

Jim: Welcome to Part Two of the Department of Justice Office of the Inspector General's podcast series on our office's Top Management and Performance Challenges report for 2015. My name is Jim Mitzelfeld, and I am a senior counsel in our office. In case you missed it, Part One of this podcast can be found on the OIG's website, at oig.justice.gov.

I'm here talking with DOJ Inspector General Michael Horowitz, and we're continuing our conversation about today's Top Challenges report.

Michael, in today's report the OIG challenges the Department to ensure effective oversight of the DOJ's law enforcement programs. In this section of the report you mentioned our office's 2012 Fast and Furious report as well as a July 2015 report on the DEA's confidential sources program. Why has the OIG continued to identify this as a challenge for the Department?

Michael: Well Jim, in light of what we have seen in those two matters and some of our other work, what is apparent is there is a very careful balance that law enforcement needs to look at, between ensuring and protecting the safety of the communities and doing it through, both using confidential sources, using undercover methods, on the one hand. On the other hand, how do you do that in a way that ensures the public safety as you also are investigating the alleged wrongdoers. And as we describe in our top management challenges report, that's a difficult balance and a challenging balance to undertake. And in both of those instances we found the Department didn't address it in an appropriate way, in at least certain circumstances, and so this remains a challenge. And it is something that Department's management will have to look at and consider carefully.

Jim: Let me just ask you a little bit about the DEA's confidential sources report because that is the most recent one. What were some of the troubling things that we found in that report?

Michael: There were a handful of issues that were particularly concerning. For example, the fact that the policies that the DEA was following, as to its oversight of its use of informants, were not fully consistent with the Attorney General guidelines on the use of undercover informants. And that's very concerning. And that's something we stated quite clearly needed to be addressed. And our understanding is the Department is undertaking that effort. Another issue we found and identified was even with the DEA's own policies, the DEA wasn't following its own policies consistently. And so we saw instances where informants who had been long-term informants, or in areas that were particularly sensitive, were not having the kind of oversight that the DEA's policies required to occur. And then in addition, we learned in the course of our audit that the DEA had been paying benefits, disability benefits and death benefits to survivors of informants, in a manner that seem to

us to be inconsistent with DEA policy, practice and statements. And [that was] something that needed to be looked at quite closely to see if it was in fact consistent with the law, and with DEA's practices, and with the Department's practices.

Jim: The conduct of the Department's law-enforcement personnel is an issue that came up in multiple OIG reviews in 2015. The reviews concerned topics ranging from off-duty conduct to allegations of employee sexual harassment. Could you summarize some of the findings the OIG made in these reports and [describe] where the Department still has room to improve?

Michael: Certainly. Some of the issues we uncovered, particularly in the off-duty conduct report, concerned the lack of guidance and information that had been provided to agents, both domestically, but primarily our focus was overseas. And the importance of following the law and the rules, no matter where individuals were placed around the world. And our concern that a report we had done 20 years ago, in 1996, on the "Good Old Boy Roundup," which can be found on our website, [included] recommendations we made 20 years ago on this very topic [that] had never really been followed through. So these same issues we saw 20 years ago, we saw in some ways here as well. And that was concerning to us.

Jim: Let me ask specifically on that issue, after our report came out, the Department has now issued a policy for off-duty conduct, is that correct?

Michael: That is correct. And that was certainly welcome and we will review it carefully and consider what kind of impact it's had. But certainly the Department was responsive and promptly did work in this area and put forward a policy laying out some of the do's and don'ts and general guidance. So that's been very important. Moving on to the sexual harassment and misconduct report, again what we saw, there was several of the law enforcement components at the Department, and in some instances all four, hadn't followed through on their own rules, hadn't put rules in place, and hadn't, in our view, appropriately disciplined or taken steps to appropriately discipline individuals. So again in a series of issues we identified among some or more of the law enforcement components for the Department.

Jim: More broadly, the Top Challenges [report] emphasizes the need to ensure ethical conduct throughout the Department. What were you thinking of when you flagged this issue, and is it your perspective that unethical conduct is a pervasive problem at the Department of Justice, or are you driving at something else?

