



Office of the Inspector General
United States Department of Justice

Statement of Michael E. Horowitz
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before the

Senate Committee on Appropriations
Subcommittee on Commerce, Justice, Science
and Related Agencies

concerning

The Department of Justice's
Fiscal Year 2015 Budget Request

April 3, 2014

Chairwoman Mikulski, Senator Shelby, and Members of the Subcommittee:

Thank you for inviting me to testify at today's hearing on the Department of Justice's (Department or DOJ) fiscal year (FY) 2015 budget request. At the outset, I want to thank the Subcommittee for its continued strong support of our work. Perhaps the biggest challenge I have had in my two years as Inspector General has been trying to manage the staffing and budget for our 400-plus person agency as we faced, seemingly every few months, another budget crisis, with ever-present threats of furloughs and shutdowns. It would be hard for me to overstate the importance of having an appropriated budget for this current fiscal year that we can now plan around. Our current budget will enable us to rebuild our staff, which has shrunk by nearly 10% over the past two years, thereby enhancing our ability to conduct oversight of the Department. Our FY 2015 budget request is relatively straightforward – we are seeking funding at our current base level of \$86.4 million, plus \$2.2 million in adjustments to base to cover, for example, rent increases and other inflationary costs.

Having a budget, and removing the furlough and shutdown threats, also provides a much-deserved boost to morale among Office of the Inspector General (OIG) employees, who have remained admirably dedicated to the office's mission despite the significant budget uncertainty of the past few years. As we prepare later this month to mark the 25th anniversary of our office's creation in April 1989, I am confident that we are an organization capable of conducting the high quality, independent oversight that Congress mandated so many years ago.

In my testimony today, I would like to highlight some examples of our recent and ongoing oversight work, discuss two significant challenges facing the Department that will impact its FY 2015 budget, and briefly comment on two legislative initiatives that I believe would materially enhance the OIG's ability to conduct timely and independent oversight.

Recent DOJ OIG Oversight of the Department's Operations

Our office has issued numerous reports since my appearance before the Subcommittee last June that have important implications for the Department's budget, and that promote transparency, increase efficiency, and enhance our national security. The findings from four reports that we issued in just the last month exemplify these results. First, our audit of the Department's efforts to address mortgage fraud identified examples of DOJ-led efforts to prioritize the investigation and prosecution of mortgage fraud cases, but also found that, despite having been appropriated significant funding for the purpose, DOJ and the Federal Bureau of Investigation (FBI) did not uniformly ensure that mortgage fraud was prioritized at a level commensurate with its public statements. The OIG also found significant deficiencies in DOJ's and the FBI's ability to report accurately on its mortgage fraud efforts. Second, our report examining the operations of the Organized Crime Drug Enforcement Task Forces (OCDETF) Fusion Center (OFC) found deficiencies in the OFC's operations that could limit its contribution to the OCDETF Program's effectiveness in dismantling significant drug trafficking and

money laundering organizations. We also found that OFC management took actions during our review that created difficulties for the OIG in obtaining information from OFC employees, and that there were reasonable grounds to believe that two OFC employees who met with us to describe concerns they had about the OFC's operations were subsequently subjected to adverse retaliatory personnel actions. Third, our follow-up report on the FBI's management of terrorist watchlist nominations found that the FBI's time requirements for the submission of watchlist actions could be strengthened and identified weaknesses in the database used by the FBI to submit, monitor, and track non-investigative subject nominations. Finally, our report on the Federal Bureau of Prisons' (BOP) efforts to improve acquisition through strategic sourcing found that while the BOP had established national contracts and blanket purchase agreements, it had not established a program to implement and oversee the General Services Administration's (GSA) Federal Strategic Sourcing Initiative or other federal strategic sourcing initiatives, and thus may be missing an opportunity for greater cost savings.

Reviews completed at the end of the last fiscal year were similarly important. In September, we issued a report on the Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF) income-generating undercover operations in which we found that ATF did not properly authorize, manage, or monitor these investigations, misused their proceeds, and failed to properly account for 2.1 million cartons of cigarettes that were associated with these investigations, the retail value of which was more than \$127 million. Also in September, we issued an interim report on the Department's use and support of unmanned aircraft systems (UAS), often referred to as "drones," in which we found that the technological capabilities of drones – such as their ability to fly for extended periods of time and maneuver effectively yet covertly around residences – and the current, uncoordinated approach of Department components to using UAS may merit the Department developing consistent UAS policies to guide their use. Notably, that report also found that two of the Department's grantmaking components had failed to require award recipients to report specific data necessary to measure the success of UAS testing, or to share the results of their programs with the Department.

