

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON SCIENCE AND TECHNOLOGY

SUITE 2320 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301

(202) 225-6375

TTY: (202) 226-4410

<http://science.house.gov>

June 14, 2007

Alberto Gonzales, Attorney General
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

Dear Mr. González:

By this letter, we are referring Michael Wholley, the general counsel of the National Aeronautics and Space Administration (NASA), to the Department of Justice for investigation into and possible prosecution for obstruction of justice and destruction of government records under 18 U.S.C. § 1505, 18 U.S.C. § 1512(c) and 18 § U.S.C. 2071.

On May 24, 2007, Mr. Wholley testified before the Subcommittee on Investigations and Oversight of the House Science and Technology Committee that he had personally destroyed the video records of an April 10 agency meeting between NASA Administrator Michael Griffin and the staff of the Office of the Inspector General (OIG) because:

[I]f they were retained and filed, they could become [government] records by virtue of that retention. From my perspective . . . I did not believe it wise to have these in any way become records, subject to release under FOIA [Freedom of Information Act]. . . .

I personally made the decision to destroy them, and I did so by breaking them into pieces and throwing them in the trash.¹

The meeting in question was a mandatory meeting between Mr. Griffin and the staff of NASA's OIG to discuss the corrective actions that Mr. Griffin was recommending for Robert Cobb, NASA's inspector general. The President's Council on Integrity and Efficiency (PCIE) determined in January of 2007 that Mr. Cobb had abused his authority as an inspector general and lacked an appearance of independence from NASA officials. Clay Johnson, deputy director of the Office of Management and Budget (OMB) and PCIE chairman, forwarded the report to Mr. Griffin to take corrective steps. Mr. Griffin had included the meeting in his "Letter of Instruction" to Mr. Cobb.²

¹ Testimony of Michael Wholley before the Subcommittee on Investigations and Oversight, May 24, 2007, provisional transcript, pp. 41-2 (hereafter "Hearing Testimony").

² Memorandum entitled "Letter of Instruction for Robert W. Cobb, Inspector General," dated March 30, 2007, from Administrator Griffin to Robert W. Cobb, p. 2.

Mr. Wholley destroyed the CDs with full knowledge that the House Science and Technology Committee and the Senate Committee on Commerce, Science and Transportation were examining all aspects of the investigation into allegations against Mr. Cobb and NASA's response to that investigation. Mr. Wholley also knew that a Congressional hearing was possible. Chairman Miller had sent a letter to Mr. Griffin requesting a copy of the PCIE report on February 23, 2007, and he received a reply on February 28. On April 2, after receiving the report, Chairman Miller and Chairman Bill Nelson of the Senate Subcommittee on Space, Aeronautics and Related Matters wrote President Bush asking for Mr. Cobb's removal. The letter was widely publicized.³ On April 3, Chairmen Nelson and Miller and Science and Technology Committee Chairman Bart Gordon wrote to Clay Johnson, the head of the PCIE, and said they were preparing for hearings. On April 4, Mr. Wholley wrote an email titled, "Hearings???", to Jeff Rosen, the general counsel of OMB, discussing the need for a meeting to "soberly consider the approach to be taken" at a hearing. "I am sure that you can appreciate that I am not particularly keen on seeing two entities of the Executive Branch at odds in a hearing before the Legislative Branch," Mr. Wholley wrote.⁴

Mr. Wholley also knew the meeting would raise questions because of the appearance that the Administrator was disciplining and controlling his inspector general. On March 14, Mr. Wholley raised those concerns with Paul Morrell, Mr. Griffin's chief of staff:

Will Moose [Mr. Cobb] be there? Will Mike's [Mr. Griffin's] words look/sound like he has taken Moose to the woodshed, thereby lending more credibility to both the complaints and the complainers, as well as the ROI [Record of Investigation] than they deserve? If Mike, on the other hand, goes too far (and this is an "eye of the beholder" issue) in his comments in support of Moose, then he had opened himself up to criticism and as become the focus of the controversy.⁵

The meeting was videotaped at NASA headquarters, on the request of NASA's public affairs office, and in two field offices, so that absent employees could view it later. As best as our staffs could reconstruct it from witnesses, written reports of the meeting, and Mr. Griffin's talking points, Mr. Griffin used the meeting to defend Mr. Cobb. He said Mr. Cobb had not abused the authority of his office, and that there were no legal or ethical issues. He also informed the staff that he was not interested in operational audits or reports that questioned NASA's engineering decisions. He said that the OIG's technical staff did not have the expertise to audit this area. He implied that he was only interested in recommendations that saved at least \$1 billion. Many OIG staff members viewed these statements as attempts to influence their work.

The content of this meeting, Mr. Wholley's interest in making sure that the actions taken by the PCIE and NASA were presented in a controlled manner to Congressional committees, and his own statements as to why he destroyed the CDs, make it highly probable that he intended to

³ Letter dated April 2 to President George W. Bush from Chairmen Gordon and Nelson; "Lawmakers Urge Bush to Fire NASA Official," *Washington Post*, April 3, 2007.

