copy of slides that had been prepared for the conference, which contained handwritten edits by an OJP OGC attorney that were consistent with the interpretation of the exception contained in the May 2008 VCO Opinion. On October 14, 2009, Semmerling forwarded to Hanes the May 3, 2009 e-mail that Semmerling had written to the OJP OGC attorney (discussed in Section III.G.4. above) that asked pointed questions about the VCO opinion and helped trigger the complaint about Semmerling from General Counsel Madan. In the e-mail message to Hanes, Semmerling noted that she never got an answer to her May 3 e-mail from OJP OGC. That same day, Hanes met with Acting Administrator Slowikowski, Rumsey, and the OJJDP Senior Advisor who authored the rebuttal memorandum. According to a summary of the meeting prepared by Rumsey, Hanes, Rumsey and the Senior Advisor expressed their "strong disagreement with the VCO opinion."¹⁷⁷

Semmerling spoke with Hanes by telephone on Friday, October 16, 2009. According to an MOI of the conversation, Hanes told Semmerling that OJP OGC planned to release the most recent version of the VCO legal opinion at the upcoming Austin conference.¹⁷⁸ The MOI states that Hanes told Semmerling that

¹⁷⁶ Rumsey did not appear to be aware during her interview with us that the new opinion was being drafted in response to a question asked by Colorado about the VCO exception that had been submitted approximately 1 month after OJJDP sought a legal opinion about Wisconsin's use of the VCO exception. It is also significant to note that Wisconsin had already been advised in January 2009 that OJP OGC had opined that its use of the VCO exception to securely detain runaways who violated court orders was appropriate. As discussed in Chapter Three, many compliance personnel in OJJDP disagreed with OJP OGC's interpretation of the VCO exception and did not inform other states of it.

¹⁷⁷ According to Rumsey's summary, Slowikowski promised that the training slides would not include the interpretation of the VCO exception to which they objected. However, as noted below, the next day Hanes told Semmerling that OJP OGC planned to release the opinion at the conference.

¹⁷⁸ The MOI does not specify whether the opinion Hanes referred to was the May 28, 2008 Opinion that responded to OJJDP's questions about Wisconsin's use of the VCO exception or the updated opinion that the OGC was working on in response to Colorado's questions about the VCO exception. The OIG determined that the VCO opinion being considered for release at the Austin

(Cont'd.)

Hanes was “opposed to the opinion and said it was wrong,” and was planning to bring it to the attention of OJP Assistant Attorney General Laurie Robinson. The MOI states:

When advised that the opinion was created specifically for Wisconsin and their compliance problem so that OJJDP could find them in compliance so they could receive funding, Hanes said that she would appreciate some information to relay to the Assistant Attorney General. Hanes was advised that Special Agent Semmerling would have to contact the [AUSAs] handling the case who were in trial.^[179]

At approximately 3:50 that afternoon, Semmerling wrote to the FAUSA and the line AUSA with the subject: “Important-Please read.” In the message, Semmerling wrote:

Internal documents show allegations in internal OJJDP e-mails that OJP OGC was being used as a means of finding certain states in compliance and that many of the answers were already known by Greg Thompson but that the OJP OGC opinions will act as cover for circumventing regulations. E-mails from OGC to Greg Thompson indicate that this may have been the case.^[180]

Semmerling wrote that OJP OGC planned to release the opinion on October 26, and that “the decision to release the opinion despite obvious objections is also part of our case.” She noted that Hanes had asked for information to share with the Assistant Attorney General, and then included a draft message to Hanes for the AUSAs’ approval. The draft message to Hanes states that due to the issuance of the VCO opinion “so that a state with compliance problems” could receive grant funds, “the OGC staff and [the State Relations and Assistance Division of OJJDP] staff involved are part of our investigation.” We found no response from the AUSAs, although a receipt indicates that both of them read Semmerling’s message within a few minutes after she sent it. The FAUSA told us he only vaguely recalled receiving the e-mail message. As described below, after reviewing it during his interview with us, he stated that he did not agree with portions of what Semmerling had written.

conference was drafted in part to respond to a question about the VCO exception that Colorado had raised with OJJDP and in part to clarify the earlier response to the question raised by Wisconsin. It is not clear that Hanes was aware that this later opinion did not solely originate from Wisconsin’s earlier query about the use of the VCO exception. Rumsey stated that she did not recall ever reading the request from Colorado or the 2010 VCO Opinion, and that her understanding of why the opinion was written was to provide “[m]ore cover for Wisconsin,” although she acknowledged that she was speculating about this motive.

¹⁷⁹ As noted, the FAUSA was unavailable due to a trial in another case. E-mails between the line AUSA and Semmerling indicate that the line AUSA also was unavailable due to a trial.

¹⁸⁰ Semmerling seemed to be implying that OJJDP Associate Administrator Thompson had orchestrated the request to OJP OGC in order to obtain legal “cover” for Wisconsin’s juvenile detention practices. As discussed in the Chapter Three, we found no evidence that this was the case.

At approximately 6:45 p.m. that evening, Semmerling wrote to Hanes, with a copy to the Senior Advisor to the Assistant Attorney General for OJP (OJP AAG Senior Advisor), and to the FAUSA and the line AUSA. Semmerling's message contained much of what she had sent to the AUSAs in draft form a few hours earlier – including advising that “OGC staff and SRAD staff involved are part of our investigation” – but with some additional language. For instance, Semmerling wrote, “The recent decision and purpose of issuing this opinion at the conference despite obvious objections is also part of our case,” but now added, “I want to ensure that there is no obstruction or hindering of the on-going criminal investigation.” Semmerling also wrote that she had informed the AUSAs that she was writing to Hanes, and then wrote:

Based on the sensitivity of this matter, I request that you share this with no one from OJJDP nor OJP, OGC. I have heard that this matter has been addressed with [the] Legal Counsel for the Assistant Attorney General so I am also cc:ing her. [Emphasis in original.]

A few minutes later, Semmerling wrote another message to Hanes, again copying the AUSAs and the OJP AAG Senior Advisor, this time to forward to the Senior Advisor the May 3, 2009 e-mail she had sent to the OJP OGC attorney who had written the 2008 VCO Opinion. Semmerling also attached the rebuttal memorandum to OJP OGC's legal opinion that the Senior Advisor had written.

6. Reactions to Semmerling's E-mail to Hanes and the OJP AAG Senior Advisor

At approximately 8:30 p.m. on October 16, about 2 hours after sending her e-mail to Hanes and the OJP AAG Senior Advisor, Semmerling sent Oleskowicz a very brief message, copying Thomas. The message stated in relevant part:

I am sending you an e-mail about Wisconsin. I know you previously got upset with me about this issue but this information cannot be ignored. Please respect me, and my knowledge and experience. I am not trying to do anything to cause you or Kim [Thomas] any problems. I want you kept in the loop. This case is dicey and has many uncomfortable aspects to it but I want to work as a team on this as we have on cases in the past.

Approximately 1 minute later, Semmerling sent a lengthy e-mail message to Oleskowicz, Thomas, RAM Taraszka, the Auditor, and SA 2. The message began:

Throughout this week, I have received information that the Office of Justice Programs (OJP), Office of [the] General Counsel (OGC) plans to release a legal opinion and train on the opinion at the OJJDP National Conference on October 26-29, 2009. This legal opinion reinterpreted the rules for the Deinstitutionalization of Status Offenders core requirement of the JJDPA after 20 years so specifically Wisconsin, with problems complying with the JJDPA could receive their 2007, 2008 and 2009 funding. The steps taken to receive this opinion by OJJDP staff

are directly related to our investigation regarding the Wisconsin Office of Justice Assistance (OJA). Thus, the OGC staff and OJJDP staff involved are part of our investigation.

Semmerling went on to describe Hanes's desire to bring the matter to the Assistant Attorney General and her request for "any information about the link to the opinion and our investigation." Semmerling also reminded Oleskowicz that during the May 7, 2009 conference call with the AUSAs and OJP personnel, Moses had stated that the legal opinion "had nothing to do with Wisconsin" despite e-mails to the contrary. Semmerling summed up her assessment of the relevance of the VCO legal opinion to the investigation as follows:

While it is true that an agency can make its own determination about how to apply rules, in this instance, the rules were changed specifically for one state, Wisconsin, the subject of our case. In investigating the case, we need to understand the story, including OJP decision-making, process, regulations and rules and legal opinions in decision-making. All important for foundation, knowledge and intent.

This is all on the back burner until the AUSAs are finished with their large lengthy trial. We are currently focusing on the false statements and conspiracy to defraud by Wisconsin OJA staff, but based on Hanes' request, information about the OGC and their legal opinions needed to be brought to everyone's attention. I understand the sensitivity of this as our Fraud Detection Office and HQ work with the OGC but they are part of this case and this cannot be ignored. As previously mentioned, I personally feel that this information needs to be relayed to the IG.

Attached to Semmerling's message were the two messages she had just sent to Hanes, the AUSAs, and the OJP AAG Senior Advisor. Oleskowicz responded the next day, a Saturday, and told Semmerling to let Thomas review the MOIs documenting the information Semmerling had obtained over the past week and that "we will discuss further." On Sunday, Semmerling replied that the MOIs were in Thomas's inbox.

The OJP AAG Senior Advisor responded to Semmerling on October 19 to confirm that she had received Semmerling's messages and to pledge her cooperation in the investigation. She also clarified her role in the AAG's office, writing that while she was an attorney, she did not provide legal counsel to the AAG, but rather served as a policy advisor. She also asked Semmerling for "guidance on how you would recommend that we proceed with any internal review of this situation; we don't want to interfere at all with your investigation so if you'd let us know the best way to proceed, that would be helpful."

Semmerling responded to the OJP AAG Senior Advisor, this time copying Oleskowicz and Thomas, to thank her for clarifying her role in the AAG's office.¹⁸¹

¹⁸¹ We asked Semmerling why she copied the FAUSA and the line AUSA on the October 16 e-mail message to Hanes and the OJP AAG Senior Advisor, but not her co-case agent and supervisors, (Cont'd.)

She also wrote, "I too want to clarify that the OJJDP staff and the OGC staff are involved with the decision and are part of the case, but I am not implying that anyone at OGC and OJJDP is a target of our investigation." Semmerling told us that no one prompted or asked her to clarify this point to the OJP AAG Senior Advisor, and that she included it because she "just wanted to make sure that they knew that."

The OJP AAG Senior Advisor had had some familiarity with the Wisconsin investigation through prior conversations with Rumsey and the OJJDP Senior Advisor. She stated that Rumsey's "hope was that there would be some type of OJP criminal investigation" and thought that "there may be improper if not illegal activity," but that "nothing she ever told me supported that." She also stated that she did not believe there was anything inappropriate about the way Semmerling alerted her to the investigation through the October 16 e-mail message. She said her main concern was to "not get in the way of whatever criminal investigation is occurring."

By contrast, Oleskowicz told us that Semmerling's actions were problematic for several reasons. First, he noted that Semmerling sent the October 16 message to the OJP AAG Senior Advisor "without discussing it with anybody in the OIG." However, he stated that this was not necessarily as much of a problem as the fact that she had not told the FAUSA in advance that she planned to notify the OJP AAG Senior Advisor that OJP and SRAD employees were now considered a part of the investigation. He said that to have done so at this juncture in the criminal case was "entirely inappropriate" and "completely inexcusable."

Second, Oleskowicz stated that Semmerling's message to Hanes and the OJP AAG Senior Advisor could be interpreted to mean that Department officials were targets of the investigation when he had already understood through his conversation with the FAUSA and SA 2 several months before that no Department officials were targets. We pointed out to him that Semmerling clarified to the OJP AAG Senior Advisor a few days later that she had not meant to imply that OGC and SRAD personnel were targets of the investigation, and asked whether that retraction was due to an intervening conversation with either him or the AUSAs. Oleskowicz said it was not, but that "[a]t that point, the toothpaste is out, and she's trying to put it back in."

Third, Oleskowicz stated that he was bothered by Semmerling's continued investigation of the VCO legal opinion because the AUSAs had said they would "handle" both the legal opinion and the rebuttal memorandum. He said he was also

and yet did copy her co-case agent and supervisors (along with the FAUSA and the AUSA) on the October 19 e-mail to the OJP AAG Senior Advisor. Semmerling responded, "I don't know. But I don't believe it's like a big deal." However, Oleskowicz stated that Semmerling frequently would "begin an e-mail string, and certain people will be on it, then some people will be dropped, then some people will be added, and she's the only one that really has all of the information," and cited this practice as an example of her tendency to overly "compartmentalize" the investigation. He stated that there were several instances of Semmerling's "telling one person not to tell another person, or one group not to tell another group about stuff."

bothered that she sent this e-mail without warning, given that she had been pursuing the issue "since day one" of the investigation, the VCO legal opinion was not new information, and "the issues she's raising . . . are old." He stated:

And then this came out of nowhere. She was working on it all week long, she says. She's been receiving information all week long. There's nothing in the case file. She hasn't told her co-case agent.^[182] She hasn't told the AUSA, to my knowledge. And then the e-mail comes out on a Friday night within minutes of when I left. I walked out of the office, and then the send button . . . was hit.

Oleskowicz said he had no recollection of discussing the above-described issues with Thomas, but stated that he could not imagine that he did not do so because she was his ASAC. Thomas told us that she did not recall the issue of Semmerling's message to Hanes and the OJP AAG Senior Advisor or having any discussions with anyone about it. Her documentation shows that she was not in the office on October 16, but was back in the office the following Monday, October 19.

The FAUSA stated that he shared Semmerling's suspicions about the VCO legal opinion and tended to agree with her that the opinion "looked unusual." He generally supported Oleskowicz's recollection that Semmerling had not consulted him or the line AUSA before advising Hanes and the OJP AAG Senior Advisor that the investigation now included SRAD and OGC, stating, "I don't think that was anything that we asked Jill to do." Although he told us that Semmerling's message to Hanes and the OJP AAG Senior Advisor did not "appear completely out of line," he criticized portions of what she had written to them. For example, he said he would not necessarily have advised Semmerling to write that "I want to ensure that there is no obstruction or hindering of the on-going criminal investigation," which he characterized as "a little strong." He also stated that openly criticizing OJP OGC's work during the ongoing criminal investigation was not "particularly helpful," and that he "didn't really view it as our job." He said that "to presume that we're correct in construing what they're doing as being improper I think would be going too far." However, he added that "[a]t the end of the day, I'm having a hard time thinking how it would really, terribly affect our investigation." The FAUSA told us that, in the final analysis, the primary problem with the case from a criminal prosecution standpoint was that the entire JJDP Act program appeared to be geared

¹⁸² Semmerling did not include SA 2 on the October 16 e-mail messages to Hanes and the OJP AAG Senior Advisor. SA 2 told us that he recalled that Semmerling had already been told by her managers not to have contact with senior officials without first telling them, but said he could not recall any details of this incident. He stated that "when she told me she reached out to [the OJP AAG Senior Advisor], I was like, did you let management know about that? And she said no, I didn't. And I said, look, it's up to you, but weren't you told that, you know, if you're going to have contact with senior officials that you should be, you know, at least informing them so our management is not finding out on the back end that you reached out to senior officials?" In an October 24, 2009 e-mail from Semmerling to a colleague, Semmerling wrote that SA 2 "kept saying they are going to hang you for talking to [the OJP AAG Senior Advisor]" and that he advised her not to tell Thomas and Oleskowicz about the e-mail to the OJP AAG Senior Advisor. When we asked SA 2 about this, he stated that he recalled telling Semmerling, "[I]t's up to you, but, you know, I think they're going to hold you in the hot seat because you did something that they told you not to do."

toward finding ways to give states their grant funds irrespective of their compliance with the statute.

Semmerling stated that Oleskowicz “wasn’t happy” about her message to Hanes and the OJP AAG Senior Advisor and “didn’t talk to me for probably a year” afterward. She stated that she knew Oleskowicz was “not going to be happy with this” even before she sent the first message to Hanes and the OJP AAG Senior Advisor on October 16 because he had told her not to focus on this aspect of the case. When asked whether she should have first discussed it with him, Semmerling stated that she was sure Oleskowicz must have thought so, but that she sent the e-mail anyway because she believed it was important to let Hanes and the OJP AAG Senior Advisor know that the VCO legal opinion was a part of the OIG investigation. When asked whether she believed she was acting contrary to instructions Oleskowicz had given her in the past, Semmerling replied that she did not. She said that she did not believe that conveying the information to an individual in the AAG’s Office was “a big deal,” because she had spoken with “high-level people” in other cases. She further said that she was not aware of the need to receive approval for contacting any official, adding that “there’s nothing in the regulations that says you can’t talk to somebody if it’s part of your case.”

7. Semmerling is Removed from the Case

The precise sequence of events leading up to Semmerling’s removal from the Wisconsin investigation is not entirely clear. We describe these events below based on witness interviews, e-mail messages, and the contemporaneous notes of Oleskowicz and the FAUSA.

Oleskowicz forwarded Semmerling’s October 16 and 19 exchanges with Hanes and the OJP AAG Senior Advisor to AIG McLaughlin and Deputy AIG Dorsett on October 20, 2009. Simultaneously, Semmerling continued her communication with Hanes and the OJP AAG Senior Advisor, forwarding to them older e-mail messages she had sent to the OJJDP Senior Advisor in May 2009 regarding responses to comments in the 1996 Federal Register notice about the proposed regulations implementing the VCO exception.

Semmerling also had an exchange during this period with Rumsey and Hanes about maintaining the confidential nature of the investigation. In an October 20 e-mail to Rumsey and Hanes, Semmerling expressed concern that Rumsey had shared an unspecified document with others in a meeting with OJJDP staff. While it is unclear what Semmerling believed the document to be, she reminded Rumsey not to “discuss the particulars of the OIG case with other OJJDP staff.” Rumsey responded, “Just to clarify, I did not share a hard copy of any external documents,” but rather identified internal OJP e-mail discussions about Wisconsin’s compliance issues. Hanes also responded, writing:

This however, underscores that time is of the essence. It is very difficult for us to carry on business as usual when we know there is a significant criminal and/or civil investigation with broad implications or

fraud and yet we are told we [can't] talk to anyone. We want to assist in any way to see this to a conclusion as quickly as possible.

Also at this time, Semmerling was planning to visit various police stations and detention facilities throughout Wisconsin beginning on October 21 to determine whether they met the definition of a "lock-up" under the JJDP Act. If these facilities had cuffing rails or other stationary objects that could have been used to securely detain juveniles, it would mean Wisconsin had been improperly excluding them from the universe of facilities it was required to monitor and report on to OJJDP to qualify for grant funds. As noted, Semmerling pursued this aspect of the investigation as a result of information she had obtained from Rumsey. However, as described below, Semmerling was removed from the case before conducting the inspections of Wisconsin's facilities as she had planned.

Oleskowicz told us that he spoke by telephone with McLaughlin twice over the course of a day or two to discuss whether to remove Semmerling from the case, but that no decision was reached until the second call, which appears to have occurred on October 21. He told us that McLaughlin stressed in one or both of the conversations that "we have to do what's best for the case." Oleskowicz said that in the first conversation, he and McLaughlin "hashed out different options" about staffing the investigation. He stated that McLaughlin was interested in knowing whether the AUSAs had been told in advance about Semmerling's messages to Hanes and the OJP AAG Senior Advisor, and asked Oleskowicz to speak with the FAUSA to find out what was going on.

Oleskowicz stated that after this first conversation with McLaughlin, he did not know for certain whether Semmerling would be removed from the case, so he directed Thomas to tell Semmerling that "circumstances have changed" and to cancel her travel plans for the Wisconsin site visits. Oleskowicz told us that the site visits "definitely had to be done," but that he first wanted to know whether Semmerling would be removed from the case.¹⁸³

Thomas stated that she did not recall knowing whether Oleskowicz and McLaughlin were considering removing Semmerling from the case at this point. As Oleskowicz directed, on October 20, she sent an e-mail message to Semmerling and SA 2 telling them that "circumstances have changed somewhat and other issues have arisen that we need to address," and that they should cancel their plans to travel to Wisconsin the next day.

¹⁸³ Semmerling stated that Thomas had told her that the site visits were not necessary and "kind of fought me on that." Thomas denied that she opposed Semmerling's plan to conduct site visits, although she stated that Semmerling's initial plan was more extensive than what she and Oleskowicz believed was necessary, and that it might be necessary to discuss the plan with headquarters to "see what they were willing to pay for." She stated that ultimately Semmerling had submitted a proposed itinerary involving a random sampling of facilities at eight of Wisconsin's largest cities, that Semmerling's travel vouchers had been approved, and that it was "all a go." In fact, according to an MOI Semmerling wrote, she and SA 2 visited at least one Wisconsin detention facility on October 8, 2009 and SA 2 conducted site visits at several Wisconsin jails and detention facilities shortly after Semmerling was removed from the case.

According to the FAUSA's notes, Semmerling called him on October 21 to tell him that she had been "told by her SAC [Oleskowicz] not to investigate jails as we [the AUSAs] asked." The FAUSA told us that he was angered by Oleskowicz's decision because he believed that the facilities would have to be inspected in order to prove the allegation that Wisconsin was not submitting accurate reports to OJJDP about juvenile detentions. The FAUSA's notes state that he called Oleskowicz and left him a message to call back.

Also on October 21, Oleskowicz had his second conversation with McLaughlin about whether to remove Semmerling from the case. Oleskowicz told us that during the second call, McLaughlin told him "to go ahead and [replace Semmerling as the case agent] and call up the AUSAs and advise them." McLaughlin told us that he decided to remove Semmerling and to replace her with an SSA who also served as the CFO's grant fraud coordinator and had been a criminal prosecutor. McLaughlin stated that the bases for his decision to remove Semmerling were:

that she was failing . . . to maintain or keep . . . her supervisors maintained [sic] as to the progress of her investigation, that . . . she was expanding the investigation to areas that were not included in the scope of the investigation without involvement of her supervisors in making that decision, that we had already had verbal discussions with her about displeasure about the management of this investigation by her. We had gone to the length of adding a co-case agent, which is a very unusual step for this investigation because of that mismanagement.

McLaughlin told O&R that Semmerling's October 16 e-mail to Hanes and the OJP AAG Senior Advisor was "the straw that broke the camel's back" for him. McLaughlin cited in particular "the fact that [Oleskowicz] was not copied on the e-mail, that nobody was, that [Semmerling] was dealing directly with these folks at OJP and seemingly expanding the investigation" and that "at least the impression could be given to officials in OJP, Washington, D.C. that they were now subjects of her investigation."

McLaughlin cited two other concerns that factored into his decision. First, he told us that relationships between OIG agents and witnesses should be "entirely abstract and professional," but that in the Wisconsin matter "it became evident" that Semmerling and Rumsey "had established a very close relationship." McLaughlin stated that he did not believe this was "a very good idea when you are conducting impartial investigations."¹⁸⁴ Second, McLaughlin said that Oleskowicz was concerned that Semmerling was alleging misconduct by OJP officials "without sufficiently identifying evidence to support that misconduct," and that Semmerling

¹⁸⁴ McLaughlin stated that one sign of the closeness of the relationship was that Rumsey called Semmerling directly to tell her that she was unhappy about her meeting with the Washington Field Office officials concerning her whistleblower retaliation complaint rather than having her attorney contact WFO or INV Headquarters management.

was making these allegations to OJP officials. He characterized this concern, which he shared, primarily as a concern over the scope of the investigation, stating:

I think that, that there was concern that this thing was getting very, very wide, very broad and wide Or the feeling was we should bring this back to Wisconsin, and Jill's concentration should be on Wisconsin and resolving that matter. And if there were other matters that needed to be resolved as a result of that thorough investigation of Wisconsin, then we could . . . begin with those and determine what our course of action would be. So, yes, I think the scope was, was a situation that, or was, was an area that we were, that I was concerned about as well as John Oleskowicz and others.

Oleskowicz said he was able to reach the FAUSA by telephone on October 23. According to the accounts of both Oleskowicz and the FAUSA, their conversation covered several issues and at points was contentious.

Oleskowicz's notes state the FAUSA confirmed that Semmerling's e-mail to Hanes and the OJP AAG Senior Advisor on October 16 was "not discussed in advance" with the FAUSA. Oleskowicz's and the FAUSA's notes indicate that Oleskowicz told the FAUSA about the complaints Oleskowicz had received from OJP officials about Semmerling. In an apparent attempt to defend Semmerling, the FAUSA appears to have likened the situation between Semmerling and the OJP to a chicken and egg scenario, asking Oleskowicz which came first, Semmerling's complaints about OJP or OJP's about her. The FAUSA's notes indicate that Oleskowicz told him he was very concerned that Semmerling had written a message to a senior OJP official that could have been viewed as "targeting OJP employees," and that "they have rights [and] need to be advised."

Oleskowicz told us that he also complained to the FAUSA about the lack of progress on the case after one and a half years, the AUSAs' lack of responsiveness and failure to return phone calls, and the USAO's lack of coordination with Semmerling and her co-case agent.¹⁸⁵ According to his notes, he read to the FAUSA a portion of Semmerling's earlier e-mail message stating that the case had been put "on the back burner until the AUSAs are finished with their large lengthy trial." Oleskowicz told us that he said to the FAUSA that if the Northern District of Iowa USAO was unable to devote the necessary time to the case, he would ask the EOUSA to reassign the matter to a new office. He said the FAUSA "called my bluff"

¹⁸⁵ After reviewing a draft of this report, the USAO noted that although Oleskowicz may have complained about the USAO's lack of coordination with the OIG, "the USAO did not act unilaterally in this investigation" and there is evidence that Semmerling bore considerable responsibility for this lack of coordination. We believe the USAO's observation has merit. For instance, as described earlier in this report, Semmerling failed to coordinate with the prosecutors regarding her intent to contact a senior official in the OJP Office of the Assistant Attorney General to allege that OJP OGC had written the VCO Opinion to benefit Wisconsin and assert that OGC officials were now "part of the investigation." As we also describe, the evidence also shows that Semmerling mischaracterized to the FAUSA Oleskowicz's instruction to Semmerling to postpone her plan to conduct site visits at various Wisconsin detention facilities.

and told Oleskowicz he would have no objection to a reassignment of the case. As discussed later in this chapter, the case was never reassigned, but the Iowa USAO ultimately declined to prosecute it in 2013.

