

**Congress of the United States**  
**Washington, DC 20515**

March 7, 2012

Todd J. Zinser  
Inspector General  
U.S. Department of Commerce  
Office of Inspector General  
1401 Constitution Avenue N.W.  
Washington, DC 20230

Charles K. Edwards  
Acting Inspector General  
U.S. Department Of Homeland Security  
DHS Office of Inspector General  
245 Murray Drive, SW, Building 410  
Washington, DC 20528

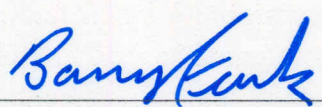
Dear Inspector General Zinser and Acting Inspector General Edwards:

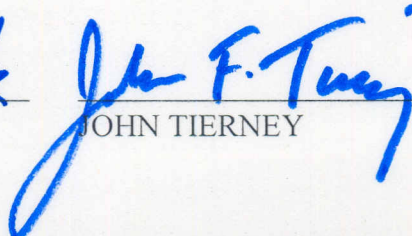
We are writing to express concern over a document that was recently obtained by a media source from the Commerce Department via a Freedom of Information Act (FOIA) request. This document summarizes a meeting that occurred between the Coast Guard's chief administrative law judge who oversaw the court system for National Oceanic and Atmospheric Administration (NOAA) Fisheries and Department of Commerce Special Investigator Charles B. Swartwood III. We have attached this document for your review, and ask that you thoroughly evaluate it, including determining how this meeting came to take place, who authorized it, and conducting any warranted follow-up actions.

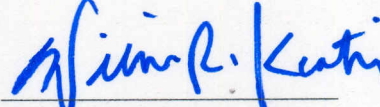
As you aware, there has been a high degree of mistrust between the NOAA fisheries, the U.S. Coast Guard Administrative Law Judge system, and the New England fishing industry. The Department of Commerce announced last year it would no longer utilize the Coast Guard administrative law judges (ALJs), and will refer new law enforcement cases to ALJs from the Environmental Protection Agency. While new cases are being assigned to the EPA ALJs, the Coast Guard ALJs are still adjudicating cases that were assigned prior to the Department of Commerce's agreement with the EPA. The Federal government's ability to successfully manage fisheries requires the active involvement and cooperation of the industry. Any appearance of judicial conflict would damage an already fragile relationship between the government and fisherman.

Therefore, we request that you carefully review the attached document. Thank you for your attention on this critical matter, and we look forward to your reply.

Sincerely,

  
BARNEY FRANK

  
JOHN TIERNEY

  
BILL KEATING

Re: Notes for meeting with Chief ALJ Hon. Joseph Ingolia  
Date: 11/15/2011 (11:45am-12:45pm)  
Location: Jams, One Beacon Street, Suite 2300, Boston, MA 02108  
Present: Megan Allison; ALJ George Jordan; Charles B. Swartwood; Tony K. Lu

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Ingolia: history – report came out – Secretary took action – came to the knowledge of USCG before May 17 – Coast Guard judges in disbelief – started to work to see what needed to be straightened out – Secretary’s directive discontinuing was just that – didn’t say anything about cases USCG already has – NOAA interested contacted – judge’s view was that if we’re guilty of that stuff, should be trying cases – still try NOAA cases, BIS, DHS component cases – we started as USCG judges, we do a lot of work for TSA/customs

USCG started to do things – we met with NOAA – we will do pending cases if you will agree to put out press release that we are not bias – they agreed to do that – after that, we had a meeting in time with Cam Kerry and Geovette Washington – Ivan Fong, DHS and Admiral Kenny, Meghan and I – purpose was to try and work something out – result was that Commerce would put out a similar press release along the line that NOAA would – NOAA put out release – Commerce approved – at that meeting, we asked to talk to CBS –

We’re here to talk about – not trying to place blame or work – recognize report was result of investigation/testimony from people involved and lawyers – we don’t know what they said, but you do – where we are is that we know the report is mistaken with respect to Lobster Inc. and the role of Judge McKenna

CBS: how so

Ingolia: first, Kuala Lumpur involved – go into first part that Judge McKenna didn’t follow District Court decision – we think that was wrong – he put out all kinds of papers about both sides to figure out what to do with penalty – ~~no body redid the two violations~~ found by Judges who heard the case (D. Ct and ALJ) – when you get into Kuala Lumpur, actually I was going on that trip, I asked McKenna to go –