⁴ E-mail entitled "Hearings???", dated April 4, 2007, from Michael Wholley to Jeff Rosen.

⁵ E-mail entitled "Decision", dated March 14, 2007, from Michael Wholley to Paul Morrell

obstruct both our investigation and our hearing, which was held on Thursday, June 7, 2007. Mr. Wholley holds an office of great legal and ethical responsibility in the federal government. More than 160 attorneys work under him, of which 35 are at NASA headquarters. Mr. Wholley admitted that he was not an expert in government records law, and that there were such experts in his office. Nonetheless, he did not consult any other attorneys or experts before he destroyed the tapes because “it was a very sensitive matter.”⁶

Mr. Wholley’s actions resulted in the expenditure of countless staff hours by the Committees, made in an effort to recreate the recorded meeting from eyewitness testimony. Instead of viewing the event firsthand, the Committees had to settle for a collage of impressions, recreated from various perspectives and talking points. We will never know how this ersatz evidence affected our investigations or the public’s confidence in NASA’s OIG.

Mr. Wholley’s interference with our investigation may have violated 18 U.S.C. § 1512(c), which prohibits the corrupt destruction of records or other objects with the intent to impair their availability at an official proceeding. *United States v. Poindexter*, determined that the related statute, 18 U.S.C. § 1505, protected preliminary and informal Congressional inquiries against obstruction as well as formal proceedings. *United States v. Poindexter*, 725 F. Supp. 13, 23 (D.D.C. 1989); *United States v. North*, 708 F. Supp. 385, 386 (D.D.C. 1988); see also *United States v. Fruchtmann*, 421 F.2d 1019 (6th Cir. 1970); *Rice v. United States*, 356 F.2d 709, 712 (8th Cir. 1966). Mr. Wholley testified that he knowingly destroyed agency documents to keep others from learning of their contents when he was fully aware that this Committee was considering a hearing that would include the circumstances and contents of that meeting.

Mr. Wholley’s actions may have also violated 18 U.S.C. § 2071, which prohibits anyone with custody of a Federal record from destroying that record. The DVDs should be considered Federal records.⁷ It is a basic rule of copyright law that work created by an employee within the scope of employment is the property of the employer. See, e.g., *Scherr v. Universal March Match Corp.*, 417 F.2d 497, 500 (2d Cir. 1969), cert. denied, 397 U.S. 936 (1970). This principle similarly applies within the Federal Government. See *United States v. First Trust Company of St. Paul*, 251 F.2d 686, 690 (8th Cir. 1958) (“If . . . notes are the written records of a government officer executed in the discharge of his official duties, they are public documents

⁶ Hearing Transcript, *supra*, p. 74

⁷ Mr. Wholley’s suggestion to the contrary is legally suspect. The Federal Records Act, 44 U.S.C. § 3301, defines a “record” as:

All books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.

44 U.S.C. § 3301. The Act clearly refers to materials preserved by an agency or *appropriate for preservation*. Mr. Wholley’s claim that the materials were not records until they were preserved was therefore specious. We are unaware of any cases that so hold, and it is unlikely that Congress intended to encourage agency officials to quickly destroy materials before they morphed into agency records. In reaching his conclusion, Mr. Wholley performed limited research and did not consult with any other attorneys or authorities.

and ownership is in the United States.”). In short, records are government property if they are produced on government time with government resources. *Pfeiffer v. Central Intelligence Agency*, 60 F.3d 861 (D.C. Cir. 1995); *Reporters Committee for Freedom of the Press v. Vance*, 442 F. Supp. 383 (1977). In the present case, the DVDs were created at the request of a NASA employee, by NASA employees and contractors, with NASA resources, and for the purpose of NASA’s business. As such, they should be considered government property.

Furthermore, in *Poindexter*, the court determined that “custody” under § 2071 should be broadly interpreted:

There is no warrant for supposing, and no legislative history suggesting, that Congress meant to subject to punishment under section 2071 only those who are the custodians of records in the technical sense, such as clerks or librarians, but to permit others working in a government agency who have access to sensitive documents to destroy or alter them with impunity. The obvious purpose of the statute is to prohibit the impairment of sensitive government documents by those officials who have access and control over them, and no court has ever held to the contrary.

Poindexter, 725 F. Supp. at 20; see also *Coplon*, 191 F.2d at 749 (finding custody under section 2071 even though defendant had been specifically denied routine access to relevant documents). So it was in the present case. Wholley’s knowing destruction of sensitive records in his possession was a great detriment to our Committees’ investigations, and we respectfully request that you initiate an investigation into his conduct.

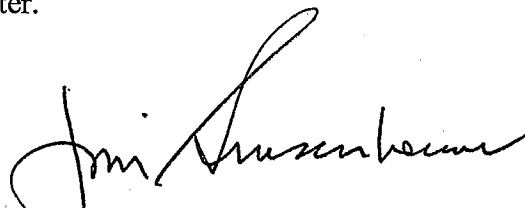
We have included as attachments all documents referred to in this letter. If your staff has any questions or need additional information, please have them contact Edith Holleman, majority staff counsel, Subcommittee on Investigations and Oversight, at (202) 225-8459, or Bart Forsyth, minority staff counsel, Subcommittee on Investigations and Oversight at (202) 225-6470.