We were unable to resolve the question of whether the FAUSA understood that Oleskowicz had planned to postpone rather than cancel altogether the site visits to Wisconsin's police stations. The FAUSA told us that this investigative step was "rudimentary," and that he viewed it as pretty unusual that [Oleskowicz was] saying, no, we're not going to do that." However, his own notes of the conversation with Oleskowicz state, "[H]e intends to have jail inspections done next week." When asked about his notes of the conversation with Oleskowicz, the FAUSA said that "aside from these notes" he believed, based on the overall tenor of the conversation, that the site visits were "not to be done at all" because Oleskowicz did not think they were necessary and the case was taking too long.¹⁸⁶

The FAUSA's notes state that Oleskowicz told him that he was also concerned that Semmerling and her co-case agent were not communicating with each other. The notes state that Oleskowicz "feels case is bogged down [and] not moving forward [and] the only way to get it moving forward is to put his most senior agent [on it]." The FAUSA's notes say that he would "urge him not to reassign [Semmerling] from this case." The FAUSA told us he was "quite surprised" when Oleskowicz told him that he was removing Semmerling from the case and expressed his displeasure to him. He told us that "too many times I work with agents who don't have her energy and enthusiasm for things. And, and I'd much rather have somebody who is interested and enthusiastic than somebody who you're having to drag along to do things." However, he also stated that "it does stick in my mind maybe there were one or two times when she did things that . . . we didn't have an understanding that that's what she was going to go do." He said he vaguely recalled that Semmerling had interviewed a few witnesses without his knowledge or "did a couple of investigative steps without coordinating with us," but added that "we would have tried to redirect her or recounsel her." He stated that he was unable to think of specific examples of this.

Semmerling told us that she saw in IDMS that the matter had been reassigned to the SSA, although Oleskowicz did not tell Semmerling of the decision to remove her from the case until October 23, 2009. We confirmed that IDMS shows that on October 21, 2009 the case had been "reassigned to [the SSA], with [SA 2] continuing as co-agent," although we could not determine when the note was entered in IDMS. Oleskowicz said he told Semmerling that he wanted her to continue to be involved and to help the SSA and SA 2 go through the case materials because she had the most knowledge about the case. Semmerling denied that Oleskowicz asked her to remain involved in the case, and stated that when the SSA

¹⁸⁶ The case notes in IDMS also support the conclusion that Oleskowicz intended to postpone the site visits rather than cancel them entirely. An October 21, 2009 entry states, "Travel to lockups postponed by management."

asked her for assistance after her removal, she was reluctant to help because “I don’t think they want me doing anything on this.”¹⁸⁷

Thomas told us that she did not recall knowing in advance that Semmerling was going to be removed from the case, having any involvement in any discussions about the removal beforehand, or being told why she was removed. Semmerling wrote in her Confidential Statement that Thomas had told her she “was removed because ‘HQ felt you had a vendetta against OJP, OGC,’” but that I was not to view the removal as ‘punishment’ or ‘discipline.’” Thomas adamantly denied telling Semmerling that she was removed due to the perception that she had a “vendetta” against OJP OGC, stating that anyone making such an assertion is a “flat-out liar.”

Oleskowicz rejected the notion that the timing of Semmerling’s removal from the case could suggest that Semmerling was removed because she had uncovered misconduct at OJP or OJJDP. Oleskowicz stated that Semmerling had not brought forth any new information in October 2009, and the issues she had raised about the 2008 VCO Opinion, which the AUSAs had reviewed, were months old. He said that her recent message to Hanes and the OJP AAG Senior Advisor advising that SRAD and OJP OGC were a part of the investigation “contradicts all of that information that we had” from the AUSAs that no DOJ employees were potential criminal subjects in the case. Lastly, he said the decision to remove Semmerling was made by McLaughlin after “two discussions with my second level supervisor about what to do with this, and then I was told replace her as case agent.”

H. Significant Developments Following Semmerling’s Removal

In this section, we discuss significant investigative steps taken by the two case agents who assumed case responsibility after Semmerling’s removal from the Wisconsin investigation in October 2009. As described below, these agents took several actions to advance the case and encourage both criminal and civil prosecutors to either prosecute Wisconsin officials or seek civil recovery against Wisconsin. We also describe Semmerling’s interactions with former Senior Counsel to the IG and current OIG General Counsel Blier and other senior OIG officials after her removal from the case, her participation in Rumsey’s whistleblower retaliation litigation, and her own disclosures to the OSC. Lastly, we describe the circumstances surrounding her retirement from the OIG in 2012.

1. Investigative Activities from Late 2009 to the Completion of the Report of Investigation in January 2014

Concurrently with Semmerling’s removal from the case, the SSA and SA 2 were assigned as lead and secondary case agents, respectively, although SA 2 had been assisting Semmerling since May 2009. Oleskowicz told us that he chose the

¹⁸⁷ However, the SSA told us that following Semmerling’s removal, Oleskowicz asked the SSA to identify any incomplete work in the case file and that the SSA identified several unfinished MOIs that had been “outstanding . . . for months.” The SSA told us that he asked Semmerling to complete them.

SSA to be the lead agent on the Wisconsin investigation because he was “the most experienced agent” in the CFO, he was the grant fraud coordinator, and was a former prosecutor. Oleskowicz explained:

There [are] these legal issues floating around. He's a former prosecutor. He knows how to make a criminal case. He knows what AUSAs would be looking for. He knows about statute of limitations. He can take this and, and make what he can before the statute runs out.

Oleskowicz told us that the SSA was “one of the best agents that has ever been in the [CFO].” Thomas stated that the SSA was “outstanding,” which she said explained why he was selected to be a SSA. SA 2 also was highly regarded as an agent, and has received several performance awards. Oleskowicz, the FAUSA, and Thomas all described SA 2 as an “outstanding agent,” and Dorsett stated that he was a “really good agent.” We interviewed two attorneys that handled the subsequent civil case against Wisconsin, and both stated that they had no concerns about SA 2 and that he performed the tasks he was asked to perform.¹⁸⁸

a. Late October 2009: Initial Direction from Management

The SSA told us that upon first being assigned to the case in late October 2009, he had numerous conversations with Oleskowicz, Semmerling, and SA 2 to get up to speed on the investigation. The SSA stated that Oleskowicz and Thomas told him that “the case was not moving towards criminal resolution quickly enough” and that “we needed to move this case and support the U.S. Attorney’s Office.” SA 2 told us that he understood the subjects of the investigation to include both Compliance Monitor 1 and his “chain of command,” and the SSA told us that the OIG “pushed very hard to have [Compliance Monitor 1’s supervisor] accepted by the U.S. Attorney’s Office as a criminal subject.” Both the SSA and SA 2 told us that they did not consider any OJP employees to be subjects or targets of the investigation, but that Oleskowicz and Thomas never discouraged them from investigating OJDP or other OJP employees. SA 2 told us that the SSA focused on the criminal case against Wisconsin and “kind of hit hard and fast because we were really concerned about statute of limitations issues with the criminal aspect of this case.”

¹⁸⁸ The SSA had at least one meeting with the civil attorney who was assigned to the matter after the Civil Division of the U.S. Attorney’s Office for the Northern District of Iowa opened a civil case in August 2010. This attorney stated that he had no recollection of the SSA. The Civil Division referred the matter to the Civil Fraud Section of the Civil Division in or about March 2011, after the SSA had retired, and therefore the other civil attorney did not have an opportunity to work with the SSA on the case.

b. November 2009- February 2010: Site Visits to Wisconsin; Coordination with USAO; and Internal OIG Meetings on Case Development

The information provided in this subsection is based upon a review of IDMS, internal OIG documents, e-mails, and witness interviews.

SA 2 visited five Wisconsin police departments between November 2 and November 3, 2009, to determine whether Wisconsin OJA was properly reporting its monitoring universe to OJJDP. SA 2 told us, and his notes reflect, that he discovered that Wisconsin OJA had not been inspecting certain facilities that it should have been inspecting for compliance with the formula grant program.

On November 5, 2009, the SSA e-mailed the line AUSA to introduce himself as the new case agent. Shortly thereafter, the SSA reviewed various case documents and sent them to the USAO for scanning into "Casemap," the USAO's document management system, at the request of the AUSAs. According to an e-mail from the SSA to Oleskowicz on November 12, 2009, during this process the SSA discovered that Semmerling had not completed several MOIs documenting her investigative activities, including MOIs describing conversations with witnesses and MOIs describing numerous documents she had received. The SSA told us that he asked Semmerling to complete these MOIs.

According to the FAUSA's notes, the FAUSA met with the SSA and SA-2 to discuss what additional information the OIG would provide to the USAO and which witnesses the OIG wanted to interview next. The FAUSA told us, and his notes reflect that it was during this meeting when the FAUSA first learned that IG Fine initially thought that the Wisconsin grant fraud allegations would be pursued through an audit rather than as a criminal investigation, and that Semmerling had converted the matter to a case.¹⁸⁹

Notes in IDMS show that on December 3, 2009, the SSA and SA 2 met again with the FAUSA, and also with the line AUSA, a Civil AUSA from the Iowa USAO, and a paralegal. The SSA wrote that he "advised [the USAO] that the OIG needed to move the case forward." At the meeting he suggested interviewing certain additional Wisconsin OJA witnesses and requested that the USAO consider using certain formal criminal investigative steps for "key witnesses who have already been interviewed." The SSA wrote that the FAUSA "agreed that [such steps] should be taken as soon as January 2010." The SSA also wrote that the AUSAs agreed to assign to a paralegal and student interns the "time-consuming chore of classifying the 14,000 documents from the case already scanned into Casemap." According to the IDMS notes, the FAUSA "advised that witness interviews will now take priority over preparing documents for Casemap."

¹⁸⁹ After reviewing a draft of this report, the USAO commented that pursuing the matter as an audit "may have enhanced the likelihood that misallocated funds would have been recovered or offset against future allocations."

On January 8, 2010, senior Investigations Headquarters official Michael Tompkins wrote an e-mail to Oleskowicz and Thomas stating that the Wisconsin case would be put on the "Priority Case update in the future."¹⁹⁰ The senior official further stated, "I know from our conversations last month, you had reassigned the case to [the SSA], and that he made great strides in November and early December." A handwritten note on the e-mail states that the process of obtaining sworn testimony would "begin in four weeks. 2 or 3 targets re: false info provided to DOJ by state."¹⁹¹

On January 22, 2010, the SSA sent an e-mail to the FAUSA and the line AUSA attaching over 100 electronic MOIs and a lengthy summary of the MOIs for the first year of the case. According to IDMS and other documents we reviewed, the SSA had spent considerable time "reviewing, correcting, and compiling" these MOIs. In the January 22 e-mail, the SSA also told the FAUSA and the AUSA that OJJDP had identified the Compliance Monitoring Liaison as a point of contact for questions on OJJDP policy; however, the SSA expressed concern that a higher-level employee would be needed for that purpose.

According to IDMS, during a February 19, 2010 telephone conversation the line AUSA told the SSA that a planned conference call with OJP had to be postponed due to weather conditions in Washington, D.C., and that the conference could not likely be rescheduled until March. During the phone call, the SSA requested that formal investigative steps begin for Compliance Monitor 1 and emphasized his concern regarding the statute of limitations. However, the AUSA responded that she "did not want to jeopardize possible civil recoveries in the case [by initiating these steps] too early."

c. March-April 2010: Additional Witness Interviews are Conducted

Based upon a review of MOIs, e-mail exchanges and IDMS, we learned that the OIG and the USAO conducted several important interviews in March and April 2010. First, the SSA and SA 2 conducted interviews for the purpose of determining whether Compliance Monitor 1 and his supervisor submitted false data to OJJDP or made false statements to Semmerling regarding Wisconsin's inspections of facilities. For example, in March and April 2010, the SSA and SA 2 interviewed the Director of Detention Facilities of Wisconsin's Department of Corrections (DOC) and two DOC inspectors to confirm the accuracy of Wisconsin OJA's claim that DOC was conducting inspections on Wisconsin OJA's behalf. According to MOIs from these interviews, the witnesses denied that DOC was inspecting facilities for compliance with the formula grant program and indicated, contrary to statements by Wisconsin

¹⁹⁰ According to the Inspector General Manual, "The Inspector General or INV Headquarters may designate any investigation as a 'priority case.' Priority cases will be completed expeditiously, and if resource constraints exist, priority cases will be worked ahead of regular non-priority investigations." IGM III-207.11.

¹⁹¹ We were unable to determine the author of the handwritten note, but we believe it likely was McLaughlin.

OJA employees, that DOC was not inspecting all of the facilities within Wisconsin OJA's monitoring universe. On March 17, 2010, the SSA e-mailed a MOI from this interview and some other documents to the line AUSA, and on March 22, 2010, the SSA sent a follow-up e-mail to the FAUSA and the AUSA in which he suggested questioning an OJJDP employee as to how she concluded that Wisconsin OJA relied on DOC inspections, contrary to the DOC Director's interview.

Second, in late March 2010, the SSA and SA 2 interviewed a Wisconsin OJA Juvenile Justice Specialist (JJ Specialist) who had been critical of certain actions taken by Wisconsin OJA. According to the MOI of her interview, the JJ Specialist provided evidence relevant to proving false statements by Wisconsin OJA employees regarding DOC's role in conducting formula grant inspections, the adequacy of Wisconsin OJA's monitoring universe, and the adequacy of the Juvenile Secure Detention Register (JSDR), a system that Wisconsin OJA used to collect data for its reports to OJJDP. Semmerling told us that the JJ Specialist was a "very key witness," but that she had not interviewed the JJ Specialist before being removed from the case because she wanted to obtain and review certain documents first. The SSA e-mailed an MOI of the interview of the JJ Specialist to the FAUSA and the line AUSA on April 1, 2010. On March 30, 2010, the SSA e-mailed his supervisors to relay his revelation, based upon the March interviews, that a Wisconsin OJA supervisor had made false statements when he told Semmerling in an October 2008 interview that Wisconsin DOC inspected all secure juvenile detention facilities on behalf of Wisconsin OJA.

Finally, on April 5, 2010, the SSA, SA 2, the FAUSA, and the line AUSA travelled to Washington, D.C., to interview several OJP and OJJDP employees, including Acting Administrator Slowikowski, SRAD Associate Administrator Thompson, Rumsey (along with her attorney), the Compliance Monitoring Liaison, the OJJDP State Representative for Wisconsin, a former Compliance Monitoring Coordinator, General Counsel Madan, and the three JJ attorneys.¹⁹² At the request of the FAUSA and the AUSA, the agents provided write-ups of the OJJDP interviews to the USAO on May 18, 2010. Also on May 18, the SSA wrote in IDMS that he had contacted the AUSA the week before to "move the case." He wrote that the AUSA "advised she was planning a meeting at the USAO regarding the case."¹⁹³

¹⁹² Based upon witness interviews and documents we reviewed, the SSA and SA 2 did not have much contact with Rumsey besides this interview. The SSA told us that his managers had advised him to keep Rumsey at "arms-length" because her whistleblower action gave her a "personal stake" in the outcome of the Wisconsin investigation. In addition, the SSA told us that he "didn't need anything more from her." He went on to say that he already had received Rumsey's allegation that "they're cooking the books" and now he was "getting actual, internal statements" from Wisconsin OJA personnel to corroborate that allegation. After reviewing a draft of this report, Semmerling commented that it was not necessary for the SSA to gather information from Rumsey because Semmerling had already obtained the necessary information from her.

¹⁹³ Witness interviews and documents we reviewed show that the CRAO Auditors completed their work on the Wisconsin OJA case in March 2010. According to a report written by Auditor 2, the SSA met with the two Auditors regarding Auditor 2's analysis of Wisconsin OJA's expenditures on March 23, 2010. During this meeting, Auditor 2 highlighted certain irregularities he had discovered, including a "high amount of money spent on technology, hotel expenditures, and other expenditures" (Cont'd.)

d. May 2010- December 2010: Formal Criminal Investigative Steps Taken

According to IDMS, the FAUSA and the line AUSA called the SSA on May 24, 2010, and told him that they intended to begin taking formal criminal investigative steps, including obtaining sworn testimony, in June. During the call, the FAUSA sought the SSA's suggestions on witnesses. The FAUSA, the AUSA, and the SSA together identified at least seven possible witnesses. On July 15, 2010, the FAUSA contacted the SSA to tell him that he had scheduled time to obtain this sworn testimony in Wisconsin on August 12, 2010. Documents we reviewed showed that the SSA did considerable work to prepare the USAO for this phase of the criminal investigation, including securing the presence of these witnesses and preparing packets of documents for each witness. The FAUSA and the line AUSA questioned five witnesses under oath on August 12, 2010.¹⁹⁴

Later in August, 2010, the USAO and the SSA exchanged numerous e-mails regarding setting up another round of sworn witness testimony on September 1, 2010. Once again, the SSA assisted the USAO by providing the AUSAs with relevant documents. The second round took place as scheduled on September 1, and four additional witnesses testified. Also on September 1, the FAUSA, the AUSA, and the SSA met with Compliance Monitor 1's attorney, who argued that Compliance Monitor 1 should be treated leniently. According to IDMS and a MOI, the SSA obtained and reviewed Compliance Monitor 1's personnel file to corroborate his attorney's representations. The next day, the SSA sent an e-mail to the FAUSA and the AUSA outlining five matters that required follow-up. Among other things, the SSA highlighted potentially incriminating aspects of the witness testimony and proposed a manner of looking at the case that might alleviate statute of limitations concerns.

E-mails between the case agents and the USAO between September and December 2010 show that the agents repeatedly urged the USAO to obtain sworn testimony from the remaining witnesses. However, our review of e-mails exchanged between the OIG and the USAO and the statements of the agents and prosecutors involved show that the complexity of the case, the prosecutors' other priorities, and other issues sometimes prevented the USAO from responding to the agents' requests and scheduling investigative steps as quickly as the agents would have liked. On September 8, 2010, the SSA e-mailed the FAUSA and the AUSA regarding setting up another date to do so. However, because the FAUSA was

compared with relatively "little money . . . spent on monitoring." Auditor 2 also wrote in his report that during the meeting the SSA had expressed frustration with the USAO's slow movement on the case. Following this meeting, the Auditor sent her supervisor an e-mail in which she expressed concern that the SSA had not yet reviewed eight binders of "the most interesting documents" that the Auditor and Semmerling had assembled, and that the SSA was too focused on Compliance Monitor 1. However, other evidence showed that the SSA and SA 2 focused on both Compliance Monitor 1 and his supervisors and that the focus on Compliance Monitor 1 was, in part, to see if he might implicate higher level Wisconsin OJA management.

¹⁹⁴ The documents we reviewed do not provide any clear explanation for why this activity was moved from June to August, 2010.

involved in a trial on another case, he was unable to schedule these additional investigative activities in September or October. The case agents sent e-mails to the FAUSA and the AUSA in November regarding the status of these activities and were told that certain other steps first had to be taken before these activities could go forward. In early December 2010, the SSA followed up with the AUSA regarding the status of the case, and she told him to contact the FAUSA because she was about to begin a trial in another case. The SSA e-mailed the FAUSA on December 3, 2010 and stated, "I have a Priority Status Report due to HQ next week regarding the Wisconsin OJA case. Please advise what our next steps are in this case." The SSA went on to summarize information that he had obtained from witnesses, which had "been included in new reports to your office." The SSA wrote to the FAUSA, "Please let us know how you will proceed at this point. As I indicated before, I am coming up to mandatory retirement next year and I would like get this case resolved."¹⁹⁵

e. December 2010- April 2011: Efforts by the Agents to Convince the USAO to Pursue the Criminal Case Despite the USAO's Doubts Regarding its Viability

Beginning in December 2010, the FAUSA began expressing doubt to the agents about the viability of a criminal case involving Wisconsin, and the SSA and SA 2 tried to convince him to continue pursuing the case.¹⁹⁶ SA 2 told us that the FAUSA was concerned that the formula grant program was a "very poorly managed program in which OJJDP's concern is just to push the money out the door and not really question the results they're getting back," and that "we're going to move forward with a potential criminal charge against Wisconsin, when in fact OJJDP sent their own inspectors out there and basically blindly approved" Wisconsin OJA's practices. Similarly, the FAUSA told us that he viewed OJJDP's lax oversight as a "significant impediment to the criminal prosecution," because "why would these guys ever think that they really needed to be by-the-book and, and have the numbers accurate when OJJDP would just give them the money anyhow?"

The FAUSA had several other concerns about the case, including whether there was enough evidence to implicate any Wisconsin OJA managers, the weak jury appeal of prosecuting a low-level employee such as Compliance Monitor 1, materiality (that is to say, whether OJJDP would have withheld money if OJA had not submitted the allegedly fabricated data), and whether the charges being pursued were within the statute of limitations. For example, in an e-mail to the

¹⁹⁵ We note that we do not fault the USAO for the delays described in this paragraph, as scheduling conflicts due to other priorities are often unavoidable and at times similarly occurred as a result of the agents' schedules. For example, the meetings in Washington, D.C., that occurred in March and April 2010 were originally scheduled for February 2010, but had to be postponed due to a conflict in one of the agent's schedules.

¹⁹⁶ After reviewing a draft of this report, the USAO commented that, in fact, the FAUSA had concerns about the viability of the Wisconsin case from the outset and that much of the delay in the investigation resulted from the USAO's efforts to "develop a prosecutable case or series of cases as desired by the OIG."

SSA on December 6, 2010, the FAUSA listed all of the potential subjects and identified his concerns about the viability of a criminal case against each. He also expressed his ongoing concern about "OJJDP's role in this case and any obstacles/challenges we face as a result of their approach to enforcement." The FAUSA suggested a meeting with the SSA and SA 2 to discuss their thoughts before he and the AUSA "make any final decisions." The SSA described this e-mail to us as "very disappointing."

The SSA and SA 2 met with the FAUSA and the AUSA on December 15, 2010. The day before this meeting, the SSA had e-mailed the FAUSA and the AUSA a list of significant witness disclosures that he and SA 2 had prepared. According to the SSA's notes in IDMS, during the December 15 meeting the FAUSA reiterated the concerns he had expressed in the December 6 e-mail, and the SSA told the FAUSA that he would "research other possible charging options."

On December 21, 2010, the SSA e-mailed the FAUSA an MOI from a follow-up interview with OJJDP Associate Administrator Thompson, during which Thompson stated that OJJDP might freeze Wisconsin's funds if DOC had not actually been performing the inspections on behalf of Wisconsin OJA, as Wisconsin OJA had claimed. However, according to the MOI, Thompson told the SSA and SA 2 that OJJDP would not have reduced Wisconsin's grant funds. On January 3, 2011, the FAUSA responded that Thompson's statement only reaffirmed his concerns regarding the materiality of Wisconsin OJA's alleged false statements:

As I read this, Thompson reaffirms that OJJDP would not have denied funding but may have withheld temporarily, pending better reporting. I think this is consistent with what we have learned from others, unfortunately.

I think it also begs the question about what OJJDP actually knew and whether they actually would have even temporarily withheld funding. Part of my concern all along is that OJJDP did know there were problems with reporting and did not withhold funding for the years we are looking at. Elissa Rumsey raised concerns. I think others were also aware of the problems.

From my perspective, there is a problem with the programs are administered [sic] by OJJDP. This is not to say that OJP was above-board in their dealings and did not exaggerate or outright lie about the numbers. However, it does make it significantly more difficult in the context of considering a criminal prosecution.

On January 11, 2011, the SSA sent the FAUSA a lengthy e-mail, posing several possible charging options with respect to Compliance Monitor 1 and his supervisor, including mail fraud, wire fraud, and criminal False Claims Act charges. The SSA also presented legal arguments as to why these potential charges were still within the statute of limitations. On January 13, 2011, the FAUSA responded with a similarly lengthy e-mail explaining why he continued to "have my doubts." He explained why he believed some of the SSA's legal theories were flawed and

also expressed concern about “jury appeal.” The FAUSA summarized his concerns by stating:

The issues are complex, both factually and legally. There are significant problems with the way the grant was administered. There are serious questions concerning the materiality of the false statements. There are problems with inconsistent statements by some of our witnesses. One of the major witnesses was given immunity before we got involved in the case.^[197] There are issues about proportionality in terms of who we may be able to charge as compared to who is the most culpable, versus others who may need to be given immunity to testify, and their culpability relative to anyone who may be prosecuted. There are issues concerning alternatives to criminal prosecution that may be available. There are legal issues concerning the statute of limitations, etc. etc. etc. We have discussed most of these at some length. There are also many good things about the evidence we have gathered. The difficulty for any case is evaluating all of the evidence and issues, good and bad, and making a judgment as to how best to proceed.

Despite these concerns, the FAUSA ended the e-mail by stating that the SSA and SA 2 were “far more familiar with the evidence” than he was and requesting their “candid input” as to:

1) whether there is a basis for criminal prosecution against one or more persons and who those person may be; 2) the legal theory for any proposed prosecution (including statute of limitations); 3) a factual synopsis supporting the proposed prosecution; 4) and any factual, legal, equitable, or practical impediments you believe may exist or other concerns you may have about such a prosecution or other remedy.

According to IDMS, on January 27, 2011, the OIG agents had a teleconference with the USAO prosecutors to address these and other issues. During the call, the agents “requested that the USAO clearly define what steps are needed at this point to make a prosecutive determination.” The FAUSA told the agents that a Wisconsin OJA supervisor’s false statements to Semmerling and the Auditor might constitute a viable criminal charge and requested to meet with Semmerling and the Auditor to discuss what the supervisor had told them. The meeting took place the following month.¹⁹⁸

¹⁹⁷ This reference appears to be to Compliance Monitor 2, the former Wisconsin OJA official who made the initial disclosure about the falsified core requirements compliance monitoring data to the OIG.

¹⁹⁸ Semmerling was not otherwise involved in the investigation at this time, aside from two e-mails she sent to the SSA in early 2011. On January 28, 2011, she sent an e-mail regarding civil fraud complaints against another state, which the SSA forwarded to the Civil AUSA. On February 3, 2011, Semmerling sent an e-mail to the SSA in which she offered to provide assistance, such as

(Cont’d.)

On February 28, 2011, the SSA retired after reaching mandatory law enforcement retirement age, and the Wisconsin OJA case remained assigned to SA 2, now as the sole case agent. On March 22, 2011, the FAUSA sent an e-mail to SA 2 stating, "we are not at all optimistic about being able to successfully pursue criminal charges, however, we have not completely foreclosed that possibility." The FAUSA stated that he planned to meet with the attorneys for the two potential subjects (Compliance Monitor 1 and his supervisor), as well as counsel for the state of Wisconsin. The FAUSA once again asked the OIG to outline the key evidence for the USAO, asking SA 2 to provide him with a "list of at least the top 10-12 main observations concerning Wisconsin OJA and the top 10-12 observations concerning OJJDP." The FAUSA stated that the list would be used as a "resource" in negotiating the case with the attorneys for the subjects and Wisconsin OJA and that the list would help "finalize our key observations about the case for potential reference for civil action." SA 2 provided the requested "top 10 list" to the FAUSA on April 8, 2011.

f. May 2011 – November 2011: Continued Follow-Up with USAO and Compliance Monitor 1's Proffer

Between May 27, 2011, and June 16, 2011, SA 2 sent the FAUSA several e-mails requesting status updates on the case. On June 16, 2011, the FAUSA responded with an e-mail message that he was still working on setting up a follow-up interview with Compliance Monitor 1 through his attorney. On June 27, 2011, SA 2 wrote to the FAUSA requesting another update. According to a priority case update written by SA 2:

As of July 1, 2011, [the FAUSA] stated he was waiting to hear from [Compliance Monitor 1's] counsel regarding an interview. [the FAUSA] stated the last approach in this case was to interview [Compliance Monitor 1] and confront Wisconsin with the facts of the case and request a settlement payment. This would avoid the need for civil action.

