INSPECTOR GENERAL DESKBOOK

VOLUME 3

Office of Inspector General
Department of The Treasury

Inspector General Deskbook
Volume 3

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Department of Justice Guidance

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OPINION OF THE OFFICE OF LEGAL COUNSEL

77-8 INSPECTOR GENERAL LEGISLATION

1977 OLC LEXIS 8; 1 Op. O.L.C. 16

February 21, 1977

ADDRESSEE:
[*1]

Memorandum Opinion for the Attorney General

OPINIONBY: HARMON

OPINION:

[**16] Certain questions exist concerning the constitutionality of H.R. 2819, which would establish an Office of Inspector General in six executive departments n1 and five other executive establishments. n2 It is our opinion that the provisions in this bill, which make the Inspectors General subject to divided and possibly inconsistent obligations to the executive and legislative branches, violate the doctrine of separation of powers and are constitutionally invalid. This memorandum briefy outlines the major provisions of the bill, discusses the constitutional problems presented by those provisions, and recommends modifications to remedy those problems.

n1 The Departments included are Agriculture, Commerce, Housing and Urban Development, Interior, Labor, and Transportation.

n2 The other establishments are the Energy Research and Development Administration, the Environmental Protection Agency, the General Services Administration, and the National Aeronautics and Space Administration.

A. Description of the Inspector General Legislation Pending Before Congress

H.R. 2819 was introduced on February 1, 1977, by Representatives [*2] Fountain and Brooks and has been referred to the Committee on Government Operations. The bill combines and reorganizes the present internal audit and investigative units in each of the 11 agencies that are the subject of the bill into a single office with certain additional responsibilities. The primary functions of the Inspector General's Office would be: (1) to develop and supervise programs (including audits and investigations) in the agency to promote efficiency and to prevent fraud and abuse; (2) to keep both the head of the agency *and* Congress fully informed regarding these matters; and (3) to recommend and report on the implementation of corrective actions.

Each Inspector General is required to prepare and submit to Congress, as well as to the head of the agency, a variety of reports, and is [**17] required to supply additional documents and information to Congress on request. These reports are required to be submitted directly to Congress without clearance or approval by the agency head or anyone else in the executive branch. The Inspector General is authorized to have access to a broad range of materials available to the agency and is given subpoena power to obtain [*3] additional documents and information.

The Inspectors General are to be appointed by the President (with the advice and consent of the Senate) "without regard to political affiliation," and whenever the President removes an Inspector General from office, the bill would require the President to notify both Houses of the reasons for removal.

The bill is modeled on Title II of Pub. L. No. 94-505, 90 Stat. 2429, which establishes an Office of Inspector General in the Department of Health, Education, and Welfare (HEW). No Inspector General for HEW has been appointed to date.

B. Constitutional Objections

1. As a threshold matter, the Justice Department has repeatedly taken the position that continuous oversight of the functioning of executive agencies, such as that contemplated by the requirement that the Inspector General keep Congress fully and currently informed, is not a proper legislative function. In our opinion, such continuing supervision amounts to an assumption of the Executive's role of administering or executing the laws. However, at the same time it must be acknowledged that Congress has enacted numerous statutes with similar requirements, many of which are currently [*4] in force.

2. An even more serious problem is raised, in our opinion, by the provisions that make the Inspectors General subject to divided and possibly inconsistent obligations to the executive and legislative branches, in violation of the doctrine of separation of powers. In particular, the Inspector General's obligation to keep Congress fully and currently informed, taken with the mandatory requirement that he provide any additional information or documents requested by Congress, and the condition that his reports be transmitted to Congress without executive branch clearance or approval, are inconsistent with his status as an officer in the executive branch, reporting to and under the general supervision of the head of the agency. Article II vests the executive power of the United States in the President. This includes general administrative control over those executing the laws. *See, Myers v. United States, 272 U.S. 52, 163-164 (1926).* The President's power of control extends to the entire executive branch, and includes the right to coordinate and supervise all replies and comments from the executive branch to Congress. *See, Congress Construction Corp. v.* [*5] *United States, 314 F. 2d 527, 530-532 (Ct. Cl. 1963).*

3. Under the bill, the Inspector General has an unrestricted access to executive branch materials and information. He has an unqualified and [**18] independent obligation to provide such materials and documents to the Congress as it may request. Obviously the details of some investigations by the Inspector General (or by the Justice Department) might well, under settled principles, require them to be withheld from Congress through the assertion of executive privilege. But the bill as written would preclude that assertion in view of the Inspector General's duty to make requested materials and information available to Congress.

4. Finally, we are of the opinion that the requirement that the President notify both Houses of Congress of the reasons for his removal of an Inspector General constitutes an improper restriction on the President's exclusive power to remove Presidentially appointed executive officers. *Myers v. United States, supra.* Although Congress has the authority to limit the President's power to remove quasi-judicial or quasi-legislative officers, *Wiener v. United States, 357 U.S. 349 (1958),* [*6] *Humphrey's Executor v. United States, 295 U.S. 602 (1935),* the power to remove a subordinate appointed officer within one of the executive departments is a power reserved to the President acting in his discretion. n3

n3 We also question the validity of the requirement that the President appoint each Inspector General "without regard to political affiliation." This implies some limitation on the appointment power in addition to the advice and consent of the Senate.

C. Suggested Modifications

We believe that the constitutional problems raised by the proposed legislation could only be cured through modification that would clearly establish the Inspector General as an executive officer responsible to the head of the agency.

The principal problem with the proposed legislation is that the Inspector General is neither fish nor fowl. While the Inspector General is supposed to be under the general supervision of the agency head, the Inspector General reports directly to Congress. He is to have free access to all executive information within the agency, yet he is not subject to the control of the head of the agency or, for that matter, even to the control of the President. [*7]

In our opinion, the only means by which this bill could be rendered constitutional would be to modify it so as clearly to establish the Inspector General as an executive officer subject to the supervision of the agency head and subject to the ultimate control of the Chief Executive Officer. We recommend the following modifications:

1. Reports of problems encountered and suggestions for remedial legislation may be required of the agencies in question, but those reports must come to Congress from the statutory head of the agency, who must reserve the power of supervision over the contents of these reports.

2. The constitutional principle of executive privilege must be preserved. The provision in the bill requiring reports to Congress [**19] of all "flagrant abuses or deficiencies" within 7 days after discovery would risk jeopardizing ongoing investigations by the agency and the Justice Department, many of which would be subject to a claim of privilege. That provision should be qualified by a specific reference to the possibility of a claim of privilege, or deleted entirely from the bill.

3. Finally, the power of the President to remove subordinate executive officers [*8] must remain intact. The requirement in the bill that the President report to Congress the reasons for his removal of an Inspector General would infringe on this power and should be eliminated.

JOHN M. HARMON

Acting Assistant Attorney General

Office of Legal Counsel

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency InvestigationsConstitutional RightsGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesGeneral OverviewEvidencePrivilegesGovernment PrivilegesProcedures to Claim Privileges

1980 OLC LEXIS 74, *; 4 Op. O.L.C. (Vol. B) 693

OPINION OF THE OFFICE OF LEGAL COUNSEL

PROVIDING REPRESENTATION FOR FEDERAL EMPLOYEES UNDER INVESTIGATION BY THEIR INSPECTOR GENERAL

1980 OLC LEXIS 74; 4 Op. O.L.C. (Vol. B) 693

June 18, 1980

SYLLABUS:
[*1]

Neither the Department of Justice nor any other federal agency has authority to provide legal representation to a federal employee in disciplinary proceedings instituted by his legal representation to a federal employee in disciplinary proceedings instituted by his own agency. Authority to provide counsel to a federal employee may be implied only where the employee's official conduct has been attacked by a nongovernmental plaintiff or a state prosecutive office, and not by an agency of the government itself.

An Inspector General's Office is an integral part of the agency in which it is located, and its investigation of an agency employee is thus analogous to an investigation of Department of Justice employees by the Criminal Division of the Department of Justice.

ADDRESSEE:

Memorandum Opinion for the Chief Counsel, National Highway Traffic Safety Administration

OPINIONBY: HARMON

OPINION:

This is in response to your request for our views on the authority of the National Highway Traffic Safety Administration (NHTSA) to provide outside legal counsel to assist certain of its employees who are being investigated by the Office of Inspector General of the Department of Transportation for possible criminal [*2] conduct. We understand that the investigation stems from allegations made by a former employee of your agency. You state that it appears to NHTSA that its employees were carrying out official policy through activity within the scope of their assigned duties and that, in your view, the employees who are the objects of the Inspector General's investigation were engaged in the performance of an agency function during the period in question.

Although, as you indicated, this Department's guidelines for its provision of legal representation to federal employees, 28 C.F.R. §§ 50.15 and 50.16, do not cover the NHTSA personnel under investigation, it will nevertheless be helpful to note the basis of those guidelines.

Section 50.15 is grounded on this Department's position that under the authority of *28 U.S.C. §§ 516*-517 and *28 U.S.C. § 509* it may in general either (1) assign lawyers on its staff to represent a federal employee in legal proceedings in which a civil claim or a criminal charge by a state governmental unit is being asserted against him for allegedly wrongful conduct in the discharge of his duties, n1 or (2) pay for private counsel for an employee when a conflict of [*3] interest makes it impossible for the Department to represent him. Legal assistance of either kind is deemed to be in the interest of the United States within the meaning of *28 U.S.C. § 517* because establishing the lawfulness of authorized conduct on its behalf is important to the government and making legal assistance available to employees tends to prevent their being deterred from the vigorous performance of their tasks by the threat of litigation.

n1 28 C.F.R. § 50.15 also authorizes this Department to provide legal representation for a federal employee in congressional proceedings.

Turning to your letter, we read it as concluding that it would be in the interest of the United States for NHTSA to provide legal counsel from its own ranks for the benefit of the employees being investigated. You point out, however, that your staff lawyers would necessarily encounter conflicts of interest in serving the employees, and you therefore

propose that the Department of Transportation and NHTSA pay for outside counsel to assist them. Thus, there is to some extent a parallel between your proposal and action taken by this Department under 28 C.F.R. § 50.15. However, there is a divergence [*4] between the two, which leads us to the conclusion that our practice under that regulation does not lend support to your position here.

When § 50.15 comes into play, the impetus for the adverse action against the federal employee has come from outside his department or agency -- that is, from a nongovernmental plaintiff in a civil suit or from a state prosecutive office. We are not aware of any authority of this Department under its own governing statutes or other laws that would permit it to provide legal representation to a federal employee in disciplinary proceedings instituted by his own department or agency, or, for that matter, in any investigation by his department or agency to determine whether such proceedings, or possibly criminal proceedings, should be instituted. Similarly, we are not aware of any legal authority for a governmental entity itself to furnish such assistance to one of its own employees in those circumstances. The interest of the United States in such cases is in ensuring that its employees adhere to the statutory and administrative standards of conduct laid down for their observance. It is one thing for a governmental organization to aid an employee under [*5] outside legal attack for actions taken in his official role, and another for the organization to aid an employee whom for its own part it may suspect of wrongful conduct.

At bottom, the question of representation is one that depends upon whether there exists a fair basis for concluding that Congress has granted to your agency the authority to provide counsel to employees who become subject to the type of administrative investigations initiated by your Inspector General. Nothing in the Act establishing the Office of Inspector General for the Department of Transportation grants that authority, and the only authority you have cited in the legislation generally governing the Department of Transportation is the general housekeeping provision that empowers the hiring of contractors. *See 5 U.S.C. § 3109; 49 U.S.C. § 1657.* The contracting statutes do not, however, provide the substantive authority you seek; in general, they only provide a method of procedure for carrying into effect powers elsewhere granted. In the absence of explicit authority, this Department has adhered to the principle -- also reflected in recent Comptroller General opinions -- that authority to retain [*6] counsel may be implied where the employee's official conduct has been attacked and prosecuted by an individual outside the agency.

This distinction is exemplified in a recent Comptroller General opinion, Comp. Gen. Op. B-193536, June 18, 1979, which ruled that an agency could not properly reimburse an employee for legal fees paid in defending himself in agency proceedings against him on charges of misconduct which, although initially raised by an outside party, were not pursued by the latter but by the agency itself on the basis of its independent determination to investigate the employee's conduct. The opinion distinguished that situation from the one in an earlier opinion, Comp. Gen. Op. B-127945, April 5, 1979, involving a hearing, required by an agency's regulations, of charges of misconduct by two of its employees in the performance of their official duties where the charges were initiated and pursued in the prescribed administrative forum by a private party. The Comptroller General concluded in B-127945 that the agency could properly expend its appropriations for the provision of private legal services to the employees, absent the possibility of representation provided by [*7] the Attorney General or its own legal staff. The later opinion, B-193536, *supra*, noted specifically that in B-127945 and other cases in which the Comptroller General had approved such expenditures, "the conduct of the Federal employees was brought into issue and pursued by a third party and not by the Government itself." B-193536, p. 6.

We have considered your suggestion that an investigation by your department's Office of Inspector General seems more analagous to the case of an outside party challenging the actions of an agency employee, than to an internal agency proceeding where the interests of the agency and its employee conflict. It is true that an Inspector General appointed and serving under the Inspector General Act of 1978 is largely free of control by the head of his department or agency in relation to his investigative functions. Nevertheless, he is an integral part of his department or agency, is selected by and serves at the pleasure of the President, and performs duties that are carried out in lesser degree in all sizable organizations of the federal government. We have been unable to find, either in the statutory structure of Inspector General offices or in [*8] the legislative history of that Act, evidence of the unique status you have suggested. Because we cannot equate the position of the Inspector General in the current investigation of NHTSA employees to that of an outside party making charges against them, we are of the opinion that neither your department nor NHTSA may retain and compensate private lawyers to serve the employees being investigated by the Inspector General.

This investigation of NHTSA employees by the Department of Transportation's Inspector General is analogous, in our view, to an investigation of Department of Justice employees by the Criminal Division of the Department of Justice. Although the Department can sometimes provide representation for Justice employees who are defendants in civil cases or state criminal proceedings, as a general rule it has authority to provide such representation only after it has determined institutionally that the employees are being asked to answer for legally defensible conduct in the course and

scope of their federal duties and that a defense of their conduct on the merits will therefore be tantamount to a defense of the United States itself, a legal entity that can act [*9] only through its agents. But when the Criminal Division initiates a criminal investigation of one of our own employees, the Department cannot have made that determination. The very purpose of the investigation is to make it -- to decide what a defense of the interests of the United States requires, be it prosecution, exoneration, or something in between; and it is for that reason that the Department cannot provide a defense of *personal* interests in the investigation itself. n2

n2 In unusual situations this Department may, during the pendency of a criminal investigation, provide representation for government employees, including Department of Justice employees, who are defendants in civil actions brought by persons outside the government. In these situations it is possible for the Department to determine that it will be in the interests of the United States to provide a provisional defense for the employees (and hence the United States) until the results of the criminal investigation are known. But this determination does not permit the Department to provide the employees with representation (either directly or through private counsel) for the purpose of defending their personal interests against the government itself in the criminal investigation. From the standpoint of defending the interests of the United States, such a defense is either unauthorized or premature. The same conclusion must be reached with respect to the investigative activities of an Inspector General.

[*10]

JOHN M. HARMON

Assistant Attorney General

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Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawSeparation of PowersLegislative ControlsImplicit Delegation of AuthorityGovernmentsFederal GovernmentClaims By & AgainstGovernmentsFederal GovernmentEmployees & Officials

OPINION OF THE OFFICE OF LEGAL COUNSEL

PROCEDURES FOR INVESTIGATING ALLEGATIONS CONCERNING SENIOR ADMINISTRATION OFFICIALS

1982 OLC LEXIS 18; 6 Op. O.L.C. 626

November 5, 1982

SYLLABUS:
[*1]

A proposal whereby personnel from one agency's Office of Inspector General would conduct an investigation of allegations of non-criminal misconduct by employees of another agency, or by the head of another agency, and report to the President's Council on Integrity and Efficiency, is of questionable legality.

The President has inherent authority to supervise and direct the performance of his appointees in office, and to investigate allegations of possible misconduct related to that performance.

Under the Inspector General Act, an Inspector General and his staff are authorized to conduct investigations into allegations of misconduct only when those allegations involve fraud and abuse in the programs and operations of the particular agency in which the office is located.

An agency head has authority to investigate allegations of misconduct against any officer or employee of his agency, including the agency's Inspector General. If under the circumstances he deems it prudent, an agency head may request that investigative personnel be detailed from another agency on a reimbursable basis to conduct such an investigation, though in such a case the investigative authority of any such detailed [*2] personnel could not exceed his own.

ADDRESSEE:

Memorandum Opinion for the Special Counsel to the Assistant Attorney General, Criminal Division

OPINIONBY: TARR

OPINION:

[**626] In accordance with your request, we have reviewed the draft proposal entitled "Procedures for Investigating Allegations Concerning Senior Administration Officials." The draft proposal was prepared for the President's Council on Integrity and Efficiency, and forwarded to you on October 4, 1982, by Joseph Wright, Chairman of the Council. You indicate that some specific questions were raised at the Council's October 12 meeting relating to the source of authority for certain of the proposed procedures, including the authority to pay the costs of an investigation. Concern was also expressed over the potential for conflict among federal law enforcement agencies generated by the proposed procedures. Our review indicates that the proposed procedures, as we understand them, are legally deficient in several respects.

I.

The procedures set forth in the draft proposal apply whenever the Council or one of its members receives an "allegation" concerning an Inspector General, a [**627] staff member in an Office of Inspector General, or the head [*3] of a department or agency represented on the Council. n1 Any allegation of criminal conduct received, or evidence of criminal conduct "uncovered" during the course of an investigation, will be referred directly to the Department of Justice, as is required by *28 U.S.C. § 535*. Under such circumstances, "the fact finding for the Council will be terminated until Justice has completed its review."

n1 The Council was established as an interagency committee by Executive Order 12301 of March 26, 1981, *46 Fed. Reg. 19211*. Its 23 members include the Deputy Attorney General, the Director of the Office of Personnel Management, the Executive Assistant Director of Investigations of the Federal Bureau of Investigation, and all of the statutory Inspectors General except those of the military departments. Under Section 2 of the Execu-

tive Order, the Council is charged with developing plans for "coordinated government-wide activities which attack fraud and waste in government programs and operations," including "standards for the management, operation, and conduct of inspector general-type activities," and policies to ensure "the establishment of a corps of well-trained and highly skilled auditors and investigators." Section 2(d) directs the Council to "develop interagency audit and investigation programs and projects to deal efficiently and effectively with those problems concerning fraud and waste which exceed the capability or jurisdiction of an individual agency."

[*4]

"Non-criminal allegations" n2 against an Inspector General, or a presidentially appointed Deputy Inspector General, are to be "brought to the attention of" the Chairman of the Council. The Chairman, "in consultation with" the head of the agency to whom the Inspector General reports and the Deputy Attorney General,

shall request an Assistant Inspector General for Investigations (not reporting to the IG in question) to conduct a fact finding for the Chairman of the Council. For the purposes of this fact finding, the AIG (Investigations) will report directly to the Chairman. n3

The report of the factfinder "shall be provided directly" to the Department of Justice, the Merit Systems Protection Board, the Office of Government Ethics, and the Office of Personnel Management, so that they might determine whether "there is evidence of any violations of laws or regulations for which they are responsible." These agencies are to notify the Chairman of "their findings and the actions which they will take." The Chairman himself is at this point provided with a "summary" of the factfinding. The Chairman, in consultation with the head of the agency to whom the Inspector General reports and [*5] the Deputy Attorney General, then reports to the Counsel to the President on the results of the factfinding.

n2 The draft proposal does not give any examples of non-criminal activity which might be the subject of an allegation against an Inspector General. We assume that "non-criminal allegations" which could spark an investigation might be related directly to the Inspector General's performance of his statutory functions, or related more generally to his performance as an officer and employee of the United States.

n3 It is not clear from the draft proposal whether some procedure for screening non-criminal allegations is to be established, or whether (as it would appear from a literal reading of its provisions) each and every allegation brought to the attention of the Chairman or members of the Council must be the subject of factfinding by an Assistant Inspector General for Investigations.

Non-criminal allegations against Office of Inspector General staff, or against heads of departments and agencies represented on the Council, are also dealt with in the draft proposal. In brief, such allegations are to be referred by the Chairman of the Council to the responsible Inspector [*6] General for investigation. A copy of the Inspector General's report is to be provided to the head of the department or agency involved, in accordance with §§ 3(a) and 4(a)(5) of the Inspector General [**628] Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101, 5 U.S.C. App. (Supp. IV 1980). In addition, the Inspector General is required to "brief" the Chairman of the Council of any "significant findings" resulting from his investigations. n4 In the case of allegations against an agency head, the Inspector General is required to provide a copy of his report to the Department of Justice, the Merit Systems Protection Board, the Office of Government Ethics, and the Office of Personnel Management. These agencies in turn must determine whether there is evidence in the report of any violation of laws or regulations over which they have responsibility, and notify the Inspector General and the Chairman of the Council of "their findings and the actions which they will take." A summary of the Inspector General's factfinding is then provided to the Chairman of the Council, who, in consultation with the Deputy Attorney General, reports to the Counsel to the President on the results of the investigation. [*7]

n4 In the case of allegations against Office of the Inspector General staff, the Inspector General is required to "inform" the Chairman of "any significant adverse findings" resulting from his investigation and "the subsequent follow-up action." It is not clear whether in this case the Inspector General is also required to inform the Chairman of findings which are not "adverse."

The draft proposal also deals with the "release of investigatory files and report findings" pursuant to Freedom of Information Act and Privacy Act requests. Such requests are to be "handled according to established procedures." n5 With respect to Privacy Act requests, the draft proposal directs that "for each system of records created to contain these investigatory files, a regulation should be promulgated claiming the (j)(2) exemption." n6 The draft proposal further

provides that all investigatory files and the investigative report are to be maintained by "[t]he IG's office that conducts the investigation."

n5 It is not clear whether the "established procedures" referred to are intended to include procedures to be established by the Council itself.

n6 The draft's reference to the "(j)(2) exemption" is apparently to the provision in the Privacy Act of 1974, Pub. L. 93-579, 88 Stat. 1897, *5 U.S.C. § 552a*, which permits certain agencies to promulgate rules to exempt systems of records from certain of the Act's provisions. *See 5 U.S.C. § 552a*(j)(2). The (j)(2) exemption is available only to an agency "which performs as its principal function any activity pertaining to the enforcement of criminal laws . . . ." Most Offices of Inspector General, whose principal functions do not involve the enforcement of criminal laws, may avail themselves only of the more limited exemption contained in subsection (k)(2) of the Privacy Act for "investigatory material compiled for law enforcement purposes." *See, e.g.*, 24 C.F.R. § 16.15(a)(2) (1981) (investigative files in HUD's Office of Inspector General exempt under § 552a(k)(2)). Note that, like subsection (j)(2), subsection (k)(2) permits an agency to exempt records from certain of the Act's accounting requirements, and from its provisions giving an individual access to information about himself. It does not permit an agency to exempt records from the Act's prohibitions on disclosure of information concerning individuals without their written consent. *See* § 552a(b). Circumstances under which such disclosure is permissible are discussed in note 12, *infra.*

[*8]

II.

The President has inherent authority to supervise and direct the performance of his appointees in office, and to investigate allegations of possible misconduct related to that performance. We assume for present purposes that much of this authority could be delegated to the Council or its Chairman. *See 3 U.S.C. §§ 301,* 302. However, Executive Order 12301 does not accomplish such a [**629] delegation, n7 and the draft proposal does not refer to any other authority relied upon for the investigation of non-criminal allegations against an Inspector General. It is our understanding that in any event the Council has no funds appropriated to it which might be used for this purpose. n8

n7 None of the Council's functions set forth in § 2 of the Order include any substantive investigative functions. *See* note 1, *supra.* While § 2(d) might be interpreted to authorize the Council to develop procedures to investigate misconduct by Inspectors General, we cannot construe it also to bestow authority on the Council actually to conduct such investigations. Such a delegation of substantive presidential authority to an agency not otherwise authorized to engage in such activities would, in our view, have to be explicit. *See 3 U.S.C. § 302.* The Council Chairman's responsibilities under § 3 of the Order are confined to establishing procedures for the Council, reporting to the President and agency heads, and establishing committees of the Council. Section 4(c) describes the Chairman's analogous administrative functions in connection with the Coordinating Conference of the Council. We are unaware of any other presidential delegation or directive, either to the Council or to its Chairman, relating to the investigation of allegations against an Inspector General.

n8 Under § 5(a) of Executive Order 12301, funds for the "administrative support" of the Council are provided by the Director of the Office of Management and Budget. The head of each agency represented on the Council is responsible for providing its representative with "such administrative support as may be necessary, in accordance with law, to enable the agency representative to carry out his responsibilities." *See* § 5(b). While *31 U.S.C. § 691* (1976) permits the expenditure of appropriated funds "for the expenses of committees, boards, or other interagency groups engaged in authorized activities of common interest," this statute does not provide authority for an agency represented on the Council to expend funds on activities which are not already authorized by its existing appropriation. Section 691 allows an interagency group to continue in existence for longer than a year without separate appropriation for its activities, as would otherwise be required by *31 U.S.C. § 696*, but does not provide any independent authority for the expenditure of agency funds. *See* H.R. Rep. No. 2023, 78th Cong., 2d Sess. (1944). The absence of authority in one agency's Office of Inspector General to investigate another agency's Inspector General is discussed in the text and note 9. Similarly, while we have not examined the issue in detail, we are unaware of any funds appropriated to the Office of Management and Budget which could be used to conduct the sort of investigations contemplated in the proposed draft.