In addition, we continue to conduct extensive oversight of the Department's efforts to combat significant crime issues, such as cyber security, and its national security initiatives. For example, we have initiated a review of the FBI's implementation of its Next Generation Cyber Initiative and a review of the FBI's Regional Computer Forensic Laboratories, among two of the Department's most important efforts to respond to the serious, rapidly evolving threat posed by cyber criminals. On national security issues, we are reviewing, with three other Inspectors General, the U.S. government's handling of intelligence information leading up to the Boston Marathon Bombings. This review is examining the information available to the U.S. government before the bombings and the information-sharing protocols and procedures followed between and among the intelligence and law enforcement agencies. We also are continuing our reviews of the FBI's use of National Security Letters (NSL), requests for business records under Section 215 of the *Foreign Intelligence Surveillance Act* (FISA), the

Department's use of pen register and trap-and-trace devices under FISA, and the Department's use of the material witness warrant statute, 18 U.S.C. § 3144. We are also continuing our review of the Federal Witness Security Program and will evaluate the Department's progress in implementing corrective measures in response to the recommendations contained in the interim report, which we discussed during my appearance before the Subcommittee last June.

In addition, our Investigations Division's case load continues unabated: during FY 2013, it received more than 12,000 complaints, had dozens of arrests and convictions resulting from corruption and fraud cases, and investigated allegations that resulted in more than 250 administrative actions against Department employees.

Finally, before turning to our assessment of the challenges facing the Department, I would like to give you a brief update on our efforts to ensure that allegations against whistleblowers are reported, investigated, and handled appropriately. Among other initiatives, last year we developed an education program on whistleblower rights and protections for our employees, posted informational posters at our offices, and created a section on our public website containing information about whistleblower rights for employees throughout the Department. I am proud to report that we were recognized for our efforts last year with certification from the Office of Special Counsel under 5 USC § 2302(c). Additionally, we continue to lead a working group of federal Whistleblower Ombudspersons that we helped launch through the Council of Inspectors General on Integrity and Efficiency (CIGIE). I will continue to increase awareness among my staff and provide the training and reporting mechanisms necessary to foster an open and effective environment for whistleblowers to come forward with information about waste, fraud, abuse, and misconduct within the Department.

Future Work and Top Challenges Facing DOJ

Let me turn now to the issues that we feel represent significant challenges facing the Department of Justice in 2014, and will impact its budget in the coming fiscal year.

In December 2013, we identified the following six major challenges for the Department: Addressing the Crisis in the Federal Prison System; Safeguarding National Security Consistent with Civil Rights and Liberties; Protecting Taxpayer Funds from Mismanagement and Misuse; Enhancing Cybersecurity; Ensuring Effective and Efficient Law Enforcement; and Restoring Confidence in the Integrity, Fairness, and Accountability of the DOJ.

I would like to highlight for the Subcommittee two challenges with potentially significant impacts on the Department's budget, and on its operational efficiency and effectiveness. A detailed discussion of our assessment of each challenge is available in the "Top Challenges" section of our website, <http://www.justice.gov/oig>.

The Crisis in the Federal Prison System Continues

During my testimony before the Subcommittee last year, I discussed at great length the two interrelated crises the Department is facing regarding the federal prison system. The costs of the federal prison system continue to escalate, consuming an ever-larger share of the Department's budget. In an era of flat budgets, the continued growth of the prison system budget poses a threat to the Department's other critical programs – including those designed to protect national security, enforce criminal laws, and defend civil rights. Second, federal prisons are facing a number of important safety and security issues, including, most significantly, that they have been overcrowded for years. Meeting this challenge will require a coordinated, Department-wide approach in which all relevant Department components participate in helping to reduce the costs and crowding in our prison system.

The Department's leadership has acknowledged that rising prison costs threaten the Department's ability to fulfill its mission in other areas. Yet the costs of the federal prison system continue to grow, with no evidence that the cost curve has been broken. For example, even though the Department's discretionary budget increased slightly from FY 2012 to FY 2014, the BOP's budget once again increased at an even faster rate, resulting in the BOP's share of the Department's budget continuing to grow. Moreover, while the number of Department employees has actually decreased since FY 2012, the number of BOP employees has increased during that same time. As a result, the BOP now has over 38,000 employees, or approximately one-third (33 percent) of all the employees at the Department.

To its credit, in the past year the Department has announced several new initiatives to address this issue, such as an initiative to limit the number of defendants charged under statutes carrying mandatory minimum sentences, and the Smart on Crime initiative, which sets out five principles designed to identify reforms to enforce federal laws more fairly and efficiently. Efforts to better align the investigative and prosecutive policies that drive incarceration costs with the Department's current budget situation represent important steps toward addressing rising federal prison costs, but much will depend on the success of their implementation.