E-mails show that for several more weeks SA 2 continued to make inquiries with the FAUSA about his progress in setting up an interview with Compliance Monitor 1, but did not receive a response. In early August 2011 SA 2 wrote to Thomas to express his frustration with the situation, and Thomas replied that she knew SA 2 was doing his best "to keep up with it and keep them moving." SA 2

identifying documents that might be useful in the civil case. In this e-mail, Semmerling also suggested that the SSA and the prosecutors contact Blier for "insight" on "criminal/civil strategies, any administrative action that can be taken in regards to OJJDP's managers actions or lack thereof, and how we could address the problems in [a Report of Investigation] so that DOJ upper management and Congress are aware of the findings and concerns." The SSA told us that he did not recall receiving additional assistance from Semmerling or speaking with Blier following Semmerling's e-mail. However, the SSA retired later that month.

made several more efforts to speak with the FAUSA about the Wisconsin investigation between late August and early October 2011.¹⁹⁹

According to e-mails we reviewed, on September 23, 2011, Compliance Monitor 1, through his attorney, agreed to provide a proffer of his expected testimony at trial, pursuant to a proffer agreement. The proffer agreement provided that the USAO would not use Compliance Monitor 1's statements during the proffer against him in a subsequent criminal prosecution. The FAUSA told us that his goal was to see if Compliance Monitor 1 might implicate higher level Wisconsin employees.

After several back-and-forth e-mails, an interview date was scheduled for November 1, 2011. SA 2 attended Compliance Monitor 1's proffer along with the FAUSA. According to a proffer report prepared by SA 2, Compliance Monitor 1 "denied he falsified data or was told by supervisors to falsify data submitted to OJJDP," and stated that he "believed there was confusion in the statements he made to Jill Semmerling." He further stated that "Semmerling did not misreport the information he stated," but that he "believed he did not accurately state the information he meant to convey." SA 2 provided the proffer report to the FAUSA on November 16, 2011. According to a case update SA 2 provided to Oleskowicz and Thomas, the FAUSA met with counsel for Wisconsin OJA on November 30, 2011, to discuss a possible settlement.

SA 2 told us that he disagreed with the FAUSA's approach with respect to Compliance Monitor 1. He said that he would have "liked to have seen" Compliance Monitor 1 indicted "at the very beginning" and then put him "on the hot seat" to implicate his managers. SA 2 stated that by the time the FAUSA sought a proffer from Compliance Monitor 1 it was too late, because "his attorney had pretty much figured out that we really didn't have a card to play anymore because of the statute of limitations."²⁰⁰ The SSA told us that part of the problem was that Semmerling had not secured a written affidavit from Compliance Monitor 1 during the initial interview. On the other hand, after reading a draft of the report, the USAO noted that certain "fundamental misunderstandings . . . appeared to contribute to OIG's perception that the USAO was failing to appropriately pursue the criminal investigation."²⁰¹ Although the prosecutors and the OIG agents appeared to have differed on how to establish Compliance Monitor 1's potential criminal liability, the

¹⁹⁹ The SSA similarly told us that while he was assigned to the case he did not receive responses to many of the e-mails and voice-mail messages he left for the criminal attorneys. We note that according to the FAUSA, the USAO in general and the particular prosecutors assigned to the case had many other priorities that occupied their time and, as noted earlier, at this point they had many concerns regarding the viability of the Wisconsin case.

²⁰⁰ The prosecutors had not resolved the question of when the statute of limitations began to run and, thus, it was unclear whether the statute of limitations had already expired or how soon it would expire with respect to charges against Compliance Monitor 1. As noted above, the FAUSA stated in a January 13, 2011 e-mail that there were "legal issues concerning the statute of limitations."

²⁰¹ As an example, the USAO cited the SSA's failure to understand that taking certain investigative steps with respect to targets of an investigation would violate DOJ policy.

evidence reflects that both offices acted reasonably and in good faith to follow the facts wherever they led. Ultimately, the USAO declined criminal prosecution. After reading a draft of this report, the USAO elaborated on the basis for the criminal declination as follows:

In the end, neither the agents nor anyone else demonstrated that the AUSAs' concerns were unfounded or that there was sufficient evidence and reason to pursue criminal prosecution of even a single subject in this matter. Although they were disappointed a criminal case could not be pursued, the agents did not express disagreement with the reasons for declining prosecution.

g. Civil Investigation

The Civil Division of the USAO for the Northern District of Iowa opened an investigation of the Wisconsin matter in August 2010. An AUSA (Civil AUSA) was assigned and the SSA and SA 2 met with him on December 15, 2010. According to IDMS, after this meeting the SSA forwarded several reports to the Civil AUSA for his review. In January and February 2011, the SSA exchanged e-mails with the Civil AUSA regarding his review of documents and regarding potential sovereign immunity concerns.

As noted above, the SSA retired from the OIG in February 2011, and SA 2 completed the remainder of the investigation.

In March 2011, the Civil AUSA sent an e-mail to the Department's Civil Division for assistance with the case, noting that the formula grant program may have lacked proper Department oversight and guidance.

On May 2, 2011, the Civil AUSA sent an e-mail to SA 2 and Oleskowicz notifying them that the Department's Civil Fraud Unit was now involved in the case and a Civil Division Attorney had been assigned. The Civil AUSA and the Civil Division Attorney requested information to help them strategize regarding the statute of limitations and define the possible damages universe. SA 2 provided the requested information in e-mail exchanges between May 4 and May 6, 2011. On May 11, 2011, SA 2 e-mailed Wisconsin's compliance monitoring reports to the Civil AUSA and the Civil Division Attorney and told them to "pay attention to references to Wisconsin Department of Corrections."

According to e-mails and IDMS, SA 2 and the Civil Division Attorney met with Moses and two other OJP OGC attorneys in February 2012 to gather information regarding Wisconsin OJA's compliance reports. The participants discussed the impact of false information on a state's compliance with the four core requirements as well as an OJJDP memorandum to the states regarding the percentage of facilities a state is required to inspect each year. On March 9, 2012, a new Civil AUSA took over after the previous Civil AUSA retired. SA 2 sent several e-mails to the Civil Division Attorney between April 2012 and October 2012 requesting updates on the status of the civil case.

h. Declination of Civil and Criminal Prosecution

On August 2, 2012, the new Civil AUSA submitted to her supervisors a Memorandum entitled "Recommendation to Decline Civil Action Against the State of Wisconsin" (Civil Declination Recommendation), which was approved and signed by her supervisors on September 10, 2012, and later adopted and approved by Civil Division leadership in April 2013. We determined that the Civil Division's rationale for declining to pursue a fraud action echoed some of the concerns previously expressed by the FAUSA, including that (1) statute of limitations issues limited the amount of damages recoverable from Wisconsin;²⁰² (2) even if Wisconsin OJA misrepresented its inspection rates, OJJDP did not require the state to inspect every facility every year; (3) based upon the 2011 proffer, Compliance Monitor 1 would not testify that he fabricated data or that any supervisor encouraged him to do so; and (4) even if Wisconsin OJA was out of compliance, OJJDP would have allowed the state to use a different data set to establish compliance. We further determined that, as with the USAO, the Civil Division concluded that although the formula grant program was poorly administered, there was little evidence of fraud.

On October 26, 2012, the Civil Division Attorney e-mailed SA 2 telling him that he expected the civil declination to be "finalized and approved in the next few weeks." SA 2 told us that by this point the criminal prosecution had already been declined.²⁰³ On November 2, 2012, the Civil Division Attorney sent an e-mail to SA 2 requesting the OIG's position on the proposed civil declination. SA 2 forwarded the e-mail to Oleskowicz stating, "[w]hile I do not agree with this, I don't think there is much we can do on an investigation that is over four years old." SA 2 then responded to the Civil Division Attorney's e-mail as follows:

While the OIG respects the decision not to move forward, the OIG had hoped that some sort of monetary settlement with Wisconsin could

²⁰² The statute of limitations provision of the False Claims Act provides that a civil action may not be brought:

(1) more than 6 years after the date on which the violation . . . is committed, or (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs first.

31 U.S.C. § 3731(b). Documents we reviewed indicate the Civil Division took the position that the application of the so-called "three-year safe harbor provision," which would have allowed an up-to-10-year statute of limitations, was problematic given that OJJDP had been notified of the allegations in 2008. Applying the 6-year statute of limitations, the funds Wisconsin received between 2003 and 2005 would not have been recoverable. In addition, the funds Wisconsin received in 2004 likely would not have been recoverable in any event, because OJJDP awarded all states their funding that year regardless of their submissions due to the 2002 Reauthorization of the JJDPA Act. That would have left only the funds Wisconsin received in 2006, which amounted to less than \$1 million, over \$3 million less than what otherwise might have been recoverable had an action been brought earlier.

²⁰³ Although we found no written documentation of the criminal declination, these circumstances would be consistent with the usual practice of resolving the criminal case before the civil case is resolved.

have been reached to recover some of the funds. It was very concerning to the OIG that Wisconsin OJ[A] submitted documentation that was not accurate and misrepresented the inspections that were conducted by the Wisconsin Department of Corrections. The limited inspections that were performed by Subject [Compliance Monitor 1] were not conducted in a proficient manner and [Compliance Monitor 1] admitted in his proffer that he did not know how to interpret juvenile log books to determine if there were any violations in the federal act.

Thereafter, according to IDMS and e-mails we reviewed, senior OIG leadership exchanged a series of e-mails in which they discussed the possibility of the IG contacting the USAO to "press them to take civil action." However, on July 3, 2013, the Civil Division Attorney e-mailed Acting SAC of INV Operations Michael Tompkins stating that the Civil Division and the U.S. Attorney's Office for the Northern District of Iowa have concluded the civil investigation and "have closed the matter without further action" (declination e-mail). Tompkins forwarded the e-mail to Oleskowicz stating, "I spoke with the attorney and this is the best we will receive concerning the declination."

i. OIG Administrative Report

According to an e-mail dated December 15, 2014, in which Oleskowicz responded to questions from the OIG's front office regarding the timeline of events in the Wisconsin matter, SA 2 submitted a first draft Report of Investigation (ROI) to his supervisors on August 15, 2013, a little over a month after the declination e-mail. Oleskowicz then asked him to take a few follow-up investigative steps, including a follow-up interview of Associate Administrator Thompson, which SA 2 conducted on September 12, 2013. According to the MOI, the purpose of the interview was for Thompson to provide an update to the OIG on the status of the awarding of grant funds to Wisconsin. The MOI states that other than the 20 percent reduction to Wisconsin's funding in 2007, Wisconsin continued to receive full funding under the JJDP Act.

CFO submitted a first draft of the ROI to INV Headquarters on November 26, 2013, and submitted subsequent drafts in response to Headquarters comments and edits on December 4 and December 10, 2013.

On January 15, 2014, INV Headquarters approved CFO to close the case. CFO then submitted a signed ROI with exhibits to INV Headquarters on January 22, 2014. The final ROI concluded that from 2001 to 2004 Wisconsin OJA submitted to OJJDP inaccurate data that falsely showed the state to be in compliance with the JJDP Act, did not accurately report the number of facilities it inspected, and did not have an adequate core requirements compliance monitoring system.²⁰⁴ On

²⁰⁴ In an e-mail to Thomas on July 24, 2013, SA 2 stated about the report that he was about to draft, "My goal is to keep this thing as clean as possible without addressing many of the allegations that Jill seemed to dig up that took this investigation way off target." SA 2 told us that he believed that the concerns with OJJDP's handling of the formula grant program would be addressed separately, possibly through an audit. He stated that "any time you go in for one specific mission, it can

(Cont'd.)

February 10, 2014, the OIG forwarded the final ROI to OJP OGC for a factual accuracy review and a determination of whether any material should be redacted. Madan told us that when OGC received the ROI, he and his staff did not realize that it had not also been provided to OJJDP. Thus, OJP OGC did not review the ROI for several months. Following an exchange of e-mails between Blier and Moses in September 2014, the OIG agreed to make one minor redaction from the public report. The final redacted ROI is published on the OIG's external website with a date of September 2014. See <https://oig.justice.gov/reports/2014/s1409a.pdf> (last accessed February 6, 2017).

Dorsett told us that the fact that the investigation took from 2008 until 2014 to complete was "completely unacceptable." He stated that "much of that time was beyond our control" as INV waited for the multiple Department attorneys at USAOs and in the Civil Division to reach prosecutorial determinations.

2. Involvement of OIG Counsel Blier and Other Senior OIG Officials

Semmerling also alleged that OIG General Counsel William Blier acted improperly with respect to her involvement in the Wisconsin investigation. Blier served as Senior Counsel to the Inspector General from June 2007 until June 2010, when he became OIG General Counsel. Semmerling alleged that Blier failed to take any corrective action after she brought her concerns about INV's handling of the Wisconsin matter to him and after he received her disclosures to the OSC in 2011.

Semmerling first contacted Blier about the Wisconsin investigation shortly after she was removed from the case in late October 2009. On November 10, 2009, Semmerling sent information by e-mail to IG Fine about two issues: (1) an allegation of possible improper lobbying by the acting Director of Bureau of Justice Assistance to influence legislation; and (2) the allegation that OJP OGC improperly issued the VCO legal opinion, which she alleged reversed a longstanding JJDPA Act regulation for the benefit of Wisconsin.²⁰⁵ IG Fine forwarded this information to OIG Senior Counsel William Blier the same day, and on November 13 responded to Semmerling that he had asked Blier to "look into this."

The 40 pages of VCO information that Semmerling sent included OJP OGC's May 2008 legal opinion and the OJJDP Senior Advisor's rebuttal memorandum, a timeline of events that Semmerling created, several OJJDP and Wisconsin OJA e-

mushroom cloud into something that's much larger," but that "if you try to address that mushroom cloud in a report then . . . that thing is going to go through a review process for 15 years." The FAUSA similarly told us that he had concerns about OJJDP's oversight but that he believed that those issues would have been part of "a whole other investigation."

²⁰⁵ The Bureau of Justice Assistance is a component within OJP. Blier followed up on the first issue by requesting a legal analysis from then-OIG General Counsel Gail Robinson, who after reviewing Semmerling's materials and researching the matter wrote back to Blier with a 2-page legal analysis and her conclusion that no violation of the Anti-Lobbying Act, 18 U.S.C. § 1913, had occurred. This report focuses only on the OIG's handling of the allegations that Semmerling raised in connection with the Wisconsin investigation.

mail messages, a newspaper article, and correspondence between Wisconsin OJA and OJJDP officials. Semmerling also requested that her disclosures to Fine and Blier be confidential. Blier wrote to Semmerling on November 13 that he was “wading through the materials” she had provided to Fine and would be in touch the following week to discuss them.

In the days that followed, Semmerling sent Blier several e-mail messages, often with long narratives describing her theory of Wisconsin’s liability for grant fraud and OJJDP and OJP’s knowledge of or complicity in Wisconsin’s alleged illegal activities, accompanied by hundreds of additional pages of information about the Wisconsin investigation. On November 16, 2009, she wrote to Blier, “I would not bother you with any of this, if I did not think this was important for DOJ and the OIG.” Blier responded, “I don’t consider any of this a bother and agree with you that it is important.”

Semmerling also shared with Blier her thoughts on why she was removed from the case and how she had been treated by Oleskowicz and Thomas. On November 16, she wrote that she was removed from the case “because of Investigations’ ‘relationship with OGC, OJP’ even though the First Assistant handling the case [the FAUSA] objected” to her removal.²⁰⁶ On November 17, she forwarded Blier several e-mail messages from Rumsey to others in OJJDP. In her message to Blier she explained that the forwarded messages had come from “the whistleblower in the case,” and went on to describe how “having to work with a whistleblower who was also an expert on the program created all kinds of problems and grief for me, too.” Semmerling wrote that Oleskowicz and Thomas had continually complained about Rumsey, and “alleged that she was my friend and was feeding me information and thus tell[ing] me how to work the case,” which Semmerling denied. Semmerling wrote that as soon as Rumsey had filed her retaliation complaint with the OSC, Rumsey was deemed “not reliable” (presumably by her managers). She then wrote that internal information from Wisconsin OJA showed that Wisconsin officials were “going around [Rumsey]’ to her superiors at OJJDP, and that the AUSAs “intended to pursue this as overt acts of conspiracy to defraud,” but that Oleskowicz did not want this investigated due to Rumsey’s retaliation complaint pending with the OSC.

In another message on November 17, Semmerling sent Blier Rumsey’s June 13, 2008 letter describing the allegations against Wisconsin, as well as a 6-page timeline of events that Semmerling had created to show her supervisors “the involvement of OJJDP and OJP OGC and its legal opinion.” In her message to Blier,

²⁰⁶ Semmerling told us that she placed the phrase “relationship with OGC, OJP” in quotes because she was repeating what she alleged Oleskowicz said to her. She told us that Oleskowicz told her she had disrupted INV’s relationships with OJP and the OIG’s Audit and Oversight and Review Divisions. Oleskowicz’s memorandum to Dorsett summarizing his July 23, 2009 meeting with Semmerling states that Oleskowicz told her that “her actions were of significant concern to us, especially in light of the fact that they did not remain within the Chicago Field Office, but extended to offices outside the CFO including [the Chicago Regional Audit Office, the USAO, and the OJP].” Neither Oleskowicz nor McLaughlin cited Semmerling’s alleged disruption of the “relationship” with OJP as a reason for removing her from the case.

Semmerling wrote that on July 23, 2009 she was told that "OJP OGC unofficially complained about me," and that she had been directed "to only look at problems with Wisconsin and not look at problems with OJP." She wrote that she told her supervisors "perhaps that was because sometimes people complain when you hit a nerve." She went on to write that "we are the OIG and while being diplomatic is important, we can't fail to ask questions or ignore issues because of 'our relationships.'" She wrote that the two agents assigned to take over the Wisconsin investigation "have never had a grant case prosecuted and do not understand the elements needed or the program." She concluded the message by writing, "Ironically, I see what happened with me is very similar to what happened to the whistleblower."

Semmerling followed this message with another message to Blier that referred to a case to which she had been assigned related to Muncie, Indiana, involving a Drug Task Force and grant fraud. She wrote, "I was taken off of that case too because of 'relationships' and lack of understanding of grant fraud investigations."²⁰⁷

On November 20, Semmerling e-mailed Blier a letter dated November 18 that summarized a discussion she had had with him on November 17. The letter described the issues in the Wisconsin investigation that Semmerling stated she had raised to her CFO management, including:

- The allegation that several states had engaged in potential fraud by placing foster children who had committed no crime into secure detention, failing to report these detentions to OJJDP, and thereby receiving federal funds to which they were not entitled;
- OJJDP's use of "an unpublished May 2008 legal opinion that re-interpreted the JDDPA in May 2008 in regards to the [VCO exception to the DSO core requirement] that changed public policy that was in effect since 1982 to assist the state of Wisconsin with one of its compliance problems," and that the "ability to change rules for a grantee in a non-transparent manner through unpublished and non-public legal opinions is an oversight concern and should be a red flag that OJJDP may be treating certain grantees differently";
- Concerns with INV's operations, "in that it is more concerned about maintaining relationships with component liaison than addressing problems that may arise in an investigation dealing with liaisons," noting that in her experience, "cases that are controversial or 'rock the

²⁰⁷ Semmerling stated that in the Muncie matter, she investigated alleged corrupt practices by FBI and USAO officials in connection with a drug task force that used seized money to fund OJP grants. Semmerling alleged that Oleskovicz removed her from this assignment because she was disrupting the OIG's relationships with the FBI and the USAO. This matter was beyond the scope of our investigation and therefore we did not seek to evaluate Semmerling's allegation.

boat' with the component are not thoroughly worked or discussed."; and

- Wisconsin OJA's apparent "clear lack of an adequate system of core requirements compliance monitoring for the core requirements of the JJDPA since 2000," coupled with OJJDP's continuing to give Wisconsin money despite "obvious flaws in their compliance monitoring system."

Semmerling also attached her May 6, 2009 message to Oleskowicz and Thomas protesting Oleskowicz's treatment of her during their May 5 meeting, adding that "[o]n July 23, 2009, there was a similar incident." Semmerling also reiterated her request for confidentiality and wrote that Blier had agreed to contact her about this request after he discussed it with Fine. Semmerling wrote that she was "afraid of reprisals," and that there had "already been incidents where I have been harassed and unfairly treated" in connection with her handling of the Wisconsin investigation.

Moments after receiving Semmerling's November 20 e-mail message and attachments, Blier forwarded them to Fine asking when Fine would have time "to review the issues raised by Jill Semmerling and how we want to deal with them." Fine told us that he did not recall having any subsequent discussions with Blier about the materials Semmerling had sent.

Blier told us that Semmerling's letter appeared to be an accurate summary of the issues he had been discussing with her since her initial contact a week earlier, but that the letter did not raise any new concerns. Blier stated that the letter appeared more "formal" than her earlier communications, adding that "my guess is that she probably had some advice in preparing this."

Blier stated that he had also been learning about the case through regular status briefings to OIG leadership, and that he understood from these briefings that the CFO and prosecutors from the Iowa USAO were actively engaged in the Wisconsin criminal investigation, and had not been told that the "case is going nowhere and we're going to shut it down." Blier stated that he discussed Semmerling's concerns about maintaining her confidentiality and fear of reprisal with Fine, and that after a management meeting with INV leadership, Fine advised Dorsett and McLaughlin of Semmerling's allegations and admonished them not to engage in any acts of reprisal against her. A series of e-mail messages exchanged between Semmerling and Blier in March and July 2010 show that Fine gave this directive to Dorsett and McLaughlin on or before March 9, 2010. Blier told us that he had also asked INV managers whether any OJP employees were deemed subjects in the investigation and had been told no, but that he could not recall when he made this inquiry.

Semmerling continued to contact Blier in the weeks that followed, although somewhat less frequently. On February 12, 2010, she sent Blier a lengthy e-mail message reiterating many of the concerns about Wisconsin OJA's compliance problems she had previously expressed. However, in this message she also expanded the issues to include other states that Rumsey had alleged to be out of compliance yet were still receiving grant funds. She wrote that in January 2008,

then-OJJDP Administrator Flores and Associate Administrator Thompson had met with senior program directors from Wisconsin and North Carolina and that therefore Thompson “should have been aware” of Wisconsin’s compliance problems, yet continued to award the state grant funds.²⁰⁸ She wrote, “Thus, the case is not just about Wisconsin, but indicates that OJJDP and OJP has oversight issues and questions need to be asked.”

Semmerling also proposed that an audit of the JJDP Act program be conducted, and should include the failure by Wisconsin and other states to report violations of the JJDP Act. She suggested that the audit be performed by “an independent party like the OIG or the [Government Accountability Office].” As described below, Blier discussed Semmerling’s audit suggestion with IG Fine and Audit Division leadership the following month.²⁰⁹

On February 18, 2010, Semmerling sent Blier the contact information for the FAUSA and the AUSA from the Northern District of Iowa USAO. Blier told us that he could not recall why he had requested this information at this time. He stated that he did not remember whether he contacted either prosecutor at this point, but he eventually did speak with the FAUSA in connection with Rumsey’s retaliation litigation.

On February 19, Semmerling wrote to Blier, “Thank you again for your professionalism,” and expressed her hope that they could “meet in person someday, perhaps even to work with you in the future under different – more positive – circumstances.” A few weeks later, Semmerling wrote to Fine to again praise Blier for his professionalism. She wrote, “It has been an awkward, uncomfortable situation for me, and I am sure it was awkward for him. Nonetheless, Bill was always respectful and responsive, even though my concerns were one of the multitude of things on his busy plate.”

²⁰⁸ In her Confidential Statement, Semmerling referred to these meetings as “secret.” Semmerling wrote in her message to Blier and also told us that she had tried to review the OJP sign-in security logs but that the sheets containing the dates of meetings between Wisconsin OJA officials and Thompson, Flores, and OJP OGC were missing. On July 28, 2009, Semmerling prepared an MOI documenting the receipt of certain records from OJP that states, “A cursory review of the Visitor logs indicates that logs from October 2007 were not included and logs from January 28, 29, and 30 are missing from the records.” Semmerling told us that this “just raised . . . another red flag.” The production may have been in response to a September 2008 request for “All notes and records regarding meetings and other communications with [Wisconsin] OJA staff.” Semmerling said that she did not seek to determine whether other pages were also missing from OJP’s document production because she was only looking for the dates on which the meetings with Wisconsin OJA officials occurred, and that she does not know whether she followed up with OJP witnesses regarding how OJP maintained its visitor logs. As discussed in Chapter Three, we found e-mail documentation of at least two of OJJDP officials’ meetings with Wisconsin OJA officials, and found no evidence of an effort to conceal that these meetings occurred.

²⁰⁹ The Audit Division developed a proposal to conduct an audit of OJJDP’s administration of the formula grant program for FY 2011 and again for FY 2012, but these proposals were not implemented.

In March 2010, Semmerling contacted Blier frequently by e-mail with grievances about the current handling of the Wisconsin investigation and her earlier removal from it, and to continue pressing for an audit of the program.

On March 4, 2010, Semmerling began a message to Blier, "Do you know why I was taken off the [Wisconsin OJA] case? Does Glenn [Fine] want this case done thoroughly and fairly to get to the true story?" She followed these questions with complaints that it was "ridiculous and unfair" that she had been removed from the case, yet had been asked by the SSA assigned to replace her for guidance about what to ask a Wisconsin Department of Corrections witness in an interview. She wrote that the SSA had not reviewed all of the relevant records she had obtained.

On March 11, 2010 she forwarded Blier documents from 2003 concerning alleged compliance problems that had been reported by Kansas and that OJJDP purportedly disregarded in awarding that state JJDP Act funds to which it was not entitled. Blier responded that he would pass the information along to the Audit and Oversight and Review Divisions "to help inform their review and determination of how to proceed."

The evidence shows that Blier followed through on his statement to Semmerling. In an April 25, 2011 e-mail to the Assistant IG for the Audit Division, Blier wrote to ask whether the Audit Division had ever followed up on a request by IG Fine a year earlier to consider a "possible audit of OJJDP's handling of its grant program relating to juvenile delinquency programs in states." According to the e-mail, Blier had sent the Audit Division information he had received related to the Wisconsin investigation in early 2010. The next day Blier sent an e-mail to Acting IG Schnedar attaching a FY 2011 Audit Proposal and indicated that the proposal had been considered but had not been "picked up" by any of the Audit Division's offices.²¹⁰

Semmerling also wrote Blier during this time to tell him that she believed she was removed from the case "to dispose of it and not correctly work it" because her management did not want to help Rumsey with her whistleblower retaliation claim. On March 11, she wrote:

Please ask Glenn [Fine] to have me reassigned as the case agent to the Wisconsin case. As of approximately April 1, I will have nothing to do. The other agents don't want to work it and are trying to tank it. I know what needs to be done. I am more than willing to put in the time and effort to work the case as it should be worked. I had planned

²¹⁰ The Oversight and Review Division (O&R Division) also took no action on the audit proposal. It is not unusual for an allegation that involves potential misconduct by a DOJ employee to be referred to the O&R Division for evaluation, even if the underlying subject matter concerns DOJ grants, which matters typically are investigated by INV or reviewed programmatically by the Audit Division.

to work it with Postal Inspection before I was pulled off. The AUSAs want to work it.^[211]

The following day she wrote Blier, "I hope Glenn does the right thing and puts me back on it," suggesting that she could be supervised by O&R or by Blier himself.²¹² Fine told us that he did not recall discussing with Blier the prospect of reassigning Semmerling to the case, and stated that it would have been "a very unusual thing" for the OIG Front Office to involve itself in case staffing matters.