[*9]

Moreover, the Inspector General Act authorizes an Inspector General and his staff to conduct investigations into allegations of misconduct only when those allegations involve fraud and abuse in the programs and operations of the particular agency or department in which the Office is located. n9 Thus, funds appropriated for the activities of an Office of Inspector General in one agency would ordinarily not be available to conduct an investigation into allegations of misconduct by personnel in another agency. An Assistant Inspector General [**630] might lawfully be directed by his own agency head to investigate allegations against the Inspector General to whom he reports, n10 or allegations against another Inspector General on a detail basis. n11 However, an Assistant Inspector General has no authority under the Inspector General Act to conduct an investigation which is unrelated to his duties and responsibilities under the Act respecting his own agency.

n9 The duties and responsibilities of an Inspector General under § 4(a) of the Inspector General Act are described in terms of "the establishment within which his Office is established." As more specifically enumerated in paragraphs (1) through (5) of that section, the Inspector General's duties and responsibilities are explicitly confined to the "programs and operations" of his own "establishment." Similarly, the investigative authority given each Inspector General under § 6(a) of the Act is limited to "programs and operations" of his own "establishment." Finally, the Inspector General is authorized under § 7(a) of the Act to investigate only complaints from employees "of the establishment." Section 11(2) of the Act defines an "establishment" as the particular agency or department in which the Office of Inspector General is established by the Act. The legislative history of the Inspector General Act makes plain that the Inspector General's authority and responsibility were intended to be restricted to the investigation of fraud and waste in the particular department in which his Office was established. *See, e.g.,* S. Rep. No. 1071, 95th Cong., 2d Sess. 7 (1978):

[T]he legislation gives the [Inspector General] no conflicting policy responsibilities which could divert his attention or divide his time; his sole responsibility is to coordinate auditing and investigating efforts and other policy initiatives designed to promote the economy, efficiency and effectiveness of the programs of the establishment.

See also H.R. Rep. No. 584, 95th Cong., 1st Sess. 12-14 (1977); 124 Cong. Rec. 32033 (1978) (remarks of Rep. Fountain). The Office of Assistant Inspector General for Investigations is described in § 3(d)(2) of the Inspector General Act as having "responsibility for supervising the performance of investigative activities relating to . . . programs and operations [of the establishment]." There is no authority under the Inspector General Act, or under any appropriation act of which we are aware, for an Assistant Inspector General for Investigations, or any member of an Inspector General's staff, to conduct investigations which do not "relate to" the "programs and operations" of the agency in which he is employed.

n10 Ordinarily, an agency head has authority, in the exercise of his supervisory responsibilities for the proper functioning of his agency, to investigate allegations of misconduct in office against an employee or officer of his agency, and to take appropriate action in the event those allegations prove well-founded. Funds appropriated for the general administration of the agency would be available for this purpose. The agency head's authority extends to the agency's Inspector General, who under § 3(a) of the Inspector General Act reports to and is "under the general supervision of" the head of his agency. However, § 3(a) also enjoins the agency head not to "prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation . . . ." Thus, an agency head might find it awkward to investigate allegations against his Inspector General without violating or appearing to violate this statutory restriction. Depending on the nature of the allegations against the Inspector General (*e.g.,* whether the allegations related directly to the Inspector General's conduct of his statutory duties), the agency head might decide to limit his own personal involvement in the matter, and request the President to direct an investigation of the Inspector General's conduct.

n11 For obvious reasons, an agency head might not wish to rely upon one of the agency's own Inspector General's staff to conduct an investigation of the Inspector General himself. If appropriate investigative personnel were not available in other parts of his agency, the agency head could request that investigative personnel be detailed from another agency on a reimbursable basis, under authority of the Economy Act. *See 31 U.S.C. § 686.* Personnel from another agency's Office of Inspector General would seem to be particularly suited for such a detail. We note, however, that in conducting an investigation in another agency at the request of the head of that agency, personnel detailed from another Inspector General's Office might be limited to the investigative authority of the head of the agency to which they were detailed. Many of the particular powers given an Inspector General and his staff under § 6(a) of the Inspector General Act, such as the power to subpoena documents, may

not be available to an agency head conducting his own independent investigation of misconduct by officers of his agency.

[*10]

III.

We are less concerned over the provisions in the draft proposal which require that the factfinder's report in an investigation of non-criminal allegations against an Inspector General be sent to the Department of Justice, the Merit Systems Protection Board, the Office of Government Ethics, and the Office of Personnel Management. These provisions also come into play in connection with an investigation of non-criminal allegations against the head of an agency. As long as the factfinder is properly authorized to perform the investigation in question, and to disclose his report to other federal agencies, there would appear to us no reason in law why the named agencies should not receive a copy of the report. n12

n12 The Privacy Act, *5 U.S.C. § 552a,* permits disclosure of records containing information about an individual without his consent in a number of specified circumstances, including two in particular which seem potentially applicable in this case. First, § 552a(b)(3) permits disclosure for a "routine use," *i.e.*, a use "for a purpose which is compatible with the purpose for which it was collected." *See also* § 552a(a)(7). A "routine use" must be established by publication in the Federal Register. *See* § 552a(e)(4)(D). Second, § 552a(b)(7) permits disclosure to another federal agency "for a civil or criminal law enforcement activity if the activity is authorized by law." Disclosure under this section is permissible only if the head of the agency desiring the information has made a written request to the head of the agency maintaining the record.

[*11]

Moreover, none of the agencies named has exclusive or even primary jurisdiction over violations of the non-criminal laws and regulations for which they are responsible. *Compare 28 U.S.C. § 535,* which mandates the "expeditious[]" referral of all criminal information or allegations to the Department of Justice. Indeed, in some cases jurisdiction over non-criminal allegations attaches only after a matter has first been investigated at the agency level. *See, e.g., 5 U.S.C.* [**631] *§ 1206*(b) (Supp. II 1978) (Special Counsel of the Merit Systems Protection Board must refer complaints of prohibited personnel practices to the appropriate agency head for initial investigation). *See also 5 U.S.C. § 2302*(c) (agency head responsible for enforcement of laws and regulations relating to personnel management).

IV.

The procedures proposed for investigating allegations against Office of Inspector General staff or the head of an agency seem to us for the most part legally unobjectionable. We question, however, whether an Inspector General would have authority under the Inspector General Act to investigate all non-criminal allegations against the head of the agency, including those [*12] unrelated to the Inspector General's statutory responsibilities respecting the programs and activities of his establishment. We also question whether either the Council or its Chairman has been properly authorized to receive information from an Inspector General relating to an investigation. *See* notes 7 and 12, *supra.*

V.

We appreciate the Council's interest in devising an effective means of holding an Inspector General and his staff accountable for their conduct under noncriminal laws and regulations generally applicable to officers and employees of the Executive Branch. And we recognize that the Council's procedures are still in the process of development. While we have expressed a number of legal reservations about the procedures as presently drafted, it should be possible to accomplish the Council's objectives through more explicit reliance on the President's inherent authority to oversee the performance of his appointees in office. n13 In addition, depending on the nature of the allegations involved, the Council may find it useful to draw upon an agency head's inherent authority to supervise the conduct of officers and employees of his agency. n14

n13 While the President could delegate this oversight function in the case of Inspectors General to the Council or its Chairman, *see 3 U.S.C. §§ 301* and 302, there would remain the question of what funds could be used to pay its costs. *See* note 8, *supra.* If the President were to retain overall responsibility for directing investigations into allegations against an Inspector General, funds appropriated to the general activities of the White House Office could be used for this purpose. If necessary, trained investigative personnel, including Inspector General staff, could be detailed from other agencies on a reimbursable basis. *See 3 U.S.C. § 107.* Alternatively,

if the President were to direct the investigation of his appointees by an agency which is otherwise authorized to investigate particular types of misconduct, funds appropriated to that agency could be made available for the investigation.

n14 An agency head's authority to investigate allegations against officers and employees of his agency, and to use funds appropriated for the general administration of the agency for this purpose, is discussed in notes 10 and 11, *supra*. Under such circumstances the investigator should report directly to the agency head, rather than to the Chairman of the Council, as the proposal currently provides in the case of investigations of Inspectors General.

[*13]

We would be interested to learn what further steps the Council decides to take in connection with this matter, and to be of further assistance should you so desire.

RALPH W. TARR

Deputy Assistant Attorney General

Office of Legal Counsel

Legal Topics:

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OPINION OF THE OFFICE OF LEGAL COUNSEL

On-Site Inspection of Books and Records in Criminal Investigations of Labor Unions and Employee Benefit Plans

1983 OLC LEXIS 120

December 23, 1983; This is an unpublished opinion of the Office of Legal Counsel.

ADDRESSEE:
[*1]

Memorandum to Stephen S. Trott

Assistant Attorney General Criminal Division

OPINIONBY: SIMMS

OPINION:

This memorandum responds to your request of September 2, 1982, which was further refined in an October 12, 1982 memorandum, concerning the statutory scope and constitutional validity of criminal investigative authority under the Labor Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 522, *29 U.S.C. § 401* et seq. (LMRDA), and the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 832, *29 U.S.C. § 1001* et seq. (ERISA). Your questions focused on the authority of two types of agents: first, criminal investigative agents employed by the Office of Organized Crime and Racketeering, Office of the Inspector General (OIG), Department of Labor [hereinafter OIG agents] n1; second, criminal investigative agents of the Federal Bureau of Investigation (FBI) [hereinafter FBI agents].

n1 The Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101, *5 U.S.C. app. § 1* et seq. (1982 ed.), provided that the functions of the Office of Special Investigations of the Department of Labor be transferred to the Office of the Inspector General. See *5 U.S.C. app. § 9*(a)(1)(F) (1982 ed.).

[*2]

Specifically, you inquired whether OIG agents have authority to conduct on-site inspections of records and accounts pursuant to *29 U.S.C. § 521*(a) of the LMRDA notwithstanding the absence of any possible civil "compliance" purpose for such inspections. You also inquired whether FBI agents have the power to conduct on-site inspections of records and accounts pursuant to the criminal investigative authority delegated by the Secretary of Labor (Secretary) to the Department of Justice under a Memorandum of Understanding Between the Labor and Justice Departments Relating to the Investigation and Prosecution of Crimes and Civil Enforcement Actions under the LMRDA. With respect to investigative authority under ERISA, you posed similar questions. That is, do OIG agents have authority to conduct on-site inspections of books and records under *29 U.S.C. § 1134*(a) absent any civil compliance purpose. Further, are FBI agents authorized to conduct on-site inspections of books and records by reason of the Secretary's delegation of certain criminal investigative authority in a 1975 Memorandum of Understanding Between the Departments [*3] of Justice and Labor Relating to the Investigation and Prosecution of Crimes under ERISA. You confined your inquiry, with respect to all four questions, to whether the power to conduct on-site inspections of books and records in purely criminal matters was statutorily authorized. If authorized, you sought guidance on the statutory scope of that inspection authority and on any constitutional restrictions that might limit the inspection authority.

For reasons set forth in detail below, we conclude that the LMRDA authorizes, by delegation from and agreement with the Secretary, OIG agents and FBI agents to conduct on-site inspections of records and accounts in purely criminal investigations under that Act. The LMRDA statutory scheme indicates that Congress intended such agents to enforce this inspection authority in nonconsensual situations by means of subpoena issued by a designated official and backed by judicial process. Under the LMRDA, a court order compelling production of documents could be obtained by establishing the good-faith pursuit of congressionally authorized purposes rather than the traditional probable cause standard.

Our conclusions with respect to ERISA are [*4] similar. Both OIG agents and FBI agents, by delegation, may conduct consensual on-site inspections of books and records in solely criminal investigations under that Act. Likewise, ERISA requires that agents proceed by means of subpoena in nonconsensual situations. Under ERISA, a showing of reasonable cause to believe a violation may exist is necessary to obtain a court order compelling production. Finally, we conclude that both the LMRDA and ERISA investigatory schemes pass constitutional muster when read so as to limit on-site inspections or subpoenas in civil and criminal investigations to records and accounts required to be kept by law.

I. Background

A. Facts

Since 1978, OIG agents working in association with the Department of Justice's Organized Crime and Racketeering Strike Force program have been performing criminal investigative functions formerly performed by Labor Department investigators in the Office of Special Investigations in the Labor Management Services Administration (LMSA) [hereinafter LMSA agents]. n2 We are informed that the Secretary of Labor has delegated his investigatory authority under *29 U.S.C. § 521* to these OIG [*5] agents. We understand that OIG agents assist the Department's Strike Force program pursuant to *29 U.S.C. § 527*, providing for cooperation among Government departments, and the 1960 Memorandum of Understanding (1960 MOU) between the Departments of Justice and Labor executed, in part, on the basis of *29 U.S.C. § 527*. See *25 Fed. Reg. 1708 (1960)*. n3 Accordingly, whenever organized crime is implicated in any criminal matters arising under the LMRDA with respect to which the Secretary has delegated investigative authority to the Department of Justice, we assume that OIG agents may be assigned to aid the Strike Force. Absent specific case-by-case arrangements, this delegated authority comprises criminal investigations arising under *29 U.S.C. § 501*(c) (embezzlement of union funds); *29 U.S.C. § 503*(b) (prohibiting employer from paying fine of labor official or employee); *29 U.S.C. § 504* (prohibiting persons convicted of certain crimes from holding office); *29 U.S.C. § 522* [*6] (extortionate picketing on or about premises of employer) and *29 U.S.C. § 530* (prohibiting use of force or violence to coerce or intimidate union member from exercising his rights under the LMRDA). FBI agents similarly would conduct inspections of records and accounts in the course of criminal investigations concerning these matters delegated to this Department by the Secretary for investigation purposes. See *28 U.S.C. § 533*(1); 28 C.F.R. § 0.85 (1982).

n2 The Office of the Inspector General assumed the criminal investigative responsibilities of the Office of Special Investigations in the Labor Management Services Administration (LMSA) in October, 1978. See *5 U.S.C. app. § 9*(a)(1)(F) (1982 ed.); n. 1 supra.

n3 The 1960 MOU formalized agreement between the two Departments on "the areas of responsibility and the procedure in connection with the investigations, prosecutions of offenses and civil enforcement actions arising under the Act [LMRDA] . . . ." Memorandum of Understanding Between the Departments of Justice and Labor Relating to the Investigation and Prosecution of Crimes and Civil Enforcement Actions under the Labor-Management Reporting and Disclosure Act of 1959 (P.L. 86-257), *25 Fed. Reg. 1708 (1960)*.

[*7]

LMSA agents continue to conduct criminal investigations under the LMRDA in non-organized crime cases and also oversee compliance with the non-criminal provisions of the LMRDA applicable to internal union affairs. The criminal investigations concern criminal matters arising under *29 U.S.C. §§ 431*, 432 and 433 (reporting of financial conditions of labor unions, financial interests of officers and employees of labor organizations, and payments or loans by employers to labor unions or employees for certain purposes); *29 U.S.C. §§ 461*-63 (provisions governing labor organizations which assume trusteeship over subordinate labor organization); *29 U.S.C. § 502* (bonding of officers and employees of labor organizations) and *29 U.S.C. § 503*(a),(b)(prohibiting loans by labor organizations to officers and employees of such organizations and payment of fines of a labor official or employee by a labor organization). The civil compliance provisions also apply to the reporting of financial conditions and interests required of labor unions, union officers and [*8] employers as well as to the regulation of union elections. See, e.g., *29 U.S.C. §§ 440*, 482. Thus, the primary difference between the OIG and FBI agents on the one hand, and the LMSA agents on the other, is that the former exercise solely criminal investigative authority under *29 U.S.C. §§ 521* and 527, while the latter have concurrent criminal investigative and civil compliance powers under *29 U.S.C. § 521*.

Similarly, pursuant to arrangements relating to ERISA, OIG agents at times aid in criminal investigations of matters arising under *18 U.S.C. § 664* (theft or embezzlement from employee benefit plan), and *18 U.S.C. § 1954* (offer, acceptance, or solicitation to influence operations of employee benefit plan). See *29 U.S.C. § 1031* (amending relevant sec-

tions of Title 18 to extend coverage to employee benefit plans). As we understand the facts, although a 1975 Memorandum of Understanding Between the Departments of Justice and Labor Relating to the Investigation [*9] and Prosecution of Crimes and Related Matters under Title I of ERISA (1975 MOU), specified that criminal investigative authority rests in the Department of Justice with respect to matters under *18 U.S.C. §§ 664,* 1027 and 1954 n4, the OIG agents aid the Department of Justice on the basis of the 1975 MOU's provision for "specific arrangements agreed upon by the two Departments on a case-by-case basis." n5 The Secretary also delegated to this Department the authority to investigate criminal matters arising under *29 U.S.C. § 1111* (prohibition against persons convicted of certain crimes from serving, inter alia, as administrator, officer, counsel or employee of any employee benefit plan), and *29 U.S.C. § 1141* (prohibiting use of fraud or violence to coerce or intimidate participant or beneficiary from exercising rights to which he is entitled under benefit plan). We are not informed whether OIG agents presently assist in investigations concerning these matters but assume that they may provide such assistance. FBI agents theoretically could conduct inspections of books and records [*10] during investigations of any of the above-mentioned criminal matters to which the Secretary's inspection authority extends.

n4 According to our information, OIG agents do not participate in investigations relating to *18 U.S.C. § 1027* (false statements and concealment of facts in relation to documents required by ERISA), although the Memorandum of Understanding would permit them to do so.

n5 The FBI retains authority to investigate all criminal offenses, except in cases in which Congress has specifically assigned this responsibility exclusively to another agency. See *28 U.S.C. § 533;* 28 C.F.R. § 0.85(a). Accordingly, the Secretary did not need to delegate authority to this Department to investigate matters under *18 U.S.C. §§ 654,* 1027 and 1954. However, because the Secretary's inspection authority under ERISA applies to any provision of subchapter I, *29 U.S.C. §§ 1001*-1144, we read this to include *29 U.S.C. § 1031,* the provision that amends *18 U.S.C. §§ 664,* 1027 and 1954, to extend the coverage of these provisions to employee benefit plans. Since we are unaware of any other statutory source of similar inspection authority for the FBI, we assume that whatever inspection authority the Department exercises must be delegated by the Secretary pursuant to *29 U.S.C. § 1136.*

[*11]

Further, the 1975 MOU provides that the Secretary and his staff retain investigative authority with regard to matters that may form the basis for possible criminal action under *29 U.S.C. § 1131* (violation of duties of disclosure and reporting of employee benefit plan description and participant's benefit rights). The Secretary also exercises civil compliance authority under ERISA. See, e.g., *29 U.S.C. §§ 1132*(a)(2), (4)-(6). Therefore, analogous to the situation under the LMRDA, two categories of investigative agents have developed: LMSA agents, who exercise concurrent criminal investigative and civil compliance authority under *29 U.S.C. § 1134,* and OIG and FBI agents, who exercise solely criminal investigative authority pursuant to *29 U.S.C. §§ 1134* and 1136.

We understand that the LMSA agents currently inspect books and records in cases prosecuted by the United States Attorneys' offices. After a labor union subject to the LMRDA, or employer covered by ERISA, files its required annual report with the Secretary, an agent may contact [*12] the officer who maintains the records and ask to inspect them. In most cases, on-site inspections are voluntarily arranged. If voluntary compliance is not obtained, it is possible to proceed by means of an administrative subpoena. Enforcement of a subpoena through the courts can obviously be time-consuming. Moreover, inspection on the premises and the ability to observe how the records are kept is a more effective investigative technique than the inspection of documents brought to LMSA agents by a record custodian.

We further note that your present inquiry is limited to whether OIG and FBI agents may inspect, as LMSA agents do, books and records of labor unions and employee benefit plans in order to detect and investigate certain crimes. Given limited resources and the large number of unions and pension plans potentially subject to inspection, the on-site inspection procedure would enhance greatly the Secretary's ability to enforce the two statutes and better enable this Department to select the best cases for prosecution. Significantly, the Acts themselves require that persons obligated to file reports shall retain sufficiently detailed records from which documents filed with the [*13] Secretary may be checked for accuracy. See *29 U.S.C. § 436* (5 year retention of records under LMRDA); *29 U.S.C. § 1027* (6 year retention of records under ERISA). The LMSA agents only inspect those records required to be kept by statute, documents to which the Secretary was intended to have access to further a valid regulatory function. We understand that the agents do not search through any and all files, drawers or rooms, but inspect only those records pointed out to them as relevant to their inquiry. As indicated in the preceding description of statutorily delegated authority, however, both OIG and FBI agents

have authority to investigate criminal matters for which inspections of things other than books and accounts might prove relevant.

B. Statutory Provisions

Section 521 of Title 29 sets forth the general investigative authority of the Secretary under the LMRDA. It provides:

> (a) The Secretary shall have power when he believes it necessary in order to determine whether any person has violated or is about to violate any provision of this chapter (except subchapter II of this chapter) to make [*14] an investigation and in connection therewith he may enter such places and inspect records and accounts and question such persons as he may deem necessary to enable him to determine the facts relative thereto. The Secretary may report to interested persons or officials concerning the facts required to be shown in any report required by this chapter and concerning the reasons for failure or refusal to file such a report or any other matter which he deems to be appropriate as a result of such an investigation.
>
> (b) For the purpose of any investigation provided for in this chapter, the provisions of sections 49 and 50 of Title 15 (relating to the attendance of witnesses and the production of books, papers, and documents), are made applicable to the jurisdiction, powers, and duties of the Secretary or any officers designated by him.

(Emphasis added.) The Secretary is authorized to cooperate with this Department and other departments and agencies, according to the terms of *29 U.S.C. § 527*, which states:

> In order to avoid unnecessary expense and duplication of functions among Government agencies, the Secretary may make such arrangements or agreements [*15] for cooperation or mutual assistance in the performance of his functions under this chapter and the functions of any such agency as he may find to be practicable and consistent with law. The Secretary may utilize the facilities or services of any department, agency, or establishment of the United States or of any State or political subdivision of a State, including the services of any of its employees, with the lawful consent of such department, agency, or establishment; and each department, agency, or establishment of the United States is authorized and directed to cooperate with the Secretary and, to the extent permitted by law, to provide such information and facilities as he may request for his assistance in the performance of his functions under this chapter. The Attorney General or his representative shall receive from the Secretary for appropriate action such evidence developed in the performance of his functions under this chapter as may be found to warrant consideration for criminal prosecution under the provisions of this chapter or other Federal law.

These statutory sections provide the basis for the Secretary's delegation of investigatory powers to OIG agents and the [*16] 1960 MOU delegating criminal investigative authority to this Department with respect to matters that may form the basis for criminal prosecution under certain provisions of the LMRDA.

The general investigative authority granted the Secretary under ERISA is contained in *29 U.S.C. § 1134*, which states:

> (a) The Secretary shall have the power, in order to determine whether any person has violated or is about to violate any provision of this subchapter or any regulation or order thereunder --
>
> (1) to make an investigation, and in connection therewith to require the submission of reports, books, and records, and the filing of data in support of any information required to be filed with the Secretary under this subchapter, and
>
> (2) to enter such places, inspect such books and records and question such persons as he may deem necessary to enable him to determine the facts relative to such investigation, if he has reasonable cause to believe there may exist a violation of this subchapter or any rule or regulation issued thereunder or if the entry is pursuant to an agreement with the plan. The Secretary may make available to any person actually affected [*17] by any matter which is the subject of an investigation under this section, and to any de-

partment or agency of the United States, information concerning any matter which may be the subject of such investigation; . . .