Thank your for your attention to this matter.

Sincerely,



BRAD MILLER
Chairman
Subcommittee on Investigations and
Oversight



F. JAMES SENSENBRENNER, JR.
Ranking Member
Subcommittee on Investigations and
Oversight

ENC:

STENOGRAPHIC MINUTES
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HEARING ON THE NASA ADMINISTRATOR'S SPEECH TO OFFICE OF
INSPECTOR GENERAL STAFF, THE SUBSEQUENT DESTRUCTION OF VIDEO
RECORDS, AND ASSOCIATED MATTERS

THURSDAY, MAY 24, 2007

House of Representatives,

Subcommittee on Investigations and Oversight

Committee on Science and Technology

Washington, D.C.

Committee Hearings

of the

U.S. HOUSE OF REPRESENTATIVES



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Office of Official Reporters

889 | recorded, and had then asked that a number of copies me made.

890 | Mr. Morrell indicated that he had recovered the copies
891 | from Public Affairs, and that this meeting was not a Public
892 | Affairs event, but rather, a closed meeting called by the
893 | Administrator, for the purpose that the Administrator set
894 | forth in his letter.

895 | I believe I told him I clearly understood his pique that
896 | his direction had been overridden, and that this closed
897 | meeting had been recorded, and that copies had been made. I
898 | believe that at the conclusion of our discussion, I asked him
899 | to leave the recordings with me, and I put them on my desk.

900 | I want to categorically state at no time and in no way
901 | did Mr. Morrell indicate to me that I should destroy these
902 | recordings. That did not happen. Sometime either later that
903 | day, or early the next day, I honestly can't recall when, I
904 | reviewed relevant portions of the Federal Records Act, and in
905 | particular, the definition of what constituted a record.

906 | I also briefly reviewed the Freedom of Information Act.
907 | I concluded that these copies made by Public Affairs were not
908 | records for purposes of the FRA, but also concluded that if
909 | they were retained and filed, they could become records by
910 | virtue of that retention. From my perspective, and I stated
911 | it to the subcommittee staff, I did not believe it wise to
912 | have these in any way become records, subject to release
913 | under FOIA. This was a closed meeting, specifically directed

914 | to not be recorded, and these DVDs were not agency records at
915 | that time, in my opinion.

916 | I personally made the decision to destroy them, and I
917 | did so by breaking them into pieces and throwing them in the
918 | trash. The next time I heard anything about these recordings
919 | was while I was on vacation in Florida the week of April 15
920 | at a family reunion. In looking at my emails, I believe I
921 | first learned of the request to provide a copy of the
922 | recording to this subcommittee some time in the late
923 | afternoon or the early evening of April 18, when I learned of
924 | the subcommittee's letter of the same date. I informed my
925 | staff I didn't have any copies of the recording, and that I
926 | had previously destroyed them. At some later time, I learned
927 | that there had been other recordings made at other VITS
928 | locations.

929 | Regarding my role in the response by Dr. Griffin to the
930 | report of the Integrity Committee, I became aware that
931 | something had been sent to Dr. Griffin from Mr. Johnson in
932 | his role as chairman of the PCIE. I will try and skip forward
933 | to stay within my five minutes, sir. I think I received this
934 | from Mr. Morrell on Monday the 26th. He gave me what had been
935 | delivered to Dr. Griffin. I asked my executive assistant to
936 | print all the documents out from the CD that was provided,
937 | and I made arrangements to meet with Dr. Griffin and discuss
938 | how he wanted this handled.

1689 Mr. WHOLLEY. Yes, sir.

1690 Chairman MILLER. Generally, I applaud that in lawyers.
1691 It doesn't happen often, but--do you have a background in
1692 FOIA or records, or records law, the--you said earlier you
1693 are not familiar with the case law that Mr. Sensenbrenner
1694 referred to. Are you--is that an area that has been an area
1695 of specialty for you, or concentration?

1696 Mr. WHOLLEY. Certainly not a specialty, sir. In terms of
1697 my past time serving as the Staff Judge Advocate of various
1698 commands and serving at headquarters.

1699 Chairman MILLER. Were there lawyers within the 160,
1700 however many who reported to you, who did have that as an
1701 area of their concentration?

