



Office of the Inspector General  
United States Department of Justice

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*before the*

U.S. Senate Committee on Homeland Security and Governmental Affairs

*concerning*

“Safeguarding Inspector General Independence and Integrity”

October 21, 2021

Chairman Peters, Ranking Member Portman, and Members of the Committee:

Thank you for inviting me to testify about this Committee's efforts to safeguard Inspector General (IG) independence and integrity. Each year, the independent oversight work of Inspectors General results in billions of dollars in recoveries and savings for taxpayers. The Committee's bipartisan Inspector General Independence and Empowerment Act of 2021 will enhance the Inspector General community's ability to more effectively perform that work on behalf of the public that we serve. I therefore strongly support the legislation and encourage you to advance this good government reform without further delay. The IG Community depends on the bipartisan support demonstrated by this Committee to ensure that we have the tools necessary to root out waste, fraud, and abuse in the federal government. The Inspector General Independence and Empowerment Act of 2021 does just that by incorporating critical provisions from three previously introduced bills: S. 587, the Securing Inspector General Independence Act; S. 1794, the IG Testimonial Subpoena Authority Act; and the House of Representatives' version of the IG Independence and Empowerment Act, H.R. 2662.

I am honored to appear today alongside my colleague, IG Allison Lerner, the Chair of the Council of the Inspectors General on Integrity and Efficiency (CIGIE). I concur with the views expressed by IG Lerner, and appreciate CIGIE's efforts in support of your legislation. My testimony today will emphasize two provisions in the Inspector General Independence and Empowerment Act that are particularly important to the Department of Justice (DOJ) Office of the Inspector General (OIG): (1) expanding DOJ OIG's jurisdiction to cover investigations of professional misconduct by DOJ attorneys; and (2) providing IGs with testimonial subpoena authority. Additionally, based on my six years as CIGIE Chair, I would like to discuss and echo IG Lerner's strong support for the legislation's amendments to the Federal Vacancies Reform Act.

*DOJ OIG's Jurisdiction to Investigate Allegations of Professional Misconduct by Department Attorneys*

I want to start by thanking the Committee for incorporating the provisions of the Senate's IG Access Act, S. 426, into its legislative package. This legislation also was included in the House of Representatives' version of the IG Independence and Empowerment Act. The IG Access Act extends DOJ OIG's jurisdiction to include allegations of professional misconduct by Department attorneys. Last Congress, as one of its first legislative actions, the House of Representatives passed the IG Access Act by unanimous voice vote with no opposition and the Senate Judiciary Committee subsequently moved the legislation to the floor of the Senate by a near unanimous vote. The current Senate version of this legislation has the support of nearly every Democratic and Republican member of the Senate Judiciary Committee, including its lead sponsors, Chair Richard Durbin and Senator Mike Lee, as well as a broad coalition of non-governmental organizations, such as the American Civil Liberties Union, the American Conservative Union, the Government Accountability Project, and the National Taxpayers Union.

The IG Access Act has received broad, bipartisan support over successive Congressional sessions because it promotes independent oversight, transparency, and accountability within DOJ for all of its employees, including Department prosecutors. The DOJ OIG is the only Inspector General in the federal government that does not have the authority to investigate alleged misconduct, including professional misconduct, by attorneys who work in the agency it oversees. As I have stated many times in past Congressional testimony, there is no principled basis for authorizing OIG oversight of DOJ law enforcement personnel, such as agents of the Federal Bureau of Investigation (FBI), while

excluding DOJ lawyers from that same OIG oversight. Providing the DOJ OIG with the authority to exercise jurisdiction in attorney professional misconduct cases would enhance the public's confidence in the outcomes of these investigations and provide the OIG with the same authority as every other IG.