(b) The Secretary may not under the authority of this section require any plan to submit to the Secretary any books or records of the plan more than once in any 12 month period, unless the Secretary has reasonable cause to believe there may exist a violation of this subchapter or any regulation or order thereunder.

(c) For the purposes of any investigation provided for in this subchapter, the provisions of sections 49 and 50 of Title 15 (relating to the attendance of witnesses and the production of books, records, and documents) are hereby made applicable (without regard to any limitation in such sections respecting persons, partnerships, banks, or common carriers) to the jurisdiction, powers, and duties of the Secretary or any officers designated by him . . . .

(Emphasis added.) Similar to the LMRDA, ERISA authorizes the Secretary to make arrangements with other agencies and departments under the terms of *29 U.S.C. § 1136*, which [*18] track almost verbatim the language of *29 U.S.C. § 527*. n6 The 1975 MOU, delegating the investigation of certain criminal matters under ERISA to this Department, was executed under the authority of both sections, 1134 and 1136, of Title 29.

n6 Section 1136 of 29 U.S.C. states:

In order to avoid unnecessary expense and duplication of functions among Government agencies, the Secretary may make such arrangements or agreements for cooperation or mutual assistance in the performance of his functions under this subchapter and the functions of any such agency as he may find to be practicable and consistent with law. The Secretary may utilize, on a reimbursable or other basis, the facilities or services of any department, agency, or establishment of the United States or any State or political subdivision of a State, including the services of any of its employees, with the lawful consent of such department, agency, or establishment, and each department, agency, or establishment of the United States is authorized and directed to cooperate with the Secretary and, to the extent permitted by law, to provide such information and facilities as he may request for his assistance in the performance of his functions under this subchapter. The Attorney General or his representative shall receive from the Secretary for appropriate action such evidence developed in the performance of his functions under this subchapter as may be found to warrant consideration for criminal prosecution under the provisions of this subchapter or other Federal law.

[*19]

II. Statutory Analysis of Investigative Power Under the LMRDA

A. Inspections by OIG and FBI Agents for Solely Criminal Purposes Under the LMRDA

Two inquiries are necessary to determine whether *29 U.S.C. § 521* authorizes OIG and FBI agents to conduct on-site inspections of books and records for purely criminal investigations. First, does the statute authorize on-site inspections for criminal purposes? If so, may OIG and FBI agents exercise this authority?

1. Congress, in enacting *29 U.S.C. § 521*(a), granted the Secretary broad power "when he believes it necessary in order to determine whether any person has violated or is about to violate any provision of this chapter . . . to make an investigation and in connection therewith he may enter such places and inspect records and accounts . . . ." See also *Int'l Brotherhood of Teamsters v. Wirtz, 346 F.2d 827, 830 (D.C. Cir. 1965)* (broad visitorial powers). The statutory language unquestionably indicates that Congress authorized the Secretary to engage in on-site inspections of records and accounts. n7 The plain terms of *29 U.S.C. § 521* [*20] equally clearly authorize the Secretary to investigate and inspect whenever he believes any violation under the LMRDA may have occurred or is about to occur (except violations of subchapter II, the Bill of Rights of Members of Labor Organizations). Cf. *United States v. Bisceglia, 420 U.S. 141, 149 (1975)* ("any person" and "any violation" language in Internal Revenue Code inconsistent with interpretation that limits investigations to particular person or particular liabilities).

n7 We are not confronted with a statute that restricts the Secretary's on-site inspection power to surveillance of the physical premises. Cf. In the *Matter of Kulp Foundry, Inc., 691 F.2d 1125, 1132 (3d. Cir. 1982)* (construing OSHA to authorize on-site inspection of materials at worksite, but to permit inspection of documents only pursuant to subpoena process).

Some violations under the LMRDA may be remedied by either civil enforcement actions or criminal prosecutions. See *29 U.S.C. §§ 439,* 440 (reporting violations). Other provisions are enforceable only by civil actions. See *29 U.S.C. § 482* [*21] (election provisions). Certain provisions in the LMRDA, however, have only criminal penalties and terms of imprisonment as sanctions for proven violations. See *29 U.S.C. §§ 501*-04. If certain misconduct is remedied by criminal penalties, then an investigation of such potentially criminal misconduct inevitably is an investigation for criminal purposes. n8 Thus, on its face, the statute suggests that investigations and the use of on-site inspection authority are proper whether employed solely for a criminal investigation, for potentially civil or criminal purposes, or for solely civil purposes. See *United States v. Acklen, 690 F.2d 70 (6th Cir. 1982)* (administrative inspection primarily to obtain evidence for criminal prosecution authorized under Controlled Substances Act; validity of administrative search depends on its scope and method rather than on criminal or civil purpose). In addition, *29 U.S.C. § 527* provides that the Secretary shall furnish the Attorney General with such evidence "as may be found to warrant consideration for criminal prosecution . . . ." Congress evidently [*22] contemplated that the Secretary would uncover some criminal evidence in the exercise of his investigatory powers. It would be highly anomalous to construe the statute to prohibit the Secretary from investigating if he anticipated that he might discover only criminal misconduct instead of civil as well as criminal misconduct.

n8 Of course, while investigations based on suspicion of criminality are for criminal purposes, prosecution of all infractions is not a foregone conclusion. The Secretary has discretion to bypass criminal sanctions in favor of civil penalties.

The legislative history adds little to the logic and implications of the statutory language with respect to whether Congress intended to authorize the use of investigative authority, including on-site inspections of books and records, in solely criminal investigations. The original bills introduced in the House and Senate n9 granted the Secretary power to investigate only when he had probable cause to believe that any person or labor organization had violated any provision of the Act. The Senate Committee on Labor and Public Welfare deleted the probable cause requirement on the grounds that "the words 'probable cause' [*23] would throw a monkey wrench into the Secretary's investigatory machinery . . . . every time he commenced an investigation the Secretary could be dragged into court until the question of probable cause had been decided." S. Rep. No. 187, 86th Cong., 1st Sess. (1959), reprinted in [1959] U.S. Code Cong. & Ad. News at 2395. Accordingly, the amended provision gave "the Secretary investigatory power when he believes it necessary in order to determine whether a violation has occurred or is about to occur." Id. at 2396. See also 105 Cong. Rec. 5990-91 (1959) (investigatory authority provides Secretary with broad investigatory power including power of subpoena).

n9 See H.R. 8400, 86th Cong., 1st Sess., § 601(a) (1959) (Landrum-Griffin bill), and S. 505, 86th Cong., 1st Sess., § 106(c) (1959) (Kennedy-Ervin bill). The House passed H.R. 8342, which contained the text of H.R. 8400. The text of H.R. 8400 was substituted in S. 1555, which, with amendments, was the bill finally reported from conference and passed.

This provision granting the Secretary broad investigatory powers emerged from the Conference Committee with only minor changes. "The conference substitute is similar [*24] to the Senate bill, except that the investigation authority is permissive rather than mandatory, no investigation may be made with respect to violations of rules and regulations, and the investigation authority does not extend to title I." H. Conf. Rep. No. 1147, 86th Cong., 1st Sess. (1959), reprinted in [1959] U.S. Code Cong. & Ad. News at 2508. Clearly, Congress intended to grant the Secretary as broad an investigatory power as possible. Congress also knew how to limit the Secretary's powers with respect to specific matters, such as violations of rules and regulations, when it so desired. Yet Congress in no way indicated that investigations of potential criminal violations were not contemplated within the general investigative authority. n10 While reliance on the legislative history may be unnecessary when the statutory language, as here, is sufficiently clear, see *Ernst & Ernst v. Hochfelder, 425 U.S. 185, 201 (1976),* nothing in the legislative history conflicts with the plain import of the statutory terms. n11 Cf. *United States v. LaSalle Nat'l Bank, 437 U.S. 298, 308, 317 n.18 (1977)* (plain language of [*25] Internal Revenue Code indicates Congress intended IRS summons authority to be used for four limited, potentially civil, purposes). Therefore, because Congress conferred broad authority on the Secretary to inspect books and records when-

ever he believes any violation may be involved, without requiring the Secretary to have probable cause that any particular violation (whether criminal or civil) occurred, we conclude that the Secretary may conduct inspections for potentially solely criminal purposes.

n10 The legislative history does not indicate an awareness of the contemporaneous decision in *Frank v. Maryland, 359 U.S. 360 (1959),* which concluded that the Framers intended the warrant requirement to apply only to searches for criminal evidence and not to administrative searches. Assuming a general knowledge of the state of Fourth Amendment law at that time, however, the congressional debate over the probable cause requirement may well have been directed to the possibility of solely criminal investigations.

n11 Courts, at least in the context of enforcing subpoenas issued by the Secretary pursuant to *29 U.S.C. § 521,* have also interpreted the Secretary's investigatory authority in a broad fashion so as to further the informing and disclosure purposes of the Act. See *United States v. Budzanowski, 462 F.2d 443 (3d Cir. 1972)* (in order to accomplish purpose of providing union members with information necessary to regulate their affairs, Congress did not limit Secretary's investigatory power with a probable cause requirement); *Int'l Brotherhood of Teamsters v. Wirtz, 346 F.2d 827, 830 (D.C. Cir. 1965)* (Burger, J.) (Secretary's broad visitorial powers to be construed in such a way as to give effect to the purposes of the Act).

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2. Having determined that the language of the statute should be read to permit the Secretary to use his general inspection authority for solely criminal investigations, we find nothing that prohibits the Secretary from delegating portions of that investigative authority to either OIG agents, who have solely criminal responsibilities, or FBI agents, who similarly perform only criminal investigations. Congress explicitly granted the Secretary the authority to delegate to any officers designated by him the power to conduct investigations and to issue subpoenas. See *29 U.S.C. § 521*(b); *Goldberg v. Battles, 196 F. Supp. 749 (E.D. Pa. 1961),* aff'd, *299 F.2d 937* (3d Cir.), cert. denied, *371 U.S. 817 (1962).* Further, *29 U.S.C. § 527* expressly authorizes the Secretary to "make such arrangements or agreements for cooperation or mutual assistance in the performance of his functions under this chapter and the functions of any such [Government] agency as he may find to be practicable and consistent with law." There is no reason [*27] to exclude OIG agents, who exercise functions formerly performed by certain LMSA agents, see *5 U.S.C. app. § 9*(a)(1)(F), from the permissible scope of delegation comprehended by §§ 521(b) and 527. n12 If Congress empowered the Secretary to utilize the facilities and employees of this Department or any agency, it is logical that Congress also gave the Secretary authority to delegate to the agency involved the power to conduct investigations. See *United States v. Weber, 255 F. Supp. 40 (D.N.J. 1965),* aff'd sub. nom. *United States v. Fisher, 384 U.S. 212 (1966).*

n12 We note that, in distinction to your request, we premise the inspection authority of both OIG and FBI agents on *29 U.S.C. §§ 521* and 527. It is unclear, for example, whether the Secretary's authority to designate officials under *29 U.S.C. § 521*(b) applies to the Inspector General's Office. See *United States v. Iannone, 610 F.2d 943 (D.C. Cir. 1979)* (Secretary of Energy may not delegate ad testificandum subpoena power to Inspector General, who is not an agent of the Secretary, when Congress expressly refused to grant Inspector General that very authority). Notwithstanding Iannone, the Secretary can delegate the power to issue subpoenas duces tecum, which the Inspector General is independently authorized to issue, to the Inspector General, pursuant to *29 U.S.C. §§ 521*(b) and 527. We recommend the promulgation of regulations or a Memorandum of Understanding to establish clearly the delegation and arrangement of responsibilities between the Secretary and the OIG.

[*28]

In fact, the 1960 MOU, executed on the basis of this statutory authority, granted investigatory authority over certain criminal matters to the Labor Department staff and delegated investigatory authority over other criminal matters to this Department. FBI agents, of course, may exercise this Department's authority. See *28 U.S.C. § 533*(1); 28 C.F.R. § 0.85 (1982). The MOU thus constitutes the contemporaneous interpretation of a recently enacted statute by those charged with its administration -- an administrative interpretation which is entitled to peculiar weight. See *Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978)* (particular deference when administrative practice "involves a contemporaneous construction of a statute by the [persons] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new") (quoting *Norwegian Nitrogen Products Corp. v. United States, 288 U.S. 294, 315 (1933)).* n13 Moreover, assuming that the Secretary's investigatory authority can be used solely [*29] for a criminal investigation, there is no indication that Congress intended to permit

noncompartmentalized delegations of civil and criminal investigatory power but to prohibit delegations of solely criminal investigatory power.

n13 So far as we are aware, every court that has considered the Secretary's authority to delegate investigative functions to either Labor Department officials or this Department has upheld that exercise of authority. See, e.g., *In re Application to Quash Grand Jury Subpoena Served Upon Local 806, Teamsters, 384 F. Supp. 1304, 1305-06 (E.D.N.Y. 1974),* aff'd, *United States v. Snyder, 668 F.2d 686 (2d Cir. 1982)* (approving 1960 MOU and assignment of Labor Department investigator to Department of Justice Strike Force); *Goldberg v. Battles, 196 F. Supp. 749 (E.D. Pa. 1961),* aff'd, *299 F.2d 937* (3d Cir.), cert. denied, *371 U.S. 817 (1962)* (LMRDA gives Secretary power to delegate investigatory functions to other Labor Department officials or to Department of Justice).

We are aware that the OIG is concerned [*30] that inspections for criminal purposes may conflict with certain principles governing administrative investigations articulated in *United States v. LaSalle Nat'l Bank, 437 U.S. 298 (1978).* n14 However, we believe that our conclusions, based on the statutory language and history of the LMRDA, are not inconsistent with that case. In United States v. LaSalle Nat'l Bank, the Court held that Congress did not intend the IRS to employ its statutory summons authority -- an investigatory power related but not identical to inspection authority -- for purely criminal investigations. Significantly, in LaSalle, the Court was construing the Internal Revenue Code in which Congress had authorized the use of investigative powers for four limited purposes, none of which suggested that obtaining evidence solely for a criminal investigation was a legitimate purpose. n15 The Court therefore determined that good-faith use of the congressionally authorized summons authority required that the IRS not abandon the pursuit of a civil tax determination or collection. n16 Under the LMRDA, in contrast, Congress authorized use of investigatory powers whenever [*31] the Secretary believes it necessary to determine whether any provision of the LMRDA, including those with solely criminal sanctions, is about to be violated. The "civil purpose" requirement that the Court created in LaSalle to ensure good faith observance of the limited grant of investigative power in issue there has no relevance to the plenary grant of investigatory power under the LMRDA statutory scheme. See also *United States v. Consolidation Coal Co., 560 F.2d 214 (6th Cir. 1977),* vacated and remanded, *436 U.S. 942 (1978),* judgment reinstated, *579 F.2d 1011 (6th Cir. 1978),* cert. denied, *439 U.S. 1069 (1979)* (Coal Mine Health and Safety Act does not distinguish between inspections predicated on overt criminal suspicion rather than administrative necessity). n17

n14 See Memorandum to Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel from D. Lowell Jensen, Assistant Attorney General, Criminal Division, at 1 (Oct. 12, 1982).

n15 Notably, the Court remarked that "for a fraud investigation to be solely criminal in nature would require an extraordinary departure from the normally inseparable goals of examining whether the basis exists for criminal charges and for the assessment of civil penalties." *United States v. LaSalle Nat'l Bank, 437 U.S. 298, 314 (1978).*

[*32]

n16 The Court in LaSalle actually established two rules: first, an IRS summons must issue before the IRS refers the subject to the Department of Justice for criminal prosecution; second, that "good faith" required pursuit of a civil purpose.

n17 Similarly, in *SEC v. Dresser Industries, Inc., 628 F.2d 1368* (D.C. Cir.) (en banc), cert. denied, *449 U.S. 993 (1980),* the court held that because the investigative provisions of the securities laws were far broader than those in the Internal Revenue Code, the prophylactic LaSalle rule, prohibiting use of IRS civil summons authority during the pendency of a criminal proceeding, was not applicable to the SEC. Rather, Congress had authorized the SEC to investigate and undertake civil enforcement actions even after this Department had initiated a parallel criminal investigation.

The only suggested objection to either the Secretary's use of his investigatory power for solely criminal investigative purposes, or to his delegation of solely criminal investigative authority to others, would be that certain "policy interests" recognized in LaSalle are thereby [*33] inadequately safeguarded. In LaSalle the Court concluded that Congress did not intend the IRS' summons authority "to broaden the Justice Department's right of criminal litigation discovery or to infringe on the role of the grand jury as a principal tool of criminal accusation." *437 U.S. at 312.* Accordingly,

the Court prohibited use of a summons upon the recommendation of criminal prosecution to this Department because "the likelihood that discovery would be broadened or the role of the grand jury infringed is substantial if post-referral use of the summons authority were permitted." *437 U.S. at 312.* These concerns are simply not applicable in the context of inspection authority under the LMRDA.

First, the strict limitations on discovery in criminal cases, see Fed. R. Crim. P. 15-17, take effect only after a grand jury has returned an indictment. Prior to that time, use of any constitutionally or statutorily permissible inspection authority can in no way broaden this Department's right to criminal discovery. Second, while an agency's subpoena authority, insofar as it parallels a grand jury's subpoena authority, theoretically [*34] might infringe the grand jury's role, but cf. *SEC v. Dresser Industries, Inc., 628 F.2d 1368, 1384* (D.C. Cir.) (en banc), cert. denied, *449 U.S. 993 (1980)* (danger that enforcement of SEC subpoena might interfere with role of grand jury too speculative to justify denying enforcement of subpoena), there is no similar concern when inspection authority, which does not directly "compete" with a grand jury's functions, is in issue. n18 Thus, we conclude that neither the primary prophylactic requirement of LaSalle -- that a summons issue prior to a recommendation to this Department for criminal prosecution -- nor the second good faith prerequisite of a "civil purpose" for the summons, see *437 U.S. at 318,* would be furthered by prohibiting or should be read to prohibit OIG or FBI agents from using inspection authority for solely criminal purposes under the LMRDA prior to an indictment.

n18 Moreover, nothing in the Constitution requires that the grand jury be the only investigatory body. From the defendant's perspective, an agency summons or subpoena should be preferable to a grand jury subpoena, because any distinctions between agency and grand jury subpoenas in substantive scope or procedural protection make the grand jury subpoena the more powerful government enforcement tool. See Developments in the Law -- Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions, *92 Harv. L. Rev. 1227, 1312-13 (1979)* (judicial scrutiny less severe in case of grand jury subpoena and appeal not available prior to civil contempt penalty).

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B. Statutory Scope of Inspection Authority Under the LMRDA

You have also requested us to ascertain the statutory scope of the inspection authority that Congress established under the LMRDA should we find that inspections for criminal purposes are statutorily authorized. On its face, *29 U.S.C. § 521*(a) confers on the Secretary a right to enter and inspect records without a warrant that is distinct from the subpoena powers provided for in *29 U.S.C. § 521*(b). Cf. In the *Matter of Kulp Foundry, Inc., 691 F.2d 1125, 1132 (3d Cir. 1982)* (inspections of documents permitted only pursuant to subpoena process). To define the statutory scope of this inspection authority, we must determine whether Congress articulated any standards that the Secretary or his delegate must meet prior to entry and how Congress intended the Secretary to enforce this inspection authority.

1. It is clear from the statutory language and the legislative history, see pp. 12-14 supra, that Congress did not require the Secretary to establish probable cause to conduct investigations in general or to conduct [*36] on-site inspections in particular. Instead, Congress vested the Secretary with discretion to investigate "whenever he believes it necessary." *29 U.S.C. § 521*(a); S. Rep. No. 187, 86th Cong., 1st Sess. (1959), reprinted in [1959] U.S. Code Cong. & Ad. News at 2396. Necessity cannot be equated with probable cause or some similar standard, and to so interpret the statutory language might seriously hamper the Secretary in conducting inspections he thinks warranted. The Supreme Court, in interpreting analogously-worded statutory authority, has held that "to import a probable cause standard to be enforced by the courts would substantially overshoot the goal which the legislators sought to attain." *United States v. Powell, 379 U.S. 48, 56 (1964)* (IRS may reinspect taxpayer's account when Secretary notifies taxpayer that additional inspection "is necessary").

In the absence of explicit congressional standards -- whether probable cause or otherwise -- the courts have, as a matter of statutory interpretation, recognized certain minimal standards that an agency must meet to ensure the good faith use of congressionally [*37] authorized investigative powers, that is, that the congressionally required determination of necessity has been made in the present case. n19 We believe that the criteria set forth in United States v. Powell, in which the Court construed the statutory scope of the Government's power to examine a taxpayer's books whenever the Secretary of the Treasury determined such examination to be "necessary," are relevant by analogy to the statutory inspection authority in the LMRDA. In Powell, the Court required the Government to show that "the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the legitimate purpose, that the information sought is not already within the [agency's] possession and that the administrative steps required . . . have been

followed . . . ." *379 U.S. at 57-58.* We conclude that an OIG or FBI agent would be fully within the statutory authority to enter and inspect books and records if he or she can meet the four above-described standards. n20

n19 Significant for present purposes, federal circuit courts of appeals have concluded that the good faith standards that apply to an agency's subpoena power similarly limit an agency's power to inspect when such inspections are enforceable by court injunction. See *I.C.C. v. Gould, 629 F.2d 847, 854-55 (3d Cir. 1980),* cert. denied, *449 U.S. 1077 (1981)* (applying standards defining good faith use of subpoenas in United States v. LaSalle Nat'l Bank and United States v. Powell, supra, to the ICC's power to inspect records); Midwest Growers Co-op Corp. v. *Kirkemo, 533 F.2d 455, 461 (9th Cir. 1976).*

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n20 Although the Supreme Court noted in United States v. LaSalle Nat'l Bank that the Powell standards are not intended to be exclusive, see *437 U.S. at 317-18 nn.19 & 20,* we believe that they are amply sufficient to ensure that the minimal curb Congress placed on the Secretary's inspection authority under the LMRDA is properly observed. The broad inspection authority under the LMRDA is distinguishable from statutes that contain words of limitation designed, e.g., to restrict the class of records to which access is permitted to those "directly pertinent." See *Bowsher v. Merck & Co., 103 S. Ct. 1587, 1596-98 (1983).*

2. The scope and effectiveness of any statutory inspection authority is also dependent on the mechanism that Congress provides for its enforcement. Depending on the particular statutory scheme, administrative agencies at times may enforce a statutory right of on-site inspection by an administrative search warrant or by means of a court injunction. Compare *Marshall v. Barlow's, Inc., 436 U.S. 307 (1978)* (administrative search warrant constitutionally required [*39] for inspections under OSHA), with *Donovan v. Dewey, 452 U.S. 594 (1981)* (warrantless inspections pursuant to Federal Mine Safety and Health Act of 1977 enforceable by court injunction). n21 In the LMRDA, however, Congress did not grant a power of entry to enforce the statutory right of inspection. n22 The Secretary or persons to whom he has delegated authority can, of course, conduct consensual warrantless on-site inspections pursuant to *29 U.S.C. § 521*(a). But absent consent, the Government's enforcement powers are defined by *29 U.S.C. § 521*(b), which incorporates the provisions of §§ 9 and 10 of the Federal Trade Commission Act of 1914 (codified as amended at *15 U.S.C. §§ 49*-50), for purposes of any investigation authorized under the LMRDA. Section 49 of Title 15 provides for enforcement by means of a subpoena rather than a warrant of entry. n23

n21 Under some statutes, refusal to consent to a warrantless inspection may be punished only by imposition of a fine. See Colonnade Catering Corp. v. *United States, 397 U.S. 72 (1970)* (statutory scheme granting Secretary of the Treasury broad authority to enter and inspect premises of retail liquor dealers provides for fine, not forcible, warrantless entry, in face of refusal to permit entry).