The Department must also ensure that it is identifying and addressing the growing challenges that will affect the federal prison budget in coming years. One ongoing challenge is BOP's management of its private prison contracts, which is the subject of an ongoing OIG review. Another such challenge is the increasing number of elderly inmates. From FY 2010 to FY 2013, the population of inmates over the age of 65 in BOP-managed facilities increased by 31 percent, from 2,708 to 3,555, while the population of inmates 30 or younger decreased by 12 percent, from 40,570 to 35,783. This demographic trend has significant budgetary implications for the Department because older inmates have higher medical costs. The National Institute of Corrections has estimated that elderly inmates are roughly two to three times more expensive to incarcerate than their younger counterparts. For example, according to BOP data, in FY 2011, the average cost of incarcerating a prisoner in a

BOP medical referral center was \$57,962 compared with \$28,893 for an inmate in the general population. Moreover, inmate health services costs are rising: BOP data shows that the cost for providing health services to inmates increased from \$677 million in FY 2006 to \$947 million in FY 2011, a 40 percent increase. The OIG is currently reviewing the trends in the BOP's aging inmate population, the impact of incarcerating a growing population of aging inmates, the effect of aging inmates on the BOP's incarceration costs, and the recidivism rate of inmates age 50 and older who were recently released.

Managing the cost of the federal prison system is just part of the Department's challenge; it must also ensure the safety of staff and inmates in federal prison and detention facilities. This task has been made exponentially harder by the prolonged, system-wide overcrowding in BOP's correctional facilities: as of November 2013, the BOP was operating with its facilities at approximately 36 percent over rated capacity, with medium security facilities operating at approximately 45 percent over rated capacity and high security facilities operating at approximately 51 percent over rated capacity.

The growth of the inmate population, along with the Department's tightened budget situation in recent years, has prevented the BOP from reducing its inmate-to-correctional officer ratio, which has remained at approximately 10-to-1 for more than a decade. In comparison, the Congressional Research Service reported that among the five largest state correctional systems in 2005 – California, Texas, New York, Florida, and Georgia – the highest ratio of inmates to correctional officers was just over 6-to-1. And importantly, overcrowding at BOP institutions is not just a problem for the BOP; it also has a significant impact on the U.S. Marshals Service (USMS), which is responsible for housing pre-trial detainees and is projected to detain an average of 62,131 individuals per day in FY 2014, a 15-percent increase since FY 2004. The USMS estimates that the BOP will only be able to house approximately 18 percent of USMS detainees, meaning that the USMS must pay to house the remainder – an average of about 50,000 detainees per day – in approximately 1,100 state, local, or private facilities.

There are several other important safety and security issues at federal prison and detention facilities that the OIG is monitoring carefully. For example, the *Prison Rape Elimination Act of 2003* (PREA) expanded the Department's responsibility to prevent the sexual abuse of inmates in BOP facilities and detainees in the custody of the USMS. The OIG's agents have long been involved in leading investigations of staff on inmate sexual misconduct, resulting in numerous criminal convictions and administrative actions by the BOP and the USMS. PREA also required the Department to issue national standards for preventing, detecting, reducing, and punishing sexual abuse in prison, which it did in May 2012. With national standards in place, the Department must ensure that those standards are being met, which will require careful oversight of BOP, USMS, and federal contract facilities, including residential reentry centers, and an extensive program for compliance auditing. The OIG intends to monitor the Department's efforts to ensure that the national standards are met.

DOJ Must Continue its Efforts to Protect Taxpayer Funds from Mismanagement and Misuse

Avoiding wasteful and ineffective spending is a fundamental responsibility of federal agencies in any budgetary environment, but in the current climate of budget constraints the Department needs to take particular care to ensure that it is operating as efficiently and effectively as possible. The OIG's recent oversight work has demonstrated the challenges facing the Department. In FY 2013 alone, the OIG's reports, including those related to audits performed by independent auditors pursuant to the *Single Audit Act*, identified more than \$35 million in questioned costs and more than \$4 million in taxpayer funds that could be put to better use.

The Department must remain particularly vigilant when taxpayer funds are distributed to third parties, such as grantees and contractors. In part due to the sheer volume of money and the large number of recipients involved, grant funds present a particular risk for mismanagement and misuse: according to the USASpending.gov website, from FY 2009 through FY 2013 the Department awarded approximately \$17 billion in grants to thousands of governmental and non-governmental recipients.