1702 Mr. WHOLLEY. Yes, sir. That would be the General Law
1703 Section.

1704 Chairman MILLER. The General Law Section, but you did
1705 not inquire of anyone in the General Law Section?

1706 Mr. WHOLLEY. I did not.

1707 Chairman MILLER. Why did you not?

1708 Mr. WHOLLEY. Well, I guess one reason, it was a very
1709 sensitive matter. As my attorneys will tell you, I do a lot
1710 of my own research. Even after they present a product,
1711 although it is not a question of not trusting them. I am, as
1712 you may have gotten from my statement, I am a show me the
1713 data, look at the law. I looked at exactly what Ranking

1714 Member Sensenbrenner, 44,3301. I looked at the FOIA. And sir,
1715 as I mentioned in my written remarks, I didn't start on this
1716 right away. It was some time later that day. There were other
1717 things going on. It was some time later that day. From my
1718 perspective, these were recordings that were made by the
1719 Public Affairs Office, of a private, closed meeting of the
1720 Administrator. They should not have been made.

1721 Chairman MILLER. All right. Mr. Wholley, Mr. Morrell
1722 discussed the email that you sent him before the meeting,
1723 that I read aloud. Do you recall that email? Do you recall
1724 your conversations about your concern about how it looked?

1725 Mr. WHOLLEY. I don't recall the conversation from the
1726 night before. I do recall the email.

1727 Chairman MILLER. Okay. So you expressed a concern in the
1728 email about how it would all look one way or the other.

1729 Mr. WHOLLEY. Yes, sir.

1730 Chairman MILLER. Okay. And so, that was--were you
1731 present--you were present at the meeting, correct?

1732 Mr. WHOLLEY. Yes, sir. I was.

1733 Chairman MILLER. Okay. Were you aware then of the
1734 concerns that Ms. Klemstine expressed, and Mr. Winters
1735 expressed, that the staff members felt about what was said at
1736 the meeting?

1737 Mr. WHOLLEY. No, I was not aware then, sir, and it is--

1738 Chairman MILLER. Well, hearing what happened at the

Statement of
Michael C. Wholley
General Counsel
National Aeronautics and Space Administration

Before the

Subcommittee on Investigations and Oversight
Committee on Science and Technology
U.S. House of Representatives

I have been asked to address five issues in my testimony today before the Subcommittee. As you may be aware, I met with the staff of the Subcommittee, as well as with staff of other committees, on April 27, 2007 for approximately three hours and addressed these five issues, as well as others, and answered to the best of my recollection and belief all of the questions posed to me.

1. You have asked me to address the April 10, 2007 meeting held by Dr. Griffin with the staff of the NASA OIG. Dr. Griffin had set out his purpose in holding such a meeting in his March 14, 2007 letter to Mr. Clay Johnson detailing the actions he intended to take after reviewing the HUD OIG Report of Investigation (ROI) on Mr. Robert Cobb, the NASA Inspector General. In his letter Dr. Griffin stated that:

“...I will schedule a meeting with the employees of the NASA Office of Inspector General to inform them that I have reviewed the ROI and I have taken the actions that I believe are necessary to address the ROI’s findings. Such a meeting will provide me an opportunity to listen to any concerns that may exist among the staff and to express my support for a strong and effective Office of Inspector General.”

I was in attendance at the meeting, arriving with Dr. Griffin and Mr. Paul Morrell, the Chief of Staff. The meeting was held in the video teleconference (VITS) room on the lower level at NASA and Dr. Griffin spoke initially for approximately ten minutes. He stated, as best I recall, something similar to what he had set forth in his letter to Mr. Johnson with respect to the ROI having revealed no evidence of a lack of integrity on the part of Mr. Cobb, nor did it indicate any actual conflict of interest or actual lack of independence on his part. I had watched Dr. Griffin’s interview on the C-Span program “Newsmakers” on Sunday morning, April 8, and his remarks at this meeting were similar to those he had articulated on that program. Dr. Griffin then opened up the floor for questions, and several questions were asked of and answered by Dr. Griffin. I believe that the meeting lasted a total of less than thirty minutes.

2. With respect to “[T]he subsequent collection and destruction of all video records of Administrator Griffin’s meeting with the OIG staff”, my involvement was as follows. At some point the morning after the meeting, Paul Morrell came into my office. This was not an unusual occurrence. He had what turned out to be several CD cases in his hand

and he sat at the table across from my desk. He appeared upset that, in spite of his direction to the contractor VITS operator that this closed meeting was not to be recorded, the meeting had been recorded. As best I recall he stated that someone in Public Affairs had asked that the meeting be recorded and had then asked that a number of copies be made. Mr. Morrell indicated that he had recovered the copies and that this meeting was not a public affairs event but rather a closed meeting called by the Administrator. I believe I told him that I clearly understood his pique that his direction had been overridden, and that this closed meeting had been recorded and copied. I believe that at the conclusion of our discussion I asked him to leave the recordings with me, and I put them on my desk. I want to categorically state that at no time, and in no way, did Mr. Morrell indicate to me that I should destroy these recordings. That did not happen.

Sometime either later that day or early the next day, I honestly cannot recall which, I reviewed relevant portions of the Federal Records Act (FRA) and, in particular, the definition of what constituted a record. I also briefly reviewed the Freedom of Information Act. I concluded that these were not "records" for purposes of the FRA, but also concluded that if they were retained and filed they could become "records" by virtue of that retention. From my perspective, and as I stated to the subcommittee staff, I did not believe it wise to have these in any way become "records" subject to release under the Freedom of Information Act. This was a closed meeting, specifically directed to not be recorded, and these DVDs were not Agency records at that time. I personally made the decision to destroy them, and I did so by breaking them into pieces and throwing them in the trash.