On March 12, Semmerling wrote to Blier to relay what she said one of the agents on the case had told her. According to Semmerling, SA 2 told her that if Rumsey had told OJJDP managers about Wisconsin's alleged fraud and OJJDP continued to award Wisconsin grants, there would be no criminal activity and the OIG investigation could be closed. The statement she attributed to the agent, if accurate, presaged a key element of the FAUSA's ultimate decision in 2013 to decline to prosecute the case based largely on his belief that OJJDP's acquiescence to Wisconsin's allegedly fraudulent activities was a potential defense to a criminal prosecution. Semmerling wrote that she was "very concerned that we would handle the case in this manner."

Blier told us that he viewed these messages as Semmerling expressing her view that the case was "not being handled appropriately" and should be removed from the CFO. He stated that he did not recall whether he specifically explored this option with Fine but was confident that he "raised this matter to his attention."

On March 15, 2010, Semmerling wrote to Blier to request "a copy of the complaint that SAC Oleskowicz said was made about me." She noted that in the past, when complaints had been made against her, she had been given an opportunity to respond in writing. Blier stated that he did not recall how he responded to this request.²¹³

²¹¹ Oleskowicz told us that after Semmerling was removed from the Wisconsin matter he noticed a "big uptick" in her work performance. He cited as an example the "outstanding job" she did on an investigation in 2010 involving an official in Executive Office of Immigration Review. As for Semmerling's statement to Blier that she had planned to work the Wisconsin investigation with the Postal Inspector before being removed, we found no evidence of any involvement by the Postal Inspector at any time during the Wisconsin investigation.

²¹² As noted earlier in this chapter, Semmerling wrote in her Confidential Statement that [REDACTED] in 2009 she had called an O&R Senior Special Agent to ask whether OJJDP staff could report the VCO opinion to him and to complain about Oleskowicz's treatment of her before she [REDACTED]. The SSA told us that he did not recall the phone call from Semmerling and that he did not recall her ever discussing the Wisconsin case with him. A search of his e-mails revealed no referral from OJJDP about the VCO issue. Other than this alleged contact, O&R had no involvement in the Wisconsin matter.

²¹³ Other than Oleskowicz's July 24, 2009 memorandum to Dorsett outlining concerns about Semmerling's work performance and criticisms raised by OJP, we found no written complaint from OJP to the OIG about Semmerling.

Semmerling at some point prepared a summary of her contacts with Blier and Fine. She wrote that in early to mid-March 2010 she had a telephone conversation with Blier, summarizing it as follows:

Blier told Semmerling that the case was being handled by the AUSA's and to stop sending him e-mails. He advised that he had been around the government a long time and something you see just make you shake your head. [Sic] He told Semmerling to just put her head down and do her work.

Blier acknowledged that he may have told Semmerling that he had been in the government a long time, but said that the rest of the statement Semmerling attributed to him "would have been inconsistent with the whole manner of my communications with her throughout the time, which was to be receptive to whatever she would want to tell us in an attempt to be as responsive as can be."

Our review of e-mail communications between Semmerling and Blier suggests that this alleged conversation coincided in time with a decrease in the frequency of their exchanges. It is also noteworthy that Semmerling's account of the alleged mid-March 2010 conversation with Blier contrasts starkly with her highly favorable statements to Blier and IG Fine about Blier's attention and responsiveness to the concerns she raised with him following her removal from the Wisconsin case. In addition, Semmerling wrote several complimentary messages about Blier concurrently with and following this alleged mid-March 2010 conversation. For example, on March 12, 2010, she wrote to Blier, "I just want to thank you for being there so I could express my frustrations on what is happening with the Wisconsin case." On January 28, 2011, Semmerling wrote to Blier, "I appreciate talking to you yesterday. I think you are an asset to the agency in your position . . ."

Blier stated that he always reviewed the information that Semmerling sent him and that he discussed this information with her in several lengthy telephone conversations. He told us that as time went on, he continued to review the detailed information that she sent him, but not at the level he would have reviewed it if the case had been assigned to him. He stated that "a theme of her communication was that she felt as though her managers, her SAC and her ASAC, didn't like her, didn't respect her . . . professionally," and his impression was that Semmerling was "defending herself."

Blier also stated that Semmerling's request for confidentiality presented some challenges for him. He said that he and Fine had received briefings from McLaughlin and Dorsett in which they had cited Semmerling's failure to make progress on the case as the reason for reassigning it, yet Semmerling was complaining to him that she had been removed from the case for very different reasons. Blier stated that he could not ask questions of INV senior managers about Semmerling's complaints to him without violating her request for confidentiality. He told us that Fine knew Semmerling and the two agents who took over the case

much better than he did, and "there was never any discussion of . . . taking any steps to upset the case assignment that the Investigations Division had handled."²¹⁴

When asked whether there was any truth to the reasons Semmerling gave him for her removal from the case, Blier responded:

I'm 100 percent sure that Jill sincerely believed she was removed from the case for the reasons that she was articulating. And I never doubted the sincerity of . . . her views. . . . [T]he reasons that Investigations Division articulated were, you know, were within management's authority, or it wasn't, it didn't seem to be pretextual. [REDACTED]. The case had gotten some age. And there was a desire to keep it moving and to reassign it. And there was, there seemed to have been a basis to, to reassign the case that was independent of all the reasons that Jill was articulating.

Blier stated that even though Semmerling's belief in why she was removed was sincere, he found McLaughlin and Dorset's explanation for her removal to be more credible. According to Blier, the decision to remove Semmerling from the case was "a management decision for appropriate management reasons."

3. Semmerling's Participation in the Rumsey Litigation and Disclosures to the Office of Special Counsel

On May 2, 2010, Semmerling filed a 30-page Confidential Statement with the OSC on behalf of Rumsey. Semmerling wrote in the introduction:

The following is a chronology of events that I believe relate to the retaliation complaint of Elissa Rumsey to the Office of Special Counsel. I am making this chronology to specifically address retaliation issues as I do not want to impede the ongoing investigation of the Wisconsin, Office of Justice Assistance (OJA) by the U.S. Department of Justice (DOJ), Office of the Inspector General regarding allegations that Wisconsin, OJA received since 2000 at least \$7 Million in DOJ [OJJDP] grant funds to which it was not entitled.

. . .

Since the investigation is on-going, this chronology is provided confidentially only to the [OSC] and cannot be released to any of the parties involved without my permission. It also cannot be released to

²¹⁴ Blier stated that Fine thought that Semmerling had sometimes taken longer to investigate cases than she needed to, and when Fine heard about the reassignment and the reasons for it, "my reading of it was that . . . he wasn't shocked by that." Fine told us that he was not surprised to learn that Semmerling's failure to move the case forward had been among the reasons cited for her removal. He stated that Semmerling had already expressed her concerns to him in her confidential memorandum that INV managers were too interested in completing investigations quickly, and he surmised that her managers "probably thought that she was taking too long."

my employing agency, the U.S. Department of Justice, Office of the Inspector General, without my permission due to reprisal concerns.

Confidential Statement at 1-2. As described throughout this report, the Statement included a significant amount of information about Semmerling's allegation that OIG officials obstructed her fact-finding investigation in the Wisconsin case. The Confidential Statement later became a part of Semmerling's May 23, 2011 disclosures to OSC about the alleged obstruction.²¹⁵

On March 25, 2011, after exhausting her administrative remedies with OSC, Rumsey filed an appeal to the Merit Systems Protection Board (MSPB) seeking reinstatement of her core requirements compliance monitoring coordinator duties, an upgrade of all performance evaluations to "Outstanding," a written apology, consequential damages, legal fees, and other relief. Blier received notice of the appeal on April 1, 2011 from an official in the Department's Justice Management Division (JMD). The JMD official wrote in the transmittal e-mail that he was notifying Blier of the appeal because some of the allegations related to the OIG's investigation of Rumsey's complaints and to an OIG employee (Semmerling). JMD assigned two attorneys (Agency Counsel) to represent the defendant Department in the Rumsey litigation.

On April 15, Rumsey's attorney filed a Motion for Protective Order with the MSPB "to ensure the unhindered availability of witness . . . Semmerling, and her protection from harassment or any interference with her or her employment by the Agency, including the Department of Justice Inspector General." The motion stated that Semmerling had been interviewed as a witness by OSC with regard to Rumsey's allegations.

In the Motion for Protective Order, Rumsey, through her counsel, alleged:

Upon information and belief, Semmerling was instructed not to pursue certain issues with the involvement of other federal or state personnel, including OJP's involvement and responsibility for the misreporting of and misuse of funds. [Footnote omitted.]

. . .

Upon information and belief, Semmerling was removed from her duties in order to obstruct the course of the [Wisconsin] investigation.

Motion at 3-4.

Semmerling told us that both Oleskowicz and Thomas instructed her not speak to OSC as a witness, and to refrain from making herself a witness by

²¹⁵ Semmerling told us that the Confidential Statement was, in part, her effort to make a record of her grievances about the handling of the Wisconsin investigation. Semmerling, through her counsel, consented to the OIG's use of the Statement in this report during an O&R interview of Semmerling on January 15, 2016.

discussing Rumsey's retaliation case with her. Oleskowicz stated that he never discouraged Semmerling from being a witness in the Rumsey litigation, adding, "I didn't even know it was occurring at the time." Thomas retired from the OIG before O&R had an opportunity to question her on this issue.

Blier told us that he was primarily concerned with supporting Semmerling as a witness in the Rumsey litigation while also protecting the OIG's interests in maintaining the integrity of the ongoing criminal investigation. He said that the involvement of Semmerling as a witness in the Rumsey litigation did not eliminate Semmerling's request for confidentiality, but it "certainly made it easier" for him to ask McLaughlin and Dorsett about Semmerling's removal from the case. Blier proposed to Agency Counsel that the Department's response to the Motion for Protective Order state that "the OIG's past actions were taken for legitimate management reasons and were not intended to and did not in fact impede the investigation." Blier told us that this proposed language – which ultimately was not included in the Department's response – was based on information provided by the Investigations Division.²¹⁶

On April 22, 2011, Blier had a telephone conversation with Semmerling, which he memorialized the same day in an e-mail message to himself. According to his message, he advised Semmerling that JMD had requested cooperation from the OIG in Rumsey's suit, and that he had advised both JMD and INV management that all requests for documents or interviews come through him. The message states that Semmerling advised him she had been contacted by "the WI complainant" – Blier wrote that it was not clear if this meant Rumsey or Rumsey's attorney – and that he had told her that she (Semmerling) "would participate, but the appropriate process would have to be followed." Blier's message states that he reiterated to Semmerling several times that "the OIG had no problem with her participating as requested or required and was not in any way suggesting otherwise." However, he told her that because her information that may be relevant to the Rumsey litigation arose from her OIG work, he believed it "would be appropriate that I (OGC) be informed of any contacts with her (Semmerling), from either party, requesting an interview, deposition, or testimony." The message states that he told her that "OGC could provide assistance, guidance and support for her participation in the process, if needed, and again emphasized that we were not seeking to get in the way of her, or anyone else's participation who may have relevant information, but because the subject involved an OIG investigation, we wanted to know of requests of OIG employees . . . and wanted to make sure information could be appropriately provided." Blier told us that it was standard procedure within the OIG for the OGC to review for privilege concerns any documents to be produced by OIG agents in litigation.²¹⁷ According to the message, Semmerling raised several other issues,

²¹⁶ Blier was advised by Agency Counsel on April 25, 2011 that Rumsey's motion for a protective order was denied.

²¹⁷ The IG Manual requires INV employees to notify the Deputy Assistant Inspector General for Investigations, through the ASAC and SAC, "before testifying or providing official OIG information in other than OIG matters." The Deputy AIG-I, in turn, must "obtain authorization from the OGC before any INV employee provides such information or testimony." IGM III-200.10.

including that she was never told why she was removed from the case and complaints about CFO management.

The message states that Blier then contacted McLaughlin and Dorsett and “raised with them for purposes of their awareness as managers the complaints [Semmerling] had raised about Chicago management,” and in particular about “Thomas’s aggressive and hostile management style and [Oleskowicz’s] disengagement.”

Approximately an hour after Blier wrote his message summarizing his conversation with Semmerling, Semmerling wrote him a message as a “follow-up to our telephone conversation this morning.” She copied Cynthia Schnedar, the former Deputy Inspector General who became Acting Inspector General after Fine left the OIG in January 2011, on the message.²¹⁸ Semmerling wrote that, as she had told Blier, she had been contacted by Rumsey’s attorney and advised that she may be a witness. She wrote that, if asked, she would testify to everything she had disclosed to Blier and Fine about waste in the JJDP Act program and “OJJDP’s inappropriate actions.” She continued:

Again, I just want to do my job. I was put in this predicament; I did not ask for it. I just wanted to work the Wisconsin OJA case the best that I could and follow the appropriate leads. I do not want to be retaliated against or harassed by my superiors for telling the truth if I am asked to testify in any hearing and for disclosing the problems with how the investigation was handled, the treatment of Rumsey, and the waste and fraud to you and Glenn. Sadly, I believe that we, as an agency, did not follow our mission in regards to the mass fraud and problems with the OJJDP program. The fraud and problems relate to the health and welfare of detained children in the U.S., who have no voice. I could have gone to the Office of Special Counsel (OSC) and filed a complaint not only about the fraud and waste in the program but how I was obstructed from properly investigating it and the prohibited personnel actions taken against me, but I did not.

I do not believe I told you this in our conversation, but I am a witness in the OSC investigation, which as you know is my right as a federal employee. I was assured that the information would remain confidential within the OSC. Despite this, I wanted it to stay in our agency and be fixed. I had hoped that by my going to you and Glenn that a thorough and appropriate investigation would be conducted so Congress and the appropriate DOJ officials would know that the OJJDP program is flawed. Again, I do not want to be retaliated against or harassed for my cooperating with the OSC.

²¹⁸ Schnedar served as Acting Inspector General from late January 2011, when IG Fine left the OIG, until April 16, 2012, when Michael Horowitz became the Inspector General.

Blier responded on April 25, 2011. He first circulated a draft of his proposed response to McLaughlin, Dorsett, and Schnedar to review for accuracy. Blier's final response stated, in part:

I have to express our disagreement with your statement in your e-mail that you were "obstructed from properly investigating [the case]." First, you have told me your view that your managers did not support your investigative approach when you were the case agent, and I am aware that you were removed from the case. However, I am confident that the OIG did not "obstruct" you or other OIG agents from pursuing the investigation in coordination with the prosecutors to expose, consistent with the OIG's mission, waste, fraud, abuse, or misconduct, wherever the evidence led.

Blier also expressed his surprise to Semmerling that she believed "prohibited personnel practices" had been taken against her because she had never alleged this in any of their prior conversations. He wrote that he was not aware of any OSC investigation relating to the Wisconsin case or to Semmerling, noting that Semmerling had not previously told him of "any OSC investigation relating to the Wisconsin case or to you." He continued, "The OIG has no desire or intention to interfere with your right to bring allegations to the OSC or other appropriate agency."

Blier told us that Semmerling's message to him on April 22, and in particular her use of the terms "obstruction" and "prohibited personnel practices," was more "pointed" than her previous complaints to him. He stated that he previously understood Semmerling to be saying that "she didn't understand why she was taken off the case, or . . . she didn't feel as though her supervisors appreciated the manner in which . . . she needed to be conducting a fraud investigation," or "she was concerned that there was, you know, a reluctance on the part of her supervisors, her management to have accusatory interactions with OJP's Office of the General Counsel or management." He stated that he did not believe she had alleged to this point that she had been obstructed in her investigation.

Blier told us that Semmerling in effect had alleged that the OIG had acted criminally, and that her allegation of obstruction called for a response. He pointed out that Semmerling herself had told him that the AUSAs were actively pursuing the criminal investigation, which he believed "was thoroughly inconsistent with anybody obstructing an investigation."

Blier also told us that he similarly did not perceive her complaints about Thomas's "hostile and aggressive management style" to amount to an allegation that the OIG had engaged in a "prohibited personnel practice." However, he acknowledged that "maybe in hindsight, looking at it . . . where it got to, you could look at all those things and say that's what she was saying all along."

Blier stated that Rumsey's MSPB litigation and Semmerling's complaints to him about the Wisconsin investigation reminded him of the OIG's discussions of a plan to conduct an audit of OJJDP. On April 25, 2011, Blier wrote to Assistant

Inspector General for the Audit Division Raymond Beudet and his deputy to ask about the status of Fine's suggestion a year before that an audit of OJJDP be conducted. The Audit deputy responded to Blier the next day with a copy of an FY 2011 audit proposal of OJJDP, which Blier forwarded to Schnedar. In his e-mail message to Schnedar, Blier wrote that the FY 2011 proposal was "developed upon our referral of Jill Semmerling's allegations to Audit last year for consideration of whether to do an audit of OJJDP's handling of this program," but that the proposal "did not get pick[ed] up by any office for this year." He wrote, "Independent of the source being [Semmerling] and the issues she has raised, it has seemed to me to be worthy of our resources."

We determined that proposals for an audit of OJJDP's administration of the JJDP Act grant program were made for FY 2011 and FY 2012. The FY 2011 audit proposal was not included in the Audit Division's work plan for that year, while the FY 2012 proposal was included in the FY 2012 work plan. The Audit Division's FY 2012 work plan specifically proposed an internal audit entitled "Oversight of the OJJDP Title II Formula Grant Program." Both the FY 2011 and FY 2012 proposals expressly referenced the "investigative assist" of the Wisconsin investigation, which revealed "allegations that many states are knowingly out of compliance with the grant requirements" and are not reporting the compliance issues in order to keep receiving grant funds. As noted, an April 2011 e-mail message from General Counsel Blier to Acting IG Schnedar indicated that the FY 2011 proposal had been considered but had not been "picked up" by any of the Audit Division's offices. RAM Carol Taraszka told us that the FY 2012 proposal was placed on the FY 2012 work plan by Acting IG Schnedar. Taraszka stated that the audit was not conducted due to competing priorities, such as national security-related audits.

In its selection of audits, the OIG typically balances audit coverage among the various DOJ components and obtains Inspector General approval before initiating an audit. In FY 2012, the Audit Division had recently completed an audit of OJJDP,²¹⁹ and selected another high risk audit involving OJJDP from the FY 2012 Audit Division work plan associated with a complaint the OIG received from Crime Victims United.²²⁰ Further, the OIG Investigations Division's investigation into the OJJDP Title II matter was ongoing in FY 2012, and it is typical that the Audit Division would not audit a program that is undergoing an investigation to avoid duplicating efforts and impinging on an ongoing investigation. Given these factors, the OIG determined it would not initiate this internal audit in FY 2012, but as discussed later in this report, the OIG plans to initiate an audit of OJJDP's administration of the JJDP Act grant program.²²¹

²¹⁹ U.S. Department of Justice Office of the Inspector General, *Procedures Used by OJJDP to Award Discretionary Grants in Fiscal Year 2007*, Audit Report 09-24 (April 2009).

²²⁰ U.S. Department of Justice Office of the Inspector General, *Audit of the Office of Juvenile Justice and Delinquency Prevention Research Award to the National Council on Crime and Delinquency*, Audit Report 12-41 (September 2012).

²²¹ The OIG has, of course, taken other actions to ensure the integrity of the Department's grant programs over time. For example, in February 2009, then-IG Fine issued an 8-page guidance
(Cont'd.)

According to an e-mail from Semmerling’s counsel to Blier, the OSC consented to release Semmerling’s Confidential Statement to Blier and Agency Counsel on May 13, 2011, in connection with Rumsey’s whistleblower retaliation suit. Blier told us that this was the first he learned of Semmerling’s Statement. Blier stated that “large swaths of it were not relevant to the [Rumsey] retaliation case, [and were an] exposition of investigative information, and that I considered it as material that would be subject to an investigative privilege.”

On May 12, 2011, Semmerling was subpoenaed to provide a deposition in Rumsey’s litigation.

On May 23, 2011, Semmerling filed whistleblower disclosures with the Office of Special Counsel. Semmerling did not claim that she had been retaliated against by the OIG. Her disclosures requested an investigation of several allegations, including:

- DOJ OIG abuse of authority and gross mismanagement, by obstructing investigation and pursuit of accountability for DOJ officials with regard to Wisconsin violations, or of Wisconsin officials responsible for the violations.
- DOJ OIG abuse of authority and gross mismanagement, through obstruction of efforts to investigate the full extent of retaliation that she was able to confirm against expert and fact witness and whistleblower Elissa Rumsey, and failure to provide Ms. Rumsey any protection against retaliation despite corroboration of her charges that – (1) Wisconsin’s Office of Juvenile Justice provided false information on compliance with legal requirements to separate adult and juvenile prisoners; (2) Wisconsin was not obtaining detention data from all adult lockups; and (3) indications that Wisconsin’s practices were common in other states.
- DOJ OIG illegality and abuse of authority by ordering Ms. Semmerling not to discuss Ms. Rumsey’s Office of Special Counsel (OSC) complaint with her nor have anything to do with any aspect of it, so she could not be called as a witness.

Letter from Thomas Devine to Acting Special Counsel William Reukauf, May 23, 2011, p. 3. In the cover letter transmitting these disclosures to the lead Agency counsel and Rumsey’s counsel, Semmerling’s counsel wrote:

document entitled “Improving the Grant Management Process.” The document was created to provide suggestions to OJP, Office of Community Oriented Policing Services, and the Office of Violence Against Women (granting agencies) “to minimize opportunities for waste, fraud, and abuse in awarding and overseeing the \$4 billion in DOJ funding contained in the American Recovery and Reinvestment Act of 2009.” Further, the OIG’s Audit Division has conducted over 60 internal audits and reviews of Department granting agencies and over 1,000 audits and reviews of external grant recipients, and has assisted the Investigations Division on grant related investigations. Together, these audits and reviews identified over \$1 billion in questioned costs, and over \$800 million in funds to better use.

When Ms. Rumsey filed the current Individual Right of Action (IRA) with the [MSPB] earlier this year, Ms. Semmerling thought that there would be an opportunity to bear witness and make a record of misconduct that she has confirmed. To date, however, she has not been able to testify due to Department of Justice (DOJ) objections. As a result, Ms. Semmerling has decided to exercise her legal rights by filing a disclosure under the Whistleblower Protection Act.

Letter from Thomas Devine to Agency Counsel and Rumsey's counsel, May 23, 2011, p. 1.

Blier forwarded the transmittal letter and disclosures to an OIG OGC colleague, noting "This is odd." Blier stated that he was referring in particular to the allegation that Semmerling had not been able to testify in the Rumsey litigation due to the Department's objections, an assertion with which he stated he did not agree. He told us that he did not understand "the purpose or the timing" of Semmerling's disclosures. However, he told us that Semmerling's action did not cause him to question Semmerling's motives or credibility, nor did it undermine his ability to continue to be professional and supportive toward Semmerling thereafter.

Blier told us that his role in the Rumsey litigation was to represent the OIG's interests and advise Agency Counsel on whether an investigative privilege should be asserted over materials that pertained to the ongoing Wisconsin criminal investigation. Blier said he also advised Semmerling in her capacity as an OIG employee appearing as a witness in a judicial proceeding.

Semmerling was deposed on July 2, 2011 in the Rumsey litigation, and also testified in the MSPB hearing on July 25, 2011, both of which Blier attended on behalf of the OIG. Between these two appearances, Blier complimented Semmerling in an e-mail message to her as "very professional and knowledgeable" during her deposition, and expressed his belief that she would "again do a good job" in testifying at the hearing. He also counseled Semmerling about what to expect at the hearing, such as how her deposition testimony could be used to impeach her over inconsistent statements or to refresh her recollection, and advised her to review her deposition testimony before testifying at the hearing.

On October 25, 2011, the MSPB Administrative Judge denied Rumsey's request for corrective action. Rumsey appealed to the full Board, which on October 28, 2013, reversed the Administrative Judge's determination with respect to the cancellation of Rumsey's telework agreement and her 2007 performance rating, and affirmed the denial determination as to Rumsey's other claims pertaining to whistleblower retaliation. See *Rumsey v. Dep't of Justice*, 120 M.S.P.R. 259 (2013.)

4. Semmerling's Retirement from the OIG

[REDACTED]

[REDACTED]

During this time Semmerling discussed retirement options with OIG Human Resources Director Cindy Lowell and Blier. A review of e-mail messages exchanged among OIG senior officials shows that efforts were made to accommodate Semmerling's [REDACTED] in order to enable her to continue employment with the Department. E-mails show that Lowell, Blier, McLaughlin, Dorsett, and other OIG officials were mindful that Semmerling did not yet have the 20 years of employment as a law enforcement official necessary to qualify for a law enforcement pension. The e-mails show that these officials considered ways in which to create a "secondary law enforcement position (more administrative or supervisory in nature than primary)" as an alternative to finding Semmerling a non-law enforcement position within the Department.

In addition, on December 20, 2011, McLaughlin sent Oleskowicz an e-mail message directing him to tell Semmerling that "[e]ffective immediately, you will become her first line supervisor and Deputy AIG Dorsett will be her second line supervisor." On December 22, 2011, Lowell wrote to Blier, McLaughlin, and Dorsett:

Before [Semmerling] left today we had a good conversation. . . . She is very happy John [Oleskowicz] is her supervisor, ok with the duties being assigned but concerned still no telework.

[REDACTED]

Blier sent [REDACTED] to Semmerling's counsel on February 3, 2012.

In early February, Semmerling wrote to Lowell that she was inclined to opt for a medical retirement rather than try to work for 20 more months to qualify for law enforcement officer retirement. [REDACTED]

[REDACTED] Semmerling [REDACTED] retired from the OIG in August 2012.

I. OIG's Investigations of OJP Personnel

As noted in this chapter, Semmerling alleged that she was removed from the case because her investigation of OJP's involvement was disruptive to the

relationship between INV and OJP. We therefore examined the relationship between these two entities to aid our assessment of whether the relationship may have caused INV to refrain from investigating OJP, as Semmerling alleges. Officials from both INV and OJP painted a mixed picture of the relationship between the two offices, citing their shared interest in identifying and deterring misuse of funds awarded through Department-administered grants while also noting important differences in the missions of the two offices.

According to INV Fraud Detection Office SAC Chawaga, much of the contact between INV and OJP during our review period revolved around OJP referrals of suspected grant fraud by grantees or allegations of misconduct by OJP employees.