These risks were evident in a recent OIG audit which questioned nearly all of the more than \$23 million in grant funds awarded by the Department to Big Brothers Big Sisters of America (BBBSA), which resulted in the Department's Office of Justice Programs (OJP) deciding to freeze the disbursement of all grant funds to BBBSA. Even so, it is my understanding that BBBSA subsequently submitted an application to the Department of Labor for grant funds and was awarded a grant totaling \$5 million. This situation demonstrates the importance of ensuring that there is appropriate information sharing between grant-making agencies across the federal government.

The Department has reported taking important steps toward improving its management of this vast and diverse grantmaking effort. For example, the Associate Attorney General's Office established a Grants Management Challenges Workgroup that is responsible for developing consistent practices and procedures in a wide variety of grant administration and management areas. In January 2012, the Department issued policy and procedures the workgroup developed to implement the Department-wide high risk grantee designation program, which allows the Department to place additional restrictions on the use of funds it provides to grantees who, for example, are deemed financially unstable or have failed to conform to the terms and conditions of previous awards. The Department should continue to be aggressive in identifying high risk grantees and placing appropriate restrictions on their funds – or halting their funding altogether. It should also use the other tools at its disposal to mitigate the risk of releasing funds to grantees, such as ensuring that grantees have adequate accounting procedures in place to track their use of Department funds and actively seeking suspension and debarment of grantees in appropriate cases, especially where doing so will help to protect grant funds administered by other federal agencies.

Strengthening the Independent Oversight of the DOJ

Providing strong and effective independent oversight over agency operations is at the core of any OIG's mission. The taxpayers rightly expect much from Inspectors General, and it is important that we have the necessary tools to allow us to conduct our significant oversight responsibilities. The Inspector General Act provides us with many of those tools. However, there are several areas where our ability to conduct effective and independent oversight can be strengthened. I would like to highlight for you today two such areas that directly affect the work of the DOJ OIG.

Access to Documents Relevant to OIG Reviews

For any OIG to conduct effective oversight, it must have complete and timely access to all records in the agency's possession that the OIG deems relevant to its review. This is the principle codified in Section 6(a) of the Inspector General Act, which authorizes Inspectors General "to have access to all records, reports, audits, reviews, documents, papers, recommendations or other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities under this Act." This principle is both simple and important, because refusing, restricting, or delaying an OIG's access to documents may lead to incomplete, inaccurate, or significantly delayed findings or recommendations, which in turn may prevent the agency from correcting serious problems in a timely manner.

Most of our audits and reviews are conducted with full and complete cooperation from Department components and with timely production of material. However, there have been occasions when our office has had issues arise with timely access to certain records due to the Department's view that access was limited by other laws. For example, issues arose in the course of our review of Operation Fast and Furious regarding access to grand jury and wiretap information that was directly relevant to our review. Similar issues arose during our ongoing review of the Department's use of Material Witness Warrants. Ultimately, in each instance, the Attorney General or the Deputy Attorney General provided the OIG with permission to receive the materials because they concluded that the two reviews were of assistance to them. The Attorney General and Deputy Attorney General have also made it clear that they will continue to provide the OIG with the necessary authorizations to enable us to obtain records in future reviews, which we of course appreciate. However, requiring an Inspector General to rely on permission from Department leadership in order to review critical documents in the Department's possession impairs the Inspector General's independence and conflicts with the core principles of the Inspector General Act.

We have had similar issues raised regarding our access to some other categories of documents. And I understand from the Inspector General for the Peace Corps that her office has had a similar issue regarding access to records within her agency. Although our office has not yet had an instance where materials were ultimately withheld from us that were necessary to complete a review, we

remain concerned about the legal questions that have been raised and the potential impact of these issues on our future reviews. Moreover, issues such as these have, at times, significantly delayed our access to documents, thereby substantially impacting the time required to complete the reviews.

My view, and I believe the view of my colleagues in the Inspector General community, is straightforward and follows from what is explicitly stated in the Inspector General Act: an Inspector General should be given prompt access to all relevant documents within the possession of the agency it is overseeing. For a review to be truly independent, an Inspector General should not be required to obtain the permission or authorization of the leadership of the agency in order to gain access to certain agency records, and the determination about what records are relevant and necessary to a review should be made by the Inspector General and not by the component head or agency leadership. Such complete access to information is a cornerstone of effective independent oversight.