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n22 We caution that because Congress did not grant the power of entry to make nonconsensual inspections by means of warrants of inspection, officials acting under the LMRDA may not use an "administrative inspection search warrant" to enforce the statutory right of inspection. See Midwest Growers Co-op Corp. v. *Kirkemo, 533 F.2d 455, 462-63 (9th Cir. 1976)* (invalidating inspection search warrant obtained by ICC officials because statute neither authorized inspection of documents without consent nor authorized use of administrative warrant to enforce statutory right of inspection). But cf. *Marshall v. Barlow's, Inc., 436 U.S. 308, 317 n.12, 320 n.15 (1978)* (suggesting that OSHA statutory provision granting Secretary power to prescribe regulations dealing with the inspection of an employer's establishment authorizes Secretary to establish ex parte warrant procedures by regulation); 29 CFR Part 1903.4 (1983) (creating ex parte warrant procedure to enforce nonconsensual administrative searches).

n23 *15 U.S.C. § 49* provides, in pertinent part, that the Government "shall have power to require by subpoena . . . the production of all such documentary evidence relating to any matter under investigation . . . ." Further, any federal district court may, "in case of contumacy or refusal to obey a subpoena issued to any person,

partnership or corporation, issue an order requiring such person, partnership, or corporation to appear . . ., or to produce documentary evidence if so ordered . . . ."

[*41]

While Government agents might enter an employer's or labor union's premises in serving a subpoena, such entry is neither necessary nor required. The recipients of the subpoena might also permit records to be reviewed on the premises, although nothing would prevent the recipient from insisting on reasonable arrangements to review the documents off the premises. Ultimately, if the recipient refused to obey a subpoena issued by the Secretary or an official designated pursuant to *29 U.S.C. § 521*(b), the Government could obtain a court order compelling production of the documents requested, if the Government were able to meet the Powell standards set forth above. See p. 20 supra. n24 As we discuss in part IV below, any constitutional restrictions applicable to such subpoena power are no more stringent than the Powell standards that are imposed as a matter of statutory construction. This is because, in the subpoena context, the constitutional requirement of reasonableness is ensured by "the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant [*42] to the inquiry . . . [and] specification of the documents to be produced [is] adequate, . . ." *Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 209 (1946).*

n24 *15 U.S.C. § 49* originally provided for application to a district court for a writ of mandamus to obtain compliance with the agency's exercise of its investigative authority or order in addition to the subpoena powers. This might have permitted the Government to obtain a court order to enforce a right of entry for OIG or FBI agents. However, Fed. R. Civ. P. 81(b) abolished the writs of scire facias and mandamus. Any similar relief that might now be available by appropriate motion under the Federal Rules would provide a party 30 days within which to respond to a request for entry. See Fed. R. Civ. P. 34(b). Because this is longer than the 10 day period generally permitted for response to a subpoena and would therefore provide greater opportunity for document destruction or alteration, we assume that the Government would have no reason to resort to such a procedure.

III. Statutory Analysis of Investigative Authority Under ERISA

A. Inspections [*43] by OIG and FBI agents for solely criminal purposes

The questions you posed with respect to investigative authority under ERISA are virtually identical to those asked with regard to the LMRDA: first, whether OIG and FBI agents may conduct on-site inspections of books and records in solely criminal investigations by virtue of the investigatory authority delegated to them by the Secretary under *29 U.S.C. §§ 1134* and 1136. Second, if so, you requested that we determine the statutory scope of that inspection authority. The statutory analysis under ERISA is analogous to that for the LMRDA and, because the statutes are virtually identical, the conclusions are, not surprisingly, essentially the same.

Section 1134(a)(2) of Title 29 authorizes the Secretary "to enter such places, inspect such books and records and question such persons as he may deem necessary to enable him to determine the facts relative to such investigation, if he has reasonable cause to believe there may exist a violation of this subchapter or any rule or regulation issued thereunder or if the entry is pursuant to an agreement with the plan." The power to enter and inspect books and [*44] records is explicit and independent from the Secretary's subpoena power. See *29 U.S.C. § 1134*(a)(2), (b), (c); cf. In the *Matter of Kulp Foundry, Inc., 691 F.2d at 1132* (OSHA authorizes inspection of documents pursuant to subpoena only). Again, the only questions are whether the Secretary's unqualified authority to inspect books and records subsumes the power to inspect for criminal purposes and if so, whether that power may be delegated to OIG and FBI agents.

1. The plain language of the statutory provision permits inspections when the Secretary has reasonable cause to believe there may be a violation of any provision or any rule or regulation in the subchapter *(29 U.S.C. §§ 1001*-1144, establishing protection of employee benefit rights), without distinction between criminal and civil misconduct. Similar to the LMRDA, certain violations of ERISA provide exclusively for criminal penalties. See, e.g., *29 U.S.C. §§ 1111*(b), 1131. Necessarily, an investigation of suspected misconduct that is remedied specifically by criminal sanctions [*45] is an investigation for criminal purposes. And, analogous to the LMRDA, Congress clearly contemplated that the Secretary would uncover evidence of criminal misconduct and required that such evidence be turned over to the Attorney General. See *29 U.S.C. § 1136.* Absent an express limitation on criminal investigations and inspections within the otherwise comprehensive investigatory authority, we believe that criminal investigations and inspections stand on no different footing than other investigations and are, accordingly, permitted under the statute. Cf. *United States v. LaSalle Nat'l Bank, 437 U.S. at 316-17 n.18* (because, in distinction to LMRDA and ERISA, the summons authority in the In-

ternal Revenue Code applies to conduct which always carries the potential for civil liability, an affirmative grant of authority for criminal investigations is necessary to constitute sufficient evidence of Congress's intent to authorize purely criminal investigations).

The legislative history, as was the case with the LMRDA, provides no indication that Congress intended to distinguish between civil and criminal investigations. [*46] Rather, it simply discloses a congressional intent to confer broad enforcement powers on the Secretary because the investigatory and regulatory powers vested in the Secretary under existing statutes had "not been sufficient to accomplish Congressional intent." H.R. Rep. No. 533, 93d Cong., 1st Sess. 3 (1973); see id. at 16 ("Committee believes it is essential to concentrate in the Secretary of Labor sufficient powers to effectively implement the provisions of this Act with the minimum amount of duplication and overlapping of functions."). The House bill gave the Secretary "authority to conduct such investigations as may be necessary to determine whether any person has violated or is about to violate any provisions of Title II or III . . . ." H.R. Rep. No. 533, 93d Cong., 2d Sess. 20 (1973). The Senate bill authorized the Secretary to examine "plan books and records without the Secretary having reason to believe a violation of the Act . . . may exist." S. Rep. No. 127, 93d Cong., 1st Sess. 16 (1973).

However, in an effort to balance concern over harassment with the administrative need for spot check audits to assure the security of funds, the Senate bill limited the Secretary to [*47] one audit annually absent reasonable cause. Id. at 16-17. Under the conference agreement, the Secretary was granted power to enter and inspect books and records without limitation as to frequency if he had reasonable cause to believe a violation existed. See H. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 328-29 (1974); S. Conf. Rep. No. 1090, 93d Cong., 2d Sess. 328-29 (1974). This investigatory authority is an integral element in the very portion of the statute that provides for criminal penalties in addition to civil enforcement. Given Congress's awareness of the possibility of criminal sanctions for certain misconduct, we believe that Congress's failure to prohibit purely criminal investigations provides implicit support for an intent to permit such investigations and inspections. Accord *United States v. Acklen, 690 F.2d at 74* (Controlled Substances Act does not distinguish inspections for criminal purposes from inspections for civil purposes).

2. Similar to the LMRDA, once it is established that the Secretary has authority to inspect for purely criminal purposes, it is clear that the statute permits delegation of that authority to either [*48] OIG agents, or FBI agents operating under the authority delegated to this Department in the 1975 MOU. See 29 U.S.C. §§ 1134(c), 1136. Because the investigatory and enforcement scheme in ERISA is patterned after that in the LMRDA, the delegation analysis set forth at pp. 14-16, supra, is equally applicable here. n25 Accordingly, we believe that ERISA authorizes both OIG and FBI agents to conduct on-site inspections of books and records in solely criminal investigations by virtue of the power delegated to them by the Secretary under *29 U.S.C. §§ 1134* and 1136.

n25 There is one minor difference in the delegation analysis under ERISA. ERISA not only established certain criminal violations in the Act itself but also made amendments to certain criminal provisions in Title 18, extending the coverage of those provisions to employee benefit plans. The Departments of Labor and Justice therefore have concurrent investigative authority with respect to sections 664, 1027 and 1954 of Title 18, and there would be no need to delegate general investigative authority to the FBI. See *28 U.S.C. § 533;* n.5 supra. To the extent the FBI has no outstanding statutory authorization for on-site inspections in criminal investigations, the Secretary could delegate such power pursuant to *29 U.S.C. §§ 1134* and 1136.

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B. Statutory Scope of On-Site Inspection Authority Under ERISA

ERISA sets more precise limits than the LMRDA on the scope of the Secretary's (or delegate's) inspection authority. According to the statute, the Secretary may enter and inspect if there is "reasonable cause to believe there may exist a violation of this subchapter . . . ." *29 U.S.C. § 1134*(a)(2) (emphasis added). Reasonable cause is nowhere defined. It is a fundamental canon of statutory construction that, in the absence of explicit definition and "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States, 444 U.S. 37, 42 (1979).* More particularly, "reasonable cause" is a term of art. If a statute contains words that have "a well-known meaning in the common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary." *Agosto v. INS, 436 U.S. 748, 755 (1978),* quoting *Lorillard v. Pons, 434 U.S. 575, 583 (1978).* Accordingly, based [*50] on analogy to the reasonable cause standard employed in other areas of Fourth Amendment law, reasonable cause would require that an agent must have a reasonable belief, or reasonably suspect, that criminal activity has occurred, is occurring or is about to occur. See *Adams v. Williams, 407 U.S. 143 (1972); Terry v. Ohio, 392 U.S. 1 (1968).* In Williams, the Court stated that a reasonable belief that a person might be engaged in

criminal activity can be based on a tip, if the tip is surrounded by "indicia of reliability." Because reasonable cause, like probable cause, is determined both by the quantum and content of information an agent possesses and by the degree of its reliability, we can only state that neither as much nor as reliable information is necessary for reasonable, in distinction to probable, cause to exist.

If reasonable cause exists, an OIG or FBI agent may conduct a warrantless inspection of books and records. If entry is refused, the terms of *15 U.S.C. § 49,* incorporated in *29 U.S.C. § 1134*(c), authorize the Secretary or a [*51] designated official to subpoena any documentary material relating to a matter under investigation. See p. 21 supra. To enforce a subpoena, it would not be necessary, as in the case of a warrant based on probable cause, that a specific charge or complaint of a violation be pending. However, proof of "reasonable cause" would require more than is required by the good faith reasonableness standards set forth in *United States v. Powell, 379 U.S. at 255,* which guarantee that the inquiry is one the demanding agency is legally authorized to make but establish no discretion-limiting standard regarding the quantum of information needed to trigger an investigation. See p. 20 supra. In addition, the Secretary or any agent to whom investigative authority has been delegated in conformity with the statute may enter and inspect "pursuant to an agreement with the [employee benefit] plan." *29 U.S.C. § 1134*(a)(2). Because the fiduciary or employer would have freely given consent to the entry and inspection in such instances, an agent need not meet independently a "reasonable cause" standard. See *Zap v. United States, 328 U.S. 624 (1946)* [*52] (audit of defendant's books and records lawful because defendant contractor had entered into contract with Government providing that his accounts and records shall be open to Government representatives).

We therefore conclude that absent written agreement, the ERISA statutory scheme authorizes on-site inspections of books and records for solely criminal purposes by OIG and FBI agents when supported by a showing of reasonable cause. Reasonable cause suggests that the agency must have a reasonable suspicion that a violation of the Act may be occurring, which is more stringent than the reasonableness standards that must be met under the LMRDA. If entry to inspect is refused, the government would have to resort to a subpoena and would be required to establish reasonable cause in order to enforce its investigatory powers. We now proceed to consider whether on-site inspections and subpoenas of books and records based on less than probable cause yet conducted in the course of a criminal investigation are constitutionally permissible.

IV. Constitutionality of LMRDA and ERISA Inspections for Criminal Purposes

The remaining question under the LMRDA and ERISA statutory schemes is whether [*53] an on-site administrative inspection of union, corporate or pension plan books and records, for concededly criminal purposes and enforced by an administrative subpoena issued on a showing of less than probable cause, is reasonable under the Fourth Amendment. The central inquiry under the Fourth Amendment is "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Terry v. Ohio, 392 U.S. 1, 19 (1968).* Reasonableness is determined by balancing the need to search against the invasion which the search entails. See *Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967).* With respect to "pervasively regulated businesses" it is clear "that a warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *Donovan v. Dewey, 452 U.S. 594, 600 (1981)* [*54] (mines); see *United States v. Biswell, 406 U.S. 311 (1972)* (firearms); *Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970)* (liquor).

We believe that warrantless inspections pursuant to the LMRDA and ERISA, limited to the records required to be kept under those statutes and made during routine business hours, probably would be held to be reasonable under the Fourth Amendment, both because they are necessary for effective enforcement of the law and because they pose only a limited interference with the legitimate privacy interests of the regulated businesses and unions. However, we need not decide this question because the right of entry is enforceable only indirectly by administrative subpoena, not on-site by means of a court order or administrative warrant based on less than probable cause. Accordingly, our inquiry is whether the issuance of an administrative subpoena, after entry to inspect has been denied, violates the Fourth Amendment because, even though the subpoena does not authorize or require entry onto private premises, it authorizes the inspection of documents without a warrant based on probable [*55] cause.

It is well-established that administrative subpoenas are constitutional so long as they are "limited in scope, relevant in purpose, and specific in directive." *See v. City of Seattle, 387 U.S. 541, 544 (1967);* see, e.g., *United States v. Miller, 425 U.S. 435, 445-46 (1976); United States v. Powell, 379 U.S. 48, 57 (1964).* In *Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946),* the Court specifically rejected the contention that the subpoena power of the Secretary

under the Fair Labor Standards Act of 1938, *29 U.S.C. §§ 209,* 211(2), a power nearly identical to the inspection authority in issue here, violates the Fourth Amendment. As the Court explained, the issuance of a subpoena involves a "constructive" search, not an actual search and seizure. See *327 U.S. at 195, 202-09.* "No officer or other person has sought to enter petitioners' premises against their will, to search them, or to seize or examine their books, records or papers without their assent, otherwise [*56] than pursuant to orders of court authorized by law and made after adequate opportunity to present objections, . . ." *327 U.S. at 195.* n26

n26 Notwithstanding the seemingly dispositive effect of *Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946),* which upheld the constitutionality of the subpoena power conferred by the Fair Labor Standards Act (FLSA) -- a power similar to that conferred by *15 U.S.C. § 49* -- a district court recently held the subpoena provisions in the FLSA unconstitutional. See Lone Steer, Inc. v. Donovan, No. Al-82-10, and Donovan v. Lone Steer, Inc., No. Al-82-24 (D.N.D. Oct. 28, 1982), appeal docketed Donovan v. Lone Steer, Inc., No. 82-1684 (April 14, 1983), prob. juris. noted, June 6, 1983. Oral argument was heard in this case on Nov. 29, 1983. See *52 U.S.L.W. 3439* (Dec. 6, 1983). Until the Supreme Court decides this case, the district court opinion casts a cloud on our ultimate conclusion that reliance on a statutory subpoena power to inspect documents is constitutional. We note, however, that the Eighth Circuit, subsequent to the district court opinion, held that a subpoena to inspect documents under OSHA was constitutional. That court specifically rejected the reasoning relied on by the district court in Lone Steer -- that Marshall v. Barlow's, Inc., prohibits an agency from obtaining any documents by subpoena without a warrant. See *Donovan v. Union Packing Co., 714 F.2d 838, 841-42 (8th Cir. 1983).* The district court's decision would thus be subject to summary reversal by the Eighth Circuit but for the direct appeal provision of *28 U.S.C. § 1252.*

[*57]

Because of this significant distinction between the production of documents in response to a subpoena and an actual intrusion on private premises, the "reasonableness" of an administrative subpoena is guaranteed by safeguards different from the warrant based on probable cause required to support "actual searches." In the context of the production of corporate records pursuant to a subpoena authorized by law and subject to judicial supervision, the Court concluded that "the Fourth [Amendment], if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable." *327 U.S. at 208.* n27

n27 The Court further clarified the Fourth Amendment constraints applicable to subpoenas by explaining that

> The requirement of "probable cause, supported by oath or affirmation," literally applicable in the case of a warrant, is satisfied in that of an order for production by the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry. Beyond this the requirement of reasonableness, including particularity in "describing the place to be searched, and the persons or things to be seized," also literally applicable to warrants, comes down to specification of the documents to be produced adequate [sic], but not excessive for the purposes of the relevant inquiry."

327 U.S. at 209.

[*58]

Therefore, with respect to subpoenas for union or corporate records issued under the authority conferred by the LMRDA and ERISA, we believe that the Constitution imposes minimal constraints relating to relevancy and burdensomeness that are analogous, if not identical, to the Powell standards that we earlier concluded are required as a matter of statutory interpretation. See also *Donovan v. Union Packing Co., 714 F.2d 838, 840-842 (8th Cir. 1983);* cf. *FTC v. American Tobacco Co., 264 U.S. 298, 306-07 (1924)* (Court imposes reasonableness, materiality and relevancy requirement in construing *15 U.S.C. § 49* to avoid a "serious question of constitutional law."). n28 To ensure that the documents sought are relevant to an investigation authorized by the LMRDA or ERISA, we recommend that inspections and production requests be limited to records statutorily required to be kept, see *29 U.S.C. §§ 436,* 1027, and records related to those required to be kept. See *Donovan v. Wollaston Alloys, Inc., 695 F.2d 1, 8 (1st Cir. 1983);* [*59] *CAB v.*

United Airlines, Inc., 542 F.2d 394, 402 (7th Cir. 1976); Burlington Northern, Inc. v. *ICC, 462 F.2d 280, 287-88* (D.C. Cir.), cert. denied, *409 U.S. 891 (1972).* If OIG and FBI agents want to inspect other materials or areas for evidence of a crime under either Act, they would have to obtain a warrant based on traditional probable cause or proceed pursuant to the relevant statutory authority if they want to inspect books and records to gather evidence of misconduct under other statutes. Cf. *United States v. Voorhies, 663 F.2d 30 (6th Cir. 1981),* cert. denied, *456 U.S. 929 (1982)* (criminal evidence obtained pursuant to a warrant based on less than probable cause in an administrative inspection could be introduced in a criminal prosecution so long as the extent of the intrusion was limited to the statutorily defined inspection authority); *United States v. Jamieson-McKames Pharmaceuticals, 651 F.2d 542 (8th Cir. 1981),* cert. denied, *455 U.S. 1016 (1982)* [*60] (same); *United States v. Prendergast, 585 F.2d 69 (3d Cir. 1978)* (same).

n28 We further note that any conceivable Fifth Amendment protection against testimonial incrimination is inapplicable in the context of the LMRDA and ERISA. As the Supreme Court emphasized in *Fisher v. United States, 425 U.S. 391, 411-42 (1976):*

> "This Court has also time and again allowed subpoenas against the custodian of corporate documents or those belonging to other collective entities such as unions and partnerships and those of bankrupt businesses over claims that the documents will incriminate the custodian despite the fact that producing the documents tacitly admits their existence and their location in the hands of their possessor. E.g., *Wilson v. United States, 221 U.S. 361 (1911); Dreier v. United States, 221 U.S. 394 (1911); United States v. White, 322 U.S. 694 (1944); Bellis v. United States, 417 U.S. 85 (1974).*"

Finally, we note that, assuming the LMRDA and ERISA administrative inspection [*61] schemes contemplating on-site inspections based on less than probable cause and enforceable by administrative subpoena subject to judicial supervision are constitutional, it is irrelevant that agents believe they may be investigating criminal misconduct or that criminal as opposed to civil sanctions are eventually imposed. Logically, if the congressional regulatory scheme permitting warrantless inspections of books and records for potentially civil or criminal purposes passes constitutional muster, then the exercise of the same authority for solely criminal purposes is also constitutional. As the Court reasoned in *Camara v. Municipal Court, "it is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." 387 U.S. at 530.* What is critical is that the particular inspection, apart from obtaining evidence of a crime, is authorized by a statute which, notwithstanding a lesser standard than probable cause, is reasonable under the Fourth Amendment. n29

n29 The reasonableness analysis changes, of course, after indictment, and possibly after recommendation to the Department of Justice for criminal prosecution. The above analysis applies only to the pre-indictment situation.

[*62]

Conclusion

In sum, we conclude that the LMRDA grants the Secretary authority to conduct on-site inspections of records and accounts in purely criminal investigations. This authority may be delegated to both OIG and FBI agents. In nonconsensual situations, this inspection authority may be constitutionally enforced by means of a subpoena, limited to records and accounts required to be kept by law, and issued by a designated official, based on evidence of a good faith pursuit of congressionally authorized purposes.

ERISA also authorizes the Secretary to conduct on-site inspections of books and records in solely criminal investigations. This authority may be delegated to OIG and FBI agents. Under ERISA, the Secretary or his delegate must establish reasonable cause to believe that a violation exists in order to obtain judicial enforcement of a subpoena for documents. Similar to our conclusions with respect to the LMRDA, we believe that this inspection authority is constitutional if limited to records and accounts required to be kept by law.

Larry L. Simms

Deputy Assistant Attorney General

Office of Legal Counsel

OPINION OF THE OFFICE OF LEGAL COUNSEL

Congressional Requests for Information from Inspectors General Concerning Open Criminal Investigations

Long-established executive branch policy and practice, based on consideration of both Congress' oversight authority and principles of executive privilege, require that in the absence of extraordinary circumstances an Inspector General must decline to provide confidential information about an open criminal investigation in response to a request pursuant to Congress' oversight authority.

The reporting provisions of the Inspector General Act do not require Inspectors General to disseminate to Congress confidential information pertaining to open criminal investigations.

1989 OLC LEXIS 7; 13 Op. O.L.C. 93
March 24, 1989

ADDRESSEE:
[*1]

Memorandum Opinion for the Chairman Investigations/Law Enforcement Committee President's Council on Integrity and Efficiency

OPINIONBY: KMIEC

OPINION:

Introduction and Summary

This memorandum is in response to your request for the opinion of this Office on the obligations of Inspectors General ("IGs") with respect to congressional requests for confidential information about open criminal investigations. Specifically, you have asked this Office to advise you as to the obligations of the IGs with respect to (1) requests based on Congress' oversight authority and (2) requests based on the reporting requirements of the Inspector General Act of 1978 ("the Act"), Pub. L. No. 95-452, 92 Stat. 1101 (1978) (codified at *5 U.S.C. app. 3).* n1

n1 On March 8, 1989, Larry Elston of your staff orally confirmed to Paul Colborn of this Office that these are the questions on which you seek our opinion.

As discussed below, when pursuant to its oversight authority Congress seeks to obtain from an IG confidential information about an open criminal investigation, established executive branch policy and practice, based on consideration of both Congress' oversight authority and principles of executive privilege, require [*2] that the IG decline to provide the information, absent extraordinary circumstances. With respect to congressional requests based on the congressional reporting requirements of the Act, we have concluded as a matter of statutory construction that Congress did not intend those provisions to require production of confidential information about open criminal investigations. Accordingly, IGs are under no obligation under the Act to disseminate confidential law enforcement information.

I. Congressional Requests Based on Oversight Authority

The decision on how to respond to a congressional request for information from an IG based on Congress' oversight authority requires the weighing of a number of factors arising out of the separation of powers between the executive and legislative branches. The principal factors to be weighed are the nature of Congress' oversight interest in the information and the interest of the executive branch in maintaining confidentiality for the information.

A. Congress' Oversight Authority

The constitutional role of Congress is to adopt general legislation that will be implemented -- "executed" -- by the executive branch. "It is the peculiar province of the [*3] legislature to prescribe general rules for the government of

society; the application of those rules to individuals in society would seem to be the duty of other departments." *Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810).* The courts have recognized that this general legislative interest gives Congress investigatory authority. Each House of Congress has power, "through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution." *McGrain v. Daugherty, 273 U.S. 135, 160 (1927).* The issuance of subpoenas in aid of this function "has long been held to be a legitimate use by Congress of its power to investigate," *Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 (1975),* provided that the investigation is "related to, and in furtherance of, a legitimate task of the Congress." *Watkins v. United States, 354 U.S. 178, 187 (1957).* The inquiry must pertain to subjects "on which legislation could be had." *McGrain v. Daugherty, 273 U.S. at 177.*

In short, Congress' oversight authority is as penetrating and far-reaching [*4] as the potential power to enact and appropriate under the Constitution.

Broad as it is, the power is not, however, without limitations. Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government.

Barenblatt v. United States, 360 U.S. 109, 111-12 (1959) (emphasis added).