Chawaga also described other aspects of the INV-OJP relationship. For instance, she said that staff in her office and agents from INV field offices have provided training to OJP personnel on spotting indicators of potential grant fraud. OJP staff also told us about such training. OJP and other Department offices have, in turn, provided background briefings on various grant programs to INV personnel. According to Chawaga and Moses, INV and OJP OGC also meet quarterly to discuss ongoing investigations.²²² Moses stated that at these meetings:

We go over the current status of all the different cases that are operational, and we check to make sure that if there is anything that is either outstanding or needs to be done, that we can interface to make sure we get it coordinated to, to get whoever needs to have something, to have it.

Madan also stated that he has helped to facilitate OIG's access to OJP's grant management system and other information to assist the OIG in its investigations.

While officials from both offices agreed that the relationship between INV and OJP generally has been cooperative and professional, they also identified areas where the two offices' interests diverge. As noted earlier in this chapter, both Madan and Moses stated that INV has sometimes asked OJP to refrain from making an award to a particular grantee due to an ongoing OIG investigation, but has not given OJP a sufficient factual basis for denying or delaying the award. Madan expressed his willingness to be cooperative with the OIG's wishes, stating, "The last thing you want to give to a crook is more money." However, Madan and Moses stated that such requests can create problems for OJP because grants pursuant to formula grant programs, unlike discretionary grants, are entitlements so long as all statutory prerequisites are met. Madan added that the burden falls on the United States to justify why the grantee is not entitled to receive the grant. Both Madan and Moses cited examples in which OJP was able to accommodate the OIG's requests to delay grant awards, but stated that it has often had to do so without knowing the details of the OIG's investigations. In these cases, OJP has had to instead rely on other reasons to justify delaying grants, such as technical legal obstacles or bureaucratic hurdles. As noted above, Moses cited the Wisconsin

²²² Moses stated that OJP OGC also meets quarterly with the OIG's Audit Division.

investigation as a particularly extreme example in which the OIG's involvement interfered with OJP's ability to conduct its work.

McLaughlin told us that INV's relationship with OJP was important from the standpoint of helping INV identify fraudulent activity, but added that "our missions were a little different." He stated, "We found often that the grant-making entities, their priorities, although it certainly included ensuring that fraud did not occur, but . . . their major priority was getting the money . . . out to the, the individuals." This viewpoint was consistent with what several other witnesses, including the FAUSA and SA 2, told us.

Blier offered a starker contrast between the missions of the two offices. He stated that OJP is a "grant-giving entity," and that its mission is to "get the money out" and to make sure the grants are being handled in compliance with OJP guidelines. He stated that the OIG's mission is to find fraud in the grant award process and bring these findings to the attention of appropriate suspension and debarment officials or prosecutors, a mission that "frankly is inconsistent with [OJP's] mission of getting the money out." Similar to Madan and Moses, Blier also stated:

[W]e've had, you know, sort of that tension with [OJP] . . . over the years about particular matters in which we have felt, the OIG has felt, that . . . there's X million dollars in grant funds that this entity is receiving. We have identified fraud by this entity. Turn the spigot off. And their response is, you know, we can't do that unless you can give us something more. And so there's a, there's a certain tension because, you know, they feel like we're putting them on the hook . . . by telling them something.

Regarding whether INV and OJP's interactions had been so enmeshed that INV would be deterred from investigating OJP officials for fear of disrupting a generally cooperative relationship, OIG officials told us emphatically that this was not the case. Blier stated that from his vantage in the OIG's front office he was quite familiar with INV's work, and that on the "spectrum of aggressiveness" in pursuing matters, OJP has not "received any favored treatment" from INV. On the specific issue of whether INV's liaison work with OJP risks inviting the perception that OIG would be reluctant to investigate misconduct within OJP, Dorsett cited INV's "track record" of having "investigated many individuals who we've had close liaison with, and if they've engaged in misconduct, you know, let the chips fall where they may." Lastly, Fine rejected the notion that the OIG ever allowed its cooperative working relationship with OJP or other DOJ component to deter it from pursuing any allegation of criminal or administrative misconduct, stating that "we have pursued aggressively allegations against OJP."

In this regard, O&R reviewed files from INV investigations of OJP personnel opened between 2005 and late 2015.²²³ We found that INV opened 18 investigations involving 27 separate OJP subjects during this period. The allegations included conflict of interest, misuse of position, contract fraud, and theft of government property. Subjects included both senior OJP and OJJDP officials, such as former OJJDP Administrator Robert Flores, as well as grant program specialists and other staff-level employees. Many of these investigations resulted in referrals to prosecutors for criminal prosecution. While we did not do an in-depth analysis of each of these cases, we concluded that INV's investigations of OJP and OJJDP employees was robust and we did not see any evidence that INV historically has compromised its mission in the interest of maintaining a cooperative relationship with OJP.

IV. Conclusions and Recommendations

In this section we provide an overview of the criminal obstruction statute and administrative misconduct and OIG investigative standards relevant to Semmerling's allegations that OIG officials obstructed her fact-finding investigation of Wisconsin's alleged fraudulent receipt of grant funds. We then provide our findings, conclusions and recommendations.

A. Relevant Legal and Administrative Standards

1. Criminal Obstruction

It is a crime to "corruptly . . . influence[], obstruct[], or impede[] or endeavor[] to influence, obstruct, or impede . . . any pending proceeding . . . before any department or agency of the United States. . . ." 18 U.S.C. § 1505. A violation of Section 1505 has three elements: (1) there was a proceeding pending before a department or agency of the United States; (2) the defendant knew of or had a reasonably founded belief that the proceeding was pending; and (3) the defendant corruptly endeavored to influence, obstruct, or impede the due and proper administration of the law under which the proceeding was pending. See *United States v. Quattrone*, 441 F.3d 153, 170, 174 (2d Cir. 2006); *United States v. Bhagat*, 436 F.3d 1140, 1146 (9th Cir. 2006); *United States v. Laurins*, 857 F.2d 529, 536-37 (9th Cir. 1988). The statute of limitations is 5 years from the time the offense was committed. See 18 U.S.C. § 1382.

A "proceeding" under Section 1505 encompasses both the investigative and adjudicative functions of a department or agency. See *United States v. Schwartz*, 924 F.2d 410, 423 (2d Cir. 1991); *United States v. Leo*, 941 F.2d 181, 199 (3d Cir. 1991); *United States v. Fruchtman*, 421 F.2d 1019, 1021 (6th Cir. 1970). A formal

²²³ O&R did not undertake a comprehensive review of all INV investigations during this period, and we therefore reach no statistical conclusions about the rate at which INV opened investigations of OJP personnel as compared with investigations of personnel in other Department components. Given the various factors that impact such decisions, we do not believe that such a comparison would be particularly meaningful in any event.

investigation by an Office of Inspector General empowered to issue subpoenas and compel sworn testimony is a Section 1505 “proceeding.” See *United States v. Kelley*, 36 F.3d 1118, 1127 (D.C. Cir. 1994) (U.S. Agency for International Development OIG); *United States v. Starks*, 472 F.3d 466, 469-70 (7th Cir. 2006) (upholding Section 1505 conviction for destruction of affidavit in DOJ OIG investigation). Our analysis assumes that Section 1505 applies to the DOJ OIG.

For purposes of this offense, “corruptly” means to act with an “improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.” 18 U.S.C. § 1515(b).

2. OIG Investigative Standards and Administrative Misconduct

Under the Whistleblower Protection Act (WPA) and Whistleblower Protection Enhancement Act (WPEA), 5 U.S.C. § 2302(b)(8), it is a prohibited personnel practice to take a personnel action in reprisal for an employee reporting what the employee reasonably believes to be certain types of misconduct, including “gross mismanagement” and “abuse of authority.” Even though Semmerling did not allege retaliation under the WPA and WPEA, we went beyond her obstruction allegation to determine if anyone involved at the OIG had engaged in any misconduct in connection with this matter under the OIG’s standards of conduct, not restricted to misconduct of the type that would be within the ambit of the WPA and WPEA.²²⁴ In assessing this, we note that, as described in this chapter, Semmerling’s counsel also invoked these gross mismanagement and abuse of authority standards in alleging to the OSC that Department officials obstructed Semmerling’s investigation.²²⁵

a. OIG Investigative Standards

Volume III, Chapter 200 of the Inspector General Manual requires Investigations Division personnel to possess and maintain the highest standards of conduct and ethics, including unimpeachable honesty and integrity, and to follow the due professional care standards established by the Council of the Inspectors General on Integrity and Efficiency (CIGIE) in conducting investigations and preparing related reports.²²⁶ See IGM, Vol. III, §§ 200.7, 200.9. Section 200.9 sets forth the following investigative standards for objectivity and impartiality, thoroughness, and timeliness:

²²⁴ We note that Semmerling’s obstruction allegation and the standards outlined above regarding it also would be covered in the latter analysis as an alleged violation of “any . . . law, rule, or regulation” under Section 2302(b)(8).

²²⁵ See Letter from Thomas Devine to Acting Special Counsel William Reukauf, May 23, 2011.

²²⁶ Before CIGIE was established in 2008, the federal Inspectors General operated under the auspices of two councils, the President’s Council on Integrity and Efficiency (PCIE) and the Executive Council on Integrity and Efficiency. The IG Manual refers to the PCIE investigative standards, which have been supplanted by CIGIE’s Quality Standards for Investigations (QSI).

- Agents must be equally receptive to both exculpatory evidence and evidence that is incriminating. All investigations, as well as the resulting reports, must be free from bias or prejudice.
- All investigations must be conducted in a fair and equitable manner, with the perseverance necessary to determine the facts.
- Evidence must be gathered and reported in an unbiased and independent manner in an effort to determine the validity of an allegation or to resolve an issue.
- All investigations must be conducted in a diligent manner. Reasonable steps will be taken to ensure that pertinent issues are sufficiently resolved and that all appropriate criminal, civil, contractual, or administrative remedies are considered.
- All OIG investigations will be conducted and reported with due diligence and in a timely manner. The OIG seeks to complete investigations within 180 days, except in unusual circumstances and for complex criminal investigations.²²⁷ This is especially critical given the impact OIG investigations have on the lives of individuals and the activities of organizations.

b. Gross Mismanagement

“Gross mismanagement” is generally defined as “a management action or inaction which creates a substantial risk of significant adverse impact upon the agency’s ability to accomplish its mission.” *Kavanagh v. Merit Sys. Prot. Board*, 2006 WL 925301 *135 (Fed. Cir. 2006), *citing White v. Dep’t of the Air Force*, 63 MSPR 90, 95 (1994). The burden for showing “gross” mismanagement . . . is “onerous.” *See Elkassir v. Gen. Servs. Admin.*, 325 Fed. Appx. 909, 912 (Fed. Cir. 2009). The “management action or inaction” must be “more than *de minimis* wrongdoing or negligence.” *Johnson v. Dep’t of Justice*, 104 M.S.P.R. 624, 634 (2007), *as quoted in DeSantis v. Napolitano*, 716 F. Supp. 2d 1100, 1107 (D. N.M. 2010).

c. Abuse of Authority

“Abuse of authority” was defined by the Special Counsel in 1988 as “an arbitrary or capricious exercise of power by a Federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons.” 5 C.F.R. § 1250.3(f) (1988). The definition has been adopted by the MSPB following enactment of the Whistleblower Protection Act in 1989, *see D’Elia v. Dep’t. of Treasury*, 60 MSPR 226, 232-35 (1993)(describing the history of the definition), overruled on other

²²⁷ As noted earlier in this chapter, the IG Manual also specified that “[c]riminal cases with more complex and extenuating circumstances may reasonably take longer, but will be worked expeditiously.” IGM III-207.5 B. In addition, a formal presentation of a matter to a prosecutor changes the status of the investigation in IDMS to “Open in Judicial Proceedings,” which tolls the 180 day clock. *Id.*

grounds by *Thomas v. Dep't of the Treasury*, 77 MSPR 224 (1998), and remains operative. See, e.g., *Wen Chiann Yeh v. Merit Sys. Prot. Board*, 527 Fed. Appx. 896, 900 (Fed. Cir. 2013), citing *Doyle v. Dep't of Veterans Affairs*, 273 Fed. Appx. 961, 964 (Fed. Cir. 2008). In construing this definition, the Federal Circuit has noted that “[d]iscussion and even disagreement with supervisors over job-related activities is a normal part of most occupations.” *Doyle v. Dep't of Veterans Affairs*, 273 Fed. Appx. 961, 964 (Fed. Cir. 2008), quoting *Willis v. Dep't of Agriculture*, 141 F.3d 1139, 1143 (Fed. Cir. 1998).

B. Conclusions

Semmerling alleged that “DOJ OIG employees obstructed fact finding in an investigation of the Wisconsin OJA for concealment of non-compliance.” See Letter from Special Counsel Carol Lerner to Attorney General Eric Holder, September 16, 2014. The narrative accompanying the Special Counsel’s referral to the Department more specifically alleges that OIG officials committed this obstruction by “limiting [Semmerling’s] investigation and ultimately reassigning her from the case.” Based on the OSC referral and Semmerling’s statements to the OIG during the course of this review, we determined that her allegations of obstruction of the Wisconsin investigation and failure to take corrective action are grounded on the following alleged actions and decisions:

- After receiving complaints about Semmerling’s conduct of the investigation from OJP General Counsel Madan, Oleskowicz bullied and harassed Semmerling at a meeting on May 5, 2009 in which he questioned Semmerling about her contacts with OJJDP and OJP officials.
- During a July 23, 2009 meeting about Semmerling’s work performance, Oleskowicz and Thomas instructed her to limit her investigation to the “lowest level” Wisconsin OJA subject and not to focus on any problems with OJJDP or OJP, including the OJP OGC’s 2008 VCO Opinion.
- During the July 23 meeting, Oleskowicz and Thomas threatened and intimidated Semmerling. The next morning, Thomas attempted to intimidate her from pursuing the investigation by providing her a list of FBI employees who were terminated for insubordination or lack of candor.
- The OIG removed Semmerling from the investigation on October 23, 2009, thereby preventing further investigation of OJP OGC and OJJDP officials’ role in the alleged grant fraud.
- After being informed of Semmerling’s concerns, former Senior Counsel to the IG and current OIG General Counsel William Blier failed to take corrective action to address problems Semmerling had identified to him about OJJDP and OJP.

Semmerling alleged that three OIG officials were responsible for obstructing the OIG’s investigation: CFO ASAC Thomas (retired); SAC Oleskowicz; and Deputy

Assistant Inspector General for Investigations Dorsett (retired). Semmerling also alleged that former Senior Counsel to the IG and current OIG General Counsel Blier failed to take corrective action after she was removed from the Wisconsin matter and she brought her complaints to IG Fine and him. The focus of much of our analysis was on the actions of Oleskowicz, who had direct supervisory involvement in this matter. Although Thomas was Semmerling's first-line supervisor from October 2008 through Semmerling's removal from the case a year later, we determined that she had limited direct supervisory responsibility over and involvement in the investigation during this time due to her responsibilities as the case agent in another matter. We further determined that Blier's involvement in the Wisconsin investigation was limited to his interactions with Semmerling after she had been removed from the case. Dorsett, by virtue of his position as Deputy Assistant Inspector General for Investigations, had involvement in the management of the case, although less directly so than Oleskowicz. We also considered the actions of AIG Thomas McLaughlin, who perhaps unbeknownst to Semmerling made the decision to remove her from the case.

We analyzed Semmerling's allegations under the criminal statute applicable to obstruction of agency proceedings (18 U.S.C. § 1505), OIG investigative standards set forth in the IGM, and the administrative standards of gross mismanagement and abuse of authority under the WPA and WPEA (5 U.S.C. § 2302(b)(8)(B)). These provisions provide differing, yet somewhat overlapping, standards against which we assessed the conduct at issue. The obstruction statute involves the element of criminal intent not found in the OIG investigative and administrative misconduct standards. OIG investigative standards impose an affirmative duty on OIG personnel to conduct investigations thoroughly, objectively, and in a timely manner. Abuse of authority entails an arbitrary or capricious exercise of power that results in improper or unfair treatment, while gross mismanagement focuses on management actions or failures to act that substantially undermine the agency's ability to accomplish its mission.²²⁸

We preface our analysis by emphasizing that Semmerling is to be commended for bringing to light significant flaws and deficiencies in the administration of the JJDP Act formula grant program. Her tenacious investigation of Rumsey's allegations revealed numerous problems that have plagued this program for several years. These problems include inefficiencies and potential disparities in the core requirements compliance monitoring, auditing, and grant approval process, issues of lack of transparency, incomplete recordkeeping, poor internal communication between managers and staff, and lack of clarity and consistency in communicating compliance guidance to grantees. Some of these problems were first identified by Rumsey, who brought them to the OIG's attention in early 2008. As a result of our review of Rumsey's allegations and Semmerling's investigative efforts, the OIG intends to undertake a comprehensive internal performance audit of OJJDP's administration of this important program.

²²⁸ The OIG's mission is to "detect and deter waste, fraud, abuse, and misconduct in DOJ programs and personnel, and to promote economy and efficiency in those programs." See <https://oig.justice.gov/> (last accessed February 6, 2017).

At the same time, after thoroughly examining the management actions and decisions taken in the course of Semmerling's investigation, we did not substantiate Semmerling's allegations based on the elements of criminal obstruction or under a gross mismanagement or abuse of authority analysis. We also concluded that OIG managers acted consistent with their obligation to conduct the Wisconsin investigation in a thorough, objective, and impartial manner. These managers maintained the assignment of four OIG personnel (two agents and two auditors) on the case upon Semmerling's removal, and aggressively pressed DOJ prosecutors and civil attorneys to seek recovery of the allegedly improper grants that Wisconsin had received from OJJDP. After nearly a year and a half of investigation, Semmerling had not developed evidence sufficient to convince the prosecutors with whom she worked and her OIG managers that predication existed to expand the criminal investigation to more broadly include OJJDP and OJP OGC officials. Accordingly, these managers acted reasonably to focus the investigation on the allegations against Wisconsin OJA. While the investigation continued for an extended period, the evidence shows that much of the time that elapsed between the OIG's receipt of the initial allegations in 2008 and its issuance of a final report in 2014 was consumed by DOJ criminal and civil attorney deliberations over whether to pursue legal action. Ultimately, DOJ attorneys declined to take any criminal or civil legal action against Wisconsin OJA.

As discussed below, we found that important aspects of Semmerling's factual assertions were either unsupported by the evidence or mischaracterizations of what we found occurred. As to the factual assertions of management actions about which there is no dispute – primarily the decision in July 2009 to focus the investigation at that time on alleged fraudulent activity by Wisconsin OJA employees, followed by the decision in October 2009 to remove Semmerling from the case – we concluded that, while Semmerling may have had a good faith basis for disagreeing with them, these decisions were made for legitimate investigative and management purposes and were consistent with the mission of the OIG. Notably, no OIG witness, including SA 2 and the Auditor whom Semmerling specifically indicated to OSC would be supportive of her allegations, provided us with any evidence substantiating Semmerling's core assertion that OIG managers sought to influence the investigation to favor Wisconsin OJA, OJJDP, or OJP.

Nevertheless, as also discussed below, we concluded that in at least one instance ASAC Thomas exercised poor judgment in her supervision of Semmerling that we found troubling and incompatible with sound management practices. We also found that, before reaching a final decision about whether to remove Semmerling from the investigation, INV management should have consulted with prosecutors handling the case to discuss Semmerling's potential removal.

In sum, we found no evidence to support the allegation that any OIG official acted "corruptly" to influence, obstruct, or impede a "pending proceeding" within the meaning of 18 U.S.C. § 1505. We further concluded that no OIG manager acted in a manner that would constitute an abuse of authority, or exercised gross mismanagement that substantially undermined the OIG's ability to accomplish its mission, or acted inconsistently with the OIG investigative standards of thoroughness, objectivity, and impartiality.

1. The May 5, 2009 Meeting

In early May 2009, Oleskowicz learned through FDO SAC Chawaga that OJP General Counsel Madan had complained about what was characterized as the aggressive and intrusive manner in which Semmerling was conducting the Wisconsin investigation. Dorsett directed Oleskowicz to discuss Madan's complaints with Madan. The OIG often initiates misconduct investigations by gaining a clearer understanding of the underlying allegations, and thus in our view, Dorsett's decision to have Oleskowicz first determine the substance of Madan's complaint was appropriate. Oleskowicz told us, and his notes support, that Madan raised several concerns, including Semmerling's questioning of OGC's legal advice regarding the VCO exception, her request for core requirements compliance monitoring reports from all states and territories for 2007, her questioning the Acting Administrator of OJJDP about inviting a Wisconsin employee to an OJJDP focus group event, and other examples of her alleged interference in OJJDP's work. After learning the details of Madan's complaint, Dorsett directed Oleskowicz to ask Semmerling a series of questions about what "instructions, guidance or advice" Semmerling had given OJP personnel regarding their contacts with Wisconsin OJA. As discussed below, we believe that Dorsett and Oleskowicz acted reasonably in this regard, but that a less confrontational approach to the meeting with Semmerling may have been the more effective course of action under the circumstances.

Oleskowicz met with Semmerling on May 5, 2009. Thomas was not involved in this meeting. Semmerling and Oleskowicz gave us differing accounts of the precise questions Oleskowicz asked, but both generally agreed that the questions were designed to elicit information about the nature of Semmerling's directions or advice to OJP officials regarding their interactions with Wisconsin OJA officials. Semmerling disputed that Oleskowicz phrased the questions as he told us he had, and stated that the questions were too vaguely worded to answer. She also said that he treated her as though she were an investigative subject, such as by asking whether she would answer his questions or wanted to leave the meeting. Oleskowicz told us that Semmerling did not provide appropriate responses to his questions, and later described Semmerling's conduct at the meeting to Dorsett and McLaughlin as "insubordination" and "misconduct."

Semmerling stated that Oleskowicz was "trying to intimidate me and trying to get me upset" during the meeting. In a May 6, 2009 e-mail message to Oleskowicz, she described his behavior as "bullying/harassment," adding that he treated her this way at a time when he knew she was about to [REDACTED]. She told us she considered the May 5 meeting to be a part of the obstruction of the fact-finding investigation, but did not clearly explain how. We therefore analyzed what we learned about the meeting to determine whether there was evidence of any improper effort to limit the fact-finding investigation.

We first considered the context in which the complaint from Madan was made and how it led to the May 5 meeting with Oleskowicz. In July 2008, Semmerling established OJP OGC as her point of contact for the criminal investigation and instructed Deputy General Counsel Moses not tell OJJDP about her investigation.

Despite her admonition to OGC officials not to divulge her investigation to OJJDP, Semmerling made her investigation known to OJJDP personnel who were generally sympathetic to Rumsey's concerns that senior OJJDP and OJP OGC officials were aware of, if not actively facilitating, Wisconsin's improper receipt of grant funds. Semmerling frequently contacted these OJJDP employees to gather information about OJJDP operations concerning Wisconsin and other states, and about the OJP OGC's issuance of the 2008 VCO Opinion. Semmerling's interactions raised concerns among OJJDP and OGC senior officials. For example, in April 2009 Semmerling questioned OJJDP Acting Administrator Slowikowski about inviting a Wisconsin OJA employee to an OJJDP focus group on Disproportionate Minority Contact (DMC), a core requirement completely unrelated to Semmerling's investigation, based on information provided by Rumsey. An OJJDP Senior Advisor separately told Slowikowski that the Wisconsin OJA official should not be invited because of the OIG criminal investigation, causing Slowikowski to question Semmerling about what others in OJJDP knew of the investigation and to tell her that others in the office were "no longer unbiased" and that a "presumption of guilt now exists" in the office because of the investigation. This DMC focus group incident evidently was brought to Madan's attention because it was among the complaints he made to Oleskowicz on May 5, 2009.

Semmerling also exchanged information with Rumsey and the OJJDP Senior Advisor about the OGC's 2008 VCO Opinion, and on May 3, 2009 sent an e-mail message to the OGC attorney who authored the opinion asking a series of questions that in our view could be read as challenging the legal validity of the opinion. This message was forwarded to Madan, who later forwarded it to Oleskowicz, and was among the issues he raised with Oleskowicz during the May 5 telephone conversation. According to Oleskowicz, Madan questioned whether Semmerling was "targeting" him in the investigation. Madan raised several other concerns, including Semmerling's recent request to OJJDP to provide her with core requirements compliance monitoring reports for all states and territories for 2007 within 8 days of the request.²²⁹ Oleskowicz's notes reflect that Madan expressed his desire to work cooperatively with the OIG, but that Semmerling's involvement was inhibiting OJP's ability to operate effectively and was having a "chilling effect" on OJP OGC staff. Madan stated to Oleskowicz and to us that his experience with Semmerling on the Wisconsin matter differed significantly from his more cooperative experience with the OIG in other grant fraud investigations, including a prior investigation that Semmerling had conducted in coordination with OJP.

Based on our review of documents and interviews of multiple witnesses familiar with these events, it appeared to us that by May 2009 Semmerling's

²²⁹ As described in this chapter, Dorsett opposed Semmerling's request as "overly broad and unduly burdensome" to OJP. Thompson told us, however, that it would not have been difficult to compile the core requirements compliance monitoring data Semmerling sought. Semmerling ultimately was able to obtain core requirements compliance monitoring data from a narrowed-down group of states, which appeared acceptable to the AUSAs. We do not believe Dorsett's resistance to Semmerling's initial request for core requirements compliance monitoring data from all states and territories indicates intent to improperly obstruct Semmerling's investigation of alleged grant fraud by Wisconsin OJA.

attention to the Wisconsin grant fraud allegation had been diverted by suspicions that OJJDP and OGC officials were somehow complicit in the fraudulent activity. As described in Chapter Three, we concluded that Semmerling lacked any specific evidence to support her suspicion that OJP officials had conspired with Wisconsin officials to improperly award the state grant funds.

Given the lack of specific evidence, we concluded that Dorsett's and Oleskowicz's response to Madan's complaint to OIG officials about the intrusiveness of Semmerling's investigation was reasonable from a management standpoint. We believe that Dorsett and Oleskowicz had a legitimate interest in understanding what Semmerling may have done to trigger Madan's complaint and whether it was appropriate to expand the investigation to focus on OJP personnel. However, we questioned why Dorsett and Oleskowicz approached the situation as they did – that is, by first gathering information from Madan about his complaint and then confronting Semmerling with a series of questions about her statements to OJP personnel without telling her why the questions were being asked. We believe that other, less confrontational and potentially more effective methods were available for addressing Madan's complaint, such as by reviewing with Semmerling her evidentiary predication for investigating OJP OGC's activities and discussing whether further investigation of these activities was justified.

Despite the confrontational nature of the approach that was taken, we found no evidence that Dorsett's and Oleskowicz's questioning of Semmerling was done in order to obstruct or improperly influence the fact-finding investigation. It is significant to note that Semmerling did not allege that Oleskowicz placed constraints on her investigation at this point in time, even though he was aware that she was investigating the 2008 VCO Opinion and was having significant interactions with senior OJJDP and OJP officials about the fraud allegations against Wisconsin OJA officials. Nor does she allege that Oleskowicz threatened to take any disciplinary action against her.