The next time I heard anything about these recordings was while I was on vacation in Florida the week of April 15th. In looking at my e-mails, I believe that I first learned of the request to provide a copy of the recording to this Subcommittee sometime in the late afternoon or early evening on April 18 when I learned of this Subcommittee's letter of the same date. I informed my staff that I did not have any copies of the recording and that I had previously destroyed them. At some later time, I learned that there had been other recordings made at other VITS locations.

3. Regarding my role in the response by Dr. Griffin to the report of the Integrity Committee, I became aware that "something" had been sent to Dr. Griffin from Mr. Johnson in his role as Chairman of the PCIE with regard to Report of Investigation of the Integrity Committee. To the best of my recollection, I became aware of this during a conversation with Mr. Morrell that occurred while we were at Ames Research Center in California at a Strategic Management Council meeting. This would have been either February 21st or 22nd. From reviewing my e-mails I have determined that on Monday, February 26th, Mr. Morrell gave me what had been delivered to Dr. Griffin. The "package" consisted of the January 22, 2007 letter from the Integrity Committee to Mr. Johnson; Mr. Johnson's transmittal letter to Dr. Griffin, a copy of the "Policy and Procedures" of the Integrity Committee, a copy of Executive Order 12993, a copy of a March 24, 1989 Memorandum Opinion from the Office of Legal Counsel to the Integrity Committee, and a CD marked "ROI IC 500, Vols I - III, -FOUO-" I asked my Executive Assistant to print all of the documents on the CD and put them in three ring binders. I

made arrangements to meet with Dr. Griffin and discuss how he wanted this handled. He indicated that he wanted the matter reviewed and that he wanted to know the full range of options open to him in light of the Report of Investigation. At some point, on either the 27th or 28th, I discussed with my Deputy, Keith Sefton, the possibility of having a newly hired individual, an experienced attorney who was due to begin working in my office on March 5th, look over the report and provide me her unvarnished opinion. I believed that this was a good option in light of her extensive experience and the fact that, so far as I was aware, she knew nothing about any of the matters or the parties involved. I asked Mr. Sefton to call her, confirm that she knew nothing about the case, and ask her if she could begin working on it at the earliest opportunity in light of the tight deadline that we were facing. She agreed to do so, and Mr. Sefton arranged to deliver a copy of the materials to her. I concurrently reviewed the materials. At the conclusion of her review she provided me her opinion. I arranged a meeting to brief Dr. Griffin, and had her, the newly hired attorney, brief him on her review. At the conclusion of her review, I indicated my full concurrence with her analysis. I then left all of the materials with Dr. Griffin, informed him that under the terms of Executive Order 12993 he was required to certify that he had reviewed the investigation, and that once he had arrived at his course of action we would prepare the transmittal letter back to Mr. Johnson. I believe that it was on Monday, March 12th, that I met with Dr. Griffin and received his direction on what actions he wished to take. We had previously discussed that his actions in his "general supervision" role over the IG were limited, and that several of the proffered options would in fact require the concurrence of the Chairman of the PCIE, Mr. Johnson. I prepared the draft response for Dr. Griffin's letter back to Mr. Johnson after the meeting, then had to go on travel for the remainder of the week. In my absence, the attorney who had reviewed the matter and who briefed Dr. Griffin worked with Mr. Morrell to finalize the March 14th letter transmitted back to Mr. Johnson.

4. Topic 4 that I have been asked to address concerns the "[M]onitoring of Mr. Cobb's actions under the corrective action plan proposed by Administrator Griffin." As indicated in the March 14, 2007 letter from Dr. Griffin, he has directed that Mr. Cobb "...meet with the Deputy Administrator on a bi-monthly basis to discuss his implementation of his individual leadership/management plan and his professional growth with the Executive Coach." I have no role in that monitoring process. The IG Act specifically authorizes that "general supervision" can be by the principal deputy, but cannot be "delegated" further. Of course, there still exist all of the options available to individuals who wish to file complaints against the Inspector General including the Integrity Committee, the EEO process, the Office of Special Counsel, and others. Dr. Griffin has publicly, and privately, stated that he wants an independent Office of Inspector General that is committed to its statutory charter.

5. I have been the General Counsel at NASA since July 26, 2004. My relationship with Mr. Cobb is both professional and amicable: Do we socialize together: no. I have never been to his home, nor he to mine. We are professional colleagues. As I stated to the staff during our three hour meeting, I find him to be a man of integrity, intelligent, focused on doing the best possible job he can, and very independent. And I like that in a person. From my perspective, he understands his role as an Inspector General, carries it

out with conviction and force, and we understand our boundaries very well. I was asked how often I talked with him and the answer is quite simple: every time I see him. We have worked together to establish an Acquisition Integrity Program, and both of us, and our respective staffs, firmly believe that it will pay great dividends to the Agency and to the government. We have also disagreed on the law on occasion, and he has the impediment of being as stubborn and argumentative as I am when we believe that we are correct. We have, on a number of issues, "agreed to disagree."