The execution of the law is one of the functions that the Constitution makes the exclusive province of the executive branch. Article II, Section 1 provides that "the executive Power shall be vested in a President of the United States of America." Article II, Section 3 imposes on the President the corresponding duty to "take Care that the Laws be faithfully executed." n2 In particular, criminal prosecution is an exclusively executive branch responsibility. *Heckler v. Chaney, 470 U.S. 821, 832 (1985); Buckley v. Valeo, 424 U.S. 1, 138 (1976); United States v. Nixon, 418 U.S. 683, 693 (1974).* Accordingly, neither the judicial nor legislative branches may directly interfere with the prosecutorial discretion of the executive branch by directing it to [*5] prosecute particular individuals. n3 Indeed, in addition to these general constitutional provisions on executive power, the Framers specifically demonstrated their intention that Congress not be involved in prosecutorial decisions or in questions regarding the criminal liability of specific individuals by including in the Constitution a prohibition against the enactment of bills of attainder. U.S. Const. art. I, * 9, cl. 3. See *United States v. Lovett, 328 U.S. 303, 317-18 (1946); INS v. Chadha, 462 U.S. 919, 961-62 (1983)* (Powell, J., concurring).

n2 One of the fundamental rationales for the separation of powers is that the power to enact laws and the power to execute laws must be separated in order to forestall tyranny. As James Madison stated in Federalist No. 47:

The reasons on which Montesquieu grounds his maxim [that the legislative, executive and judicial departments should be separate and distinct] are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner."

The Federalist No. 47, at 303 (James Madison) (Clinton Rossiter ed., 1961).

[*6]

n3 See *Heckler v. Chaney, 470 U.S. at 832* ("[T]he decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'"); *United States v. Nixon, 418 U.S. at 693* ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.").

On the other hand, Congress' oversight authority does extend to the evaluation of the general functioning of the Inspector General Act and relevant criminal statutes, as well as inquiring into potential fraud, waste and abuse in the executive branch. Such evaluations may be seen to be necessary to determine whether the statutes should be amended or new legislation passed. See *Watkins v. United States, 354 U.S. at 187.* Given the general judicial reluctance to look behind congressional assertions of legislative purpose, an assertion that Congress needed the information for such evaluations would likely be deemed sufficient in most cases to meet the threshold requirement for congressional inquiry. This general legislative [*7] interest, however, does not provide a compelling justification for looking into particular ongo-

ing cases. n4 Accordingly, we do not believe that as a general matter it should weigh heavily against the substantial executive branch interest in the confidentiality of law enforcement information. We discuss that interest next.

n4 For instance, Congress' interest in evaluating the functioning of a criminal statute presumably can be satisfied by numerical or statistical analysis of closed cases that had been prosecuted under the statute, or (at most) by an analysis of the closed cases themselves.

B. Executive Privilege

Assuming that Congress has a legitimate legislative purpose for its oversight inquiry, the executive branch's interest in keeping the information confidential must be assessed. This subject is usually discussed in terms of "executive privilege," and we will use that convention here. n5 Executive privilege is constitutionally based. To be sure, the Constitution nowhere expressly states that the President, or the executive branch generally, enjoys a privilege against disclosing information requested by the courts, the public, or the legislative branch. The existence [*8] of such a privilege, however, is a necessary corollary of the executive function vested in the President by Article II of the Constitution, has been asserted by numerous Presidents from the earliest days of our Nation, and has been explicitly recognized by the *Supreme Court. United States v. Nixon, 418 U.S. at 705-06.* There are three generally-recognized components of executive privilege: state secrets, law enforcement, and deliberative process. Since congressional requests for information from IGs will generally implicate only the law enforcement component of executive privilege, we will limit our discussion to that component.

n5 The question, however, is not strictly speaking just one of executive privilege. While the considerations that support the concept and assertion of executive privilege apply to any congressional request for information, the privilege itself need not be claimed formally vis-a-vis Congress except in response to a lawful subpoena; in responding to a congressional request for information, the executive branch is not necessarily bound by the limits of executive privilege.

It is well established and understood that the executive branch has generally limited [*9] congressional access to confidential law enforcement information in order to prevent legislative pressures from impermissibly influencing its prosecutorial decisions. As noted above, the executive branch's duty to protect its prosecutorial discretion from congressional interference derives ultimately from Article II, which places the power to enforce the laws exclusively in the executive branch. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is some danger that congressional pressures will influence, or will be perceived to influence, the course of the investigation. Accordingly, the policy and practice of the executive branch throughout our Nation's history has been to decline, except in extraordinary circumstances, to provide committees of Congress with access to, or copies of, open law enforcement files. No President, to our knowledge, has departed from this position affirming the confidentiality and privileged nature of open law enforcement files. n6

n6 See generally Assertion of Executive Privilege in Response to Congressional Demands for Law Enforcement Files, 6 Op. O.L.C. 31 (1982) (regarding request for open law enforcement investigative files of the Environmental Protection Agency); Memorandum for the Deputy Attorney General from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Refusals by Executive Branch to Provide Documents from Open Criminal Investigative Files to Congress (Oct. 30, 1984).

[*10]

Attorney General Robert H. Jackson well articulated the basic position:

It is the position of this Department, restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to "take care that the Laws be faithfully executed," and that congressional or public access to them would not be in the public interest.

Disclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain.

40 Op. Att'y Gen. 45, 46 (1941).

Other grounds for objecting to the disclosure of law enforcement files include the potential damage to proper law enforcement that would be caused by the revelation of sensitive techniques, methods, or strategy; concern over the safety of confidential informants and the chilling effect on other sources of information; [*11] sensitivity to the rights of innocent individuals who may be identified in law enforcement files but who may not be guilty of any violation of law; and well-founded fears that the perception of the integrity, impartiality, and fairness of the law enforcement process as a whole will be damaged if sensitive material is distributed beyond those persons necessarily involved in the investigation and prosecution process. n7 See generally Congressional Subpoenas of Department of Justice Investigative Files, 8 Op. O.L.C. 252, 262-66 (1984).

n7 In addition, potential targets of enforcement actions are entitled to protection from premature disclosure of investigative information. It has been held that there is "no difference between prejudicial publicity instigated by the United States through its executive arm and prejudicial publicity instigated by the United States through its legislative arm." *Delaney v. United States, 199 F.2d 107, 114 (1st Cir. 1952).* Pretrial publicity originating in Congress, therefore, can be attributed to the government as a whole and can require postponement or other modification of the prosecution on due process grounds. Id.

C. Accommodation with Congress [*12]

The executive branch should make every effort to accommodate requests that are within Congress' legitimate oversight authority, while remaining faithful to its duty to protect confidential information. n8 See generally *United States v. AT&T, 567 F.2d 121, 127-30 (D.C. Cir. 1977);* Assertion of Executive Privilege in Response to a Congressional Subpoena, 5 Op. O.L.C. 27, 31 (1981) ("The accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch.").

n8 President Reagan's November 4, 1982 Memorandum for the Heads of Executive Departments and Agencies on "Procedures Governing Responses to Congressional Requests for Information" states:

The policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch . . . . [E]xecutive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary. Historically, good faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches.

Only rarely do congressional requests for information result in a subpoena of an executive branch official or in other congressional action. In most cases the informal process of negotiation and accommodation recognized by the courts, and mandated for the executive branch by President Reagan's 1982 memorandum, is sufficient to resolve any dispute. On occasion, however, the process breaks down, and a subpoena is issued by a congressional committee or subcommittee. At that point, it would be necessary to consider asking the President to assert executive privilege. Under President Reagan's memorandum, executive privilege cannot be asserted vis-a-vis Congress without specific authorization by the President, based on recommendations made to him by the concerned department head, the Attorney General, and the Counsel to the President. We have no reason to believe that President Bush envisions a different procedure.

[*13]

The nature of the accommodation required in responding to a congressional request for information clearly depends on the balance of interests between the Executive and Congress. For its part, Congress must be able to articulate its need for the particular materials -- to "point[] to . . . specific legislative decisions that cannot responsibly be made without access to materials uniquely contained" in the presumptively privileged documents (or testimony) it has requested, and to show that the material "is demonstrably critical to the responsible fulfillment of the Committee's functions." *Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731, 733 (D.C. Cir. 1974).* The more generalized the executive branch interest in withholding the disputed information, the more likely it is that this interest will yield to a specific, articulated need related to the effective performance by Congress of its legislative functions. Conversely, the more specific the need for confidentiality, and the less specific the articulated need of Congress for the in-

formation, the more likely it is that the Executive's need for confidentiality will prevail. See *Nixon v. Administrator* [*14] *of General Services, 433 U.S. 425, 446-55 (1977)* (discussion of balance of interests); *United States v. Nixon, 418 U.S. at 707-13* (same); *United States v. AT&T, 567 F.2d at 130-33* (same).

In light of the limited and general congressional interest in ongoing criminal investigations and the specific and compelling executive branch interest in protecting the confidentiality of such investigations, the executive branch has generally declined to make any accommodation for congressional committees with respect to open cases: that is, it has consistently refused to provide confidential information. However, on occasion after an investigation has been closed, and after weighing the interests present in the particular case, the executive branch has briefed Congress on prosecutorial decisions and has disclosed some details of the underlying investigation. n9

n9 Once an investigation has been closed without further prosecution, some of the considerations previously discussed lose their force. Access by Congress to details of closed investigations does not pose as substantial a risk that Congress will be a partner in the investigation and prosecution or will otherwise seek to influence the outcome of the prosecution; likewise, if no prosecution will result, concerns about the effects of undue pretrial publicity on a jury would disappear. Still, such records are not automatically disclosed to Congress. Obviously, much of the information in a closed criminal enforcement file -- such as unpublished details of allegations against particular individuals and details that would reveal confidential sources and investigative techniques and methods -- would continue to need protection.

In addition, the executive branch has a long-term institutional interest in maintaining the confidentiality of the prosecutorial decisionmaking process. The Supreme Court has recognized that "human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *United States v. Nixon, 418 U.S. at 705*. It is therefore important to weigh the potential "chilling effect" of a disclosure of details of the prosecutorial deliberative process in a closed case against the immediate needs of Congress.

[*15]

In conclusion, although in the absence of a concrete factual setting we cannot analyze the case for withholding any particular document or information in response to a congressional oversight request, we can advise that as a general matter Congress has a limited oversight interest in the conduct of an ongoing criminal investigation and the executive branch has a strong interest in preserving the confidentiality of such investigations. Accordingly, in light of established executive branch policy and practice, and absent extraordinary circumstances, an IG should not provide Congress with confidential information concerning an open criminal investigation.

II. Congressional Requests Based on the Inspector General Act

The second question raised by your opinion request is whether the reporting provisions of the Inspector General Act require that IGs provide Congress with confidential information on open criminal investigations that is not normally shared with Congress under established executive branch policy and practice with respect to oversight requests. We believe that both the text and legislative history of these provisions demonstrate that they do not impose such a requirement. [*16]

The Act establishes a number of congressional reporting requirements with respect to the activities of the IGs. Most generally, section 4(a)(5) requires each IG to keep the head of [the agency within which his office is established] and the Congress fully and currently informed, by means of the reports required by section 5 and otherwise, concerning fraud and other serious problems, abuses, and deficiencies relating to the administration of programs and operations administered or financed by such [agency], to recommend corrective action concerning such problems, abuses, and deficiencies, and to report on the progress made in implementing such corrective action.

Section 5(a) requires each IG to prepare semi-annual reports summarizing the activities of his office, and section 5(b) requires that the head of the IG's agency submit these reports to the appropriate committees or subcommittees of Congress within 30 days of receiving them. Section 5(d) requires each IG to report immediately to the head of the [agency] whenever the [IG] becomes aware of particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs and operations of such [agency]. [*17] The head of the [agency] shall transmit any such report to the appropriate committees or subcommittees of Congress within seven calendar days, together with a report by the head of the agency containing any comments such head deems appropriate.

Finally, section 5(e) provides in subsection (1) that none of the reporting requirements "shall be construed to authorize the public disclosure" of certain information, while also providing in subsection (3) that neither the reporting requirements nor any other provision of the Act "shall be construed to authorize or permit the withholding of information from the Congress, or from any committee or subcommittee thereof."

In our judgment, nothing in the text of these provisions provides that confidential law enforcement materials pertaining to ongoing cases must be transmitted to Congress. To the contrary, the statutory scheme set out in section 5 of the Act merely envisions that the periodic reports from each IG to Congress will be a general "description" and "summary" of the work of the IG. This view of section 5 is supported by the Act's legislative history. In proposing the congressional reporting requirements that were ultimately enacted [*18] into law, n10 the Senate committee made it clear that it did not contemplate that reports from the IGs would be so specific that confidential investigative information would fall within the scope of the report and, in any event, it was not intended that such information would be required. For example, with respect to section 5(a)(4)'s requirement that semi-annual reports contain "a summary of matters referred to prosecutive authorities and the prosecutions and convictions which have resulted," the committee indicated:

By using the word "summary" in subsection (a)(4), the committee intends that Congress would be given an overview of those matters which have been referred to prosecutive authorities. It would be sufficient, for instance, for an [IG] at HUD to include in his report the fact that he had referred 230 cases of fraud in FHA programs to the Justice Department for further investigation and prosecution. It would be highly improper and often a violation of due process for an IG's report to list the names of those under investigation or to describe them with sufficient precision to enable the identities of the targets to be easily ascertained. However, once prosecutions and convictions [*19] have resulted, the IG could certainly list those cases, if he deems such a listing appropriate.

S. Rep. No. 1071 at 30.

n10 The Act was originally considered by the House of Representatives as H.R. 8588, which contained similar reporting requires to those of the Senate bill. Compare House version, sections 3-4, 124 Cong. Rec. 10,399 (1978), with Senate version, sections 4-5, 124 Cong. Rec. 32,029-30 (1978). The legislative history regarding the House provisions is much less extensive than that for the Senate provisions. See generally H.R. Rep. No. 584, 95th Cong., lst Sess. 13-14 (1977). H.R. 8588 passed the House, but failed in the Senate, which considered instead a substitute bill reported from the Senate Committee on Governmental Affairs. See 124 Cong. Rec. 30,949 (1978); S. Rep. No. 1071, 95th Cong., 2d Sess. (1978). The House accepted the substitute Senate bill and it was enacted into law.

The committee noted that section 5(b)'s requirement that semi-annual reports be submitted to Congress "contemplates that the IG's reports will ordinarily be transmitted to Congress by the agency head without alteration or deletion." Id. at 31 (emphasis added). The committee went on [*20] to stress, however, that nothing in this section authorizes or permits an [IG] to disregard the obligations of law which fall upon all citizens and with special force upon Government officials. The Justice Department has expressed concern that since an [IG] is to report on matters involving possible violations of criminal law, his report might contain information relating to the identity of informants, the privacy interest of people under investigations, or other matters which would impede law enforcement investigations. As noted above, the committee does not envision that a report by the [IG] would contain this degree of specificity. In any event, however, the intent of the legislation is that the [IG] in preparing his reports, must observe the requirements of law which exist today under common law, statutes, and the Constitution, with respect to law enforcement investigations. . . .

The committee recognizes, however, that in rare circumstances the [IG], through inadvertence or design, may include in his report materials of this sort which should not be disclosed even to the Congress. The inclusion of such materials in an [IG's] report may put a conscientious agency head in a serious [*21] bind. The obligation of an agency head is to help the President "faithfully execute the laws." Faithful execution of this legislation entails the timely transmittal, without alteration or deletion, of an [IG's] report to Congress. However, a conflict of responsibilities may arise when the agency head concludes that the [IG's] report contains material, disclosure of which is improper under the law. In this kind of rare case, section 5(b) is not intended to prohibit the agency head from deleting the materials in question. n11

n11 "In the rare cases in which alterations or deletions have been made, the committee envisions that an agency head's comments on an [IG's] report would indicate to the Congress that alterations or deletions had been made, give a description of the materials altered or deleted, and the reasons therefore." Id. at 32.

Id. at 31-32 (emphasis added). n12

n12 In addition to thus stating its intention with respect to the confidentiality of law enforcement information, the committee also expressed its understanding that section 5(b) cannot override executive privilege with respect to deliberative process information:

[T]he committee is aware that the Supreme Court has, in certain contexts, recognized the President's constitutional privilege for confidential communications or for information related to the national security, diplomatic affairs, and military secrets. Insofar as this privilege is constitutionally based, the committee recognizes that subsection 5(b) cannot override it. In view of the uncertain nature of the law in this area, the committee intends that subsection 5(b) will neither accept nor reject any particular view of Presidential privilege but only preserve for the President the opportunity to assert privilege where he deems it necessary. The committee intends that these questions should be left for resolution on a case-by-case basis as they arise in the course of implementing this legislation.

Id. at 32 (emphasis added) (citations omitted).

[*22]

The committee also made it clear that the same principles apply with equal force to the requirement of section 5(d) that the IG reports to agency heads on "particularly serious or flagrant problems" also be submitted to Congress. In stating with respect to this section that "as in subsection (b), the agency head has no general authority or right to delete or alter certain provisions of the report" id. at 33, the committee clearly implied that the agency head retained the ability -- as in the "rare case" identified with respect to subsection (b) -- to delete "materials . . . which should not be disclosed even to the Congress." Id. at 32.

Conclusion

Long-established executive branch policy and practice, based on consideration of both Congress' oversight authority and principles of executive privilege, require that in the absence of extraordinary circumstances an IG must decline to provide confidential information about an open criminal investigation in response to a request pursuant to Congress' oversight authority. With respect to congressional requests based on the reporting requirements of the Inspector General Act, we similarly conclude that the reporting provisions of the Inspector [*23] General Act do not require IGs to disseminate confidential information pertaining to open criminal investigations.

DOUGLAS W. KMIEC

Assistant Attorney General

Office of Legal Counsel

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesGovernment PrivilegesExecutive PrivilegeEvidencePrivilegesGovernment PrivilegesProcedures to Claim PrivilegesGovernmentsFederal GovernmentU.S. Congress

LEXSEE 13 OP. O.L.C. 54

OPINION OF THE OFFICE OF LEGAL COUNSEL

Inspector General Authority to Conduct Regulatory Investigations

The Inspector General Act of 1978, as amended, does not generally vest in the Inspector General of the Department of Labor the authority to conduct investigations pursuant to regulatory statutes administered by the Department of Labor. The Inspector General has an oversight rather than a direct role in investigations conducted pursuant to regulatory statutes: he may investigate the Department's conduct of regulatory investigations, but may not conduct such investigations himself.

The responsibility to conduct regulatory investigations cannot be delegated by the Secretary to the Inspector General pursuant to section 9(a)(2) of the Inspector General Act.

The significant investigative authority granted to Inspectors General under the Inspector General Act includes the authority to investigate recipients of federal funds, such as contractors and grantees, to determine if they are complying with federal laws and regulations and the authority to investigate the policies and actions of the Departments and their employees. This latter authority includes the authority to exercise "oversight" over the investigations that are integral to the programs of the Department.

1989 OLC LEXIS 70; 13 Op. O.L.C. 54

March 9, 1989

ADDRESSEE:
[*1]

Memorandum Opinion for the Solicitor Department Of Labor

OPINIONBY: KMIEC

OPINION:

This memorandum responds to the request of September 23, 1988, as supplemented by a letter of December 5, 1988, for the opinion of this Office as to the scope of the investigative authority of the Inspector General of the Department of Labor under the Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (1978), as thereafter amended (codified as amended at 5 U.S.C. app. ** 1-9) ("the Act"). Specifically, we were asked to determine whether the authority granted the Inspector General includes the authority to conduct investigations pursuant to statutes that provide the Department with regulatory jurisdiction over private individuals and entities that do not receive federal funds.

As set forth below, we conclude that the Act does not generally vest in the Inspector General authority to conduct investigations pursuant to regulatory statutes administered by the Department of Labor. n1 Rather, Congress intended the Inspector General to be an objective official free from general regulatory responsibilities who investigated the employees and operations of the Department, as well as its contractors, grantees and other [*2] recipients of federal funds, so as to root out waste and fraud. Thus, the Inspector General has an oversight rather than a direct role in investigations conducted pursuant to regulatory statutes: he may investigate the Department's conduct of regulatory investigations but may not conduct such investigations himself. n2

n1 We shall henceforth refer to such investigations as "regulatory investigations." Such investigations generally have as their objective regulatory compliance by private parties. On the other hand, investigations properly within the ambit of the Inspector General generally have as their objective the elimination of waste and fraud in governmental departments, including waste and fraud among its employees, contractors, grantees and other

recipients of federal funds. As we note below, however, see infra note 20, the Inspector General may investigate private parties who do not receive federal funds when they act in collusion with the Department's employees or other recipients of federal funds to avoid regulatory compliance.

n2 When our opinion was first requested in this matter, we attempted to limit our opinion to the specific situation that prompted the dispute between the Solicitor of Labor and the Inspector General. See Letter for George R. Salem, Solicitor of Labor, from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel (Oct. 28, 1988); Letter for J. Brian Hyland, Inspector General, Department of Labor, from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel (Oct. 28, 1988). Your predecessor replied that the dispute had not arisen from a specific statutory or factual context, but rather from the Inspector General's claim of "general authority to investigate any violation of any statute administered or enforced by the Department." Letter for Douglas W. Kmiec, from George R. Salem at 1 (Dec. 5, 1988). In his response, the Inspector General agreed that the dispute concerned the existence of such general authority. Letter for Douglas W. Kmiec, from J. Brian Hyland (Dec. 22, 1988) ("Hyland Letter"). Accordingly, while we have made reference to certain specific regulatory schemes (such as the Fair Labor Standards Act) which Mr. Salem offered as paradigmatic examples of statutes giving rise to the general dispute, we have responded to the request with an opinion establishing general principles. We would be pleased to give more specific guidance with respect to the scope of the Inspector General's authority in the context of a particular statutory scheme should you or the Inspector General so request.

[*3]

I. Background

A dispute has arisen between the Solicitor and Inspector General of the Department of Labor as to the types of investigations the Inspector General is authorized to conduct. It is undisputed that the Inspector General is authorized to conduct investigations of the Department's operations, employees, contractors, grantees and other recipients of federal funds. What is disputed is whether the Inspector General is also authorized to conduct investigations pursuant to statutes that grant the Department regulatory authority over individuals and entities outside the Department who do not receive federal funds.

The dispute has precipitated interest beyond the Department of Labor. n3 At issue is the authority of the Inspector General under regulatory statutes such as the Fair Labor Standards Act ("FLSA"), 29 U.S.C. ** 201-219, and the Occupational Safety and Health Act ("OSHA"), 29 U.S.C. ** 651-678, which impose restrictions on individuals and entities who are not employees of a Department and who are not contractors, grantees or other recipients of federal funds distributed by the Department. n4 FLSA, for instance, requires that a fixed minimum wage be paid to any covered [*4] employee, id. * 206, as well as imposing other regulatory requirements such as restricting the work week to 40 hours unless the employee is compensated at not less than one and one half times the regular rate. Id. * 207. Similarly, OSHA imposes on employers the duty to furnish a safe workplace and to comply with the safety standards promulgated by the Secretary of Labor under its authority. Id. * 654(a).

n3 The Inspector General Act is a generic one in the sense that its core provisions apply to most of the departments and agencies of the federal government. See 5 U.S.C. app. ** 2(1), 11(2) & 8E. Our opinion, therefore, will necessarily have applicability beyond the Department of Labor. For this reason, this opinion has been of interest to various Inspectors General in other departments, and in addition to the materials submitted by the Inspector General of the Department of Labor, we have reviewed carefully the letters and memoranda other Inspectors General have submitted to us. Memorandum for Dennis C. Whitfield, Deputy Secretary of Labor, from Richard Kusserow, Inspector General, Department of Health and Human Services ("HHS") (Oct. 6, 1988); Letter for Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, from Charles R. Gillum, Inspector General, Small Business Administration (Nov. 4, 1988); Letter for Douglas W. Kmiec, from John W. Melchner, Inspector General, Department of Transportation (Dec. 1, 1988); Letter for Douglas W. Kmiec, from Paul A. Adams, Inspector General, Department of Housing and Urban Development (Nov. 30, 1988); Letter for Douglas W. Kmiec, from Francis D. DeGeorge, Inspector General, Department of Commerce (Dec. 1, 1988).

[*5]

n4 At our request, the Solicitor provided a detailed description of three investigations undertaken by the Inspector General. This was to clarify for our benefit the nature of the dispute between the Solicitor and the Inspector General. We have addressed here the general legal question asked by the Solicitor. We express no opinion as to whether any of these particular investigations was authorized.