Semmerling asserted that during his May 5 conversation with Madan, Oleskowicz indirectly compromised her ability to conduct her investigation. She stated in both her Confidential Statement and to us that she learned in July 2009 from the OJP OGC Contact that during the May 5, 2009 conversation with Madan, Oleskowicz had told Madan that OGC need only answer written questions from Oleskowicz, and that the responses could also be provided in writing. However, Semmerling's July 2009 MOI of the discussion with the OJP OGC Contact about the substance of the May 5 conversation between Oleskowicz and Madan merely states:

It was agreed that OJP, OGC would not take "any guidance" about the case unless it was in writing. It was decided that "absent any written guidance," no action would be taken.

Semmerling told us that she did not want to include in the MOI Oleskowicz's alleged statement to Madan that OGC need only respond to written questions from him because she did not want to be "confrontational" and "throw [Oleskowicz] under the bus." It would, of course, be an issue of serious concern if Semmerling deliberately omitted relevant material from an MOI for any purpose. However, we found no

evidence to substantiate Semmerling's account of the May 5 meeting that she provided in her Confidential Statement, and thus cannot determine whether or to what extent her MOI of her July 2009 conversation with the OJP OGC Contact is accurate and complete. No party to the May 5 conversation – Madan, Moses, the OJP Senior Advisor, or Oleskowicz – recalls Oleskowicz and Madan discussing the terms under which OIG would communicate with OJP OGC, either to gather information or to provide guidance. Even the OJP OGC Contact stated that he did not recall being present for the conversation, much less the specific description of the meeting that Semmerling attributed to him from their conversation in July 2009.

We agree with Semmerling that the arrangement she described in her Confidential Statement between Oleskowicz and Madan, if true, could have hampered her ability to conduct a fair and thorough investigation of the Wisconsin OJA fraud allegations. However, Semmerling's two accounts of the May 5 conversation between Oleskowicz and Madan are substantively dissimilar, and no witness supports either version. Given these conflicting accounts, and the absence of corroborating direct or circumstantial evidence for her assertion that Oleskowicz instructed OJP OGC to respond only to Oleskowicz's written questions, we are unable to rely on Semmerling's claim. In any event, Semmerling did not interview any OJP OGC officials between May 5, 2009 and her removal from the case in October 2009 (other than her July 2009 conversation with the OJP OGC Contact), and does not allege that any OJP OGC witnesses refused to answer questions from her based on Oleskowicz's alleged instruction to Madan. Therefore, there is no evidence that Oleskowicz's alleged instructions to Madan, even if they were provided, in fact obstructed or limited Semmerling's fact-finding in the investigation.

Having found no evidence that Dorsett, Oleskowicz, or any other OIG official in any way limited Semmerling's investigative activities during Oleskowicz's May 5, 2009 meeting with her, we conclude that this meeting did not amount to obstruction or meet the standards required for a finding of abuse of authority or gross mismanagement.

2. The July 23, 2009 Meeting

On July 23, 2009, shortly after Semmerling returned to duty following [REDACTED] from the office, she was summoned to Thomas's office for a meeting with Thomas and Oleskowicz. Witness statements and documents show that the purpose of the meeting was to discuss what Oleskowicz characterized as a decline in Semmerling's work performance before [REDACTED]. Oleskowicz told us there were no plans to discuss the substance of the Wisconsin matter at the meeting, and that he recalled Semmerling raising the topic.²³⁰

²³⁰ As discussed earlier in this chapter, Oleskowicz consulted with the OIG's Director of Human Resources in late May 2009, while Semmerling was [REDACTED], about Semmerling's behavior. That official recommended that Oleskowicz suggest to Semmerling that she contact the Department's Employee Assistance Program (EAP), although he advised that, as a less

(Cont'd.)

Oleskowicz's memorandum to Dorsett about the meeting reflects that he and Thomas discussed concerns about Semmerling's emotional well-being, and also raised specific examples of Semmerling's alleged lack of candor and insubordination. Oleskowicz's memorandum also states that Oleskowicz raised a concern with Semmerling that she may have been mischaracterizing her conversations with Oleskowicz and Thomas to the AUSAs with whom she worked on a matter unrelated to the Wisconsin case.²³¹ However, as described in this chapter, several months after the July meeting with Oleskowicz and Thomas, Semmerling apparently did mischaracterize to FAUSA the FAUSA an instruction she received from Oleskowicz and Thomas in the Wisconsin OJA investigation. In late October 2009, Oleskowicz had told Semmerling to postpone site visits to Wisconsin detention facilities. However, the evidence – including the FAUSA's contemporaneous notes, an entry in IDMS, and relevant witness testimony – strongly indicates that Semmerling did not accurately relay this information to the FAUSA, telling him instead that Oleskowicz did not want the site visits to be conducted at all, thereby giving credence to the "mischaracterization" concern Oleskowicz raised during the July 23 meeting.

Oleskowicz said he envisioned the July 23 meeting as an opportunity to "clear the air and move forward" with Semmerling. However, the evidence shows that the meeting became contentious. According to Oleskowicz, he had met with Thomas beforehand to review what would be covered during the meeting with Semmerling, but that several times during the meeting Thomas said things "that hadn't been in the plan."

The July 23, 2009 meeting raises two issues relevant to Semmerling's allegation that OIG officials obstructed her fact-finding in the Wisconsin investigation: Whether Oleskowicz or Thomas directed Semmerling not to investigate the 2008 VCO Opinion and OJP's alleged complicity in Wisconsin's receipt of grant funds to which it was not entitled; and whether Oleskowicz or Thomas threatened or sought to intimidate Semmerling to cause her to fear disciplinary action if she acted contrary to their instructions.

a. Limiting the Wisconsin Investigation

There is a factual dispute as to whether or in what manner Oleskowicz or Thomas may have told Semmerling not to investigate the 2008 VCO Opinion and OJP's alleged complicity in the Wisconsin fraud matter. Semmerling told us that during the July 23 meeting, Oleskowicz for the first time told her not to "look at" or "not to investigate" the legal opinions, or any involvement that OJP OGC and OJDP had with Wisconsin, and "not to go down that road." She stated that Oleskowicz

desirable option, a disciplinary letter may be necessary. Under the circumstances, we thought it was reasonable for Oleskowicz to defer this conversation with Semmerling until after her return to the office rather than just before or even during [REDACTED].

²³¹ Oleskowicz also wrote that Semmerling "lacked candor" in her responses to him during their May 5, 2009 meeting concerning Madan's complaint, although Semmerling's alleged lack of candor during that meeting did not involve discussions with the AUSAs in the Wisconsin matter.

indicated to her that this instruction originated with Dorsett. She also said she was told “only to focus on [Compliance Monitor 1],” but was never told she could not investigate other Wisconsin OJA employees, although she perceived that Oleskowicz meant that she should not.

Oleskowicz denied ever telling Semmerling not to investigate the legal opinions, OJP OGC, or OJJDP, or to limit her investigation to Compliance Monitor 1 in the Wisconsin OJA. Thomas stated that she did not recall if these issues were discussed. Oleskowicz said he had told Semmerling several times to make sure that the AUSAs reviewed the 2008 VCO Opinion and had asked her what they thought about it, but never received a response. We found no e-mails from Oleskowicz reflecting his position on whether or how the VCO legal opinions should be addressed. However, his notes from a May 7, 2009 conversation with the FAUSA indicate that the AUSAs agreed to “handle” the VCO opinion and a memorandum written in rebuttal to it by the OJJDP Senior Advisor, and the FAUSA told us that he did in fact review at least the 2008 VCO Opinion. Semmerling, who was present for this May 7 conversation with the prosecutors, said she did not recall that the prosecutors agreed to review the opinions. We determined that Oleskowicz sought the prosecutors’ involvement in assessing the OGC legal opinion and its potential effect on the criminal case.

Oleskowicz stated that he repeatedly told Semmerling to “lock in” Compliance Monitor 1’s admission that he had fraudulently manipulated Wisconsin’s core requirements compliance monitoring data and that Compliance Monitor 1’s cooperation could then be used to implicate his supervisors in the Wisconsin OJA. Semmerling stated that it was she, not Oleskowicz, who had proposed this strategy. In either case, it is not disputed that Oleskowicz and Semmerling discussed using Compliance Monitor 1 to pursue a criminal case against more senior Wisconsin OJA officials.

Given the starkly differing accounts of whether Oleskowicz instructed Semmerling to limit the investigation to a low level Wisconsin OJA employee, we could not conclusively determine whether Oleskowicz in fact told Semmerling not to investigate the 2008 VCO Opinion, or OJP OGC or OJJDP’s potential collusion with Wisconsin OJA. We note, however, that the Auditor with whom Semmerling worked did not recall ever being told not to investigate OJP OGC or OJJDP. Similarly, SA 2, who also worked with Semmerling, said that he was never given this instruction, and that Semmerling had never told him that she was given this instruction. Both the SSA and SA 2 also told us that they were not instructed to limit their investigation to the lowest level Wisconsin OJA employee. Rumsey also stated that Semmerling never told her that she had been directed not to investigate the VCO opinion or OJP OGC.²³² Most significantly, we determined that Semmerling continued to investigate the VCO opinion after the July 23 meeting, and by mid-October 2009 was confident enough in her finding that OJP OGC had issued the

²³² As described in this chapter, early in the investigation Semmerling had told Rumsey of the OIG’s reluctance to issue an IG subpoena in the case, which suggests that Semmerling was not hesitant to share investigative strategy type information with Rumsey.

opinion in order to allow Wisconsin to receive grant money that, without Oleskowicz's knowledge or approval, she shared her finding with senior OJJDP official Melodee Hanes and the OJP Office of the Assistant Attorney General Senior Advisor. When Semmerling later forwarded to Oleskowicz her messages to these senior officials, she wrote, "I know you previously got upset with me about this issue but this information cannot be ignored." This October 16, 2009 message to Oleskowicz suggests that Semmerling at least perceived that Oleskowicz had previously expressed some level of disapproval of Semmerling's investigation of the VCO opinion.

Based on the totality of the evidence, we believe that Oleskowicz likely sought to dissuade Semmerling from focusing on the OJP OGC's issuance of the 2008 VCO Opinion at that time and made known to her that he believed the issue should be examined by the AUSAs. However, we found no evidence that he imposed a hard and fast prohibition on Semmerling's investigative activities regarding OJP OGC's issuance of the VCO opinion, and her conduct and contemporaneous statements were, as noted above, inconsistent with such a limitation. We also found no evidence that Oleskowicz prohibited Semmerling from investigating other possible collusion by OJP officials. Semmerling stated, for example, that Oleskowicz never prohibited her from interviewing particular officials in OJP OGC or OJJDP. Rather, we think Semmerling may well have misinterpreted Oleskowicz's undisputed guidance to build the criminal case based on Compliance Monitor 1's admission of fraud as a directive not to investigate alleged misconduct more broadly within OJP.

Even assuming Oleskowicz had explicitly instructed Semmerling to focus on Wisconsin OJA's alleged criminal actions and not on OJP OGC's or OJJDP's possible involvement in the alleged grant fraud, this prioritization of investigative resources would not have been unreasonable, or constituted obstruction of an agency proceeding, or an abuse of authority or gross mismanagement. As Semmerling acknowledged, by July 2009, at least portions of the criminal case against Wisconsin OJP were in jeopardy of being time-barred, a concern Oleskowicz said he had expressed to Semmerling several times. In our view, it therefore would not have been unreasonable for Oleskowicz, as Semmerling's supervisor, to set achievable, if limited, goals for the criminal investigation rather than risk losing the opportunity to lock in Compliance Monitor 1's admission of fraud and, potentially, build a larger case. We therefore believe that any instruction from Oleskowicz to prioritize the Wisconsin OJA's alleged criminal conduct over the far more speculative criminal involvement of OJP OGC or OJJDP personnel was not unreasonable and, in fact, under the circumstances may well have been advisable.

Lastly, the allegation that Oleskowicz, Dorsett, or other OIG officials had an improper purpose for prioritizing the investigation of Wisconsin OJA over an investigation of OJP is undercut by several facts. First, by July 2009, Semmerling had openly been investigating activities surrounding the 2008 VCO Opinion and the conduct of OJP OGC and OJJDP officials for over a year. As discussed above, Oleskowicz was aware of Semmerling's investigative activities involving OJP OGC and OJJDP as of at least early May 2009 due to Madan's complaint, and knew that the prosecutors did not consider any DOJ employees to be criminal subjects. There

is no dispute that Oleskowicz did not place any limits on Semmerling's investigative activities at that time. Moreover, Semmerling was about to [REDACTED], and although Oleskowicz considered replacing Semmerling as case agent at that time, he did not do so. Further, there is at least some evidence that in early May Oleskowicz had an interest in whether the 2008 VCO Opinion was of investigative value to the AUSAs. Had Oleskowicz wanted to avoid implicating OJP in fraudulent activity – to protect OIG's relationship with OJP or for any other improper purpose – he would not have sought the AUSAs' involvement in reviewing the 2008 VCO Opinion. Finally, the testimony and statistics regarding INV's active efforts to pursue misconduct and wrongdoing related to the Department's grants undercuts the argument that Oleskowicz or the Division more broadly was acting to protect the OIG's relationship with OJP or OJJDP. Rather, the evidence points toward efforts by Oleskowicz to obtain a favorable outcome of the investigation in the form of a criminal indictment against at least one Wisconsin OJA employee, and to follow the evidence to OJP and OJJDP if the AUSAs believed it was warranted.

In sum, there is no persuasive evidence to support Semmerling's allegation that OIG officials limited her fact-finding investigation during the July 23 meeting. Even assuming that Oleskowicz made some effort at that time to direct Semmerling to focus on alleged fraud by Wisconsin OJA officials, as we believe likely was the case, we found no basis to conclude that he or his superiors did so for an improper purpose. We also concluded that such a directive was consistent with the investigative standards set forth in the IG Manual to conduct a thorough, unbiased and timely investigation, and was a reasonable and legitimate exercise of Oleskowicz's supervisory authority rather than an abuse of it.

b. Intimidation or Threat of Disciplinary Action

We determined that Thomas inappropriately threatened Semmerling with disciplinary action during and immediately after the July 23 meeting. During the meeting, Thomas and Oleskowicz alleged that Semmerling had lacked candor in at least one matter that was unrelated to the Wisconsin investigation. The evidence shows that Thomas and Semmerling had a history of poor relations, and the accusation appeared to be, at least in part, a vestige of pre-existing tension between her and Semmerling. According to Semmerling, Thomas escalated the issue by warning Semmerling at the meeting, in Oleskowicz's presence, that the FBI fired employees for lack of candor – clearly implying that the OIG could take similar action – and the day after the July 23 meeting Thomas underscored this by presenting Semmerling with a document containing summaries of disciplinary adjudications recently made by FBI's Office of Professional Responsibility, including employee dismissals for insubordination and lack of candor. Semmerling told us that Thomas said she had been given the document during a recent trip to Washington, D.C. Although Thomas denied ever seeing such a document or providing it to Semmerling, the evidence showed that Thomas had in fact given Semmerling the document. Semmerling provided a copy of the document to the OIG, it matched Semmerling's description, and its date coincided with Thomas's travel to Washington two weeks before the July 23 meeting.

Semmerling told us she regarded Thomas's action as a threat to fire her, and a way of intimidating Semmerling and hindering her from "being thorough in fact-finding in all the allegations" in the Wisconsin OJA case. Semmerling also stated that she did not believe she would actually be fired, but that the threat caused her to remain "quiet" in the face of Thomas's accusations during the meeting. Given the pre-existing animosity between Semmerling and Thomas, and Thomas's reliance on Semmerling's conduct in another matter for the lack of candor accusation, we cannot conclude that Thomas's action was specifically intended to interfere with or obstruct Semmerling's conduct of the Wisconsin investigation. However, we believe Thomas's action, whether intended or not, undermined Thomas's effectiveness as Semmerling's supervisor and exacerbated an already unproductive working relationship, thereby adversely affecting OIG operations. Had Thomas not retired and continued to serve as a supervisor in the OIG, we would have recommended at a minimum that she be counseled on her management practices.

We do not believe the evidence supports a similar finding as to Oleskowicz. His memorandum to Dorsett summarizing the July 23 meeting shows that he raised Semmerling's failure to provide clear responses to his questions during the May 5 meeting as an example of Semmerling's insubordination and lack of candor. As noted above, we questioned whether Oleskowicz's approach to the May 5 meeting was more confrontational than necessary, and we similarly questioned whether rehashing the May 5 meeting months later was the most effective way to illustrate Oleskowicz's management concerns. It is clear that by July 23 Oleskowicz and his superiors at OIG Headquarters had grown frustrated with the investigation because it was moving slowly and, at least according to Oleskowicz, was consuming more investigative resources than other cases.²³³ However, there is no evidence that Oleskowicz used examples of perceived deficiencies in Semmerling's conduct to threaten or intimidate her into limiting her investigation. Accordingly, we found no basis on which to conclude that Oleskowicz sought to obstruct the fact-finding investigation in this manner, or that his conduct in this regard amounted to gross mismanagement or an abuse of authority.

3. Removal from the Case in October 2009

Assistant IG for Investigations McLaughlin decided to remove Semmerling from the Wisconsin case on October 21, 2009, and he advised Oleskowicz of his decision that same day. Oleskowicz told the FAUSA and Semmerling of the decision on October 23. An OIG Special Agent (SA 2) and two auditors, along with a Senior Special Agent who was assigned to replace her, continued the investigation following Semmerling's removal. After criminal and civil attorneys in the USAO and the Civil Division of the Department declined to pursue fraud claims against Wisconsin OJA, the OIG issued a final Report of Investigation in 2014. Semmerling

²³³ OIG managers' frustration with the pace of the investigation as of July 23, 2009 was misplaced to the extent that it did not take into account Semmerling's [REDACTED], which may have delayed progress on the case due to factors beyond Semmerling's control.

alleges that the decision to remove her from the case obstructed the fact-finding investigation.

A week prior to her removal, Semmerling had sent e-mail messages to OJJDP senior official Melodee Hanes and the OJP AAG Senior Advisor advising that OJP OGC had issued the 2008 VCO Opinion so that Wisconsin, which had “compliance problems,” could receive money. Semmerling’s messages to these officials stated that the opinion and “the steps taken to receive this opinion are directly related to our case,” and thus OJP OGC and OJJDP State Relations and Assistance Division staff involved in the opinion “are part of our investigation.”²³⁴ The evidence shows that Semmerling did not discuss her decision to send these messages with the AUSAs, her supervisors, or her co-case agent. However, immediately after sending the messages, Semmerling forwarded them to Oleskowicz and Thomas, writing, “I know you previously got upset with me about this issue.” Semmerling told us that she knew Oleskowicz “was not going to be happy with this” before she sent the messages, but sent them anyway because she believed it was important to let Hanes and the OJP AAG Senior Advisor know that the VCO legal opinion was a part of the OIG investigation.

It is significant to note that Semmerling told us she did not believe that by sending these e-mails she was acting contrary to instructions from Oleskowicz. Semmerling’s belief that she was not prohibited from telling senior Department officials that they were “part of the investigation” due to their involvement in the 2008 VCO Opinion undermines her allegation that Oleskowicz improperly “limited” her investigation to a low level Wisconsin OJA employee.

Oleskowicz told us that Semmerling’s messages to the senior Department officials were “entirely inappropriate” and “completely inexcusable” because she had not conferred with the AUSAs before sending them. He said he also believed that the messages implied that Department officials were subjects or targets of the investigation even though his understanding from the AUSAs and SA 2 as of a few months earlier was that no Department officials were considered to have criminal involvement. Oleskowicz informed McLaughlin and Dorsett about the e-mail messages on October 20, and told us he discussed reassigning Semmerling from the case with McLaughlin twice before McLaughlin made his decision to remove her. There is no evidence that Thomas was involved in this decision.

We found that McLaughlin’s removal of Semmerling from the case was a reasonable management decision and was not done to obstruct the fact-finding investigation. However, the evidence shows that McLaughlin made this decision without first consulting the AUSAs. Given the need for close coordination between the prosecutors and the OIG investigators on pending investigations, we believe

²³⁴ Semmerling did, apparently of her own accord, e-mail the OJP AAG Senior Advisor a few days later that “the OJJDP staff and the OGC staff are involved with the decision and are part of the case, but I am not implying that anyone at OGC and OJJDP is a target of our investigation.” However, that does not alter our analysis of the impact of her prior e-mail and its role in her removal from the case.

that, instead of proceeding unilaterally, McLaughlin should have directed Oleskowicz to consult with the FAUSA regarding the possibility of removing Semmerling from the case before finalizing the decision.²³⁵

Prior to his decision, McLaughlin had been kept apprised of developments in the case and had concerns that it was not moving quickly enough. He was also aware that Semmerling alleged that OJP officials were complicit in Wisconsin OJA's fraudulent actions, and that Oleskowicz did not believe there was evidence to support the allegation. He also believed that Semmerling had developed a close relationship with the complainant in the case and questioned whether such a relationship was appropriate in the context of conducting an unbiased investigation. These concerns relate directly to the investigative standards set forth in the IG Manual requiring investigations to be conducted and reported with due diligence and in a timely, unbiased, and independent manner in an effort to determine the validity of the allegations.

McLaughlin told us, credibly in light of this chronology, that Semmerling's e-mail messages to Hanes and the OJP AAG Senior Advisor in mid-October 2009 were "the straw that broke the camel's back" for him. He said that Semmerling had alleged misconduct by OJP officials and expanded the investigation beyond its original scope without the involvement of her managers.²³⁶ He stated that Semmerling's messages to Hanes and the OJP AAG Senior Advisor could have given "at least the impression" that OJP officials were now subjects of the investigation, and that Semmerling had alleged misconduct against Department officials without identifying supporting evidence. He said that she had done this after Oleskowicz and Thomas had already expressed to her their "displeasure" with her handling of the case and had taken the "very unusual step" of adding a co-case agent to the case due to what he characterized as Semmerling's "mismanagement" of it.

We believe that McLaughlin's management concerns about Semmerling's e-mail messages were reasonable. Semmerling knew she was expected to focus her investigative efforts on the alleged grant fraud by Wisconsin OJA employees, yet without her supervisors' knowledge, and under the auspices of OIG authority, expanded the scope of the investigation to include DOJ officials. Semmerling's statement to Hanes and the OJP AAG Senior Advisor – that OJP OGC had written a legal opinion specifically to allow a non-compliant state to receive federal grant funds – was a serious charge phrased as an OIG conclusion rather than as an allegation. Despite examining the issue of the VCO opinion for over a year, Semmerling had gathered no evidence that the opinion was written for an improper purpose. We believe Semmerling's representation to senior Department officials to the contrary went beyond the appropriate use of OIG's investigative authority and

²³⁵ As noted above, when the FAUSA was subsequently informed of the decision to remove Semmerling, he said he expressed his disagreement with the decision to Oleskowicz.

²³⁶ McLaughlin also had asked Oleskowicz to determine whether Semmerling had discussed in advance with the AUSAs her intent to send the e-mails to the senior OJJDP and OJP officials. Oleskowicz learned from the FAUSA on October 23 that Semmerling had not notified the AUSAs in advance; however, McLaughlin's decision to remove Semmerling had been made by this point.

that McLaughlin reasonably concluded it was in the best interests of the case to reassign it to another investigator.

In that regard, while Semmerling's e-mail messages to Hanes and the OJP AAG Senior Advisor were the "last straw" for McLaughlin, other factors contributed to the decision to remove Semmerling from the case, including management frustration with the slow pace of the investigation, Semmerling's unapproved expansion of the scope of the investigation, concerns that she had developed a close relationship with a witness, and complaints that she had inappropriately inserted herself into OJP operations. We concluded that the decision to remove Semmerling from the case was based on McLaughlin's reasonable belief, shared by Oleskowicz, that Semmerling was mismanaging the investigation.

In short, we found no evidence to indicate that Semmerling was removed from the case in order to obstruct the fact-finding investigation or for any other improper purpose. To the contrary, the OIG Investigations Division leadership maintained a team of two agents and two auditors to continue to work on the matter after Semmerling's removal. Ultimately it was Department attorneys – not OIG managers – who declined to bring a grant fraud action against Wisconsin OJA, much less criminally pursue Semmerling's broader theory that OJJDP and OGC officials colluded to award Wisconsin grant funds to which it was not entitled. The attorneys spent years considering various legal theories under which a criminal or civil fraud claim against Wisconsin viably could be pursued, only to conclude in 2013, based on information Semmerling had gathered years earlier through her thorough investigative work, that OJJDP's lax administration of the JJDP Act undermined the case against Wisconsin.

There is no evidence that Semmerling was ever barred or even dissuaded from sharing with the AUSAs the information she had developed in support of her suspicion that OJJDP and OJP OGC officials were complicit in Wisconsin OJA's alleged improper activities. There is similarly no evidence to indicate that Oleskowicz attempted to interfere with or impede the prosecutors' work, and the FAUSA himself told us he had no information to suggest otherwise.²³⁷ To the contrary, Oleskowicz contacted the FAUSA in October 2009 and complained about the USAO's lack of responsiveness to the OIG and failure to make progress on the case, and even threatened to seek to have the case transferred to a more proactive USAO – a posture that we believe reflected a desire to advance the case, not obstruct it.

²³⁷ When asked whether he had any information about whether Oleskowicz tried to delay the investigation, the FAUSA stated that the only indication he had of this was what he believed to be Oleskowicz's directive that Semmerling not conduct site visits to inspect Wisconsin detention facilities as the FAUSA had requested. However, as discussed in this chapter, the FAUSA's own notes of his conversation with Oleskowicz show that Oleskowicz merely decided to delay the site visits by about a week, after Semmerling was replaced on the case with the SSA. Moreover, the site visits took place shortly after Oleskowicz and the FAUSA spoke, showing that whatever the FAUSA may have believed Oleskowicz's intentions to be based on Semmerling's representations or otherwise, Oleskowicz in fact supported and approved the site visits.

Lastly, we found that significant progress on the case was made after it was reassigned in October 2009. Had Oleskowicz, Dorsett, or McLaughlin sought to obstruct the investigation, they would not have assigned two criminal investigators, including a senior agent who served as the CFO's Grant Fraud Coordinator, to complete the investigation, with the assistance at various times of two auditors. Moreover, e-mails and other evidence show that Oleskowicz fully supported the investigative steps these agents took, including repeatedly urging the USAO to obtain sworn testimony from numerous witnesses using formal criminal procedures, conducting site visits of police stations and detention facilities throughout Wisconsin, interviewing OJJDP and OGC officials in Washington, D.C., and developing legal and factual arguments to convince the prosecutors to pursue the case against Wisconsin when faced with the FAUSA's reluctance to do so.

In sum, we concluded that Semmerling was removed from the case for legitimate management reasons, and no OIG official acted improperly, much less criminally, to obstruct the fact finding investigation by her removal.