As I stated to the staff with whom I met on April 27th, I do not think that anybody wishes more than I do that a recording of that meeting could be provided to this body. Your staff has apparently received allegations of what was said and done at that meeting that range from the patently false to the ridiculous. If a video or audio recording of the event existed, it would clearly demonstrate what actually occurred and we would not, perhaps, be having this hearing. There were, I believe, somewhere between 120 and 200 people, mostly OIG staff members including investigators, who were present at this meeting. To in any way imply that I destroyed the copies of the recordings in an attempt to destroy evidence of the substantive content of the meeting beggars belief. I recognize that memories and perceptions differ. That said, some of the allegations contained in the April 25th letter, and which were related to me in my meeting with the staffers on April 27th, were so false as to clearly imply an intent to mislead on the part of those who provided them.

This latter point leads me to comment on a subject that is of significant and growing concern to me. I believe that "facts" matter, and that before any individual, organization or agency is pilloried, before anyone's reputation is destroyed publicly or privately, there is an ethical obligation to vigorously ascertain the truth, the factual underpinnings, of each and every allegation. I come here today with the firm conviction that such is the purpose of this hearing. My sense in this matter is that there has been, on the part of some of the people involved in this matter, a certain "sentence first, verdict later" mindset. My sense is that allegations have been slipped under the door or thrown over the transom, often anonymously or with the request of anonymity, and in all-too-many cases they are immediately given a mantle of "credibility" because they originate from someone "familiar with the issues" and therefore "must be true." In the best of all possible worlds some level of skepticism, some kernel of "doubt," some due diligence in ascertaining the facts must come into play. In the best of all possible worlds individuals making such allegations would be required to swear to the truth of what they are saying, and would be made aware of the consequences of any false statement. In the best of all possible worlds, judgment would be withheld, and inflammatory, inaccurate public releases and commentary would be curtailed until all allegations had undergone the scrutiny of rigorous analysis. While I recognize that such a "perfect world" may not be attainable, I nonetheless believe that each of us should do our part to come as close to it as possible.

Finally, I want to publicly apologize to everyone at NASA who has had to expend time and effort trying to find whether a copy of this recording still exists. I want to particularly apologize to Dr. Griffin and the leadership at NASA. This agency has

important work to do for this nation and its people, work that is critical to our national security and our economic future, and distractions like this are not helpful. I have spent my professional life trying to resolve problems and trying to make things better. Despite my honest and considered efforts in the matter of the destruction of the DVDs, I regret that I have failed to do so in this regard.

National Aeronautics and
Space Administration
Office of the Administrator
Washington, DC 20546-0001



March 30, 2007

TO: Robert W. Cobb, Inspector General
FROM: Administrator
SUBJECT: Letter of Instruction for Robert W. Cobb, Inspector General

This letter is provided to you to address the matters raised in the Integrity Committee's (IC) Report of Investigation, Case Number 500, which was transmitted to me for action.

As you are aware, the subject report consisted of a summary of the allegations against you as well as the verbatim transcript of your interviews conducted by the Department of Housing and Urban Development (HUD) Office of Inspector General (OIG) investigators under the direction of the Chairman of the IC. Pursuant to the requirements of Executive Order 12993, I have reviewed that report.

The conclusion of the IC was that you had, with respect to some employees, created an "abusive work environment," and that in so doing you had engaged in an "abuse of authority." Additionally, the IC concluded that with respect to the allegations involving a "failure to report" the compromise of NASA TAA files and your refusal to issue a joint "Crime Stoppers Report" with the Texas Rangers in a matter involving the possible theft of a ring, you had created an "appearance of lack of independence outside the quality standards expected of an IG. I have carefully considered the conclusions of the IC in my review of the ROI.

The Inspector General Act of 1978, as amended, provides that "Each Inspector General shall report to and be under the general supervision of the head of the establishment involved" In light of my review of the record, and the instruction I received in the transmittal letter from the Chairman of the PCIE/ECIE, Mr. Clay Johnson, I am taking the following actions in my "general supervision" capacity:

- I have advised you that I believe you would benefit both from courses in leadership and management as well as from the services of an Executive Coach. To that end, and with the concurrence of the Chairperson of the PCIE/ECIE, I will arrange for your attendance, at the earliest possible time, at an appropriate resident course at the Federal Executive Institute (FEI) where you will be assisted in developing an individual leadership and management training plan. Additionally, I will, again with the concurrence of the Chairperson of the

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PCIE/ECIE, arrange for the services of an Executive Coach to assist you over the next year to further enhance your leadership and management skills.