The Secretary of Labor is the official charged with administering these statutes. That authority includes specific grants of enforcement and investigative authority. See, e.g., id. ** 212(b), 657. The Inspector General, however, believes that the provisions of the Act granting him authority to conduct investigations "relating to the programs" of the Department vest in him general investigative authority under these regulatory statutes. Memorandum for the Deputy Secretary, Department of Labor, from J. Brian Hyland, Inspector General, Department of Labor, Re: Authority of Inspector General at 2 (Oct. 17, 1988) ("Hyland Memo"). n5 Indeed, he argues that since the Act gives him authority to "supervise" all investigations "relating to programs" of the Department of Labor, he has supervisory [*6] authority over the Secretary of Labor with respect to her exercise of her statutory authority to conduct investigations pursuant to the regulatory statutes the Department administers. Id. at 7.

n5 The Inspector General does not claim that he has the same enforcement and litigative authority as the Secretary of Labor. For instance, he neither claims authority under the FLSA to impose civil monetary penalties, nor the authority to initiate civil litigation. Rather, he claims the authority to conduct regulatory investigations and refer the results to the Department of Justice for civil action or criminal prosecution.

The Solicitor disagrees. He views the Inspector General as an auditor and internal investigator for the Department -- authorized to investigate the operations of the Department, the conduct of its employees and the Department's contractors, grantees and other recipients of federal funds. n6

n6 The Solicitor does not question the authority of the Inspector General to conduct investigations relating to organized crime and racketeering to the extent that authority derives from the jurisdiction of the Office of Special Investigations whose functions were specifically transferred to the Inspector General in the Act. 5 U.S.C. app. * 9(a)(1)(G). Various issues relating to the scope of that authority are addressed in an earlier opinion of this Office. Memorandum for Stephen S. Trott, Assistant Attorney General, Criminal Division, from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel, Re: On-Site Inspection of Books and Records in Criminal Investigations of Labor Unions and Employee Benefit Plans (Dec. 23, 1983).

[*7]

II. Discussion

The Act established the Office of Inspector General in the Department of Labor and in the other covered departments. The purpose of the Act, as stated in section 2, is "to create independent and objective units" to "conduct and supervise audits and investigations relating to the programs and operations" of the covered departments, 5 U.S.C. app. * 2(1), and "to provide leadership and coordination and recommend policies for activities designed (A) to promote economy, efficiency, and effectiveness in the administration of, and (B) to prevent and detect fraud and abuse in, such programs and operations." Id. * 2(2).

Section 4 of the Act provides authority that is correlative to these responsibilities:

(a) It shall be the duty and responsibility of each Inspector General, with respect to the establishment within which his Office is established--

(1) to provide policy direction for and to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of such establishment;

. . . .

(3) to recommend policies for, and to conduct, supervise, or coordinate other activities carried out or financed by such establishment for the purpose [*8] of promoting economy and efficiency in the administration of, or preventing and detecting fraud and abuse in, its programs and operations;

. . . .

Id. * 4(a). Furthermore, section 6(a)(2) authorizes the Inspector General "to make such investigations and reports relating to the administration of the programs and operations of the applicable establishment as are [in his judgment] necessary or desirable." Id. * 6(a)(2).

Finally, section 9(a)(2) authorizes the transfer of "such other offices or agencies, or functions, powers, or duties thereof, as the head of the establishment involved may determine are properly related to the functions of the [Inspector General] and would, if so transferred, further the purposes of this Act," but adds the caveat: "except that there shall not be transferred to an Inspector General . . . program operating responsibilities." Id. * 9(a)(2).

The question presented is the meaning of the phrase "relating to the programs and operations" in section 4 and "relating to the administration of the programs and operations" in section 6, as well as similar language elsewhere in the Act. n7 The Act does not define terms such as "investigations" and "programs," [*9] nor does the Act expressly address whether the Inspector General is authorized to conduct investigations pursuant to regulatory statutes administered by the Department. But we think the meaning of the statutory language is clear when examined in the context of the structure and legislative history of the Act.

n7 In a supplemental letter to us, the Inspector General argues that it is necessary to accept his broad view of his authority lest a situation be created whereby there was no entity investigating a wide-range of criminal offenses under the regulatory jurisdiction of the Department of Labor. Letter for Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, from J. Brian Hyland, Inspector General, Department of Labor (Dec. 22, 1988). Specifically, he argues that while the Department of Labor may generally have criminal investigative authority over the offenses listed in the labor provisions (title 29 of the U.S. Code), it does not, with one specific exception, have criminal investigative authority over the general criminal provision of title 18. Id. at 1-2. By contrast, the Inspector General argues that he does possess criminal investigative authority under title 18. Id. at 2.

The Inspector General's argument is misconceived. We have no doubt that the Inspector General has criminal investigative authority, see 5 U.S.C. app. * 4(d); United States v. Aero Mayflower Transit Co., 831 F.2d ll42, ll45 & n.3 (D.C. Cir. 1987), but he only has that authority within the scope of his statutorily-granted investigative authority. It is the scope of that authority that is at issue here.

Moreover, we note that it would by no means be anomalous if neither the Secretary of Labor nor the Inspector General had criminal investigative authority over some statutory violation that affected the Department of Labor. The Federal Bureau of Investigation ("FBI") has general criminal investigative authority over all violations of federal law. 28 U.S.C * 533(1); 28 C.F.R. * 0.85(a) (1989). See also 28 U.S.C. * 535. Other departments or agencies have authority to conduct criminal investigations only "when investigative jurisdiction has been assigned by law to such departments and agencies." 28 U.S.C. * 533. Thus, it is not unusual for the FBI to have exclusive criminal investigative authority with regard to certain statutory violations.

[*10]

The impetus for the Inspector General Act of 1978 was revelations of significant corruption and waste in the operations of the federal government, and among contractors, grantees and other recipients of federal funds. S. Rep. No. 1071, 95th Cong., 2d Sess. 4 (1978). Furthermore, Congress concluded that the existing audit and investigative units were inadequate to deal with this problem because they reported to, and were supervised by, the officials whose programs they were to audit and investigate. Id. at 5-6; H.R. Rep. No. 584, 95th Cong., 1st Sess. 5 (1977).

The Act addressed both the underlying problem and this organizational defect. The Inspector General was to deal with "fraud, abuse and waste in the operations of Federal departments and agencies and in federally-funded programs." S. Rep. No. 1071 at 4. The Inspector General was to be an objective official reporting directly to the head of the department and not to the program head whose operations were to be audited and investigated. H.R. Rep. No. 584 at 11. This objectivity was to be fostered by a lack of conflicting policy responsibility: "[T]he legislation gives the [Inspector General] no conflicting policy responsibilities [*11] which could divert his attention or divide his time; his sole responsibility is to coordinate auditing and investigating efforts and other policy initiatives designed to promote the economy; efficiency and effectiveness of the programs of the establishment." S. Rep. No. 1071 at 7.

The legislative history of the Act reflects a consistent understanding that the role of the Inspector General was to be that of an investigator who would audit and investigate the operations of the departments and their federally-funded programs. See, e.g., S. Rep. No. 1071 at 27 ("The [Inspector General's] focus is the way in which Federal tax dollars are

spent by the agency, both in its internal operations and its federally-funded programs."). n8 The legislative history also rejects the idea that Inspectors General would have the authority to conduct regulatory investigations of the type at issue here. The most comprehensive statement is in the House Report:

While Inspectors General would have direct responsibility for conducting audits and investigations relating to the efficiency and economy of program operations and the prevention and detention of fraud and abuse in such programs, they would not [*12] have such responsibility for audits and investigations constituting an integral part of the programs involved. Examples of this would be audits conducted by USDA's Packers and Stockyards Administration in the course of its regulation of livestock marketing and investigations conducted by the Department of Labor as a means of enforcing the Fair Labor Standards Act. In such cases, the Inspector General would have oversight rather than direct responsibility.

H.R. Rep. No. 584 at 12-13 (emphasis added). See also S. Rep. No. 1071 at 27-28. n9

n8 The Inspector General has quoted to us various statements made by Members of Congress during hearings or debates that he asserts support his view that Congress intended that Inspectors General have authority to investigate violations of regulatory statutes administered by their departments. These quotations include general statements to the effect that Inspectors General were to have broad authority to investigate the programs and employees of the departments, see, e.g., Hyland Memo at 3 (quoting Rep. Fountain), as well as general statements that Inspectors General would restore public confidence in government, see, e.g., id. at 4 n.8 (quoting Rep. Levitas). None of these quotations provides support for the view that Congress intended to vest the Inspectors General with authority over regulatory investigations.

The Inspector General also argues that the hearings made Congress aware that the then-existing Inspectors General were undertaking regulatory investigations under the departments' regulatory statutes, but the evidence he cites does not support his argument. For instance, he quotes a report submitted to a Senate Committee at the same time as the Senate was considering the Act in which the Inspector General of the Department of Health, Education and Welfare defined "abuse" as covering "a wide variety of excessive services or program violations, and improper practices," id. at 4, but there is nothing in the quotation to indicate that the reference to "program violations" meant general regulatory enforcement rather than violations of law committed by department employees or its contractors or employees. Similarly, the Inspector General cites references in the testimony of the non-statutory Inspector General of the Department of Agriculture at the House committee hearings regarding investigations of meat and grain inspections which had been conducted by his office. We have examined the portions of the testimony of the Inspector General and other officials of the Department of Agriculture at these hearings which dealt with these investigations. The only relevant colloquy we can find occurred when Representative Jenrette asked the Audit Director of the Department of Agriculture whether the "majority" of these investigations had to do with employees of that Department. The response was: "Yes, I would say most of the time it had to do with some sort of inspection function and inspection employees. Also, the plants that had been afforded meat inspection service or meat grading service." Establishment of Offices of Inspector General: Hearings on H.R. 2819 Before the Subcomm. of the House Comm. on Government Operations, 95th Cong., 1st Sess. at 47 (1977). Representative Jenrette then responded that this was appropriate because "employees of the Department . . . should certainly have oversight . . . before the citizen on the street," and that the people the taxpayers are paying should be subject to "control" and "investigat[ion]." Id. We believe, in fact, that the grain inspectors who had been the subjects of these investigations were licensees of the Department of Agriculture not employees. In any event, this testimony hardly provides support for the view that Congress generally understood that conducting regulatory investigations was part of the role of Inspectors General.
[*13]

n9 Similarly, Representative Levitas stated:

The Inspectors General to be appointed by the President with the advice and consent of the Senate will first of all be independent and have no program responsibilities to divide allegiances. The Inspectors General will be responsible for audits and investigations only.

. . . .

> Moreover, the Offices of Inspector General would not be a new "layer of bureaucracy" to plague the public. They would deal exclusively with the internal operations of the departments and agencies. Their public contact would only be for the beneficial and needed purpose of receiving complaints about problems with agency administration and in the investigation of fraud and abuse by those persons who are misusing or stealing taxpayer dollars.
>
> 124 Cong. Rec. 10,405 (1978).

The statement in the House Report that Inspectors General were to have "oversight" but not "responsibility for audits and investigations constituting an integral part of the program involved" is not surprising because to vest such authority in the Inspectors General would have constituted a fundamental alteration in the departments' regulatory authority. It would have taken away the power [*14] to control the investigatory portion of a department's regulatory policy from the official designated by statute or by the Secretary n10 and placed it in an official separate from the regulatory division of the department. n11 As the legislative history makes clear, however, it was not the intention of Congress to make such a fundamental change in the regulatory structure of the departments and agencies of the federal government. Rather, Congress was concerned with waste of federal funds and the need for an independent official who could review the employees and operations of federal agencies.

> n10 For instance, as we have noted before, the Secretary of Labor is expressly provided with authority to engage in investigations to assure compliance with the health and safety regulations of OSHA. See 29 U.S.C. * 657.

> n11 The Inspector General argues, however, that no "policy" considerations would be implicated by his having supervisory authority over the regulatory investigations of the Department. While conceding that "[d]ecisions regarding the emphasis, focus, and type [civil, criminal, administrative] of program enforcement, and the best use of available program resources, can have substantive 'policy' ramifications," he states that "these considerations have little or no bearing when potential criminal violations are involved," and that it is toward uncovering such criminal violations that he intends to direct his efforts. Hyland Memo at 8. The Inspector General's argument fails to recognize that whether to choose criminal over civil remedies is one of the classic "policy" choices that a regulator must make.
>
> The Inspector General also argues that his investigative activity implicates no "policy" concerns because he will refer cases to the Department of Justice, which will make the final decision as to whether to file criminal charges. Hyland Letter at 2-3. It is true that the Department of Justice has the final say over whether criminal charges will be filed. 28 U.S.C. ** 516, 519. But it is equally true that the Department of Justice is responsive to the policy judgments of the referring agencies, and will, within the limits of available resources, generally follow the wishes of the referring agency as to questions such as the appropriate balance between criminal and civil enforcement.

[*15]

The statement in the House Report that Inspectors General were not to conduct investigations "constituting an integral part of the programs involved" is also dictated by the nature of the Inspector General's role. The purpose of creating an Inspector General was to have an official in the department who would not have responsibility for the operations of the department and would thus be free to investigate and criticize. If the Inspector General undertakes investigations under the department's regulatory statutes, he could not perform this role. One of the Inspector General's functions is to criticize regulatory investigative policy, a function he cannot perform if it is his responsibility to set and implement that policy.

The Inspector General, for instance, indicates that he disagrees with the current regulatory investigative policy of OSHA which he views as illustrating "an ingrained philosophy of enforcement that subordinates and trivializes the investigation and prosecution of significant criminal felony violations in favor of civil and administrative remedies and petty criminal offenses (e.g., misdemeanors)." Hyland letter at 4. We would expect therefore that the Inspector [*16] General might discharge his statutory "oversight" duty by preparing a report for the Secretary and Congress detailing this criticism of OSHA's regulatory investigative policies. See 5 U.S.C. app. * 5. However, once the Inspector General assumes authority over OSHA's regulatory investigative activity -- as under his interpretation of the statutory language he is bound to do n12 -- he would become an official responsible for implementing policy. Thus, with regard to the regulatory investigations the Inspector General would be undertaking, there would be no truly objective person to investi-

gate claims of misbehavior and abuse. The purpose of the Act is not only to protect the taxpayers' money, but also to serve as a check on mistreatment or abuse of the general public by government employees. If the Inspector General, however, is conducting and supervising regulatory investigations of the department, the very evil that Congress wanted to avoid by establishing an objective Inspector General would be created: namely, the responsible official would be charged with auditing and investigating his own office.

n12 Specifically, the Inspector General argues that the statutory mandate in section 4(a)(1) that the Inspector General is "to provide policy direction for and to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of" the department vests supervisory power in him over all investigations conducted by the Department of Labor, including investigations such as those conducted under OSHA that are integral to the regulatory enforcement of the program. Hyland Memo at 7.

[*17]

In sum, we think that the legislative history and structure of the Act provides compelling evidence that in granting the Inspector General authority to "conduct and supervise audits and investigations relating to the programs and operations" of the department, 5 U.S.C. app. * 2(1), Congress did not intend to grant the Inspector General authority to conduct, in the words of the House Report, "investigations constituting an integral part of the programs involved." Rather, the Inspector General's authority with respect to investigations pursuant to the Department's regulatory statutes is, again in the words of the House Report, one of "oversight." We therefore conclude that investigations undertaken pursuant to the Department of Labor's regulatory statutes, such as FLSA and the OSHA, are not the type authorized by the Act.

We also conclude that this type of regulatory investigative authority cannot be delegated by the Secretary to the Inspector General under section 9(a)(2) of the Act. n13 Section 9(a)(2) authorizes the Secretary to transfer additional functions to the Inspector General but only if they are "properly related" to the functions of the Inspector General and would "further [*18] the purposes of this Act." It specifically forbids the transfer of "program operating responsibilities" to the Inspector General. Whether or not the conduct of investigations pursuant to regulatory statutes constitutes "program operating responsibilities" within the meaning of the Act, such investigative authority, as outlined above, is inconsistent with structure and purpose of the Act and cannot be said to be "properly related" to the Inspector General's functions, nor could the transfer of these functions to the Inspector General be said to "further the purpose of the Act." n14 Thus, if the Secretary and the Inspector General believe that there is a need for the Inspector General to undertake particular types of regulatory investigations, they should seek from Congress specific amendments of the Act. n15

n13 We do not address whether any other statute provides the Secretary with authority to delegate such functions to the Inspector General. Nor do we address how any such provision should be reconciled with the Act's express prohibition on the transfer of "program operating responsibilities" to an Inspector General.

Moreover, while we do not agree that section 9(a)(2) provides authority to delegate the conduct of regulatory investigations to the Inspector General of Health and Human Services, see Memorandum for Dennis C. Whitfield, Deputy Secretary of Labor, from Richard P. Kusserow, Inspector General, Department of Health and Human Services at 6-7 (Oct. 6, 1988), we believe that the Inspector General may possess authority to conduct certain investigations into the programs he references (such as Medicare) as part of his responsibility under the Act to investigate regulatory compliance by recipients of federal funds. We have not been asked, however, to review any specific statutes under the jurisdiction of the Secretary of HHS and thus do not address this question.

[*19]

n14 We also disagree with the Inspector General that he can assume criminal investigative authority by means of a Memorandum of Understanding ("MOU") with the FBI. As this Office has previously stated, the Attorney General does not have the authority to delegate his criminal investigative authority under 28 U.S.C. * 533 to other departments or agencies of the government. See, e.g., Department of Labor Jurisdiction to Investigate Certain Criminal Matters, 10 Op. O.L.C. 130, 132-33 (1986). An MOU with the FBI is only appropriate where the department or agency already has criminal investigative authority concurrent with that of the FBI. Id. at 133.

Accordingly, insofar as any MOU purports to provide the Inspector General with criminal investigative authority not specifically granted by statute, it should be revised. On the other hand, the Department of Justice may deputize officials in other agencies, including investigators assigned to an Inspector General's office, to enforce

the criminal law. Of course, criminal investigations by deputized officials in other agencies remain under the supervision of the Department of Justice.

n15 The Act itself contains what appears to be at least one specific exception in the authorization of the transfer of the Office of Special Investigations in the Department of Labor to the Inspector General. See supra note 6. In 1988, there was also an attempt to transfer the Office of Investigations at the Nuclear Regulatory Commission ("NRC") to the new office of the Inspector General of NRC, but that attempt did not succeed. See infra note 19.

[*20]

Our conclusions here are consistent with the decision of the district court in *United States v. Montgomery County Crisis Center, 676 F. Supp. 98 (D. Md. 1987).* n16 In this case, the Inspector General of the Department of Defense had issued a subpoena to a community counseling center seeking production of documents relating to telephone calls made by a member of the United States Navy who was allegedly suicidal and who had allegedly disclosed classified information during the telephone calls. In holding the subpoena to be outside the scope of the Inspector General's authority, the court pointed to a number of factors including privacy concerns, no one of which was necessarily dispositive. *Id. at 99.* Three of the factors the court pointed to, however, are relevant here. The court stated:

First the "investigation" to which the subpoena relates concerns a security matter, not one involving alleged fraud, inefficiency or waste -- the prevention of which is the Inspector General's clearest statutory charge.

Second, the "investigation" is not even ostensibly related to a general programmatic review but is limited to tracking down the source of one alleged security breach.

n16 The conclusion we reach here is also consistent with an earlier opinion of this Office. Authority of the State Department Office of Security to Investigate Passport and Visa Fraud, 8 Op. O.L.C. 175 (1984). In this opinion we considered among other questions whether the Inspector General of the Department of State had authority only to investigate "passport and visa malfeasance" under 18 U.S.C. ** 1542-1546 (malfeasance or criminal activity on the part of Department of State employees in obtaining passports or visas for themselves or others) or whether he also could investigate "passport and visa fraud" under 18 U.S.C. * 1541 (criminal deceit in passport or visa acquisition by persons other than Department of State employees). At that time, the authority of the Inspector General of the Department of State derived from the Foreign Service Act of 1980, 22 U.S.C. * 3929. (The Department of State was first brought within the ambit of the Act by Pub. L. No. 99-399, 100 Stat. 867 (1986).) The Foreign Service Act, however, had been "patterned" after the Inspector General Act of 1978 and explicitly incorporated the portions of the Act granting investigative authority. Thus, we looked to the structure and legislative history of the Act for guidance in determining the scope of the investigative authority possessed by the Inspector General under the Foreign Service Act. 8 Op. O.L.C. at 177-78. Our conclusion was that legislative history of the Act "strongly suggests that Congress intended that the focus of the Inspector General's authority be on the conduct of Department employees or contractors as opposed to the conduct of outside persons who may have occasion to deal with the Department." *Id. at 178.* Ultimately we concluded that Inspector Generals did not have authority to investigate "passport and visa fraud," i.e., fraud not involving employees of the Department of State. *Id. at 179.*

Our opinion is also consistent with various judicial decisions upholding the subpoena power of Inspectors General in cases involving investigations of contractor or grantee fraud. See, e.g., *United States v. Westinghouse Elec. Corp., 788 F.2d 164 (3d Cir. 1986)* (Inspector General of Department of Defense investigation of defense contractor); *United States Dep't of Hous. and Urban Dev. v. Sutton, 68 B.R. 89 (E.D. Mo. 1986)* (Inspector General of HUD investigation of properties insured by HUD). The only judicial opinion that we are aware of that is possibly inconsistent with our opinion is an unreported district court opinion that was supplied to us by the Inspector General, United States v. H.P. Connor (Civ. No. 85-4638, D.N.J., Dec. 9, 1985). This decision involved the enforcement of a subpoena issued by the Inspector General in the course of an investigation of alleged Davis-Bacon Act violations. In an opinion enforcing the subpoena, the court stated: "No argument can be made that this investigation is beyond the Inspector General's statutory grant." Slip Op. at 6. There is no citation or reasoning to support this statement, and it is unclear from the opinion whether this issue was even argued. We think the issue of whether the Inspector General of the Labor Department has general authority to investigate all federal contractors under the Davis-Bacon Act is more complex than the district court's opinion reveals.

> The Davis-Bacon Act requires federal contractors to pay a minimum wage (established by reference to prevailing wages in the community). 40 U.S.C. * 276(a). The Secretary of Labor is expressly given authority to conduct investigations to assure compliance with these requirements. See Reorg. Plan No. 14 of 1950, 5 U.S.C. app. at 1261. In order to assure compliance with the Davis-Bacon Act, we understand the Secretary of Labor may investigate not only contractors of the Department of Labor but any federal contractor. To the extent this is true, investigations of contractors outside the Department of Labor seem akin to regulatory investigations because they are unrelated to waste and fraud in the operations of the Department of Labor itself or among its employees, contractors or grantees. Thus, there is a substantial question whether it is appropriate for the Inspector General of the Department of Labor to conduct general investigations of Davis-Bacon Act compliance by federal contractors outside the Department of Labor. Before rendering an opinion on the scope of the authority of the Inspector General of the Department of Labor to conduct investigations pursuant to the Davis-Bacon Act, however, we would want your views and those of the Inspector General on how this issue should be resolved in light of the general principles set out in this opinion and the specific provisions of the Davis-Bacon Act.

[*21]

. . . .

[In addition,] although the Inspector General is authorized to issue subpoenas to carry out all of his "functions assigned by . . . [law]," the language of the Senate Committee Report on the 1978 Inspector General Act makes clear that in granting him subpoena power Congress was focusing upon obtaining records necessary to audit and investigate the expenditure of federal funds.

Id. While Montgomery Crisis Center involved a different type of investigation than those at issue here, the court's analysis of the Inspector General's statutory investigative authority supports the conclusions we have reached.

We also note that the legislative history of the recent amendments to the Act, Pub. L. No. 100-504, 102 Stat. 2515 (1988) (to be codified at 5 U.S.C. app.), which extended its coverage to a number of other Departments, including the Treasury Department and the Department of Justice, as well as extending the Inspector General concept to 33 other "designated federal entities," displays an understanding of the authority of the Inspector General that is fully consistent with the conclusions we have reached in this opinion. For instance, the House Report responded to concerns [*22] that extending the Act to the Department of Justice would interfere with the Department's investigative and law enforcement functions in the following language:

A simple extension of the 1978 act to include the Department of Justice would not result in a direct and significant distortion and diffusion of the Attorney General's responsibilities to investigate, prosecute, or to institute suit when necessary to uphold Federal law. The investigation and prosecution of suspected violations of Federal law and the conduct of litigation are parts of the basic mission or program functions of the Department of Justice. The 1978 act does not authorize inspectors general to engage in program functions and, in fact specifically prohibits the assignment of such responsibilities to an inspector general.