Michael: No. One of the things that is clear from the work we do is that the vast majority of Department employees and their law enforcement agents are hard-working, dedicated public servants who follow the rules, the law, in everything they do. And it's really quite a remarkable institution in that regard. Unfortunately, and this

is what we have pointed out in some of our reports, the misdeeds of a handful of individuals can tarnish the whole Department. The reputational risk for the Department is substantial. And for a Department of Justice that one of its primary responsibilities is to arrest criminals, and try them, having a handful of wrongdoers harm the prosecution efforts of the overwhelming majority of honest and hard-working law-enforcement agents, prosecutors, [and] staff is very concerning. And that's why the Department needs to be even more vigilant in all of the work they do.

Jim: We even had one example, that we talk about in the report, where an FBI agent who ended up helping himself to some of the heroin evidence, [that] his actions resulted in, I think, more than two dozen criminal cases that had to be tossed out.

Michael: Yes. The actions of one FBI agent who was taking heroin from evidence bags to support his drug habit and resulted in a significant jail sentence for that agent, impacted dozens of criminal cases. And that's an example of the impact that an event like that can have. But it went even further because it required the FBI and the OIG to think about what are some of the systemic issues that that [incident] raises? If an FBI agent, over that period of time, can successfully steal heroin from evidence bags, how does that occur? And how do we oversee and how does the FBI correct its controls? So that an incident like that doesn't happen again, or it is much harder to have happen.

Jim: Let's talk about the Department's attorneys. Allegations of misconduct by DOJ attorneys are currently investigated by the Office of Professional Responsibility, also known as OPR, rather than the Inspector General's office. Do you still think that's a problem?

Michael: I do, and my predecessors here as Inspectors General have thought it was a problem. And we have advocated for and argued for jurisdiction of all Department employees, including lawyers who engage in misconduct. The challenge is, and the difficulty is, at a time when the Justice Department and communities at large agree that when there is misconduct by law enforcement it should be reviewed by an independent entity, separated from the prosecutors, that has complete independence. At the same time the Department and the President's 21st Century Task Force [President's Task Force on 21st Century Policing] is advocating for that approach, we have a system in place where misconduct by the Department's prosecutors is overseen by a component of the Department that's managed by the Department's leadership. And not by a statutorily-independent IG's office. In my view, the same reasons that folks have made clear the importance of independent oversight of alleged misconduct by agents, should be done by an independent OIG, inspector general, like we do -- there is no principled reason, in my view, for there to be a different system in place for the lawyers.

Jim: Let's talk about the OIG's limited access to information. The Top Challenges [report] raises this issue in the context of ensuring ethical conduct, but I know you feel that this issue pervades all of the OIG's work because it challenges your independence. First, why is the OIG's limited access to information identified as a challenge for the Department?

Michael: The touchstone for any effective, independent oversight is to have access to the information you need to conduct that oversight. If you don't have that access to the information, you can't conduct effective independent oversight. We can't get 50 percent, 80 percent, or even 99 percent of the information [we request] – because we don't know what's in that remaining 1 percent. That could change everything. Without being able to independently get everything, and having the people we are overseeing making the decision whether the law allows us to receive something or doesn't [allow us to] receive something is not appropriate. And in my view is inconsistent with the intent of the IG Act when it was passed in 1978. And so that's why that remains a problem. There needs to be a fix. It needs to be made clear that IGs, have a right to complete, full access to information to do our jobs. And we have to be the ones deciding what we need to see, not the people we are overseeing.

Jim: Right now, as I understand it, there are bills before the House and Senate that would both provide legislation to basically solve this problem. How confident are you that those bills will be taken up and that we could fix this issue?

Michael: Well we'll see how that goes. We are very encouraged by the fact that in both the House and the Senate the bills have strong bipartisan support, and that the supporters are pushing them, and pushing them forcefully. And it's heartening to know that we have that kind of support and that the Justice Department itself recently announced that it also believes the DOJ IG should be able to get complete access and independent access to information.