- I will require, again with the concurrence of the Chairperson of the PCIE/ECIE, that you attend at least one management/leadership resident course at HQT, or an equivalent facility, each year that you remain under my general supervision.
- I direct that you meet with the Deputy Administrator on a bi-monthly basis to discuss both your implementation of your individual leadership/management plan and your professional growth with the Executive Coach.
- You and I will meet with the OIG staff at the earliest available opportunity. I will make clear that I expect and support a strong OIG which continues to be dedicated to identifying fraud, waste, and abuse, and that I am committed to leading an Agency where full and frank discussions are not just tolerated but are expected, condoned, and encouraged in a climate without fear of retribution, and one in which the full panoply of protections exists for "whistleblowers."

I trust that you will both understand and appreciate the actions that are being taken, and that you will benefit professionally from these actions.

Michael D. Griffin

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Congress of the United States
Washington, DC 20515

April 2, 2007

President George W. Bush
The White House
1600 Pennsylvania Ave., N.W.
Washington, D.C. 20500

Dear President Bush:

Late last week, the undersigned were provided with the report of the Integrity Committee (IC) of the President's Council on Integrity and Efficiency (PCIE) relating to its investigation of Robert Cobb, the inspector general of the National Aeronautics and Space Administration (NASA). The Integrity Committee found that Mr. Cobb had abused his authority by creating a hostile and abusive work environment and had taken actions that gave the appearance of a lack of independence from the NASA management in violation of the *Quality Standards for Federal Office of Inspector General* established by the PCIE.

The Integrity Committee took the unprecedented step of stating that, "All members of the committee further believed that disciplinary action up to and including removal could be appropriate" (emphasis added).¹

After reviewing the report and the voluminous supporting documentation, it is our position that Mr. Cobb must be removed for the good of NASA and the nation, and we are requesting that you do so. The Record of Investigation demonstrated that the office environment has seriously deteriorated and is affecting the staff's ability to conduct audits and investigations for fear of verbal abuse and ridicule. Experienced, skilled employees appear to have become more interested in avoiding Mr. Cobb's anger than in doing credible work. The IC viewed Mr. Cobb's conduct as "inconsistent with the high standards of conduct expected of senior executives." It was more than an "aggressive management style or a way of expressing dissatisfaction with employee performance," but "arbitrary and capricious conduct, which affected the rights of senior employees to a non-hostile and abusive workplace."² Given that the Office of the NASA Inspector General has important roles in assuring the safety of the Space Shuttle program and other high-risk national assets, this is an untenable situation that cannot be allowed to continue.

¹ Letter dated March 20, 2007, from James H. Burrus, Jr., IC Chair, to Clay Johnson III.

² January 22, 2007 Report of the Integrity Committee to Clay Johnson III, Chairman, PCIE, p. 2.

The IC also found that numerous incidents that, as a group, were sufficient to create an "appearance of a lack of independence" problem, and noted that it was the "responsibility of the IG to consider how the combined affect [sic] of his interaction with the Agency head might cloud or be perceived to cloud his independence." While the *Quality Standards* do not have the status of law, rule or regulation, "the IC views these standards as a benchmark for IG performance and applicable to all IGs through EO 12805, *Integrity and Efficiency in Federal Programs*."³

During the IC's investigation, Mr. Cobb was allowed to respond to each allegation. He did not deny any of them, but gave excuses for each of them. In response to the allegations of creating a hostile work environment by using profanity, threats and intimidation against his staff, he said he was "passionate when people are insubordinate to my face." In his deposition, Mr. Cobb – who had no auditing nor investigative experience prior to assuming his position – frequently described his staff as producing "deplorable and relatively meaningless" work that he personally had to rewrite and as having faulty understanding of the relevant laws. He determined that "anyone could do audits" and replaced experienced auditors with technical people who could not audit according to the required government standards. These "reorganizations" seriously delayed the production of audits.

Additionally, without both an appearance of and actual independence, neither his staff nor NASA employees will be able to trust Mr. Cobb. Trust is an essential element for any IG because he will not receive information if the perception is that he cannot be trusted. Mr. Cobb is clearly outside of the acceptable norms for this critically important job. The work done by the Justice Department's inspector general and the inspector general for Iraq reconstruction demonstrate the need for strong inspectors general who can be trusted as credible critics – not apologists – for the agencies they oversee. In contrast, the situation in the NASA IG office deteriorated so far that audits are being delayed and rewritten to the point at which they are meaningless or not timely. Mr. Cobb personally rewrote audits; in one case a review took 14 months and 24 revisions and resulted in a 1-1/4 page report. Reports written with recommendations ended up with no recommendations. Sometimes the audit staff just gave up.

Cobb deliberately replaced experienced auditors with "technical" people because he believed the auditors couldn't communicate. The problem was that the technical people couldn't audit to government standards, and their work had to be redone – which caused additional delays. His view was that "you don't need auditors to do audits," and he took steps to force out senior GS-15 auditors with a buy-out. The result has been that the technical people he brought in are now working under auditors so that they can produce acceptable audits.

Cobb stated to the investigators that "almost every audit and administrative report that came into my office throughout the first couple of years, they were all substantially revised and amended to be consistent with the law." As a result, reports were delayed or significantly revised based on Cobb's personal view of the law. There is no evidence that he was correct.