The importance of having an independent office within DOJ to oversee allegations of misconduct by DOJ lawyers was recognized by the National Association of Assistant United States Attorneys (NAAUSA) in [an opinion piece published by Law360](#) on April 14, 2021. The opinion piece states, "the National Association of Assistant United States Attorneys supports establishing the [Office of Professional Responsibility] as a completely independent office, similar to the OIG, that is not subject to the supervision of the attorney general." Instead of providing the OIG with jurisdiction to conduct oversight of DOJ lawyers, the NAAUSA proposed that "the chief of professional responsibility would be a presidential appointment with U.S. Senate confirmation, just like the inspector general, and outside the chain of command of the attorney general." While I completely agree with the NAAUSA that independence is necessary to promote public confidence in investigations of Department lawyers, Congress already created a statutorily-independent entity within DOJ that has a demonstrated ability to conduct such oversight, namely the OIG, and in my view there is no reason to create a parallel independent entity within DOJ in order to achieve that important principle.

If this legislation were enacted, the OIG would handle this new authority consistent with its responsibilities under the Inspector General Act and conduct lawyer-related misconduct investigations as follows:

- **The OIG would assign only attorneys to review professional misconduct cases, using the same standards currently used by the DOJ Office of Professional Responsibility (OPR).** The primary goal of the IG Access Act is not to upend the standards that are applied when reviewing attorney misconduct allegations but rather to promote public confidence in those investigations by authorizing a statutorily independent OIG to conduct them where necessary. The OIG employs dozens of attorneys whose backgrounds and experiences are similar to the lawyers in OPR, including former prosecutors and Department attorneys specializing in attorney ethics, in both the OIG's leadership and our Oversight and Review Division, which would be handling the professional misconduct allegations. This group of OIG attorneys are from the same OIG division that led our review of the FISA abuse allegations, the Clinton email and Comey memos investigations, our review of the Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF) Operation Fast and Furious, and other sensitive and complex matters. They have also handled the numerous ethics issues that have arisen in our reviews and investigations. Moreover, the OIG is committed to adopting the same substantive criteria currently used by OPR to ensure consistency in how professional misconduct allegations are assessed by our offices. In short, if the IG Access Act is adopted, there will continue to be only one standard applied in attorney misconduct cases, and those matters will only be investigated by experienced attorneys.
- **The OIG would work effectively and efficiently with OPR to review attorney misconduct allegations, as it has done with the internal affairs offices at each of the Department's components.** The IG Access Act would ensure that the process for reviewing attorney misconduct allegations is identical to the system that currently exists across DOJ for non-attorney misconduct allegations, such as for those involving FBI agents. The OIG would

develop a standard process with OPR, as exists with each of the other internal affairs offices across the Department's law enforcement components, for reviewing incoming allegations and the OIG would then decide whether it would investigate the allegations. For decades, the OIG has coordinated effectively with the internal affairs offices at the FBI, ATF, Drug Enforcement Administration (DEA), Federal Bureau of Prisons, U.S. Marshals Service, and other Department components. Our processes with the other components have not resulted in different investigative standards or inconsistent application of legal standards. In fact, the disciplinary processes at the FBI and DEA, in particular, have substantially improved since the OIG obtained statutory oversight authority over those components in 2002, in significant part due to the greater transparency and accountability that has resulted from the OIG's oversight. From a good government standpoint, the process for identifying the investigating office in attorney misconduct matters would become more efficient, not less, because the legislation would clarify the OIG's ability to investigate these matters, and eliminate the sometimes painstaking, inefficient discussions that currently take place between the OIG and Department leadership when an allegation is made that lies somewhere in between the OIG's and OPR's current jurisdiction.

- **The OIG would no longer need to request DOJ leadership approval to investigate serious allegations of professional misconduct by lawyers, which to date the Department has consistently denied.** Although existing Department regulations allow the OIG to request authority from the Deputy Attorney General to conduct a professional misconduct investigation, the reality is that in every instance where the OIG has made a request pursuant to the regulation, the then Deputy Attorney General has denied the OIG's request. That includes, most recently, the OIG's request to investigate the circumstances under which Jeffrey Epstein received a non-prosecution agreement from the Southern District of Florida. Moreover, requiring the OIG to request permission from Department leadership to handle a matter, and empowering the Deputy Attorney General to "block" OIG oversight of a serious misconduct allegation, undermines IG independence and is inconsistent with the Inspector General Act.