CBS: I’ve seen timeline

Ingolia: nothing to do with McKenna got anything from trip – George went with him – director of administration – have them both here because they know more – other areas if you want us to go into detail – we ask that the report – allow to make suggestion – I don’t think anybody has to be damaged by this – you took the testimony about facts, you carried out your duties with respect to what you were asked to do – used testimony – that testimony is wrong – you can come out with something, reevaluate with new information, and that with respect to Coast Guard ALJ, you say what you want by way of correction – if that happens, it aligns everything – Commerce can come out with respect to changes

made, Special Master's Report -- want to make sure that judges agreement discontinued because of what he said -- he wanted to make a change, comport with regulated community -- he has an absolute right to say he didn't want USCG anymore -- he didn't have a right to do it on the basis of what he did it on -- we can go into other areas and furnish documents

NOAA comes out -- they've already hired new judges -- don't know if you're aware -- e started 17 years ago not even realizing at the time that what NOAA does is driven by what the USCG does in terms of boarding vessels and OAA assesses penalties -- thought it would be a good idea to do cases because we know in and out -- OPM rule of if you want ALJ, you borrow ALJ -- then they go to someone else -- NOAA thought so much about that there was a law passed that NOAA would hire coast guard ALJ to do cases -- if we're in way of someone trying to do something about OAA enforcement -- we don't really want to do it, but we're not going to oppose in any way -- secretary had the authority -- the agreement provides that it can be discontinued if either or both parties agreed, filed 30 days notice -- it would have been over -- that he didn't is the problem we have -- NOAA is already using EPA judges as of September 8, 2011 and we stopped doing the new cases -- even after what secretary said, NOAA gave us 3-4 more cases -- that's basically where we are --

We have thoughts from McKenna's case -- idea that whatever transpired gave rise to the fact that he was bias/might have been bias/lend credence of bias -- that rankled other judges -- some judges haven't even tried cases -- how feel!

CBS: we have a disagreement with respect to Lobsters Inc. -- legal and factual -- Judge McKenna has issued statement, he has a different timeline -- his timeline seems to indicate that he did not know he was going on this trip prior to his issuing the decision -- that agreement was entered into by Lobsters, but not yet by NOAA -- it was not an agreement because no conclusion -- he has stated sufficiently his reasons why I may have been in error -- but I stand by everything said in the report -- I talked to 75 people, and another 40-50 people -- they're all saying the same thing --

They're saying they could not get a fair shot before an LJ -- lawyers are telling them not to go, you're going to lose --

Ingolia: you're talking to people wanting rebate and lawyers wanting those cases -- not going to get a deal going forward -- take Yacubian -- they are screaming about Yacubian for settlement -- case came to them where D. Ct found two valid charges and third wasn't -- that went back to McKenna --

CBS: this is where we have disagreement -- word was 'vacated' -- remanded to NOAA and not to ALJ -- and for NOAA to reassess case in accordance with decision by Gorton and Woodlock -- that is my position -- I am not backing off that --

Jordan: McKenna was not the judge in Lobsters Inc. -- that was judge Blayden -- Judge Blayden -- Gorton affirmed two findings and ordered reassessed -- it was sent back to NOAA, NOAA sent back to our docketing center for reassignment on May 9, McKenna then issued an order related to filings made by party -- his order only indicates to in effect start a schedule to start an equivalent of PPIP -- what was government position/intent for sanctions/what sanctions -- after government did that, issued order to

respond, and then we had a settlement -- in NOAA cases, I do not approve settlements -- only notice from parties to remove because of settlement -- in USCG cases, I assess settlements -- approve or reject -- in NOAA, you can settle cases after decision as long not before administrator-- McKenna had no part of settlement

Ingolia: the order he put out in case about him recusing himself -- Peter Pan -- don't believe that all of the judges agreed with the tone and some .... -- don't want you to feel that was result of decision by judges

CBS: appeared before all forums -- haven't tried in USCG ALI's -- I don't know any judges -- didn't come to this thing with preconceived ideas of ALIS -- dealt with ALIS as a judge -- SSA -- they did a good job -- I still don't have any preconceived ideas -- I am reporting what I was told -- you pointed out only complainers I talked to -- that's obvious -- to this day, I don't have any strong feelings about your organization one way or another

Ingolia: you cannot remove judge because people lost before judge -- because perception they will not win

CBS: there were specific reasons why they were getting short shrift -- it's a perception --

Allison: you have a perception -- did you look at any statistical -- we researched it -- we looked at all of our published cases -- these cases went to full hearing -- we looked at reduction of civil penalties and sanctions -- rather significant -- we pulled record on Westlaw -- doesn't show bias -- when we have a report about bias -- did you see McKenna's order in Lobster's Inc -- that's what puzzles us in program because McKenna refers to case law -- he specifically asked parties to look at all factors -- this is a thorough order on remand --