H.R. Rep. No. 771, 100th Cong., 2d Sess. 9 (1988).

Similarly, the House Report described the provisions of the proposed bill (to be codified as section 8E of the Act) which extended the Inspector General concept n17 to 33 other federal entities as requiring "that multiple audit and investigative units in an agency (except for units carrying out audits or investigations as an integral part of [*23] the program of the agency) be consolidated into a single Office of Inspector General . . . who would report directly to the agency head and to the Congress." Id. at 14 (emphasis added). n18 This statement is followed almost immediately by the statement that these newly-created "inspectors general would have the same authorities and responsibilities as those provided in the 1978 act." Id. at 15. It is also significant that a provision in the Senate bill that would have transferred to the newly-created Office of the Inspector General at the Nuclear Regulatory Commission the office that conducted the Commission's regulatory investigations was dropped after objections were raised by several Senators. n19

> n17 The principal difference between the Inspectors General at these 33 entities and the Inspectors General in the other departments and agencies is that the former are appointed, and removable, by the head of the agency or entities rather than by the President. See 5 U.S.C. app. * 8E(c).

> n18 This quotation is from the Committee report describing the bill that was passed by the House, and the relevant provisions of which were adopted by the House-Senate conference and enacted into law. An earlier ver-

sion of the bill introduced in the House, see 134 Cong. Rec. 3013 (1988), but never voted on, as well as the bill passed by the Senate, see 134 Cong. Rec. 612 (1988), included a definition of the "audit units" that were to be established in the other federal establishments that tracks the quoted language in the Committee report. A comparison of the two versions of the House bill indicates that the definition was dropped as part of a simplification of the structure of the bill whereby the concept of the Inspector General was incorporated by reference rather than being defined. There is nothing in the House debates to suggest that the deletion of this definition from the earlier version of the bill was intended to have substantive effect. This is confirmed by the Conference Report, which in describing the reconciliation of the relevant portions of the House and Senate bills does not indicate that the deletion of the definition of "audit unit" from the Senate bill was understood to have any substantive consequences. See 134 Cong. Rec. 27,283 (1988).

[*24]

n19 The bill as introduced in the Senate provided for the transfer to the newly-created Office of the Inspector General at the Nuclear Regulatory Commission not only the personnel and functions of the Office of Internal Audit which performed "the typical IG functions -- that is, internal audit and investigations," 134 Cong. Rec. 616 (1988) (statement of Sen. Glenn), but also the functions of the Office of Investigations ("OI"), which conducted program investigations of NRC licensees. The Senate Report described the transfer of OI to the Inspector General as "consistent" with the Act. S. Rep. No. 150, 100th Cong., lst Sess. 18 (1987). When the bill was reported from the Committee to the full Senate, however, there was objection to the transfer of OI to the Office of the Inspector General on the ground that it would interfere with the authority of the Commission to perform its regulatory functions resulting from its loss of control of the investigative unit which conducted investigations integral to the Commission's regulatory mission. 134 Cong. Rec. 616 (1988). As a result, the Committee Chairman, Senator Glenn, agreed to drop the transfer of OI to the Office of the Inspector General from the bill. Id.

[*25]

Finally, in light of the genuine concern expressed to us by some Inspectors General, we think it worthwhile to set out briefly the significant investigatory authority that is granted to Inspectors General under the Act. Without purporting to provide a complete description of the nature and scope of these authorities, we simply note that the Inspector General: (1) has authority to investigate recipients of federal funds, such as contractors and grantees, to determine if they are complying with federal laws and regulations, n20 and (2) can investigate the policies and actions of the Departments and their employees. n21 Of significance here, this latter authority includes the authority to exercise "oversight" over the investigations that are integral to the programs of the Department. Thus, the Inspector General has the authority to review regulatory investigative activities of the Department of Labor, and to report his criticism and findings to the head of the department and Congress. All we conclude here is that the Act does not give the Inspector General the authority to assume these regulatory investigative responsibilities himself.

n20 Thus, our opinion should not be understood as suggesting that the Inspector General does not have authority to conduct investigations that are external to the Department. He clearly has that authority in the case of federal contractors, grantees and other recipients of federal funds, as well as authority to investigate individuals or entities that are alleged to be involved with employees of the Department in cases involving employee misconduct or other activities involving fraud, waste and abuse. For instance, the Inspector General would clearly be able to undertake investigations into the conduct of a corporation that paid bribes to an employee of the Department of Labor to overlook violations of OSHA regulations.

[*26]

n21 The Solicitor of Labor does not challenge the exercise of such authority by the Inspector General:

[T]he Inspector General of DOL and I are in full agreement that if the IG's office has reason to believe that some sort of misfeasance or malfeasance by DOL personnel has occurred, the IG's Office is fully authorized to investigate such possible misconduct, whether or not the investigation of a program violation is also involved. Secondly, the investigations to which this question is directed do not include any which might be directed against a recipient of funds from the Department, whether those funds have been obtained by means of lawful or

unlawful activity, so long as the investigation is directed at activities which occurred in connection with the receipt or use of the DOL funds.

Letter for Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, from George Salem, Solicitor of Labor, at 2 (Dec. 5, 1988). The Inspector General brought to our attention a 1981 letter from the Criminal Division of the Department of Justice. The letter was in response to an inquiry from the General Counsel of the Department of Health and Human Services as to the authority of the Inspector General to investigate violations of the Food and Drug Act. The relevant portion of the letter states:

We are of the opinion that the legislation establishing the Inspectors General was generally not intended to replace the regulatory function of an agency such as FDA to investigate possible violations of the Act. However, we also feel that as part of the IG's general oversight responsibilities, he is authorized to investigate allegations of improprieties within the programs of his department or agency. Therefore, we can envision situations where FDA and/or the IG will be investigating alleged violations of the Act.

Letter for Juan A. del Real, General Counsel, HHS, from D. Lowell Jensen, Assistant Attorney General, Criminal Division (Dec. 10, 1981). The Inspector General suggests that this letter supports his view that he has authority to conduct regulatory investigations. We find nothing in this letter inconsistent with our conclusion here. Like the Criminal Division in 1981, we believe that the Inspector General is authorized to investigate "allegations of improprieties within the programs of his department" and thus we too can envision situations where the Inspector General of HHS would investigate alleged violations of the Food and Drug Act. An obvious example of such a situation would be when there were allegations that employees of the Food and Drug Administration had been bribed to approve a drug for sale to the public.

[*27]

DOUGLAS W. KMIEC

Assistant Attorney General

Office of Legal Counsel

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsAgriculture & FoodProduct QualityLabor & Employment LawOccupational Safety & HealthAdministrative ProceedingsCitations & InspectionsLabor & Employment LawOccupational Safety & HealthDuties & Rights

Summary of Barr Letter

On July 17, 1990 William P. Barr, Acting Deputy Attorney General, wrote a letter to William M. Diefenderfer, Deputy Director of Office Management and Budget addressing the results of discussions between the Department of Justice (DOJ) and the President's Council on Integrity and Efficiency (PCIE) concerning the investigative authority of Inspectors General. The letter related to an earlier opinion issued on March 9, 1989 by the DOJ's Office of Legal Counsel (OLC). This opinion, generally referenced to as the Kmiec opinion (*see* 13 Op. Off. Legal Counsel 54), concluded that the Inspector General of the Department of Labor did not have authority to undertake criminal investigations of private parties under regulatory statutes such as the Fair Labor Standards Act or the Occupational Safety and Health Act. In a subsequent letter dated September 11, 1989 Acting Deputy Attorney General Edward S.G. Dennis, Jr. emphasized that the OLC opinion defined the authority that is granted all Inspectors Generals by the general provisions of the Inspector General Act. However, confusion remained as to the scope of the opinion and its application outside the context of the Department of Labor.

In order to clarify the opinion, The DOJ and the PCIE have agreed on a set of defining principles regarding the investigative jurisdiction of IGs:

1) Each IG may conduct criminal and other investigations of agency employees and other recipients of federal funds etc. so long as the investigations are related to the IG's agency's programs and operations;
2) Each IG may conduct criminal and other investigations of those that are not agency employees and who do not receive federal funds:
    a. When an external party is suspected of having acted in collusion with an agency employee or recipient of agency funds to violate a federal law;
    b. When the IG is investigating an external party under the Program Fraud Civil Remedies Act (31 U.S.C. §§ 3801-12);
    c. When, in an application for federal benefit or in a document relating to the payment of funds or property to the agency, an external party has filed or attempts to file a fraudulent statement with the intention of deliberately misleading an employee or official of the agency, unless investigating such conduct is within the investigative jurisdiction of an agency compliance or other investigative unit as part of its programs and operations.
3) In oversight reviews of programs office compliance or enforcement efforts, each IG may conduct spot check investigations of external parties in the following circumstances:
    a. To assess the method, propriety, scope, or objectivity of program monitoring by the program compliance or enforcement office;
    b. To assess whether the program compliance or enforcement office is fulfilling its statutory or regulatory duties; and/or
    c. To determine the validity of allegations that employees of the agency are failing to report, or are attempting to cover up, regulatory violations, or are otherwise guilty of criminal misconduct.

Washington, D.C. 20530

July 17, 1990

William M. Diefenderfer
Deputy Director
Office of Management and Budget
17th Street and Pennsylvania Ave., N.W.
Washington, D. C. 20503

Dear Mr. Diefenderfer:

This letter is intended to memorialize the results of the recent discussions between the Department of Justice and the President's Council on Integrity and Efficiency (PCIE) concerning the investigative authority of the Inspectors General. On March 9, 1989, the Department's Office of Legal Counsel (OLC) issued an opinion resolving a dispute between the Solicitor of Labor and the Inspector General of the Department of Labor concerning the scope of that Inspector General's investigative authority under the Inspector General Act. In that Opinion, OLC concluded that the Inspector General of the Department of Labor did not have authority to undertake criminal investigations of private parties under regulatory statutes such as the Fair Labor Standards Act or the Occupational Safety and Health Act. In the wake of the OLC Opinion, Inspectors General expressed some confusion and concern over the scope of the Opinion and its application outside the context of the Department of Labor.

In a letter dated September 11, 1989, Acting Deputy Attorney General Edward S.G. Dennis, Jr. emphasized that the OLC opinion identified the nature of the authority that is granted all Inspectors General by the general provisions of the Inspector General Act, but did not address the specific situation of any Inspector General other than the Labor Department Inspector General. The Dennis letter recognized that "the full extent of the investigative authority of any particular Inspector General can only be determined by reviewing all of the statutory provisions from which he derives his authority." Id. at 2.

The Department of Justice and the PCIE, with the assistance of the Office of Management and Budget, have been carrying on discussions in an attempt to resolve misunderstandings that have arisen from the opinion and to apply the experience that both DOJ and PCIE have gained in recent months in addressing questions relating to the scope of the authority of Inspector Generals.

Through this process DOJ and PCIE successfully have reached a more comprehensive and clear understanding of a variety of areas of IGs' authority and accordingly have drafted a set of principles that clarify the opinion in several respects. These clarifying principles are as follows:

1. Each IG may conduct criminal and other investigations of agency employees, contractors, grantees, other recipients of federal funds and guarantees, and offerors or other applicants for agency contracts, grants, guarantees, or funds, so long as these investigations are related to the IG's agency's programs and operations.

2. Each IG may also conduct criminal and other investigations of individuals and entities who are not agency employees and who do not receive federal funds (hereafter in this document referred to as "external parties") under the circumstances listed below, which are intended to be illustrative and not all inclusive. No presumption of validity or invalidity should apply to a circumstance not listed.

   a. When an external party is suspected of having acted in collusion with an agency employee or a recipient of agency funds to violate a federal law, and investigation of the external party is a necessary complement to the investigation of the employee or recipient.

   NOTE: Recent indictments or convictions involving collusion with external parties, or other information providing reasonable suspicion of collusion, may predicate an IG's investigation of external parties interacting with the agency in that particular area. When there is no longer reason to suspect collusion, however, the investigation should be transferred to the responsible agency compliance unit.

   b. When the IG is investigating an external party under the Program Fraud Civil Remedies Act (31 U.S.C. §§ 3801-12) in connection with the possible imposition of administrative penalties under that Act.

   c. When, in an application for a federal benefit or in a document relating to the payment of funds or property to the agency, an external party has filed, attempts to file, or causes or conspires to be filed a false or fraudulent statement with the intention of deliberately misleading an employee or official of the agency or of committing a

fraud upon the agency unless investigating such conduct by an external party is within the investigative jurisdiction of an agency compliance or other investigative unit as part of its programs and operations.

"Federal benefit" includes pecuniary benefits but also such nonpecuniary benefits as licenses and permits.

3. In addition to the above, in oversight reviews of program office compliance or enforcement efforts, each IG may conduct spot check investigations of external parties in the following circumstances:

a. To assess the method, propriety, scope, or objectivity of program monitoring by the program compliance or enforcement office; and/or

b. To assess whether the program compliance or enforcement office is fulfilling its statutory or regulatory duties; and/or

c. To determine the validity of allegations that employees of the agency are failing to report, or are attempting to cover up, regulatory violations, or are otherwise guilty of criminal misconduct.

NOTE: Spot checks thus do not have as their objective the investigation of external parties per se, although the results when appropriate may be reported to the Attorney General for prosecutive consideration. Rather, spot checks are intended to assist in the assessment of the structure and management of agency programs, so that the IG may report on them fully to the agency head and the Congress.

4. Neither this statement nor the opinion issued by the Office of Legal Counsel on March 9, 1989, addresses in any way the authority of an Inspector General to conduct audits.

Please let me know if we can be of further assistance.

Sincerely,

William P. Barr
Acting Deputy Attorney General

OPINION OF THE OFFICE OF LEGAL COUNSEL

Whether Agents of the Department of Justice Office of Inspector General are "Investigative or Law Enforcement Officers" Within the Meaning of 18 U.S.C. § 2510 (7)

Agents of the Department of Justice Office of Inspector General are "investigative officers" within the meaning of 18 U.S.C. § 2510(7) and as such may be authorized to apply for and conduct court-authorized electronic surveillance regarding matters within that Office's investigative jurisdiction.

1990 OLC LEXIS 50; 14 Op. O.L.C. 107

May 29, 1990

ADDRESSEE:
[*1]

LETTER OPINION FOR THE ASSOCIATE UNITED STATES ATTORNEY SOUTHERN DISTRICT OF NEW YORK

OPINIONBY: McGINNIS

OPINION:

This responds to your request for our opinion as to whether agents of the Department of Justice Inspector General ("DOJ/OIG") can be considered "investigative or law enforcement officer[s]" within the meaning of *18 U.S.C. § 2510*(7). n1 We have concluded that the DOJ/OIG falls within that statutory definition.

n1 See Letter for William P. Barr, Assistant Attorney General, Office of Legal Counsel, from Louis J. Freeh, Associate United States Attorney, Southern District of New York (Apr. 23, 1990).

Your request arises from an application to the Criminal Division for court-authorized electronic surveillance pursuant to title III of the Omnibus Crime Control and Safe Streets Act ("OCCSSA"), Pub. L. No. 90-351, tit. III, § 802, 82 Stat. 197, 212 (1968) (codified at *18 U.S.C. §§ 2510*-2520). During the drafting of that application, you considered the question whether agents of the DOJ/OIG were authorized to act as "investigative or law enforcement officer[s]" who are permitted by OCCSSA to listen to intercepted communications. [*2] Because the question is one of first impression and involves the intersection of the OCCSSA and the Inspector General Act, the Office of Enforcement Operations of the Criminal Division recommended that you seek our advice.

Title III of OCCSSA was intended to "provide law enforcement officials with some of the tools thought necessary to combat crime without unnecessarily infringing upon the right of individual privacy." n2 In general, the statute prohibits surveillance of wire and oral communications without the consent of at least one party to the communication, but creates certain specific exceptions for law enforcement purposes, subject to procedural and substantive requirements. n3 Most relevantly, section 2516 provides for interception of wire, oral, or electronic communications for law enforcement purposes pursuant to a court order based upon a showing and finding of probable cause. Under subsection 2516(1), the Attorney General and certain other officers within the Department of Justice may authorize the making of an application to a federal judge for an order "authorizing . . . the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal [*3] agency having responsibility for the investigation of the offense as to which the application is made," if the underlying offense falls within one of several categories of federal crimes enumerated in section 2516. Under section 2518, each such application for a court order must be made in writing and include such information as "the identity of the investigative or law enforcement officer making the application." If the application is approved, the identified officer may listen to the intercepted communication. Id. § 2518 (3) - (5). n4

n2 *Scott v. United States, 436 U.S. 128, 130 (1978).*

n3 See S. Rep. No. 1097, 90th Cong., 2d Sess. 27-28 (1968).

n4 Moreover, investigative or law enforcement officers, if authorized to intercept communications, may disclose the contents of the communications to other investigative or law enforcement officers, may use those contents to the extent that such use is appropriate to the proper performance of their official duties, may in suitable circumstances give testimony concerning those contents, and may disclose and use intercepted communications relating to offenses other than those specified in the court order if the former are obtained in the course of a court-authorized interception. Id. § 2517(1) - (3), (5). Further, investigative or law enforcement officers specially designated by an appropriate prosecutor may intercept wire or oral communications on an emergency basis, subject to later judicial review. Id. § 2518(7).

[*4]

Subsection 2510(7), in turn, defines "investigative or law enforcement officer" to mean

> any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses.

Because the definition is phrased throughout in the disjunctive -- investigative or law enforcement officer, empowered to conduct investigations or to make arrests -- it seems plain that Congress intended the term "investigative officers" to be broad enough to include officials who participate in investigations but do not have arrest authority. Moreover, the only discussion in the legislative history of the term "investigative officers" indicates that the term encompasses all officers who carry out any law enforcement duties relating to offenses enumerated in section 2516:

> Paragraph (7) defines "investigative or law enforcement officer" to include any Federal, State, or local law enforcement officer empowered to make investigations of or to make arrests for any of the offenses enumerated [*5] in the proposed legislation. It would include law enforcement personnel carrying out law enforcement purposes.

S. Rep. No. 1097, 90th Cong., 2d Sess. 91 (1968) (emphasis added).

Moreover, case law also interprets the term "investigative officer[s]" broadly to include all law enforcement officials involved in the investigation of the enumerated offenses, even if they lack the authority to make arrests. n5 Finally, this Office has previously opined that in light of the use of "the broad term 'investigatory' [sic]," FBI support personnel qualify as "investigative officers" within the meaning of section 2510(7). n6

n5 See *United State v. Feekes, 879 F.2d 1562, 1565-66 (7th Cir. 1989)* (prison investigator within section 2510(7)); *In re Grand Jury Proceedings, 841 F.2d 1048, 1054 (11th Cir. 1988)* (House of Representatives Committee in impeachment proceeding against federal judge is an "investigative officer" within section 2510(7)); *United States v. Clark, 651 F. Supp. 76, 79 (M.D. Pa. 1986),* aff'd, *857 F.2d 1464 (3d Cir. 1988),* cert. denied, *490 U.S. 1073 (1989)* ("While prison employees may not be 'the FBI or others normally recognized as law enforcement officers,' . . . [they] fall within the category of investigative officers . . . ."); *Crooker v. Department of Justice, 497 F. Supp. 500, 503 (D. Conn. 1980)* (prison officials, even though lacking arrest authority for any of the offenses enumerated in section 2516(a), were investigators under section 2510(7)).

n6 Memorandum for William H. Webster, Director, Federal Bureau of Investigation, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, Re: Use of FBI Support Personnel to Monitor Title III Surveillance at 20 (Oct. 31, 1984).

[*6]

We believe DOJ/OIG agents qualify as "investigative officer[s]" under section 2510(7) as construed above, because these agents may make investigations of offenses enumerated in section 2516. Each Inspector General has the duty and responsibility to "provide policy direction for and to conduct, supervise, and coordinate audits and investigations" relating to the programs and operations "of [the] establishment" in which he functions. *5 U.S.C. app. 3,* § 4 (a) (1). n7 An Inspector General must also "conduct, supervise, or coordinate other activities carried out or financed by such estab-

lishment for the purpose of . . . preventing and detecting fraud and abuse in, its programs and operations." Id. § 4(a) (3). Inpector Generals also have responsibility "with respect to (A) . . . the prevention and detection of fraud and abuse in . . . programs and operations administered or financed by such establishment, [and] (B) the identification and prosecution of participants in such fraud or abuse." Id. § 4(a) (4) (emphasis added). These responsibilities require an Inspector General to "report expeditiously to the Attorney General whenever the Inspector [*7] General has reasonable grounds to believe there has been a violation of Federal criminal law." Id. § 4(d). n8 Thus, the Inspector General Act entrusts the DOJ/OIG with investigative, auditing and other responsibilities relevant to the detection and prosecution of fraud and abuse within Justice Department programs or operations. n9

n7 Although the Inspector General Act originally did not provide for an Inspector General within the Department of Justice, a 1988 amendment to the Inspector General Act created the DOJ/OIG. See Pub. L. No. 100-504, 102 Stat. 2515, 2520-21 (1988).

n8 The provisions relating specifically to the DOJ/OIG state that the Inspector General "shall be under the authority, direction, and control of the Attorney General with respect to audits or investigations, or the issuance of subpoenas, which require access of sensitive information" concerning specified areas of law enforcement. *5 U.S.C. app. 3,* § 8D(a) (1).

n9 Indeed, this Office has stated that it had "no doubt that the [Labor Department] Inspector General has criminal investigative authority . . . within the scope of his statutorily-granted investigative authority." Inspector General Authority to Conduct Regulatory Investigations, 13 Op. O.L.C. 54, 58 n.7 (1989).

[*8]

In particular, we believe that the DOJ/OIG's investigative jurisdiction carries with it the power to investigate offenses enumerated in section 2516, should the DOJ/OIG discover evidence that Justice Department personnel, contractors or grantees are engaging in such offenses in connection with the Department's programs or operations. Among these offenses may be, for example, bribery of public officials and witnesses *(18 U.S.C. § 201),* influencing or injuring an officer, juror, or witness (id. §§ 1503, 1512, 1513), obstruction of criminal investigations (id. § 1510), wire fraud (id. § 1343), mail fraud (id. § 1341), and dealing in illegal drugs. See id. §§ 2516(1) (c), (e).

Accordingly, we conclude that DOJ/OIG agents (including special agents, auditors and investigators) are investigative officers within the meaning of *18 U.S.C. § 2510*(7), and as such may be authorized by the appropriate officials within this Department to apply for and to conduct court-authorized electronic surveillance with regard to matters within the DOJ/OIG's investigative jurisdiction.

JOHN O. McGINNIS

Deputy Assistant [*9] Attorney General

Office of Legal Counsel

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesCrimes Against PersonsBriberyPublic OfficialsElementsCriminal Law & ProcedureSearch & SeizureElectronic EavesdroppingVideo SurveillanceEvidenceIllegal EavesdroppingGeneral Overview

LEXSEE 22 OP. O.L.C. 50

OPINION OF THE OFFICE OF LEGAL COUNSEL

INTERPRETATION OF PHRASE "RECOMMENDATION THAT FUNDS BE PUT TO BETTER USE" IN INSPECTOR GENERAL ACT

Although it is a close question, the better interpretation of the Inspector General Act is that Congress did not intend to limit the phrase "recommendation that funds be put to better use" to only those audit recommendations that achieve identifiable monetary savings.

1998 OLC LEXIS 27; 22 Op. O.L.C. 50

March 20, 1998

ADDRESSEE:
[*1]

MEMORANDUM FOR THE ASSISTANT ATTORNEY GENERAL FOR

ADMINISTRATION

AND THE

INSPECTOR GENERAL

OPINIONBY: JOHNSEN

OPINION:

You have asked us to resolve a dispute regarding the appropriate interpretation of the phrase "recommendation that funds be put to better use," as used in the Inspector General Act, 5 U.S.C. app., §§ 1-12 (1994) ("IG Act"). It is our understanding that the Justice Management Division ("JMD") and the Office of the Inspector General ("OIG") disagree as to which recommendations may properly be identified and reported by OIG as "funds put to better use." See Memorandum for Dawn Johnsen, Acting Assistant Attorney General, Office of Legal Counsel, from Stephen R. Colgate, Assistant Attorney General for Administration, and Michael R. Bromwich, Inspector General, Re: Audit Resolution Committee Request for Legal Opinion (July 11, 1997). JMD asserts that "'funds put to better use' may only be claimed when some type of savings results from the audit recommendation." Id. at 1. OIG, on the other hand, believes that the phrase also encompasses "recommendations that funds be redirected to achieve greater efficiency, accountability, or internal control objectives even though not necessarily [*2] monetized as savings." Id.