For these reasons, I thank you for including this critical reform as part of your broader IG legislative package and believe the public would be well-served by its adoption.

#### *Testimonial Subpoena Authority*

Within your legislation, another critical good government reform for both my office, and the IG community more broadly, is the authority to subpoena witnesses for testimony in IG investigations and reviews. As I have noted on multiple occasions in testimony before this Committee, both in my past role as CIGIE Chair and as the DOJ IG, I strongly support granting IGs testimonial subpoena authority because the absence of such authority hinders the ability of OIGs to conduct complete oversight. Without this authority, OIGs are unable to obtain potentially critical evidence from former federal employees, employees of federal contractors and grant recipients, and other non-government witnesses unless they voluntarily agree to be interviewed.

For example, a federal employee's resignation or retirement enables the former employee to avoid being interviewed by an OIG about serious misconduct the former employee allegedly engaged in while working for the federal government. It also has an impact on the ability of law enforcement components to adjudicate misconduct cases. Indeed, a recent OIG review found that, in more than

10% of the misconduct cases pending before the FBI's Office of Professional Responsibility in FY 2017 and FY 2018, the FBI employee retired or resigned prior to the disciplinary process being completed. We further found that the FBI's Office of Professional Responsibility closed those cases without regularly documenting substantiation decisions. Further, an OIG's inability to compel testimony from federal contractors and grant recipients can result in the OIG being unable to gather sufficient evidence to hold the contractor or grant recipient accountable for waste, fraud, and abuse in connection with the use of federal funds, and therefore affects our ability to recover misused federal funds. In addition, an OIG's access to relevant testimony from witnesses who are former federal employees, or employees of contractors and grant recipients, is often essential in order for OIGs to conduct complete investigations of employees, including conducting effective whistleblower retaliation investigations.

Recently, Congress granted this authority to CIGIE's Pandemic Response Accountability Committee, as it had previously done with the Recovery Accountability and Transparency Board in 2009. Further, the Department of Defense IG was granted statutory authority by Congress in 2009 to compel testimony from former agency employees and third party witnesses in its investigations, and has used that authority sparingly and only to advance its efforts to curb government waste, fraud, and abuse.

Moreover, in nearly every significant review my office has completed since I became the IG in 2012, beginning with our "Review of ATF's Operation Fast and Furious and Related Matters," we have noted how the lack of testimonial subpoena authority has either undermined our efforts, or significantly delayed completion of our work. For example, most recently, in our review of the FBI's handling of the allegations against Former USA Gymnastics Physician Larry Nassar, we noted that the former President of USA Gymnastics, Steve Penny, refused our request for a voluntary follow up interview that we sought after the OIG learned additional information about his and a former FBI Special Agent in Charge's actions and potential conflict of interest. Additionally, the DOJ OIG noted in its December 2019 "Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation" that we would have directly benefited from the ability to subpoena former government and non-government individuals who had direct knowledge about the election reporting by Christopher Steele. Similarly, we noted that our ability to assess the Department's "zero tolerance policy" on immigration enforcement was impacted because former Attorney General Sessions did not agree to be interviewed by the OIG, and we could not compel his testimony. And these refusals to testify by former DOJ employees happen all too frequently in many of our less-high profile, but also significant matters, as we have noted in numerous public summaries of these investigations (*See, e.g., "Findings of Misconduct by former FBI Special Agent in Charge for Making Two False Statements,"* April 19, 2021, available at: <https://oig.justice.gov/sites/default/files/reports/21-062.pdf>). As a result, our ability to hold former officials fully accountable for serious misconduct is often undermined, thereby diminishing the public's trust in its government and harming the taxpayers.