The reports from the Inspector General have often been important to the work of our Committees in its oversight of NASA. The evidence presented in the IC report demonstrates that

³ Ibid., pp. 8-9.

the Committees and the public are not receiving useful assistance from one of their primary tools.

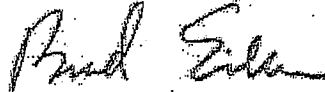
Given the compelling weight of the evidence compiled by the Integrity Committee, we believe that the NASA inspector general can no longer be effective in his office and should be immediately replaced.

Your prompt attention to this letter is greatly appreciated.

Sincerely,



SENATOR BILL NELSON
Chairman
Subcommittee on Space,
Aeronautics and Related Matters
Committee on Commerce, Science and
Transportation



REPRESENTATIVE BRAD MILLER
Chairman
Subcommittee on Investigations and
Oversight
House Committee on Science and
Technology

Wholley, Michael C. (HQ-MA000)

From: Wholley, Michael C. (HQ-MA000)
Sent: Wednesday, March 14, 2007 8:11 AM
To: Morrell, Paul (HQ-AA000)
Subject: Decision

Paul,
I wasn't very articulate in our discussion last night and I apologize. Truth is, I am really troubled by the proffered "addition" to the letter. Let me try to set out my reasons. First, I don't see the value or utility of adopting the "suggestion" and I see a lot of "downside" for Mike. Who will be invited to this meeting? Only the HQ IG staff? The entire 200 staff from across the Agency? Will Moose be there? Will Mike's words look/sound like he has taken Moose to the woodshed, thereby lending more credibility to both the complaints and the complainers, as well as the ROI than they deserve. If Mike, on the other hand, goes too far (and this is an "eye of the beholder" issue) in his comments in support of Moose, then he has opened himself up to criticism and has become the focus of the controversy. From my perspective, Mike should stick with the original plan. He will have more than adequate opportunities over the next few weeks to tell the ENTIRE NASA community how he has resolved this while, appropriately, not going into the "detail" of a personnel matter. I also believe there is great value in being able to answer "No" if asked whether any external input(s) were incorporated into his selected course of corrective action. Mike will have the chance to answer questions on this matter at Hearings, at the next "Administrator's Update" and at other times, and we should have a set of suggested answers that are responsive and carefully crafted. To call a "special meeting" of the IG staff and not be prepared to back Moose in a strong way will undercut Moose, grant more credibility to the complaints and the investigation that is warranted, and be, I believe, counterproductive. On the other hand, to call a special meeting and praise Moose in front of the selected "group" will risk Mike becoming the center of the controversy. As I said last night, I see no "upside" for Mike in the proposed COA, and I do see a downside. Mike will have plenty of opportunities over the next several weeks to demonstrate that he has taken appropriate steps, that he recognizes the importance of a solid, independent, OIG and that he considers the matter closed. I would hate for the focus of the "firestorm" to shift from the "report" and the lengthy process that it consumed to Mike! If the proposed course is being suggested in order to show support for Moose, I believe there are better, and less potentially dangerous ways, to do that. I am up; call me on 202 465 6954 if you want. I know this is not a "legal" matter, but I am concerned about how this will play out if the suggested COA is adopted.
Mike

Michael C. Wholley
NASA General Counsel
300 E Street, SW
Washington, D.C. 20546-0001

TEL: 202-358-2450

FAX: 202-358-2741

Donovan, Catherine (HQ-MA000)

From: Wholley, Michael C. (HQ-MA000)
Sent: Wednesday, April 04, 2007 5:04 PM
To: jrosen@omb.eop.gov
Subject: Hearings ??

Jeff,

As this entire issue continues to spin up to "escape velocity" (if not already there) and we see the selective release of "documents" on a daily basis from Senator Nelson's office (and others on the House subcommittee on I&O), I cannot but wonder where the adult leadership is located for these staffers.

Without putting too fine a point on it, I truly believe that they have now consumed so much of the kool aid that they are intoxicated. There is an analogy about trying to make "chicken salad" out of "chicken something-or-other" that seems increasingly germane.

That said, the reason for this e-mail is to arrange a meeting between the two of us, and anyone else you care to bring from your staff who has been involved in vetting this investigation, BEFORE there is any "hearing" so that we can soberly consider the approach to be taken. As I have indicated to you in the past, I have some quite serious concerns about both the substantive and the procedural parts of the "investigation" and the forensic rigor that the IC brought (and/or failed to bring) to their evaluation of what was put in front of them by the HUD OIG report.

I am sure that you can appreciate that I am not particularly keen on seeing two entities of the Executive Branch at odds in a hearing before the Legislative Branch. Let me know your availability this week and next if you are interested in meeting.

Here to serve,

Mike

Michael C. Wholley

NASA General Counsel

300 E Street, SW

Washington, DC 20546

202.358.2450; FAX: 202.358.2741

Michael.C.Wholley@nasa.gov

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