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United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
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March 24, 2011

The Honorable Ray LaHood
Secretary
U.S. Department of Transportation
1200 New Jersey Avenue SE
Washington, D.C. 20590

Dear Secretary LaHood,

Several months ago, three senior Members of Congress wrote you a letter asking you to review the circumstances surrounding the June 2009 departure of Amtrak Inspector General Fred Weiderhold.[1] Citing the findings of a 15-month investigation conducted by the offices of Senator Charles Grassley and Representative Darrell Issa, this letter alleged that the Chairman of the Board and General Counsel of Amtrak unlawfully removed Mr. Weiderhold from his position. I am writing to provide you with new information that flatly contradicts this allegation.

According to a recent review of Mr. Weiderhold's departure by the Department of Transportation Inspector General (DOT IG), the Amtrak Board of Directors lawfully acted to end Mr. Weiderhold's employment after determining that his conduct was harmful to Amtrak and was not consistent with the professional standards of Inspectors General.[2] The DOT IG review also presents a number of other factual findings that explain why the relationship between Amtrak's leaders and its Inspector General had badly deteriorated, and how Amtrak's Board of Directors decided in early 2009 to end Mr. Weiderhold's tenure as Amtrak Inspector General. The authors of the Grassley-Issa report were either unaware of these important facts or, more likely, chose not to include them in the report.

In a letter and memo I sent you on November 17, 2010, I expressed my concerns that the Grassley-Issa report did not provide a complete picture of the circumstances that led to Mr. Weiderhold's departure from Amtrak.[3] According to the DOT IG's recent review, the Grassley-

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[1] Letter from Senator Charles E. Grassley, Representative Darrell Issa, and Representative John Mica, to Ray LaHood, Secretary of Transportation (Sept. 23, 2010).

[2] The information provided in this letter about the DOT IG review comes from two sources: 1) a February 16, 2011, briefing of Commerce Committee staff by DOT IG Chief Counsel, Omer Poirier, and 2) a March 23, 2011, letter from Calvin Scovel, DOT Inspector General, to Senator Charles Grassley, Chairman Darrell Issa, and Chairman John Mica. This review will hereinafter be cited as "DOT IG Review."

[3] Letter from Chairman John D. Rockefeller IV to Ray LaHood, Secretary of Transportation (Nov. 17, 2010); Memorandum from Majority Staff, Senate Commerce Committee, to Chairman John D.

Issa report's version of events was not just incomplete; in several important aspects, it was just plain inaccurate. It is regrettable that so much government time and money has been spent responding to this flawed report. It is even more regrettable that the report was used as a basis to accuse two senior Amtrak officials of breaking the law.

In the rest of this letter, I will discuss several of the key areas where the DOT IG's review fails to support factual findings in the Grassley-Issa report.

1. The Source of the Disagreement Between IG Weiderhold and Amtrak Management was Mr. Weiderhold's Inappropriate Communications with Congress

The Grassley-Issa report attributed the friction between Inspector General Weiderhold and Amtrak management to management's repeated interference with the operations of Mr. Weiderhold's Office of the Inspector General (OIG). In particular, the report cited multiple instances in which Amtrak's General Counsel allegedly impaired the effectiveness and independence of the Inspector General's activities.[4]

The DOT IG review found, however, that the incident that led to Mr. Weiderhold's June 2009 departure was not related to the tensions that obviously existed between the OIG and the Amtrak General Counsel.[5] Instead, the actual cause of the confrontation was Mr. Weiderhold's unauthorized communications with Congress about American Reinvestment and Recovery Act (ARRA) funds.

According to Amtrak officials interviewed by the DOT IG, the enacted ARRA legislation required that $450 million of the $1.3 billion Amtrak received in the bill be dedicated to "capital security grants," even though Amtrak management had not requested security-related funds.[6] Amtrak officials later discovered that the security grant language had been inserted at the request of Mr. Weiderhold, who had been communicating with Congress about this matter without consulting Amtrak management.[7]

While the Inspector General Act gives Mr. Weiderhold and all other Inspectors General the right to communicate directly with Congress about the programs and operations of their

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Rockefeller IV (Nov. 16, 2010) (online at http://commerce.senate.gov/public/?a=Files.Serve&File_id=99faf60e-8675-4526-b0ed-a324c2259ea0).

[4] Minority Staff Report, Senate Finance Committee and House Oversight and Government Reform Committee, *The Removal of the Inspector General for the National Railroad Passenger Corporation (Amtrak)*, 111th Congress (Sept. 13, 2010) (online at http://republicans.oversight.house.gov/index.php?option=com_content&view= article&id=979:amtrak-ig-staff-report&catid=21) (hereinafter "Grassley-Issa Report").