Limitations on the DOJ OIG's Jurisdiction

Let me briefly turn to an issue that was discussed during my testimony last June before this Subcommittee, which is an oversight limitation that is unique to my office: unlike Inspectors General throughout the federal government, our office does not have authority to investigate all allegations of misconduct within the agency we oversee. While we have jurisdiction to review alleged misconduct by non-lawyers in the Department, under Section 8E of the Inspector General Act, we do not have the same jurisdiction over alleged misconduct committed by Department attorneys when they act in their capacity as lawyers – namely, when they are litigating, investigating, or providing legal advice. In those instances, the Inspector General Act grants exclusive investigative authority to the Department's Office of Professional Responsibility (OPR). As a result, these types of misconduct allegations against Department lawyers, including those that may be made against the most senior Department lawyers (including those in leadership positions) are handled differently than misconduct allegations made against law enforcement agents or other Department employees.

My office has long questioned this distinction between the treatment of misconduct by attorneys acting in their legal capacity and misconduct by other Department employees. Such a system cannot help but have a detrimental effect on the public's confidence in the Department's ability to review misconduct by its own attorneys. In recent months, others have expressed a similar concern. For example, the independent, non-partisan Project on Government Oversight (POGO) issued a report last month that was critical of OPR's longstanding lack of transparency and recommended empowering our office to investigate misconduct by DOJ attorneys. And I would like to thank Senator Murkowski for co-sponsoring S.2127, a bipartisan bill that would amend the Inspector General Act to enable our office to investigate allegations of attorney misconduct.

The jurisdictional limitation on our office is a vestige of the fact that OPR pre-existed the creation by Congress in 1988 of the DOJ OIG, resulting in the statutory

carve-out on our jurisdiction. The Department has consistently taken the position that because OPR has specialized expertise in examining professional conduct issues involving Department lawyers, OPR should handle professional misconduct allegations against Department attorneys. Whatever merit such an argument may have had in 1988 when the OIG was established by Congress, it is surely outdated.

Over the past 25 years, our Office has shown itself to be capable of fair and independent oversight of the Department, including investigating misconduct allegations against its law enforcement agents. Indeed, a similar argument was made many years ago by those who tried to forestall our Office's oversight of alleged misconduct by FBI agents. This argument against Inspector General oversight of the FBI was rejected, and we have demonstrated through the numerous investigations and reviews involving Department law enforcement matters since then, including our Operation Fast and Furious review, that our office has the means and expertise to handle the most sophisticated legal and factual issues thoroughly, effectively, fairly, and independently. Moreover, Inspectors General across the federal government have the authority to handle misconduct allegations against lawyers acting as such within their agencies, and they have demonstrated that they are fully capable of dealing with such matters. Seen in this context, the carve-out for OPR from our Office's oversight jurisdiction is best understood as an unnecessary historical artifact.

Eliminating the jurisdictional exception for OPR in the Inspector General Act would ensure the ability of our Office to fully review and, when appropriate, investigate allegations of misconduct of all Department employees. Moreover, even with such a jurisdiction change, the Department's OPR would almost certainly remain in place to handle "routine" misconduct allegations that do not require independent outside review by an OIG, much as the internal affairs offices at the FBI and the Department's other law enforcement components remain in place today even though the OIG's jurisdiction was expanded years ago to include those components. The current system with the law enforcement components works well, particularly given the OIG's limited resources. Each day, the OIG reviews new allegations of misconduct involving law enforcement personnel and determines which ones warrant investigation by an independent OIG, such as those that involve high-level personnel, those that involve potential crimes and other serious misconduct, and those that involve significant issues related to conduct by management. Those that we determine do not meet these standards are returned to the law enforcement component's internal affairs unit for handling, although the OIG frequently requires the internal affairs unit to report back to the OIG on the outcome of its investigation or review.

Our Office's statutory and operational independence from the Department ensures that our investigations of alleged misconduct by Department employees occur through a transparent and publicly accountable process. Unlike the head of OPR, who is appointed by the Attorney General and can be removed by the Attorney General, the Inspector General is a Senate confirmed appointee who can only be removed by the President after notification to Congress, and the Inspector General has reporting obligations to both the Attorney General and Congress.

Giving the OIG the ability to exercise jurisdiction in all attorney misconduct cases, just as it does in matters involving non-attorneys throughout the Department, would enhance the public's confidence in the outcomes of these important investigations and provide our office with the same authority as other Inspectors General.

Conclusion

Due in large part to the continued support of this Subcommittee, FY 2013 represented a strong and productive year for the OIG, which we are continuing in FY 2014. I look forward to working closely with this Subcommittee to ensure that our office can continue its vigorous oversight through FY 2015 and beyond.

This concludes my prepared statement. I would be pleased to answer any questions that you may have.