4. Failure to Take Corrective Action after October 2009

Just after Semmerling was removed from the case in October 2009, she contacted then-Inspector General Fine about her concerns that OJP OGC improperly issued the VCO legal opinion, which she alleged reversed a longstanding JJDPA Act regulation so that Wisconsin could receive grant funds it would otherwise not receive. Fine asked then-Senior Counsel William Blier to look into the matter. In the months that followed, Semmerling provided Blier with a significant amount of material about the alleged collusion between OJP OGC and OJJDP and Wisconsin OJA, including e-mail messages, correspondence, MOIs, and her own summaries of the evidence. Semmerling also complained to Blier that she had been treated unfairly by Oleskowicz and Thomas, and that she had been removed from the case so that INV could preserve its relationship with OJP, among other reasons. Semmerling asked Blier to keep her disclosures to him confidential. Although not explicitly raised in the OSC's referral to us, Semmerling alleged that Blier improperly failed to take any corrective action based on her disclosures to him, including her May 23, 2011 disclosures to the OSC that Semmerling's counsel also sent to Blier.

We reviewed INV's record of pursuing allegations of misconduct by OJP employees and found no basis to conclude that INV personnel acted inappropriately to try to preserve a "relationship" with OJP officials, as Semmerling alleged to Blier. OIG personnel by definition must interact with officials from components under the OIG's oversight, and relationships between the OIG and these components exist of necessity and are perfectly appropriate to facilitate the OIG's oversight work. For example, OIG investigators routinely develop points of contact within the various components to assist with access to documents and for other investigative purposes. These relationships must be professional and at arm's length, and must never compromise the OIG's independence and ability to conduct a thorough and fair investigation of any Department employee or office. We saw nothing in this case to suggest that INV managers violated these fundamental OIG investigative

standards in their handling of OJP officials' alleged involvement in the Wisconsin matter, as Semmerling alleged to Blier.

We believe Semmerling's complaints to Blier placed him in a particularly challenging position. First, as Senior Counsel and later General Counsel, he lacked direct management authority over INV and the kind of first-hand knowledge of the case that would qualify him to make informed staffing decisions. We thus believe that Blier reasonably refrained from interceding on Semmerling's behalf in INV management's case staffing decisions, and do not believe he abused his authority or exercised gross mismanagement by not taking steps to have Semmerling reassigned to the case as she requested, which would have involved attempting to reverse a decision that, for the reasons detailed above, we find was not improperly reached.

Second, Semmerling had requested Blier to maintain her confidentiality. Blier understood from Dorsett and McLaughlin that Semmerling was removed from the case because she had not made progress on it. Blier also learned through regular management briefings that the USAO was actively engaged in the case and was moving the matter forward, even after Semmerling was removed. Yet Semmerling was telling him that her managers wanted to "dispose of" the case and "not correctly work it" in order to preserve INV's relationship with OJP and to avoid helping Rumsey in her whistleblower case, among other improper reasons. Semmerling's request for confidentiality, which Blier said he honored, limited his ability to explore Semmerling's allegations or to reconcile them with what INV senior managers were telling him about the status of the case. We believe that under the circumstances, Blier reasonably relied upon the representations of senior INV managers that the case was progressing, and that he had little basis to second guess their decision to remove Semmerling from the case or act to try to reverse this decision.

We also found it significant that, while respecting Semmerling's request for confidentiality, Blier sought to determine whether the OIG's Audit Division was interested in reviewing potential deficiencies in the JJDP Act formula grant program based on information that Semmerling had presented to him shortly after she was removed from the Wisconsin case. Evidence shows that Blier conveyed this information to the Audit Division in early 2010. The Audit Division, in turn, proposed a nationwide audit of the program in FY 2011 and again in 2012, but for the reasons described in this chapter, opted not to conduct the audit at that time. Blier's actions show that he took Semmerling's larger concerns about the administration of the formula grant program seriously and made some effort toward ensuring that those these programmatic issues were considered.

A third challenge Blier faced was meeting his obligations as Senior Counsel to the IG and later as the OIG's General Counsel to protect the OIG's interests in the ongoing Wisconsin investigation while also providing guidance to Semmerling in her capacity as a witness in Rumsey's whistleblower retaliation action. We believe the evidence shows that Blier appropriately protected the OIG's interests while counseling Semmerling to be truthful and cooperative as a witness, and that these differing roles did not compromise his effectiveness or integrity. Semmerling

acknowledged Blier's professionalism and responsiveness several times following her removal from the case.

In sum, we do not believe Blier abused his authority or exercised gross mismanagement by failing to seek to have Semmerling reinstated on the case.

Even though Semmerling's disclosures did not demonstrate that she had been removed from the investigation for any improper purpose, we believe the disclosures revealed potential deficiencies in OJJDP's administration of the JJDP Act formula grant program that should be closely examined. We are not the first to make this observation. Semmerling herself proposed that an audit of the program be conducted as early as 2008, when she was first assigned to the matter. The proposal was revisited in 2010 by Blier and IG Fine and again in 2011, when Blier contacted senior managers in the Audit Division to ask about the status of Fine's suggestion a year before that an audit of OJJDP be conducted. The Audit Division included a formal proposal to conduct an internal nationwide audit of OJJDP's administration of the JJDP Act grant program in its FY 2012 work plan. The OIG decided not to perform the audit in FY 2012 after analysis of several competing priorities, including national security matters and another high risk OJJDP allegation, thereby avoiding impinging on or duplicating the efforts of the ongoing investigation into the OJJDP Title II matter at the time.²³⁸

Given the OIG's limited resources, we do not believe that this collective OIG leadership decision to prioritize other investigations and audits over an audit of OJJDP during the relevant time period amounts to an abuse of authority or gross mismanagement.

C. Planned OIG Audit

We believe that Rumsey and Semmerling have raised important concerns about the way OJJDP administers the JJDP Act formula grant program. For that reason, the OIG intends to conduct an audit to determine whether OJJDP is properly managing its grant management process.

²³⁸ U.S. Department of Justice Office of the Inspector General, *Audit of the Office of Juvenile Justice and Delinquency Prevention Research Award to the National Council on Crime and Delinquency*, Audit Report 12-41 (September 2012).

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

We did not substantiate the allegations addressed in this report. While we found that Semmerling raised important concerns that warrant consideration by OJP as well as further review by the OIG of OJJDP's procedures, we identified no misconduct by OJP or OIG employees.

Specifically, as discussed in Chapter Three, we did not find persuasive evidence that employees at OJJDP or OJP, including OJP's OGC, sought or issued legal opinions that altered long-standing policy or were in contravention of law, in order to enable Wisconsin's OJA to circumvent JJDP Act requirements. Thus, we did not substantiate allegation 3 in the OSC referral. We also did not substantiate allegation 5 that juveniles who have run away from state-ordered placements are being illegally detained in secure facilities in contravention of statutory grant conditions, because this allegation presumes that the legal opinions addressed in allegation 3 were in contravention of law.

Although we did not substantiate allegations 3 and 5, our review identified several areas where we believe OJP can make significant improvements in its administration of the JJDP Act. Specifically, in Chapter Three we made the following recommendations:

1. OGC should consider issuing guidance clarifying its interpretation of the Valid Court Order exception to the Deinstitutionalization of Status Offenders Core Requirement. In particular, we recommend that OGC consider addressing competing interpretations of the plain meaning of the statute, clarifying its interpretations of the terms "offense" and "charge" and how the meanings of those terms might impact OJJDP's position on pending legislation, and addressing the significance of particular facts, state laws, and due process protections for juveniles.
2. OGC should consider issuing guidance clarifying the circumstances under which juveniles may be confined in unoccupied adult jails consistent with the Jail Removal core requirement. In particular, any such guidance should clarify what statutory and regulatory requirements must be met before juveniles may be confined in unoccupied adult jails.
3. OJJDP should expeditiously notify all states and other interested parties that 28 C.F.R. § 31.303(f)(3)(vii), which provides that "[a] non-offender such as a dependent or neglected child cannot be placed in secure detention or correctional facilities for violating a valid court order," has been determined to be *ultra vires*.
4. OJP should develop standard procedures for determining what should be published in the Federal Register for notice and comment and for identifying significant guidance documents to be posted on OJP's or OJJDP's websites.

5. OJP should develop a plan to improve communications within and among OJP components. In Chapter 3, we suggested five items that could be included in such a plan.
6. OJP should consider revising its compliance monitoring report template to gather additional information about states' use of the VCO exception and compliance with certain procedural requirements.

We addressed allegation 4 in Chapter Four of this report. After thoroughly examining the management actions and decisions taken in the course of Semmerling's investigation, we did not substantiate the allegation that OIG employees obstructed fact finding in the investigation of the Wisconsin OJA for concealment of non-compliance. However, we believe that Semmerling's tenacious investigation of the allegations made by the OJJDP employee revealed numerous problems that have plagued the JJDP Act grant program for several years. These problems include inefficiencies and potential disparities in the core requirements compliance monitoring, auditing, and grant approval processes, transparency issues, incomplete recordkeeping, poor internal communication between managers and staff, and lack of clarity and consistency in communicating compliance guidance to grantees. The OIG therefore intends to conduct an audit to determine if OJJDP is properly managing its grant management process.

ATTACHMENT A



U.S. Department of Justice

Office of Justice Programs

Washington, D.C. 20531

MAY 28 2008

MEMORANDUM TO: Gregory Thompson
Associate Administrator
State Relations and Assistance Division
Office of Juvenile Justice and Delinquency Prevention

THROUGH: Charles T. Moses *ATM*
Deputy General Counsel
Office of the General Counsel

FROM: [REDACTED]
Attorney Advisor
Office of the General Counsel

Issue: Is it a violation of § 223(a)(11) of the Juvenile Justice and Delinquency Prevention Act (JJDP A) for status offenders, such as runaways, to be securely detained for being held in contempt of court for violating a valid court order?

Section 223(a)(11) of the the JJDP A is a core requirement commonly known as the "De-institutionalization of Status Offenders" provision or "DSO." This JJDP A requirement mandates that state plans -

(11) shall, in accordance with rules issued by the Administrator, provide that -

(A) juveniles who are charged with or who have committed and offense that would not be criminal if committed by an adult, excluding-

- (i) juveniles who are charged with [certain weapons offenses]...;
- (ii) juveniles who are charged with or who have committed a violation of a valid court order; and
- (iii) juveniles who are held in accordance with the Interstate Compact on Juveniles as enacted by the State;

shall not be placed in secure detention facilities or secure correctional facilities; ...

The above-stated issue entails an interpretation of the exception set forth at § 223(a)(11)(A)(ii), commonly referred to as the Valid Court Order exception to DSO. A violation of a valid court order (VCO),¹ by anyone – an adult or minor – provides grounds for a judge to hold the violator in contempt of court and, possibly, secure confinement. While a status offense, such as running away or truancy – in and of itself– shields a minor from secure confinement under § 223(a)(11), that protection is eliminated once the status offender violates a court order or is otherwise held in contempt of court. It is of no consequence whether the matter that initially brought the juvenile into court was a status offense or a delinquency offense. Any alternate interpretation of the DSO provision would be too strained to withstand a plain reading of the statute.

Conclusion:

Runaways are status offenders if they persist in running away from non-secure settings and, therefore, as status offenders, they cannot be held in secure detention for repeated runs. If however, a runaway has been made subject to a VCO prohibiting him from running away, and he violates that court order by running, he can be held in contempt of court which is a non-status offense. Once held in contempt of court, that juvenile can be held and in secure detention under § 223(a)(11)(ii). After a status offender violates a VCO, he is entitled to the protections set at § 223(a)(23), as applicable.

Please be further advised that given this conclusion, § 31.303(f)(3)(vii) of the current JJDPA regulations is *ultra vires* and, thus, cannot be enforced.² The fact that a juvenile is abused, neglected or dependent does not insulate him or her from the DSO exception set forth in § 223(A)(11)(ii).

cc: Rafael Madan
J. Robert Flores

[REDACTED]

¹ § 103(16) of the JJDPA provides that: "the term 'valid court order' means a court order given by a juvenile court judge to a juvenile –

(A) who was brought before the court and made subject to such order; and

(B) who received, before the issuance of such order, the full due process rights guaranteed to such juvenile by the Constitution of the United States;"

² 28 CFR 31.303(f)(3)(vii) provides that "[a] non-offender such as a dependent or neglected child cannot be placed in secure detention or correctional facilities for violating a valid court order."

ATTACHMENT B

MEMORANDUM

TO: Nancy Ayers
FROM: [REDACTED]
RE: Response to OGC Memorandum on the VCO Exception
DATE: 9/05/08

The following memorandum explores issues relevant to OJJDP and OGC's discussions about status offenders, abused and neglected children, and the use of the valid court order (VCO) exception. It is a proposed OJJDP response to OGC's memorandum dated May 28, 2008.

Background

The OJJDP State Relations Assistance Division (SRAD) requested that OGC render an opinion regarding a state's use of the VCO exception in cases involving abused and neglected children alleged to be runaways. As SRAD staffer [REDACTED] [REDACTED] stated in an e-mail message dated April 28, 2008:

It has recently come to our attention that a given State has been utilizing the VCO exception for adjudicated non-offenders (i.e. victims of child abuse and/or neglect) who repeatedly run away from a non-secure placement. These youth have been court ordered not to run, but have "not" been formerly adjudicated as status offenders. Assuming all other process requirements have been met, would this constitute an acceptable use of the VCO exception or would these instances need to be counted as violations of DSO?

On July 23, 2008, OJJDP and OGC staff met to examine the OGC memorandum dated May 28, 2008 responding to SRAD's question. This opinion posed the question:

Is it a violation of § 223(a)(11) [42 USC § 5633 (a)(11)] of the Juvenile Justice and Delinquency Prevention Act (JJDP Act) for status offenders, such as runaways, to be securely detained for being held in contempt of court for violating a valid court order?

It concluded:

Runaways are status offenders if they persist in running away from non-secure settings and therefore, as status offenders, they cannot be held in secure detention for repeated runs. If, however, a runaway violates that court order by running, he can be held in contempt of court which is a non-status offense. Once held in contempt of court, that juvenile can be held and in secure detention under Section

223(a)(11)(ii). After a status offender violates a VCO, he is entitled to the protections set as 223(a)(23)

Please be further advised that given this conclusion, Section 31.303(f)(3)(vii) of the current JJDP regulations is *ultra vires* and thus, cannot be enforced. The fact that a juvenile is abused, neglected or dependent does not insulate him or her from the DSO exception set forth in Section 223(A)(II)(ii).

At the meeting, OPD staff voiced concerns about OGC's interpretation of the JJDP in relation to the VCO and its use in cases involving children alleged or adjudicated abused and neglected. At the conclusion of the meeting, OPD staff agreed to do the following:

- Review the opinion and make recommendations for modifications, particularly because the opinion did not fully address the issue of the non-offender being subject to the VCO;
- Identify previous OGC/OJDP legal opinions that shed light on the issues; and
- Review current statutory language with the aim of proposing modifications for consideration during the JJDP reauthorization process.

JJDP Provisions At Issue

The opinion must be examined in light of the following pertinent JJDP statutory provisions:

42 USC § 5633

(a)(11) shall, in accordance with rules issued by the Administrator, provide that

(A) juveniles who are charged with or who have committed an offense that would not be criminal if committed by an adult by an adult, excluding—

(ii) juveniles who are charged with or who have committed a violation of a valid court order;

Shall not be placed in secure detention facilities or secure correctional facilities; and

(B) juveniles—

(i) who are not charged with any offense; and

(ii) who are-

(I) aliens; or

(II) alleged to be dependent, neglected, or abused;

shall not be placed in secure detention facilities or secure correctional facilities.

42 USC § 5633

(a)(23) provide that if a juvenile is taken into custody for violating a valid court order issued for committing a status offense—

(A) an appropriate public agency shall be promptly notified that such juvenile is held in custody for violating such order;

(B) not later than 24 hours during which such juvenile is so held, an authorized representative of such agency shall interview, in person, such juvenile; and

(C) not later than 48 hours during which such juvenile is so held—

(i) such representative shall submit an assessment to the court that issued such order, regarding the immediate needs of the juvenile; and

(ii) such court shall conduct a hearing to determine—

(I) whether there is reasonable cause to believe that such juvenile violated such order; and

(II) the appropriate placement of such juvenile pending disposition of the violation alleged[.]

42 USC § 5603

(12) the term “secure detention facility” means any public or private residential facility which—

(B) is used for the temporary placement of any juvenile who is accused of having committed an offense, or of any other individual accused of having committed a criminal offense[.]

(13) the term “secure correctional facility” means any public or private residential facility which—

(B) is used for the placement, after adjudication and disposition, of any juvenile who has been adjudicated as having committed an offense or any other individual convicted of a criminal offense[.]

42 USC § 5603

(16) the term “valid court order” means a court order given by a juvenile court judge to a juvenile—

(A) who was brought before the court and made subject to such order; and

(B) who received, before the issuance of the order, the full due process rights guaranteed to such juvenile by the Constitution of the United States;

(C) Repealed. Pub. L. 107-273, Div. C, Title II, Section 12204(7)(B), Nov. 2, 2002, 116 Stat. 1871.

OJJDP Response to OGC Memorandum

In conversations with OGC staff, and as expressed in the OGC memorandum, OJJDP has been advised that the JJDPA is explicit regarding the use of the VCO exemption in cases involving status offenders. OJJDP believes that the statute is clear that once a youth is charged and adjudicated a status offender and the subject of a VCO order that she/he can be placed in secure confinement for violating such a court order as long as certain requirements as delineated by the JJDPA are followed by state and local authorities. However, the opinion does not answer the question originally posed by SRAD involving the use of the VCO exception in dependency cases in which youth are not formally charged as status offenders.

The opinion makes no reference to provisions of the JJDPA relevant to this discussion, such as 42 USC 5633(a)(11)(B)(i)(ii), which prohibits the placement of children, *not charged with an offense* [emphasis added] and alleged to be abused and neglected, from being placed in secure detention or correctional facilities. The opinion also makes an assumption that a VCO violation (OGC assumes to be the equivalent of a finding of contempt) makes the offense a non-status offense (even though the underlying violation involves a status offense). The implication here is that the offending youth now becomes a delinquent and is subject to secure confinement. As will be discussed in greater detail below, a review of legal literature, state statutes, and case law addressing juvenile courts' inherent contempt power reveals variance in state practice with several states prohibiting or significantly limiting the use of contempt in cases involving delinquency, status offenses, and dependency. Furthermore, the opinion is contrary to the 2002 JJDPA's legislative history that reflects "the view that non-offenders, such as abused and neglected children, should never be placed in any type of secure facility where they are in contact with juvenile offenders."¹

The OGC opinion implies that a youth exhibiting incorrigible or runaway behavior automatically becomes a status offender and therefore, subject to the VCO exemption. However, OJJDP argues that a non-offender or dependent child does not become a status offender merely by the alleged or actual act of running away. This assertion is supported by 28 CFR 31.304 (h) which defines "status offender" as "[a] juvenile offender who has been charged with or adjudicated for conduct which would not, under the law of the jurisdiction in which the offense was committed, be a crime if committed by an adult." As reflected in the regulation, the term "status offender" is a legal term and is applied to a youth after a formal accusation and judicial adjudication that a youth has committed a status offense. As stated above, the JJDPA, 42 USC 5633(a)(11)(B)(i)(ii), expressly states that an abused and neglected child who has not been charged with an offense cannot be placed in secure detention or correctional facilities. Such a child is adjudicated a dependent child, not a status offender, and remains under the jurisdiction of the court based on abuse and neglect findings and child and family service needs. Because a child

¹ House Report 107-203 (p. 38)(to accompany H.R.1900)(107th Congress, 1 Session)(can be accessed from the US DOJ's intranet/Virtual Library at http://10.173.2.12/jmd/lib/leghistory/publ107-273.php#_PUBLIC_LAW (last viewed August 15, 2008)(more comprehensive legislative history discussion can be found in this memorandum below).

exhibits certain “acting out” behavior does not terminate their status as an “abuse and/or neglected” child and take them outside the scope of 42 USC 5633(a)(11)(B)(i)(ii).

In addition, the opinion does not examine due process considerations in the context of dependency court cases in which children who are the subject of these cases can potentially be held in contempt or in violation of a VCO. As reflected in the JJDP, including its definition of the VCO, a youth is entitled to the full array of due process protections prior to being found in violation of a VCO.² One of these critical protections is the right to an attorney who represents the child’s stated interests in legal proceedings. Throughout the nation, it varies as to whether a child who is the subject of a dependency court proceeding is afforded attorney representation. In many jurisdictions, guardians ad litem (GALs), including non-attorneys, are appointed to represent a child’s best interests. In some cases, children do not have GALs or attorney counsel. Regarding the SRAD scenario, the question arises as to whether the state in question provided OJJDP with documentation related to the due process considerations stated above. In order to satisfy due process considerations, even if a state were to indicate that an attorney was appointed, OJJDP would need clarification that the attorney is in fact acting in the role of an attorney and not a GAL.³ Likewise, in many jurisdictions, children who are the subject of dependency court proceedings may not always be present in court for their hearings and may not always be fully apprised of court order requirements. Notice of a court order’s mandates and the consequences for violating those mandates is another critical element of due process.

The memorandum also summarily dismisses twenty-three years of regulatory law. Effective June 20, 1985, 28 CFR §31.303(f)(3)(vii) provides that “[a] non-offender such as a dependent or neglected child cannot be placed in secure detention or correctional facilities for violating a valid court order.”⁴ The OGC memorandum states: “Please be further advised that given [the opinion’s] conclusion, § 31.303(f)(3)(vii) of the current

² “Valid Court Order” is defined in part in the JJDP as a “court order given by a juvenile court judge to a juvenile...who received, before the issuance of such order, the full due process rights guaranteed to such juvenile by the Constitution of the United States. 42 U.S.C. § 5603 (16).

³ For example, Wisconsin Statutes Annotated (W.S.A.), § 938.235, provides for the appointment of an attorney guardian ad litem who represents the “best interests” of the child in dependency court proceedings. In Wisconsin, the attorney guardian ad litem is not the equivalent of an attorney appointed to represent the child in a delinquency or status offense case in which secured detention is potentially at issue. This “counsel” is defined as meaning “an attorney acting as adversary counsel.” Wisconsin law explicitly states that such “[c]ounsel shall advance and protect the legal rights of the party represented [and] ... may not act as guardian ad litem for any party in the same proceeding.” W.S.A., § 938.23 (1g) & (1j). The appointment of this type of counsel satisfies due process guarantees; the appointment of a guardian ad litem in a proceeding in which an individual is at risk for secure detention or correctional confinement does not. Moreover, “[a] juvenile alleged to be delinquent under s. 938.12 or held in a juvenile detention facility shall be represented by counsel [as defined above] at all stages of the proceedings.” W.S.A. § 938.23 (1m). Likewise, regarding youth who may be placed in a juvenile correctional facility, Wisconsin law states: “A juvenile subject to proceedings under s. 938.357(3) or (5) shall be afforded legal representation as provided in those subsections.” W.S.A. § 938.23 (1m)(ar).

⁴ 50 FR 25550 (Notice of Final Regulation, June 20, 1985).

JJDP regulations is *ultra vires* and, thus, cannot be enforced.” *Ultra vires* means beyond or outside authority. It is true that this regulation applies to a previous incarnation of the JJDP. However, the regulation is based on similar, if not even more explicit, JJDP statutory language regarding the prohibition against secure detention and correctional confinement of abused and neglected children who have not been charged with an offense. This regulation resulted from formal rule making processes and is still the law unless it is contrary to the reauthorized statute.⁵ OJJDP asserts that this regulation provides further insight on how to interpret the 2002 statute as it is in concert with OJJDP’s interpretation of 42 USC 5633(a)(1)(B)(i)(ii) as described above and legislative history.

Legislative History

In its memorandum, OGC does not give weight to legislative history in its statutory interpretation of the JJDP. We understand that OGC took this approach because OGC believes that the statute is clear on its face. However, a review of earlier versions of the JJDP and legislative history of the 2002 JJDP supports OJJDP’s above-stated conclusions and informs its interpretation of the Act. Commenting on changes to the statutory definitions of “secure detention facility” and “secure correctional facility,” the House Report⁶ accompanying the legislation enacted as the 2002 JJDP states:

Clarification of modification to definitions

The changes to the definitions of “secure detention facility” and “secure correctional facility” are designed to exclude facilities that house only non-offender juveniles from these statutory definitions. Shelter facilities that house these juveniles, who range in age from newborns to age 18, may have

⁵ See the following general statement of administrative law identified in California Jurisprudence 3d: “A regulation, valid when promulgated, becomes invalid on the enactment of a statute in conflict with the regulation. However, an administrative regulation will not be considered as having been impliedly annulled by a subsequent act of the legislature, unless the two are irreconcilable, clearly repugnant, and so inconsistent that they cannot have concurrent operation.” CAJUR ADMINLAW § 256 (Thomson/West 2008). As stated above, the regulation at issue is consistent with the 2002 JJDP and remains the law. See also Jacob Stein, Glenn Mitchell, Basil J. Mezzines, Legal Effect of Agency Rules § 13.03, 3 Administrative Law (2007)(“Both the Courts and Congress recognize that rules and regulations validly promulgated pursuant to congressional authority have the full force and effect of law. Therefore, an agency is as much bound by its own properly promulgated rules as the persons affected by them.” (pp. 13-51-13-53)).

⁶ House reports are viewed as one of the more credible sources for legislative history. As stated by Professor Kent Greenwalt of Columbia University School of Law, “[c]onference committee reports, written after differences in language between the two houses of Congress have been ironed out, have the highest status in the United States. These indicate the understanding of the members from both houses of Congress who are most closely associated with a bill. Committee reports from the House and Senate are next in importance. These reflect the work of the committees that have deliberated about legislation and that are mainly responsible for the language adopted by each house. These reports also may help other legislators understand what a bill is about.” Kent Greenwalt, Statutory Interpretation: Twenty Questions (Foundation Press, New York, New York 1999) p. 173 [check cite]

construction features designed to restrict the movement of children in these facilities for their own safety and protection. It is not Congress' intent to prohibit the use of dedicated facilities for these children even where they might otherwise be classified as secure. However, where a hardware secure facility houses juvenile offenders, whether status or delinquent, it shall continue to be defined as a secure detention or correctional facility subject to the core requirements of the Act. It is our expectation that, with this clarification, the Office of Juvenile Justice and Delinquency Prevention will take steps to provide that its regulatory 24-hour hold exception to the current Section 223 (a)(12)(A) deinstitutionalization requirement applies only to status offenders and does not apply to non-offenders. *It is the Committee's view that non-offenders, such as abused and neglected children, should never be placed in any type of secure facility where they are in contact with juvenile offenders.* (Emphasis added.)⁷

As reflected in the opinion above, in appropriate cases, courts and parties to dependency proceedings identify non-correctional, staff secure placements for such children in abuse and neglect cases. These facilities or programs, including specialized foster care, are dedicated to working with dependent children with behavioral problems.⁸ One can also conclude that the JJDPAs expressly incorporated their sentiments in the 2002 JJDPAs as reflected in 42 USC 5633(a)(11)(B)(i)(ii).