[5] DOT IG Review, *supra* note 2.

[6] Title XII of Pub. L. No. 111-5 (Feb. 17, 2009).

[7] DOT IG Review, *supra* note 2.

agencies, the law does not give them the authority to directly communicate with Congress about agency funding. Mr. Wiederhold's unauthorized involvement in funding issues was clearly outside of the scope of his statutory duties and appears to violate the Inspector General Act's requirement that Inspectors General work under the general supervision of the heads of their agencies.[8] This episode is consistent with other cases cited in the Senate Commerce Committee November 16, 2010, staff memo, which documented how a succession of Amtrak managers had complained that Mr. Weiderhold inappropriately involved himself in management decisions.[9]

According to the DOT IG, Amtrak's President and CEO, Joseph Boardman informed the Amtrak Board that he strongly objected to Mr. Weiderhold's unauthorized communications with Congress, and that he would resign from the company if the Board did not act to end Mr. Weiderhold's tenure as Inspector General.[10] After unsuccessfully attempting to mediate this dispute, including a request for help from the Inspector General community, the Board began taking steps to replace Mr. Weiderhold.[11]

2. ***The Amtrak Board Independently Deliberated on Mr. Weiderhold's Employment Status and Did Not "Constructively Remove" Him from His Position.***

The Grassley-Issa report suggests that Amtrak President and CEO, Joseph Boardman and General Counsel Eleanor Acheson, were involved in Mr. Weiderhold's departure from Amtrak.[12] In the letter they sent you on September 23, 2010, Senator Grassley and Representatives Issa and Mica reiterated this finding, declaring that Ms. Acheson "unlawfully interfered with the independence of the OIG and removed Mr. Weiderhold from his post as IG in violation of the provisions of the Inspector General Act of 1978."[13]

The DOT IG's review of Mr. Weiderhold's departure does not support these claims. According to the DOT IG, Amtrak's Board of Directors first reached out to the DOT IG and the Council of Inspectors General on Integrity and Efficiency (CIGIE) for help resolving the dispute. After these two groups declined to get involved, the Board hired an independent outside counsel, J. Steven Patterson of the Hunton & Williams law firm, to help the Board consider how it could

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[8] 5 U.S.C. Appendix 3 § 8G(d). The Amtrak Office of the Inspector General is one of the "designated federal entity" IG offices created by Congress in a 1988 amendment to the Inspector General Act of 1978.

[9] Senate Commerce Committee Majority Staff Memorandum, *supra* note 3.

[10] While the authors of the Grassley-Issa report claim that they conducted 13 interviews, they apparently did not interview Mr. Boardman, whose testimony, according to the DOT IG review, is key to understanding the facts surrounding Mr. Weiderhold's departure.

[11] According to the DOT IG review, both the DOT IG and the Council of Inspectors General on Integrity and Efficiency (CIGIE) declined to help mediate the dispute.

[12] Grassley-Issa Report, *supra* note 4, at 16-18.

[13] Grassley, Issa, Mica letter (Sept. 23, 2010), *supra* note 1.

end Mr. Weiderhold's employment at Amtrak.[14] During the weeks leading up to Mr. Weiderhold's departure, the Board consulted Mr. Patterson about its options, without involving Amtrak management in its deliberations. According to the DOT IG, Mr. Patterson had sufficient knowledge of the underlying legal issues to properly advise the Board.[15]

Mr. Patterson advised the Board it could seek Mr. Weiderhold's voluntary retirement, or it could initiate a removal process pursuant to the requirements of the Inspector General Act.[16] As Congress amended it in 2008, the Act required Amtrak to notify Congress at least 30 days before it removed Mr. Weiderhold or transferred him to another position.[17] According to the DOT IG's review, Mr. Patterson's legal advice was reasonable, and the Board appeared to follow this advice in its subsequent interactions with Mr. Weiderhold.[18]

The authors of the Grassley-Issa report concluded that the Amtrak Board "constructively removed" Mr. Weiderhold from his position, meaning that the Board coerced him to resign his position.[19] The DOT IG review instead found ample evidence showing that Mr. Weiderhold voluntarily accepted an offer from the Board to retire from Amtrak with a generous severance package worth more than $250,000.[20]

The most persuasive evidence that Mr. Weiderhold's departure was voluntary comes from Mr. Weiderhold himself. He told DOT IG investigators that he fully understood the contents of the severance package and voluntarily accepted it after considering it for several hours.[21] According to the DOT IG review, Mr. Weiderhold expressed his interest in accepting the retirement package before any discussion of the Board's willingness to commence the formal removal process.[22] In addition, Mr. Weiderhold failed to exercise his right to void the package within seven days of signing it.[23]

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[14] DOT IG Review, *supra* note 2.