CBS; I am not involved in case

Allison: cases can be reopened with changes in policy

CBS: all it was was a recommendation

Jordan: what is the process -- where do we seek redress from what we see as clear errors of fact

CBS; secretary said that there were couple of recommendations that they did not agree with

Ingolia: would have loved that you do additional investigation --

Allison: statistics in a summary -- I can give it to you in an excel spreadsheet --

Ingolia: what about final tally where it states

Allison: we went to westlaw/lexus and pulled published decisions -- this report got to public and we owe public truth -- we feel parts of report could be corrected -- did you see this order from McKenna -- you ignored remand order -- to you this is ignoring federal judges order -- so when Judge Gorton said that ...

CBS: he was very clear -- got McKenna to issue order --

Allison: I think there is some -- when NOAA gets case file and it gets back to docketing center

CBS: I have issued a report, concluded certain things for Lobster's Inc. --

Allison: not asking you to change conclusion -- just records to show that we are not biased -- that we have done our job

CBS: you understand I am involved in another investigation -- double --

Allison: you've interviewed everyone but the judges -- we have no due process --

CBS: what I've report is what I've been told -- investigated judges in SJC -- interviewed no other judges

Ingolia: do you think Secretary's delegation to look at then why are the judges involved in the report?

CBS: looking at enforcement action taken -- one case involved McKenna and I reported what I found

Ingolia: let's assume that the facts are exactly right -- you think that those facts lend credence to idea that all the judges are biased --

CBS: that doesn't say that -- I said there is a perception -- there is no one out there that said there was a fair shot --

Ingolia: when you said nobody, did you interview other people? On this matter? You interviewed people in these cases...

CBS: in the cases, I interviewed people from NOAA

Ingolia: when guy says settle or go before "my judge"

CBS: what you don't know is what happened before the cases appeared before ALJ -- you don't know what was said between lawyers and parties -- I am beginning to get an impression that you were used by certain enforcement personnel --

Ingolia: we were used -- if they were running around --

CBS: I think you were being used by NOAA personnel -- give an example: 75k assessed penalty, 6m permit sanction -- poor fishermen -- calls up lawyer, we can settle this for 25k or 35k, otherwise it's going to be the 75 -- that's what is going on before the judge- that's how it's going to come out -- some of these lawyers figured out that is what is going to happen

Ingolia: when we started NOAA cases, saw settlements in 15<sup>th</sup> scheduled, settled at 13<sup>th</sup> -- what I am saying is that Agency is not United States -- our decisions are within Agency -- I came from revenue and tax -- my feeling is 10 days before trial, you settle case or it's going to trial -- if not going, it would be called -- coast guard cases we have authority to change, not in NOAA cases though -- my feeling, lawyer told me that we liked it to go to last minute -- might get a better settlement

CBS: I've settled cases then while jury was out

Ingolia: agency is supposed to be fair to people

(b)(5)

CBS: I am not going back to first report – the secretary can do whatever – I won't do it

Allison: even if .... To public

Ingolia: frankly, I don't think the Secretary knew what he was doing when he discontinued agreement – when he related it to your report, if he had the advice of someone from Commerce – even NOAA, that would have been fine - how you do this – you want my opinion - the lawyers – some lawyers, as far back as 2001, have been writing letters to Senator Kennedy about what's wrong with the unfair laws to fishermen – I think it is way too cumbersome of law, penalties are too high – on the presumption – when we were doing it, we had that impediment – we just wanted...judges wanted to get off hook that they were biased – give you an example – want everyone satisfied – nobody is hurt, including you, and somebody says look at this, we're all being charged with bias – I said to them, no you're not, you're being charged with perception of bias arising from McKenna's case

CBS: not just McKenna's case

Ingolia: as I said, we had a discussion – it came down to perception – trying to convince....word they hung up on was "lends credence"

CBS: "to perception

Ingolia: their statement was not perception, was lends credence, it means truth – we just want to go about our business – as I told you, I have copies of NOAA's press release –

CBS: NOAA is one party; Secretary of Commerce is another

Allison: [provides copy of press release] – copy of you were saying there was a MOA

CBS:

Ingolia: MOA Agreement has statement

Allison: these documents were cleared through Geovette and Monica – this is not just NOAA

Ingolia: what is your relationship to Commerce – is this report separate from Commerce

CBS: independent contractor –

Allison: independent contractor?