Jim: One of the interesting challenges you identified for the first time last year, and it makes the list again this year, is the challenge of implementing performance-based management.

For our listeners who may not be familiar with this concept, what exactly is "performance-based management?"

Michael: Well that's where you focus your analysis and you look at metrics, measurements, [and] information, that assesses how a program has performed, as opposed to simply the output of the program. So for example at the Justice Department, rather than looking at how many arrests did we make this year, and did we

increase the number of arrests from a year ago, which is one metric, one measurement that can be an appropriate measurement. But standing alone it doesn't give you a sense of, or any idea of, whether the Justice Department is having an impact on crime in the communities. The measurement really ought to be: How many arrests are being made, and are those arrests having an impact in their communities? Is the federal government arresting the right people? Are they bringing the right cases into federal court? And are those cases helping local communities address the crime problem? That's really what this is about in terms of performance-based management. For far too long, I think the thinking has been, we increased the number of arrests this year, or charges, or convictions, by 5 percent and that means we should get more funding so we can arrest more people. That doesn't answer the fundamental question of are those arrests having an impact, particularly for a federal system, where oftentimes there is dual jurisdiction with the local authorities. And, in fact, in many cases the primary responsibility for prosecuting those types of cases, like drug cases, usually falls to the local authorities -- or firearms cases. Those kinds of street crimes were traditionally handled by states and so that's what we are thinking about: What is the Department doing to measure its impact in these areas.

Jim: Some of the challenges the Department has that we have identified both in our reports, as well as the top management challenges, are that they have trouble identifying the correct data, getting reliable data and then acting on that data. Is that correct?

Michael: Yes. So it's a significant problem in each of the areas. One of the things -- going back to what we talked about in the first podcast about -- the prison system, there we've got \$6 billion-plus going out each year for prison related costs. BOP has a wide variety of programs in place to reduce recidivism rates. There are halfway houses that cost hundreds of millions of dollars all across the country. Yet, there is little data assessing, collected by the BOP or other parts of the Department, assessing how are these programs doing in terms of lowering recidivism. Which ones are helping people find jobs? What are the best programs in those areas? Which halfway houses are doing the best job in terms of rehabilitating recently-released convicts from prisons? That's the kind of data we keep asking about when we do our oversight work, and we are not seeing it. And that's the kind of thinking that needs to go on, as we move forward in these areas.

Jim: The last challenge on the list is the always-important one of protecting taxpayer funds from mismanagement and abuse. Your report noted that the Department continues to face significant challenges in using and monitoring funds within its control and as well as the millions of dollars it doles out each year in grants. In your view, what are some of the issues that continue to make this difficult for the Department?

Michael: I think one of the main challenges they face, for example, in the grant making space is the Department gives out a very large number of grants that are relatively small dollar amounts. And when I say relatively small dollar amounts, I use the term carefully, because we are still talking hundreds of thousands, if not millions, of dollars. So it's significant amounts of money but by comparison, for example, many other agencies give out grants that are hundreds of millions of dollars. And so the Department has to oversee thousands of grants that are in the hundreds of thousands or millions of dollars, and that takes substantial time and effort. So the Department has made progress in doing that. We have found that they've made important progress there. But we still find examples where that oversight hasn't gone far enough and hasn't been effective enough to find the problems.

Jim: Now that this report has been provided to the Department and Congress, I'm curious to know what you hope the Department will do with it?

Michael: I think, as in the past, my expectation is that they will take it seriously. They will hopefully benefit from our identification of these issues and some of the items we have identified. Their response certainly seems to indicate that they have taken to heart the variety of issues we have identified. And of course our hope is that by identifying these issues, these are areas where the Department will put a greater focus and consider further how it can, in those instances where it has made improvements, improve further. And in those instances where it really hasn't done much yet, to start pushing forward in a much more aggressive way.

Jim: That's it for the Second Part of our two-part podcast series on the OIG's 2015 Top Management and Performance Challenges report. To read the OIG's Top Challenges report in full, visit our website, at oig.justice.gov.

Thank you for joining us today.