As these examples indicate, the need for this authority has crossed administrations of both parties. Indeed, CIGIE first supported IG testimonial subpoena authority during the first year of the Obama administration, shortly after CIGIE was created.

I also note that your legislation contains several appropriate and important safeguards, which I fully support, to ensure the judicious exercise of testimonial subpoena authority by IGs, including allowing the Attorney General an opportunity to object to the issuance of a subpoena and an IG

panel to oversee the issuance of testimonial subpoenas. In sum, this bill would greatly enhance the OIGs' ability to access important evidence, while also putting in place appropriate safeguards to protect against both misuse by an Inspector General and any negative impact to the Department of Justice's criminal law enforcement equities. That is why I support its enactment.

*Promoting IG Independence by Amending the Federal Vacancies Reform Act of 1998*

Finally, I strongly support amendments to the Federal Vacancies Reform Act of 1998 that would require that any individual who is designated by the President to serve as an acting IG be a senior individual who currently serves in an OIG. As CIGIE Chair, I wrote previously to this Committee on this important amendment and noted that this provision will improve the institutional independence that is critical to effective IG oversight.

Under the Federal Vacancies Reform Act of 1998 (Vacancies Act), the IG's selected deputy typically assumes leadership of an OIG when an office becomes vacant. However, under the Vacancies Act's current provisions, the President lawfully may elect to direct a political appointee or a senior employee in the agency overseen by the OIG to serve as acting IG. The appointment of a political appointee from the administration or the appointment of a senior employee in the overseen agency risks creating both actual and apparent conflicts that negatively affect the ability of the acting IG to maintain the required independence. This is wholly inconsistent with the core principles underlying the IG Act and should not be allowed.

For example, a critical function of IGs is to receive information from whistleblowers about fraud, waste, and abuse in their agency and the IG Act mandates that IGs protect the identify of those whistleblowers. There can be little doubt that agency employees would be reluctant to blow the whistle on agency fraud, particularly by agency supervisors or senior officials, if the acting IG is also a senior agency employee or political appointee who has access to their complaints and their identity.

Your legislation would preclude such appointments by limiting who is eligible to temporarily serve as acting IG to either the IG's designated deputy or another senior oversight professional from within the IG community. Doing so would prevent the conflicts inherent in asking individuals to serve in a managerial or political role in their agencies while also exercising independent oversight.

Last year, Jack Goldsmith, the former head of DOJ's Office of Legal Counsel during the George W. Bush Administration, wrote that amending the Vacancies Act to prohibit political appointees and agency officials from serving as an acting IG was an effective, "[clearly constitutional](#)" way to promote IG independence. More recently, Professor Goldsmith and former White House Counsel Bob Bauer noted that these amendments to the Vacancies Act are the "[single most important step](#) Congress can take to secure inspector general independence."

Indeed, agencies themselves benefit when an acting IG is independent in both fact and appearance. That independence allows IGs to be a critical, credible source for answers when controversial allegations of mismanagement or wrongdoing arise in an agency.

The concern about political appointees or management officials serving in an acting capacity as IG is not new. Rather, this concern has stretched across Administrations, as indicated in multiple Government Accountability Office (GAO) reports. This is perhaps best highlighted by concerns that have been raised across three successive Administrations regarding the Inspector General position

at the Department of State.