[15] *Id.*

[16] *Id.*

[17] 5 U.S.C. Appendix 3 § 8G(e).

[18] DOT IG Review, *supra* note 2.

[19] Grassley-Issa Report, *supra* note 4, at 17. Under current federal employment law, "Coercion is demonstrated by showing that the agency essentially imposed the terms of the resignation on the employee, that the employee had no alternative to resignation, and that the resignation was a result of improper acts by the agency [citation omitted]." *Parrott v. MSPB*, 519 F.3d 1328, 1332 (Fed. Cir. 2008).

[20] DOT IG Review, *supra* note 2.

[21] *Id.*

[22] *Id.*

[23] *Id.*

While it might have been advisable for the Amtrak Board to notify Congress that it was seeking Mr. Weiderhold's voluntary retirement, it had not yet initiated a formal removal process against Mr. Weiderhold and therefore had not triggered the 30-day congressional notification process.[24]

3. Mr. Weiderhold Did Not Think He Was Subject to a Congressional "Gag Order."

The Grassley-Issa report also alleges that Mr. Weiderhold's separation agreement prohibited him from speaking with Congress. The report states that the agreement "did not allow Weiderhold to speak to Congress about the Board's actions to remove him as IG, the reasons for those actions, or anything else related to the circumstances of his departure."[25]

This allegation also appears to be meritless. While Mr. Weiderhold's agreement contained Amtrak's standard language prohibiting him from disparaging his former employer, it did not contain any prohibition on his talking to Congress. In fact, Mr. Weiderhold told DOT IG investigators he was familiar with the severance package language and had actually written much of it himself at an earlier job he held at Amtrak. [26]

According to interviews with Amtrak officials and Mr. Weiderhold conducted by the DOT IG, the parties assumed that Mr. Weiderhold had the right to communicate with Congress. This right was based on a legal principle known as the "public policy exception," which prohibits employers from preventing employees from reporting misconduct to government entities.

The "public policy exception" is well-known among attorneys who work on federal employment and whistleblower cases, including presumably the attorneys involved in the Grassley-Issa investigation. Directly contradicting the Grassley-Issa report, Mr. Weiderhold himself told DOT IG interviewers that he understood the agreement did not prohibit him from communicating with Congress.[27] Amtrak later added a clause to the agreement making this understanding explicit after it received an inquiry from the offices of Senator Grassley and Representative Issa.[28]

Conclusion

While I disagree with both the factual findings and conclusions of the Grassley-Issa report, I share the authors' zealous support for the independence of Inspectors General. Inspectors General play an essential role in making sure that taxpayers' dollars are being spent

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[24] *Id.* In a recent decision of the U.S. Court of Appeals for the District of Columbia, the Court applied the Civil Service Reform Act's definition of "removal" to the 30-day removal notice of the 2008 IG Act. *Walpin v. Corporation for National and Community Services*, 630 F.3d 184 (D.C. Cir. 2011).

[25] Grassley-Issa Report, *supra* note 4, at 16.

[26] DOT IG Review, *supra* note 2.

[27] *Id.*

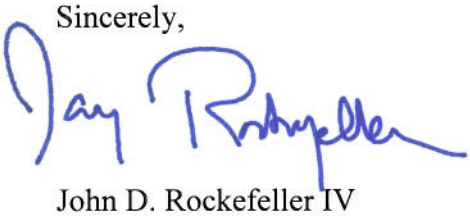
[28] Grassley-Issa Report, *supra* note 4, at 16.

carefully and in accordance with the law. They are a valuable partner to all of us in Congress who are committed to vigorous executive branch oversight.

But while they demand accountability from the government agencies they oversee, Inspectors General themselves "must also be held accountable for their conduct" when they do not follow the laws Congress has established for their operations.[29] The multiple reviews of this matter that have now taken place demonstrate that Amtrak had valid concerns about Mr. Weiderhold's performance as Inspector General and took difficult, but necessary, steps to end his tenure at Amtrak. Amtrak has showed its commitment to oversight and accountability since that time by engaging outside experts to find a well-respected member of the IG community, Ted Alves, to succeed Mr. Weiderhold as the Amtrak Inspector General.

It is my sincere hope that the DOT IG's review finally puts this matter to rest, and that we can once again focus our full attention on building a rail network that that will help fuel our country's growth in the 21st century.

Sincerely,



John D. Rockefeller IV
Chairman

Cc: Kay Bailey Hutchison
Ranking Member

[29] Project on Government Oversight, *Inspectors General: Accountability is a Balancing Act* (Mar. 10, 2009) (online at http://www.pogo.org/pogo-files/reports/government-oversight/inspectors-general-accountability-is-a-balancing-act/go-igi-20090320.html).