Contempt Authority and the Juvenile Court

During the meeting between OJJDP and OGC, the question emerged as to whether a juvenile status offender could be held in contempt of court for certain behaviors and thereby become a delinquent offender subject to detention or incarceration in a secure correctional facility. The answer to this question is not clear cut as a number of appellate courts and state legislatures dealing with juvenile court contempt process have frowned upon this approach in addressing the needs of status offenders and others have supported it (typically older decisions from the 1970's and 1980's). For those courts finding disfavor with juvenile court contempt, they have viewed the use of contempt to place juvenile status offenders (and at times delinquent offenders) as "bootstrapping" or undermining legislative intent to keep status offenders and nonviolent delinquents out of secure correctional confinement.

⁷ House Report 107-203 (p. 38)(to accompany H.R.1900)(107th Congress, 1 Session)(can be accessed from the US DOJ's intranet/Virtual Library/http://10.173.2.12/jmd/lib/leghistory/publ107-273.php#_PUBLIC_LAW (last viewed August 15, 2008).

⁸ My conclusions here are based in part on my experiences in supervising the cases of and representing thousands of dependent children in Maryland's court system. Our child clients had serious behavioral problems including running away. I do not recall one time in which one of our clients became the subject of a child in need of supervision (CINS) petition or contempt proceedings. We had clients who committed delinquent acts, but they were formally charged with the delinquent offense. Even in these courts, as the child's attorney, I would attempt to have the case diverted from the delinquency system and handled by the dependency court. I would recommend that the state in question, including its juvenile courts, access training and technical assistance related to dispositional placements in child abuse and neglect cases. See discussion of Maryland case *In re: Ann M.* discussed below.

Most of the literature, case law, and statutes address contempt in the context of delinquent youth and status offenders. However, at least two highest state level appellate court cases deal with children involved in abuse and neglect cases. Authored by Chief Judge Murphy ██████████ of the Court of Appeals of Maryland, *In Re: Ann M.* has governed Maryland law since 1986. Ann M. had been adjudicated a child in need of assistance (CINA) or dependent child after initially being adjudicated a child in need of supervision (CINS) or status offender. Because of continued truancy, the Circuit Court held her in contempt and gave her a suspended sentence of thirty days conditioned on her attending school. In a unanimous decision reversing the lower court's order, Chief Judge Murphy concluded:

The exercise of the contempt power "demands care and discretion in its use so as to avoid arbitrary, capricious or oppressive application." *State v. Roll, supra*, 267 Md. at 717, 298 A.2d 867. Moreover, as we indicated in *Roll*, both as to direct and constructive contempts, "the limits of the power to punish for contempt are 'the least possible power adequate to the end proposed.'" *Id.* at 734, 298 A.2d 867 (quoting *Harris v. United States*, 382 U.S. 162, 165, 86 S. Ct. 352, 15 L.Ed.2d 240 (1965)).

Under the [Maryland] Juvenile Causes Act, no disposition of a juvenile petition, whether of a delinquent, CINA or a CINS, may result in a criminal conviction. § 3-824. Nor may a juvenile court, in exercising its jurisdiction under the Act, commit a child to an adult penal facility, § 3-823(b). While Ann's conviction for criminal contempt, and her sentence to an adult detention center, were not the result of a disposition of a juvenile petition, the sanction imposed was plainly inconsistent with the rationale undergirding these statutory impediments in the treatment of juveniles. In this regard, we have reminded judges exercising juvenile jurisdiction to bear in mind that juvenile proceedings are of a special nature designed to meet problems peculiar to the adolescent, *In re Fletcher*, 251 Md. 520, 529, 248 A.2d 364 (1968); and that the juvenile law has as its underlying concept the protection and rehabilitation of juveniles, rather than the imposition of punitive sanctions, *In re Johnson*, 254 Md. 517, 255 A. 2d 419 (1969).⁹

Similarly, in the aforementioned Florida Supreme Court opinion, the Court was quite adamant in its view that abused and neglected children exhibiting status offending type of behavior should not be locked up in secure confinement. In *A.A. v. Rolle*, the Court stated:

To adopt the State's arguments would result in entirely disregarding the plain language of the statutory definition of "secure detention," the specific prohibitions against the use of secure detention as punishment, and the entire intent and thrust of the 1988 and 1990 amendments to the Florida Juvenile Justice Act. The quintessential irony of adopting such an argument is that children who are found

⁹ *In re Ann M.*, 309 Md. 564, 571-2; 525 A.2d 1054, 1058-9 (1987)(Decision also cites to a number of cases in which juvenile courts were found to have violated their criminal contempt powers and others which upheld criminal contempt; note that these cases are from the 1970's and 1980's).

to be dependent or in need of services would be incarcerated in a facility designed to hold those who are an imminent threat to public safety. Dependent children and children in need of services are not criminals; it has been determined that they have been neglected or physically, emotionally, or sexually abused. § 39.01(10), Fla.Stat. (Supp.1990). The acts of contempt committed by the dependent children in this case constituted running away from home and refusing to go to school. These acts are ones that the legislature deems a sign of children *in need of services*, not children in need of punishment. *See § 39.01(8)(a), Fla.Stat. (Supp.1990)*. It is inconceivable that a system of justice that has removed these children from their parents or guardians, ostensibly “[t]o provide ... care, safety, and protection,” section 39.001(2)(b), would instead incarcerate them because of resultant behavior attributable to neglect or abuse.

We therefore hold that, under chapter 39, juveniles may not be incarcerated for contempt of court by being placed in secure detention facilities. We are aware that two of our previous decisions suggest a different result. *A.O. v. State*, 456 So.2d 1173, 1175 (Fla.1984); *R.M.P. v. Jones*, 419 So.2d 618, 620 (Fla.1982). Those decisions were rendered before the 1988 and 1990 amendments to chapter 39. As this opinion indicates, the amendments specifically prohibited the use of secure detention facilities to punish juveniles for contempt. We therefore overrule both *R.M.P.* and *A.O.* to the extent they are inconsistent with this opinion.

In so holding, we are not unmindful of the frustration of judges confronted with children who have been taken away from their parents because of abuse or neglect, as well as children whose abuse or neglect may have caused them to become delinquent. The lack of adequate placement alternatives or mental and physical health services for children needing them is a recurring daily problem in our juvenile system. Even though the legislature has recognized the critical need to provide appropriate placements or services for such children, these services have not been made available.... The courts, however, cannot attempt to supply the legislative vacuum in this fashion.¹⁰

A comprehensive review of all applicable legal literature, statutes, and case law is not possible in this memo.¹¹ However, it is hoped that this brief discussion will reflect that

¹⁰ 604 So. 2d 813 (Fla. 1992)(note that the statute referenced in opinion was amended in 1997 permitting the court to hold youth in secure confinement for specified periods upon being held in contempt for violation of a “community control” court order. In 1998, a lower level District Court of Appeal of Florida (5th District) judge denied writs of habeas corpus petitions filed by juvenile delinquents who had been held in indirect contempt of court for violating a community control order. *G.S. v. State of Florida*, 709 So.2d 122 (District Court of Appeal of Florida, 5th District 1998). However, this case did not deal with abused and neglected children or status offenders and as such, the above-cited Florida Court of Appeals case still governs).

¹¹ Also see, Maggie L. Hughey, *Note: Holding a Child in Contempt*, 46 Duke Law Journal 353, 384 (November 1996)(although dated, provides succinct general overview of contempt and a comprehensive discussion of statutory and case law addressing juvenile court contempt); Roderick L. Ireland, Chapter 4, “Children in Need of Services” (CHINS) Jurisdiction: § 4.25. Propriety of contempt sanctions to enforce

some states have voiced strong views regarding the placement of children in detention and correctional facilities through use of the contempt process.

Previous Legal Opinions

In reviewing previous legal opinions by John Wilson, former OJJDP Legal Counsel and Acting Administrator, I did not find an opinion that is specific to the issues addressed in this memorandum.

Recommendations for JJDPA Modifications

At the conclusion of the OJJDP/OGC meeting in July, OJJDP indicated that it would provide OGC with draft language to address its concern about abused and neglected being subject to the VCO exception. First, after a more careful review of the OGC opinion and the JJDPA, and as discussed above, OJJDP concludes that the statute is clear on the issues presented and that an abused and neglected child who has not been charged with an offense cannot be placed in secure detention or correction facilities, even for violating a court order issued in a dependency case. If OGC maintains otherwise, we recommend that language similar to 28 CFR § 31.303(f)(3)(vii) be added as an additional provision to 42 USC § 5633 (a)(11)(B) as follows:

42 USC § 5633

(a)(11) shall, in accordance with rules issued by the Administrator, provide that

(B) juveniles—

- (iii) who are not charged with any offense; and
- (iv) who are-
 - (I) aliens; or
 - (II) alleged to be dependent, neglected, or abused;

shall not be placed in secure detention facilities or secure correctional facilities *for any reason, including violation of a valid court order issued in dependency court proceedings.*” (Emphasis added.)

2008 Reauthorization (S. 3155)

On June 18, 2008, Senator Patrick Leahy introduced S. 3155 reauthorizing the JJDPA. On July 31, 2008, the Senate Judiciary Committee met for the bill’s mark-up. According to Thomas (Library of Congress website), the Committee “ordered [S. 3155] to be reported with amendments favorably.”

CHINS dispositional orders, Massachusetts Practice Series TM, Juvenile Law (Current Through 2007-2008)(provides overview of appellate case law and proposes judicial response).

Senator Benjamin Cardin introduced one of these amendments of relevance to the issues addressed in this memorandum. Approved 11-7 in committee, the amendment proposes to phase out the VCO exception over a three year period. Addressing the detention of status offenders in secure confinement, the amendment requires that state plans include the following:

(D) there are procedures in place to ensure that any juvenile held in a secure detention facility or correctional facility pursuant to a court order described in this paragraph [VCO exception] does not remain in custody longer than 7 days or the length of time authorized by the court, which is shorter; and

(E) not later than 3 years after the date of the enactment of the Juvenile Justice and Delinquency Prevention Act of 2008 with a 1 year extension for each additional year that the State can demonstrate hardship as determined by the Administrator, the State will eliminate the use of valid court orders to provide secure lockup of status offenders[.]

If the Cardin amendment is ultimately enacted and the VCO exception is eliminated, some of the discussion above will be rendered moot. However, the amendment does not address the potential ramification that a court will tap into its inherent authority to hold youth in contempt for violating court orders. As indicated earlier, this authority requires further examination in the context of juvenile court proceedings. It is not a best practice for courts to use contempt proceedings to lock dependent children or status offenders in secure detention or correctional facilities.

Conclusion

Is it a violation of 42 USC § 5633 (a)(11)(B) of the JJDP Act to place children who are the subject of dependency court proceedings in secure confinement when they have violated a court order issued in dependency court proceedings and have not been formally charged with a status or other offense? In light of the legal and other analysis presented above, OJJDP concludes that such placements do violate 42 USC 5633 (a)(11)(B) of the JJDP Act.

The OGC's conclusions have serious ramifications for OJJDP's efforts to support state efforts in developing and implementing evidence-based or promising programs addressing the needs of children with behavioral and related problems. The approach of the state in question in handling the needs of abused and neglected children with behavioral problems is not based on sound evidence and recognized in the child welfare field as an appropriate response.

Copy: [REDACTED]

ATTACHMENT C



U.S. Department of Justice
Office of Justice Programs
Office of the General Counsel

Washington, D.C. 20531

MEMORANDUM

TO: Jeffrey Slowikowski
Acting Administrator
Office of Juvenile Justice
and Delinquency Prevention

THROUGH: Rafael A. Madan
General Counsel

FROM: [REDACTED]
Attorney Advisors

RE: Application of section 223(a)(11)(A)(ii) of the 1974 Juvenile Justice and
Delinquency Prevention Act ("JJDPA") to "non-offenders"

Section 223(a)(11) of the JJDPA^{1/} contains two subparagraphs. Pursuant to *subparagraph (A)* (and subject to three statutory exceptions), any State that places "status offenders"^{2/} in secure detention facilities or secure correctional facilities is liable to a reduction in the amount it otherwise would be entitled to receive under the formula grant program established by that Act; pursuant to *subparagraph (B)*, a State that places "non-offenders."^{3/} in such facilities is liable to the same reduction in the amount to which it otherwise would be entitled under the program.

You have asked whether it is a violation of section 223(a)(11) for a State to place in a secure detention facility or secure correctional facility an individual (otherwise a non-offender) who violates a valid court order ("VCO").^{4/} In other words, you ask whether a violation of a VCO

^{1/} Codified at 42 U.S.C. § 5633(a)(11).

^{2/} Cf. 28 C.F.R. § 32.304(h) (definition of *Status offender*).

^{3/} Cf. 28 C.F.R. § 32.304(i) (definition of *Non-offender*).

^{4/} Defined at JJDPA section 103(16), codified at 42 U.S.C. § 5603(16); see also 28 C.F.R. § 32.304(o) (definition of *Valid court order*).

suffices, alone, to constitute an “offense” within the meaning of section 223(a)(11)(B)(i).

Section 223(a)(11) of the JJDPa provides that each State plan submitted to the Administrator for purposes of receiving funding under the formula grant program—

(11) shall, in accordance with rules issued by the Administrator, provide that—

(A) juveniles who are charged with or who have committed an offense that would not be criminal if committed by an adult, excluding—

(i) juveniles who are charged with or who have committed a violation of section 922(x)(2) of title 18, United States Code, or of a similar State law;^{5/}

(ii) juveniles who are charged with or who have committed a violation of a court order; and

(iii) juveniles who are held in accordance with the Interstate Compact on Juveniles [(“ICJ”)] as enacted by the state;

shall not be placed in secure detention facilities or secure correctional facilities; and

(B) juveniles—

(i) who are not charged with any offense; and

(ii) who are—

(I) aliens; or

(II) alleged to be dependent, neglected, or abused;

shall not be placed in secure detention facilities or secure correctional facilities.

By its plain terms, section 223(a)(11)(B) “forbids”^{6/} States from placing juveniles who are charged with *no* offense (and otherwise satisfy that subparagraph) in secure detention/correctional facilities — an “offense” for purposes of that subparagraph being either a “criminal-type offense”^{7/} or a “status offense.”^{8/} And no less plainly does section 223(a)(11)(A) “forbid” States from placing juveniles who are status offenders in secure detention/correctional

^{5/} “It shall be unlawful for any person who is a juvenile to knowingly possess— (A) a handgun; or (B) ammunition that is suitable for use only in a handgun.”

^{6/} “Forbids” only in the sense of subjecting States that violate it to a reduction in the amounts that they otherwise would be entitled to receive under the formula grant program.

^{7/} 28 C.F.R. § 31.304(g) (definition of *Criminal-type offender*).

^{8/} *Cf.* 28 C.F.R. § 31.304(f) (definition of *Juvenile offender*) (“a criminal-type offender or a status offender.”).

facilities, unless they are status offenders *by virtue of* being charged with/having violated either 18 U.S.C. § 922(x)(2) or a VCO, or otherwise are held under the ICJ — *i.e.*, under section 223(a)(11)(A), a State *may* place juveniles in secure detention/correctional facilities *if* they are charged with/have violated 18 U.S.C. § 922(x)(2) (a status offense), *if* they are charged with/have violated a VCO that relates to status as a juvenile, or *if* they otherwise are held under the ICJ.

Accordingly, the very act of charging a juvenile (who otherwise is a non-offender) with violating 18 U.S.C. § 922(x)(2) suffices as a matter of law to bring that juvenile within the ambit of section 223(a)(11)(A)(i), and the very act of charging a juvenile (otherwise a non-offender) with violating a VCO that relates to status as a juvenile^{9/} similarly suffices to bring him within the ambit of section 223(a)(11)(A)(ii).

Bearing the foregoing conclusion in mind, in order to make appropriate compliance determinations under section 223(a)(11), monitors from your office first should exclude both individuals who are not "juvenile offenders" within the meaning of 28 C.F.R. § 32.304(f) and juveniles who are "criminal-type offenders" within the meaning of 28 C.F.R. § 32.304(g) from their consideration, as nothing in section 223(a)(11) "forbids" States from holding them in secure detention/correctional facilities. Thereafter, once they have determined the population that *is* subject to section 223(a)(11), your monitors should exclude those juveniles within that population who are charged with/have violated 18 U.S.C. § 922(x)(2) or a VCO that relates to status as a juvenile, or otherwise are held under the ICJ.

Please do not hesitate to advise if you should have any questions.

^{9/} Lest there be any confusion on the point, it should be stressed that, for purposes of section 223(a)(11)(A)(ii), the VCO *must* relate to the violator's status as a juvenile. For example, a juvenile's violation of a VCO requiring his in-court testimony would be insufficient to bring the juvenile within the scope of that section; but violation of a VCO relating to juvenile status (e.g., truancy, underage driving, running away, curfew) could serve as a proper predicate for secure detention of a juvenile thereunder.

ATTACHMENT D

From: [REDACTED]
Sent: Wednesday, July 09, 2008 1:13 PM
To: Thompson, Gregory
Cc: [REDACTED] Moses, Charles
Subject: RE: Substantive de Minimis Standard

Greg, After reviewing Wis. Stats. 938.209(1), it appears that there is no statutory bar to WI's proposal regarding jails that under some circumstances, become secure detention facilities. *Presuming all other statutory and regulatory requirements are met*, the mere fact that the physical building serves at other times as a jail, does not preclude it from meeting the definition of secure detention facility at a point in time. If you have any further information about the criteria used by WI that you think may inform this opinion, please forward it to me. Thanks, [REDACTED]

[REDACTED]
Attorney Advisor
Office of General Counsel
Office of Justice Programs
U.S. Department of Justice
[REDACTED]

From: [REDACTED]
Sent: Wednesday, July 02, 2008 5:16 PM
To: Thompson, Gregory
Cc: [REDACTED]; Moses, Charles
Subject: Substantive de Minimis Standard

Greg,
You asked for an opinion about whether or not WI's attempt to invoke the substantive de minimis standard meets the requirements of the regulation. In order to use the substantive de minimus standard, each of the following requirements from 28 CFR Sec. 31.303(f)(6)(iii)(B)(1) must be met:

- (i) State law, court rule, or other statewide executive or judicial policy clearly prohibits the detention or confinement of all juveniles in circumstances that would be in violation of section 223(a)(14);
- (ii) All instances of noncompliance reported in the last submitted monitoring reported were in violation of or departures from, the State law, rule, or policy referred to in paragraph (f)(6)(iii)(B)(1)(i) of this section;
- (iii) The instances of noncompliance do not indicate a pattern or practice but rather constitute isolated instances;
- (iv) Existing mechanisms for the enforcement of the State law, rule or policy referred to in paragraph (f)(6)(iii)(B)(1)(i) of this section are such that the instances of noncompliance are unlikely to recur in the future; and
- (v) An acceptable plan has been developed to eliminate the noncompliant incidents and to monitor the existing mechanism referred to in paragraph (f)(6)(iii)(B)(1)(iv) of this section.

WI purports that of the 144 jail removal violations identified, 126 are in violation of state law. (See pp. 21-22 of WI's justification.) Because not all instances (126 of 144) are violations of State law, rule or policy, the requirement contained

in subsection (ii) of 28 CFR Sec. 31.303f(6)(iii)(B)(1) is not met. Thus, WI does not meet the substantive de minimus standard.

As an alternative to claiming the substantive de minimus standard, WI purports that county jails can be used as secure detention facilities under certain circumstances. They have cited a WI statute that describes the circumstances under which it is allowed -- Wis. Stats. 938.209(1). I have begun examining the idea that a facility can serve as both a secure detention facility and a jail and plan to provide a response to you next week. Please let me know if you have any questions. Thanks, [REDACTED]

[REDACTED]
[REDACTED]
Attorney Advisor
Office of General Counsel
Office of Justice Programs
U.S. Department of Justice
[REDACTED]
[REDACTED]

ATTACHMENT E



U.S. Department of Justice

Office of Justice Programs

Office of the Assistant Attorney General

Washington, D.C. 20531

JUL 14 2017

MEMORANDUM TO: Michael E. Horowitz
Inspector General
United States Department of Justice

THROUGH: Daniel C. Beckhard
Assistant Inspector General, Oversight and Review Division
Office of the Inspector General
United States Department of Justice

FROM: Alan R. Hanson 
Acting Assistant Attorney General

SUBJECT: Response to the Office of the Inspector General's Draft Report,
*A Report of Investigation of Certain Allegations Referred by the
Office of Special Counsel Concerning the Juvenile Justice and
Delinquency Prevention Act Formula Grant Program*

This memorandum provides a response to the Office of the Inspector General (OIG), Oversight and Review Division's draft report issued July 6, 2017, entitled, *A Report of Investigation of Certain Allegations Referred by the Office of Special Counsel Concerning the Juvenile Justice and Delinquency Prevention Act Formula Grant Program*. While the draft report found allegations referred by the Office of Special Counsel as unsubstantiated, it described long-standing problems with the Office of Juvenile Justice and Delinquency Prevention's (OJJDP) monitoring of state compliance with the Juvenile Justice and Delinquency Prevention Act (JJDP Act).

In addressing these long-standing issues, the Office of Justice Programs (OJP) has been working diligently toward improving our compliance monitoring oversight of the JJDP Act, and ensuring justice and safety for youth, families, and communities. In close coordination with the Office of the General Counsel (OGC), OJJDP has revised and updated compliance policies and guidance to ensure consistent and objective application of its monitoring of states compliance with the four core requirements¹ outlined in the JJDP Act.

¹ The four core requirements of the JJDP Act include: 1) Deinstitutionalization of Status Offenders; 2) Separation of Juveniles from Adults in Institutions; 3) Removal of Juveniles from Adult Jails and Lockups; and 4) Reduction of Disproportionate Minority Contact.

For over 20 years, the State Relations and Assistance Division within OJJDP was responsible for compliance monitoring oversight, as well as a full grant management workload. Recognizing the need for dedicated staffing resources to ensure adequate oversight of the compliance monitoring responsibilities, as part of a reorganization of OJJDP in 2015, OJJDP established the Core Protections Division to oversee and monitor each state's compliance with the JJDPA. Since the establishment of the Core Protections Division in 2015, OJJDP has diligently worked on revising and updating compliance policies and guidance; ensuring consistent application of compliance policies and guidance; and improving communication and transparency with the states.

Revising and Updating Compliance Policies and Guidance

- In October 2015, OJJDP issued its policy entitled, *Monitoring of State Compliance with Juvenile Justice and Delinquency Prevention Act*, which OJJDP subsequently updated in December 2016 and June 2017. This policy addressed changes needed to ensure that existing guidance aligned with the JJDPA and strengthened OJJDP's oversight, such as changing the compliance reporting requirement to the Federal fiscal year; requiring submission of a full year of compliance data; and requiring states to explicitly certify regarding the accuracy and completeness of its compliance submissions.
- In August 2016, OJJDP completed its revisions to the Formula Grant Program regulation at 28 CFR Part 31 and published a notice of proposed rulemaking in the Federal Register. Upon review of over 300 comments received on the proposed rule, OJP issued a partial Final Rule on January 17, 2017, which took effect in April 2017. The partial rule amended the standards for compliance with the core requirements; provided a definition for the term "detain or confine" and clarified that the term refers to both the secure and non-secure detention of juveniles; changed the due date for submission of state compliance monitoring data and reports; and clarified compliance data facility reporting requirements. OJJDP and OGC are currently drafting a supplemental Final Rule to address other issues in the proposed rule that were not included in the partial Final Rule. In addition, OJJDP revised the *OJJDP Guidance Manual for Monitoring Facilities under the Juvenile Justice and Delinquency Prevention Act*, which is pending final review.

Ensuring Consistent Application of Compliance Policies and Guidance

- Beginning with Fiscal Year (FY) 2016 funding eligibility determinations, Core Protections Division staff developed and implemented a Compliance Determination Analysis Form, to document its review and analysis of state compliance submissions to determine the adequacy of the state's compliance monitoring system and its level of compliance with the four core requirements.
- To enable consistent tracking and analysis of state compliance monitoring submissions, in FY 2016, OJJDP developed a web-based compliance reporting system for states to submit the required compliance monitoring data and reports.
- In April 2017, OJJDP issued its *Compliance Monitoring Risk Assessment Policy Guidance*, which details its process for continuously monitoring states to assess when more frequent

onsite monitoring is warranted. Through this risk-based process, OJJDP will document its annual review of the states' compliance monitoring systems against a standardized set of key criteria and determine the level of monitoring activity needed.

Improving Communication and Transparency with the States

- Over the past year, OJJDP has provided support, resources, information, and technical assistance to 54 states and territories, through approximately 100 events, on a variety of juvenile justice issues. In addition, the OJJDP Acting Administrator is actively participating in State Advisory Group meetings. To further improve communication, OJJDP continues its efforts to conduct monthly conference calls with the State Juvenile Justice Specialists to provide evolving guidance and address individual state concerns and answer questions.
- On June 12, 2017, OJJDP conducted a multi-faceted training for new State Juvenile Justice Specialists, who have been serving in that role for less than 3 years. The training focused on the role of a juvenile justice specialist, including their responsibilities for administering the Title II Part B Formula Grants program; monitoring and reporting on the four core requirements of the JJDPA; and supporting the State Advisory Group (SAG). On September 12-15, 2017, OJJDP will conduct training for all Compliance Monitoring Coordinators, Disproportionate Minority Contact Coordinators, and SAG members.
- In FY 2016, OJJDP developed a Compliance Audit Module within OJP's Grants Management System (GMS) to process and track compliance audits. The Compliance Audit Module will be the system of record for documenting the onsite compliance audit, from the notification to the grantee regarding the audit through the final resolution and closure of findings and recommendations identified during the audit. The Core Protections Division is currently piloting the module and it is anticipated that by year-end all compliance audits will be tracked in the Compliance Audit Module.

While OJJDP has made meaningful progress in improving its oversight of compliance with the JJDPA, we recognize that additional improvements are needed. OJJDP and OGC will continue collaborating to ensure that OJJDP guidance to the states is conveyed in a clear and consistent manner. In addition, to ensure sustained progress toward improving oversight of compliance with the JJDPA, OJP's Office of Audit, Assessment, and Management, will annually review key management controls.

We appreciate this opportunity to respond to the draft report. If you have any questions regarding this response, please contact Ralph E. Martin, Director, Office of Audit, Assessment, and Management, at (202) 305-1802.

cc: Maureen A. Henneberg
Deputy Assistant Attorney General

cc: Eileen Garry
Acting Administrator
Office of Juvenile Justice and Delinquency Prevention

Leigh Benda
Chief Financial Officer

Ralph E. Martin
Director
Office of Audit, Assessment, and Management

Rafael A. Madan
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Richard P. Theis
Director, Audit Liaison Group
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Robert P. Storch
Deputy Inspector General
Office of the Inspector General

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