In a 2007 report, the GAO expressed concern that from January 2003 through April 2005, four management officials from the State Department served as the acting IG, all four of whom had served in the Foreign Service in prior management positions, including political appointments as U.S. ambassadors to foreign countries.<sup>1</sup> Then, in January 2008, following the departure of the Senate-confirmed Inspector General, another Foreign Service Officer was appointed to serve as acting IG. That individual remained in the position for over five years, until Steve Linick's confirmation as Inspector General in September 2013. The GAO, in its 2007 report, and again in a 2011 report, noted that "the appointment of management and Foreign Service officials to head the State OIG in an acting capacity for extended periods of time is not consistent with professional standards for independence."<sup>2</sup> In a 2011 hearing to discuss GAO's findings and recommendations, the then-Chair and Ranking Member of the House Committee on Foreign Affairs expressed serious bipartisan reservations about the effectiveness of the State Department's acting IG, on account of his concurrent role as a senior Foreign Service officer.<sup>3</sup>

These concerns persisted until a permanent IG, Steve Linick, was nominated by the President and confirmed by the Senate in 2013. For example, at a hearing to discuss OIG vacancies, then Chairman of this Committee, Senator Ron Johnson, and multiple witnesses discussed the perception that the State Department's acting IG had failed to conduct independent and effective oversight of then Secretary Hillary Clinton because of the acting IG's temporary appointment and the inherent conflict of interest created when an official serves in both a management and an oversight role simultaneously.<sup>4</sup> Similarly, in a letter to CIGIE and then-Secretary of State Kerry in 2015 seeking information about the extended time that passed between Senate-confirmed IGs at the State Department while the position was filled by a career foreign service officer, Senator Grassley, who is a lead sponsor of this legislation, raised specific concerns about the performance of the State Department's prior acting IG, noting, "As these examples demonstrate, an inspector general must be independent, because agencies cannot be trusted to investigate themselves."<sup>5</sup>

The May 2020 designation of a State Department political appointee and the subsequent September 2020 designation of a Foreign Service officer and appointed ambassador to serve as the acting IG at the State Department following IG Linick's removal again raised independence concerns at that Office, as had been the case during the George W. Bush and Obama Administrations. However, this challenge is not unique to the State Department. As the GAO again noted in its most recent report on this issue, from June 2020, "the extended use of temporarily assigned agency management staff to head an OIG can affect the perceived independence of the entire office in its reviews of agency operations. . . . the practice is not consistent with the independence requirements of GAGAS, other

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<sup>1</sup> Government Accountability Office, "Inspectors General: Activities of the Department of State Office of Inspector General," GAO-07-138. Mar. 23, 2007.

<sup>2</sup> See, e.g. Government Accountability Office, "State Department Inspector General: Actions to Address Independence and Effectiveness Concerns Are Under Way." GAO-11-382T. April 5, 2011. (available at: <https://www.gao.gov/assets/130/125878.pdf>).

<sup>3</sup> Committee on Foreign Affairs. U.S. House of Representatives. "Watching the Watchers: The Need for Systemic Reform and Independence of the State Department Inspector General." April 5, 2011.

<sup>4</sup> Committee on Homeland Security and Governmental Affairs. U.S. Senate. "Watchdogs Needed: Top Government Investigator Positions Left Unfilled for Years." June 3, 2015.

<sup>5</sup> Letter from Senator Charles Grassley to the Honorable Michael Horowitz and the Honorable John Kerry. August 27, 2015.

professional standards that IGs follow, and the purposes of the IG Act.”<sup>6</sup> The Committee’s legislation would address this issue, which has been a bipartisan concern for over a decade, and I hope that it is enacted promptly.

## Conclusion

In conclusion, I want to again thank the Committee for its bipartisan efforts to support both my office and the IG Community. As I noted at the outset, the long tradition of bipartisan support from this Committee for IG reform is necessary so that we can fully carry out our important missions on behalf of the U.S. taxpayers.

I understand that a number of amendments to Chairman Peters and Ranking Member Portman’s managers amendment to the IG package have been offered, and I would be pleased to discuss any of these with you. Thank you for the opportunity to testify, and I would be pleased to answer any questions that you may have.

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<sup>6</sup> Government Accountability Office, “Inspectors General: Independence Principles and Considerations for Reform.” GAO-20-639R. June 8, 2020. (available at: <https://www.gao.gov/assets/710/707412.pdf>).