CBS: special master appointed by secretary of commerce – hired me through Jams – pay jams and jams pays me – I am not an employee, second, I have no relationship whatsoever with anyone at Commerce, including Cam Kerry – first time I met him was the day I was appointed – he told me we met when I was president of bar association – have no professional relationship – to my knowledge, never appeared, never met Geovette – never voted John Kerry – registered republican – never heard of Secretary Locke until he appointed me – I have no relationship

Allison: going through Jams website – going through sitting judge, what judge appointed?

CBS: appointed as special master by judge through Jams – secretary of commerce has right to appoint whoever or whatever – don't have to be a judge to do whatever

Ingolia: amendment to agreement – contrary to idea that it was discontinued at some middle of agreement – secretary said he wanted agreement discontinued – wish it would have just happened that way

CBS: I can read it –

Allison: it was cleared through commerce- know Monica Medena?

CBS: don't know who she is

Ingolia: she is undersecretary – I am still trying to do same thing – working with judges – you get it corrected or not – and do whatever – I'm trying to avoid that – I am going to Commerce- you have nothing to do with Commerce – NOAA, coastguard, DHS – Commerce, why don't you put something out – [agreement] – that's not commerce – want Commerce to say that new Secretary to make clear that discontinuance was ... so it ends.

Jordan: one point from before – the issue of Magnuson Act – regulations by NOAA – preponderance of evidence

CBS: want you to understand – difficult to understand – we know Secretary has discretion to remit penalties – he has decided to exercise decision in certain cases – 3) he has appointed me as his agent to review cases and to make recommendations – he has given me standard review – in 9/23/2010 secretarial decision memorandum – I look to that to make decisions

Jordan: clear and convincing – perception is never clear and convincing

CBS: did not make decision on perception

Jordan: secretary did not act on recommendation for more thorough review

Ingolia: secretary said saw report, wants thorough investigation – that would be okay – want it out of [judges] – want to easily say forget second report – ...

(b) (5)

Jordan:

CBS: in first one, I personally interviewed lawyers/special agents

Jordan: we're looking to get access to statements made

CBS: not going to get them from me – that's privileged material – I am not releasing them – privileged information

Ingolia: might be right – Secretary's got it...

CBS: I got it

Ingolia: somebody can make FOIA request –

CBS: headline, then everyone can think about retribution

Ingolia: we can't defend newspaper articles

Ingolia: lawyer – take for example NOAA cases – by law, when I assign NOAA case, it has to be assigned to judge with case in chief – case about fees – I don't have any choice – the lawyers come in, 2 of them, they filed it, they don't know what the law is – within less than 24 hours – that material, argument they made and what judges made and fact it wasn't reassigned because of what secretary said – they were



arguing...they didn't know what the law said, yet, that found its way into the article, Congressman Frank, Tierney, they came out with lawyer to somebody – whoever they are, they are working behind the scenes – that is what gets me – I am sure everyone of their clients said not fair deal – won't take much to convince client that he gets a fair deal if he loses – it drives me crazy – if you look at Yacubian – if they had let that case go, the max is 210k – they settled for 400k+ - you and I would agree – they settled for something [high] – there is something smelly about that – I just think that in the testimony they gave you – it's a concerted effort –

Ingolia: Gloucester Times, Saving Seafoods –

CBS: Gaines credibility is nothing

Ingolia: they get stuff from lawyer, and they write article – that same guy is coming back and telling you facts – it drives me nuts

CBS: this isn't one or two lawyers – some of them have offices here –

Ingolia: these guys are not active – what I'm going to do – what comes out of judges – question you were asked, "how come you're a special master" – I don't know if that is true or not – don't want to deal with it – feeling about the delegation is that you were charged – in your report, to look at those guys running enforcement/dealing with lawyers – I get your statement and if it relates to judges, I'm going to look at what judge has done – if they're telling me what judge is done, for example, Kuala Lumpur, that is clearly wrong – I bet you one of those guys came out with facts about Kuala Lumpur – we know a FOIA request was made by the trip –

CBS: IG did it

Ingolia: facts given that way is a shame – caused all kinds of trouble – judges trying to protect from bias – judge wouldn't follow affidavit – Bivens case – what worries me is that Yacubian comes around and says that we've gotten so far and we're going to finish it off...that's Bivens – don't want judges accused of bias and you can't defend yourself – ALJ filed false affidavit – 5<sup>th</sup> circuit said we don't have jurisdiction