As we explain more fully below, we conclude that, although it is a close question, the better reading of the statute is that Congress did not intend to limit the phrase "recommendation that funds be put to better use" to only those audit recommendations that achieve identifiable monetary savings.

DISCUSSION

Section 5 of the IG Act requires each Inspector General to prepare semiannual reports "summarizing the activities of the Office" during the immediately preceding six-month period. 5 U.S.C. app., § 5(a). The statute specifies certain information that must, at a minimum, be contained in such reports. Id. Included among these requirements is:

> a listing, subdivided according to subject matter, of each audit report issued by the Office during the reporting period and for each audit report, where applicable, the total dollar value of questioned costs (in-

> cluding a separate category for the dollar value of unsupported costs) and the dollar value of recommendations that funds be put to better use.

Id. § 5(a)(6). The statute further requires separate statistical tables summarizing, with respect to audit reports pending and issued during [*3] the reporting period, decisions made by management as a result of those reports: one table concerns the status of management decisions in response to questioned costs, and the other concerns the status of management decisions in response to recommendations that funds be put to better use. Id. §§ 5(a)(8), (9).

The phrase "recommendation that funds be put to better use" is defined in the IG Act as follows:

> a recommendation by the Office that funds could be used more efficiently if management of an establishment took actions to implement and complete the recommendation, including --
>
> (A) reductions in outlays;
> (B) deobligation of funds from programs or operations;
> (C) withdrawal of interest subsidy costs on loans or loan guarantees, insurance, or bonds;
> (D) costs not incurred by implementing recommended improvements related to the operations of the establishment, a contractor or grantee;
> (E) avoidance of unnecessary expenditures noted in preaward reviews of contract or grant agreements; or
> (F) any other savings which are specifically identified.

Id. § 5(f)(4). Looking first only to that portion of the definition that precedes items (A) through (F), the critical interpretive [*4] question is whether "a recommendation that funds could be used more efficiently" is limited to a recommendation that funds could be saved. An affirmative answer to this question requires equating efficiency with identifiable savings. n1 However, the dictionary defines "efficiency" as the "capacity to produce desired results with a minimum expenditure of energy, time, money, or materials." Webster's Third New International Dictionary 725 (1986). Pursuant to this definition, efficiency could include, but need not necessarily be limited to, monetary savings. Efficiency could be achieved, for example, by accomplishing a particular task in a shorter amount of time, thereby freeing up personnel resources to turn to another task. Although ultimately an agency may save money by saving energy, time, or materials, such savings may be neither identifiable nor quantifiable. We therefore conclude that, standing alone, the definition of "recommendation that funds be put to better use" that precedes subsections (A) through (F) would best be interpreted as not requiring a demonstration of identifiable savings.

> n1 We use the term "savings" as we understand JMD uses that term, i.e. an identifiable reduction in costs. See Webster's Third New International Dictionary 2020 (1986).

[*5]

JMD further contends, however, that each of the examples that follows in subsections 5(f)(4)(A) through (F) refers to some type of savings, and therefore that the definition of "recommendation that funds be put to better use" also must be interpreted as limited to specifically identified savings. Under the long-established canon of *ejusdem generis*, where a general term follows a specific one, the general term should be construed to encompass only subjects similar in nature to those subjects enumerated by the specific words. 2A Norman J. Singer, Sutherland Statutory Construction § 47.17 (5th ed. 1992). The doctrine is equally applicable where specific words follow general ones: application of the general term is then restricted to matters similar to those enumerated. Id. We note, however, that the rule is, like other canons of statutory construction, "only an aid to the ascertainment of the true meaning of the statute. It is neither final nor exclusive." *Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 89 (1934).* The canon should not govern "when the whole context [of a statute] dictates a different conclusion." *Norfolk and Western Ry. v. American Train Dispatchers Ass'n, 499 U.S. 117, 129 (1991).* [*6]

There are two separate *ejusdem generis* arguments to be made with respect to subsection 5(f)(4). The first relies upon the catchall reference in subsection 5(f)(4)(F) to "any other savings" to reinforce a conclusion from the text of subsections 5(f)(4)(A) through (E) that the categories itemized therein all enumerate various examples of savings. OIG, however, disputes that all of the examples listed in subsections (A) through (E) constitute savings. OIG concedes that

(A) ("reductions in outlays") and (B) ("deobligation of funds") comprise savings, but questions whether (C) ("withdrawal of interest subsidy costs") would also fall into this category, especially if the interest subsidy is recaptured and reallocated elsewhere. See E-Mail for Beth Nolan, Deputy Assistant Attorney General, Office of Legal Counsel, and Janis Sposato, Deputy Assistant Attorney General, Justice Management Division, from Robert L. Ashbaugh, Deputy Inspector General, Office of Inspector General (Dec. 19, 1997). Similarly, OIG asserts that subsections (D) ("costs not incurred by implementing recommended improvements") and (E) ("avoidance of unnecessary expenditures") need not necessarily result in savings, [*7] if the funds recovered are reinvested in the program. Id. We believe, however, that the better reading of (C), (D), and (E) is that they do define different categories of savings. The language used in these subsections suggests funds recovered -- e.g., "withdrawal of . . . costs," "costs not incurred," "avoidance of unnecessary expenditures" -- and thus provides strong textual support for application of *ejusdem generis* in this context.

Under the second *ejusdem generis* argument, the general definition of "recommendation that funds be put to better use" that precedes subsections 5(f)(4)(A) through (F) is limited by the items listed in those subsections, i.e. the definition is limited to identifiable savings. We believe this second argument, while not without merit, is less tenable in light of both the textual definition of "recommendation that funds be put to better use" and the legislative history of the IG Act.

Under the statute, a "recommendation that funds be put to better use" is a "recommendation . . . that funds could be used more efficiently if management of an establishment took actions to implement and complete the recommendation, including" the list [*8] of examples of savings in subsections (A) through (F). *5 U.S.C. app. § 5*(f)(4). An interpretational difficulty is presented by the fact that the word "including" could be read to modify either the phrase "recommendation . . . that funds could be used more efficiently" or the phrase "actions to implement and complete the recommendation." If the list of examples of savings is read to modify the former, then the argument that "recommendation that funds be put to better use" is limited to savings is more forceful, for the various categories of savings would exemplify the kinds of final recommendations that management might make. However, if the list of savings instead modifies the noun "actions," then the categories of itemized savings offer examples of the kinds of actions management might take to "implement" a particular recommendation for greater efficiency. Under the second reading, achieving savings would be part of the implementation of the recommendation; the decision whether to reinvest those savings in the program from which they derived or to set them aside for some other purpose would complete the recommendation. Thus, a recommendation [*9] that funds be put to better use could require management to take steps to achieve savings and then reallocate those savings to the same program or others in order to realize a more efficient use of the funds, in terms of energy, time, or materials. The end result need not necessarily produce identifiable savings, even though savings would be achieved during one of the interim steps of the recommendation.

Although it is a close question, we think that the second reading better reconciles the list of examples in subsections 5(f)(4)(A) through (F) with the broader definition of "recommendation that funds be put to better use" preceding that list. In light of our conclusion that the term "efficiently" is not limited to identifiable savings, it is more consistent with this broader understanding to interpret subsections (A) through (F) as illustrative of the kinds of interim actions that might be taken to implement a particular recommendation.

Because it is a close textual question, we look to the legislative history of the 1988 amendments to the IG Act, in which the definition of "recommendation that funds be put to better use" first appeared, to see if we can find evidence of congressional [*10] intent. The history is not particularly helpful with respect to the question before us, but it does not contradict our textual interpretation. One of Congress's concerns in enacting the 1988 amendments was that the semi-annual reports of inspectors general varied widely in format and in the terms used to describe the audit resolution process. See S. Rep. No. 100-150, at 24 (1987). Congress wanted to standardize the reporting process in order to develop "an overall picture of the Federal government's progress against waste, fraud and mismanagement." Id. At the same time, Congress enacted reforms "to provide for more independence for audit and investigative operations." H.R. Rep. No. 100-771, at 5 (1988), reprinted in 1988 U.S.C.C.A.N. 3154, 3158 ("House Report"). The House hearings on the 1988 amendments affirmed Congress's "strong commitment to the IG concept and the indisputable preponderance of evidence that IG's have greatly improved operations in their departments and agencies, in addition to saving the American taxpayers literally billions of dollars." Inspector General Act Amendments of 1988: Hearing on H.R. 4054 before a Subcomm. of the House Comm. on Government [*11] Operations, 100th Cong. 21 (1988) ("House Hearing") (statement of Rep. Horton) (emphasis added).

Originally, neither the Senate bill (S. 908) nor the House bill (H.R. 4054) proposing the 1988 amendments to the IG Act included any reference to "recommendation that funds be put to better use." Rather, the phrase first appeared in H.R. 4054 after committee markup. The precise scope of the definition is not addressed in the legislative history. How-

ever, the House report offers some support for a broad reading of that phrase that comports with our interpretation of the text:

> The format speaks of "funds recommended to be put to better use." The committee intends that inspectors general report the amounts of funds or resources that will be used more efficiently as a result of actions taken by management or Congress if the inspector general's recommendation is implemented.

House Report at 19, reprinted in 1988 U.S.C.C.A.N. at 3172 (emphasis added). The committee's reference not only to "funds" but also to "resources" "that will be used more efficiently" is more consistent with an understanding of "recommendation that funds by put to better use" that includes non-monetized [*12] efficiencies.

Moreover, while we recognize that the statements of individual legislators have limited interpretive value, see *Garcia v. United States, 469 U.S. 70, 76 (1984)*, we note a floor comment made by Senator Glenn, Chairman of the Senate Governmental Affairs Committee that considered S. 908, who praised the historical success of inspectors general in achieving both identifiable savings and non-quantifiable efficiencies:

> According to the most recent report from the Council that coordinates IG activities, in the past 5 years more than $ 92 billion have been recovered or put to better use because of the IG efforts.
>
> That comes out to about $ 18 billion per year. That is B for billion. That is a significant amount of money. It could be even greater than that, because it is difficult to evaluate and quantify some of these savings where you are making more efficient use of money.

134 Cong. Rec. 615 (1988) (statement of Sen. Glenn) (emphasis added). Although it is not clear that Senator Glenn, nor for that matter any other member of Congress who spoke about the proposed legislation, was thinking of the distinction between identifiable savings [*13] and other efficiencies in the context of "recommendation that funds be put to better use" at the time he made his statement, the comment suggests that Senator Glenn considered that funds "recovered or put to better use" would not necessarily be quantifiable.

CONCLUSION

Neither the text nor the legislative history of the IG Act offers clear evidence of how broadly Congress intended to define "recommendation that funds be put to better use." Nevertheless, we conclude that, on balance, the better interpretation of that term is that it not be limited to only those audit recommendations that achieve identifiable monetary savings.

DAWN JOHNSEN

Acting Assistant Attorney General

Office of Legal Counsel

OPINION OF THE OFFICE OF LEGAL COUNSEL

WHISTLEBLOWER PROTECTIONS FOR CLASSIFIED DISCLOSURES

A Senate bill addressing the disclosure to Congress of classified "whistleblower" information concerning the intelligence community is unconstitutional because it would deprive the President of the opportunity to determine how, when and under what circumstances certain classified information should be disclosed to Members of Congress.

A House bill addressing the same subject is constitutional because it contains provisions that allow for the exercise of the President's constitutional authority.

1998 OLC LEXIS 25; 22 Op. O.L.C. 92

May 20, 1998

ADDRESSEE:

[*1]

STATEMENT

BEFORE THE

PERMANENT SELECT COMMITTEE ON INTELLIGENCE

U.S. HOUSE OF REPRESENTATIVES

OPINIONBY: MOSS

OPINION:

Mr. Chairman, Congressman Dicks, and Members of the Committee:

My name is Randolph Moss. I am a Deputy Assistant Attorney General in the Office of Legal Counsel at the Department of Justice. I am pleased to be here to present the analysis of the Department of Justice concerning the constitutionality of S. 1668 and H.R. 3829, two bills that address disclosure to Congress of classified "whistleblower" information concerning the intelligence community.

As the Department has previously indicated, it is our conclusion that S. 1668, like the Senate passed version of section 306 of last year's Intelligence Authorization bill, is unconstitutional. n1 It is unconstitutional because it would deprive the President of the opportunity to determine how, when and under what circumstances certain classified information should be disclosed to Members of Congress -- no matter how such a disclosure might affect his ability to perform his constitutionally assigned duties. In contrast, H.R. 3829 is constitutional because it contains provisions that allow for the exercise of that authority.

n1 In addition, the Department of Justice took a similar position with respect to comparable legislation in a brief that it filed in the Supreme Court in 1989. See Brief for Appellees, *American Foreign Serv. Ass'n v. Garfinkel, 488 U.S. 923 (1988)* (No. 87-2127).

[*2]

I begin by briefly summarizing the principal provisions of S. 1668 and H.R. 3829. I then review the relevant constitutional history and doctrine. I conclude by applying the relevant constitutional principles to the two bills. Because other witnesses at the hearing today can best address the practical concerns posed by legislation in this area, my remarks are limited to the relevant constitutional considerations.

I

A.

S. 1668 would require the President to inform employees of covered federal agencies (and employees of federal contractors) that their disclosure to Congress of classified information that the employee (or contractor) reasonably believes provides direct and specific evidence of misconduct "is not prohibited by law, executive order, or regulation or otherwise contrary to public policy." n2 The misconduct covered by the bill includes not only violations of law, but also violations of "any . . . rule[] or regulation," and it encompasses, among other things, "gross mismanagement, a gross waste of funds, [or] a flagrant abuse of authority." n3

n2 Section 1(a)(1)(A).

n3 Section 1(a)(2)(A), (C).

S. 1668 would thus vest any covered federal employee having access to classified [*3] information with a unilateral right to circumvent the process by which the executive and legislative branches accommodate each others' interests in sensitive information. Under S. 1668, any covered federal employee with access to classified information that -- in the employee's opinion -- indicated misconduct could determine how, when and under what circumstances that information would be shared with Congress. Moreover, the bill would authorize this no matter what the effect on the President's ability to accomplish his constitutionally assigned functions. As discussed below, such a rule would violate the separation of powers. n4

n4 The Supreme Court has employed three principles in resolving separation of powers disputes. First, where "explicit and unambiguous provisions of the Constitution prescribe and define . . . just how [governmental] powers are to be exercised," *INS v. Chadha, 462 U.S. 919, 945 (1983),* the constitutional procedures must be followed with precision. Second, where the effect of legislation is to vest Congress itself, its members, or its agents with "'either executive power or judicial power,'" the statute is unconstitutional. *Metropolitan Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 274 (1991)* (citation omitted). Finally, legislation that affects the functioning of the executive may be unconstitutional if it either "'impermissibly undermine[s]' the powers of the Executive Branch" or "'disrupts the proper balance between the coordinate branches [by] preventing the Executive Branch from accomplishing its constitutionally assigned functions.'" *Morrison v. Olson, 487 U.S. 654, 695 (1988)* (citations omitted). Because we conclude that S. 1668 would violate separation of powers under even the most lenient of these tests, there is no need to resolve whether one of the more stringent standards applies.

[*4]

B.

H.R. 3829 would amend the Central Intelligence Agency Act and the Inspector General Act of 1978 to provide a means for covered executive branch employees and contractors to report to the Intelligence Committees certain serious abuses or violations of law or false statements to Congress that relate to "the administration or operation of an intelligence activity," as well as any reprisal or threat of reprisal relating to such a report. Under H.R. 3829, any employee or contractor who wishes to report such information to Congress would first make a report to the inspector general for the Central Intelligence Agency or their agency, as appropriate. If the complaint appears credible, the relevant inspector general would be required to forward the complaint to the head of his or her agency, and the head of the agency would generally be required to forward the report to the Intelligence Committees. Moreover, if the inspector general does not transmit the complaint to the head of the agency, the employee or contractor would generally be permitted to submit the complaint -- under defined conditions -- to the Committees directly.

Significantly, unlike S. 1668, H.R. 3829 provides that the [*5] head of the agency or the Director of Central Intelligence may determine "in the exceptional case and in order to protect vital law enforcement, foreign affairs, or national security interests" not to transmit the inspector general's report to the Intelligence Committees and not to permit the employee or contractor directly to contact the Intelligence Committees. n5 Whenever this authority is exercised, the head of the agency or the Director of Central Intelligence must promptly provide the Intelligence Committees with his or her reasons for precluding the disclosure. In this manner, H.R. 3829 would provide a mechanism for congressional oversight while protecting the executive interest in maintaining the strict confidentiality of classified information when necessary to the discharge of the President's constitutional authority. As a result, unlike S. 1668, H.R. 3829 is consistent with the constitutional separation of powers.

n5 See id. § 2(a), proposed new paragraph (5)(E) to be added to subsection (d) of section 17 of the Central Intelligence Agency Act of 1949, *50 U.S.C. § 403q* (1994); id. § 2(b)(1), proposed new section 8H(e) to be added to the Inspector General Act of 1978, *5 U.S.C. app. 3* § 8 (1994 & Supp. II 1996).

[*6]

II.

A host of precedents, beginning at the founding of the Republic, support the view that the President has unique constitutional responsibilities with respect to national defense and foreign affairs. n6 As was recognized in the Federalist Papers and by the first Congresses, secrecy is at times essential to the executive branch's discharge of its responsibilities in these core areas. Indeed, Presidents since George Washington have determined on occasion, albeit very rarely, that it was necessary to withhold from Congress, if only for a limited period of time, extremely sensitive information with respect to national defense or foreign affairs. n7

n6 The President's national security and foreign affairs powers flow, in large part, from his position as Chief Executive, U.S. Const. art. II, § 1, cl. 1, and as Commander in Chief, id. art. II, § 2, cl. 1. They also derive from the President's more specific powers to "make Treaties," id. art. II, § 2, cl. 2; to "appoint Ambassadors . . . and Consuls," id.; and to "receive Ambassadors and other public Ministers," id. art. II, § 3. See The Federalist No. 64, at 392-94 (John Jay) (Clinton Rossiter ed., 1961). The Supreme Court has repeatedly recognized the President's authority with respect to foreign policy. See, e.g., *Department of the Navy v. Egan, 484 U.S. 518, 529 (1988)* (the Supreme Court has "recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive'") (quoting *Haig v. Agee, 453 U.S. 280, 293-94 (1981)); Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 705-06 n.18 (1976)* ("The conduct of [foreign policy] is committed primarily to the Executive Branch."); *United States v. Louisiana, 363 U.S. 1, 35 (1960)* (the President is "the constitutional representative of the United States in its dealings with foreign nations"); *New York Times Co. v. United States, 403 U.S. 713, 741 (1971)* (Marshall, J., concurring) ("it is beyond cavil that the President has broad powers by virtue of his primary responsibility for the conduct of our foreign affairs and his position as Commander in Chief"); *id. at 761* (Blackmun, J., dissenting) ("Article II . . . vests in the Executive Branch primary power over the conduct of foreign affairs and places in that branch the responsibility for the Nation's safety."); see also *United States v. Kin-Hong, 110 F.3d 103, 110 (1st Cir. 1997)* ("Our constitutional structure . . . places primary responsibility for foreign affairs in the executive branch . . . ."), reh'g den., *110 F.3d 121 (1st Cir. 1997)* (en banc); *Ward v. Skinner, 943 F.2d 157, 160 (1st Cir. 1991)* (Breyer, J.) ("The Constitution makes the Executive Branch . . . primarily responsible" for the exercise of "the foreign affairs power."), cert. denied, *503 U.S. 959 (1992); Sanchez-Espinoza v. Reagan, 770 F.2d 202, 210 (D.C. Cir. 1985)* (Scalia, J.) ("Broad leeway" is "traditionally accorded the Executive in matters of foreign affairs.").

[*7]

n7 See History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress, 6 Op. O.L.C. 751 (1982) (compiling historical examples of cases in which the President withheld from Congress information the release of which he determined could jeopardize national security).

Perhaps the most famous of the Founders' statements on the need for secrecy is John Jay's discussion in the Federalist Papers. Jay observed:

> There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular assembly. The convention have done well, therefore, in so disposing of the power of making treaties that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest. n8

n8 The Federalist No. 64, at 392-93 (John Jay) (Clinton Rossiter ed., 1961).

[*8]

Our early history confirmed the right of the President to decide to withhold national security information from Congress under extraordinary circumstances. In the course of investigating the failure of General St. Clair's military expedition of 1791, the House of Representatives in 1792 requested relevant documents from the executive branch. n9 President Washington asked the Cabinet's advice as to his proper response "because [the request] was the first example, and he wished that so far as it should become a precedent, it should be rightly conducted." n10 Washington's own view was that "he could readily conceive there might be papers of so secret a nature, as that they ought not to be given up." n11

n9 For recent scholarly discussions of this episode and its significance for the development of separation of powers, see Gerhard Casper, Separating Power 28-31 (1997); David P. Currie, The Constitution in Congress: The Federalist Period 1789-1801 163-64 (1997).

An earlier episode had occurred in 1790 when, in response to a request from the House of Representatives, Secretary of State Thomas Jefferson furnished that body with a report on Mediterranean trade. The report also touched on advice provided by a confidential European source on the possibility of buying peace with Algiers, which was endangering that trade. Jefferson relayed the source's advice to the House, but stated that his or her "name is not free to be mentioned here." Report of Secretary of State Jefferson, Submitted to the House of Representatives (Dec. 30, 1790) and Senate (Jan. 3, 1791), in 1 American State Papers: Foreign Relations 105 (1791). Jefferson also submitted the report with a request that the Speaker treat it as a secret document; and when the report was received, the House's galleries were cleared. See Casper at 47-50. The executive branch continues the practice of redacting identifying information on confidential sources when providing secret information to Congress.

[*9]

n10 1 Writings of Thomas Jefferson 303 (Andrew Lipscomb ed. 1903) (The Anas).

n11 Id.

A few days later a unanimous Cabinet -- including Secretary of State Thomas Jefferson, Secretary of the Treasury Alexander Hamilton, and Attorney General Edmund Randolph -- concurred. The Cabinet advised the President that, although the House "might call for papers generally," "the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public." n12 The Executive "consequently was to exercise a discretion" in responding to the House request. n13 The Cabinet subsequently advised the President that the documents in question could all be disclosed consistently with the public interest. n14

n12 Id. at 304.

n13 Id.

n14 Id. at 305.

Although President Washington ultimately decided to produce the requested documents, they were actually produced only after the House, on April 4, 1792, substituted a new request apparently recognizing the President's discretion by asking only for papers "of a public nature." n15

n15 3 Annals of Cong. 536 (1792); see also Abraham D. Sofaer, War, Foreign Affairs and Constitutional Power 82-83 (1976); Casper at 29.

[*10]

Two years later, President Washington adhered to his conclusion regarding the respective authorities of the executive and legislative branches. Acting upon the advice of Attorney General William Bradford and other Cabinet officers, Washington responded to an unqualified request from the Senate for correspondence between the Republic of France

and the United States minister for France by providing the relevant correspondence, except for "those particulars which, in [his] judgment, for public considerations, ought not to be communicated." n16

n16 4 Annals of Cong. 56 (1794); see Sofaer at 83-85. The Cabinet officers whom Washington consulted and who all agreed that he could withhold at least part of the material from the Senate were Hamilton, Randolph and Knox. Id. at 83. Randolph also informed Washington that he had met privately with Madison and with Justice James Wilson (another influential Framer), who provided similar advice. Id. at 83-4 n.*. "No further Senate action was taken to obtain the material withheld." Id. at 85.

In 1796, when a controversy arose regarding whether President Washington could be required to provide the House of Representatives with records [*11] relating to the negotiation of the Jay Treaty, James Madison -- who was then a Member of the House -- conceded that even where Congress had a legitimate purpose for requesting information the President had authority "to withhold information, when of a nature that did not permit a disclosure of it at the time." n17

n17 5 Annals of Cong. 773 (1796). As President Washington observed in declining the House's request:

> The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion, a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic: for this might have a pernicious influence on future negotiations; or produce immediate inconveniences, perhaps danger and mischief, in relation to other Powers.

Id. at 760. Washington had previously sought and received advice from Alexander Hamilton, then in private practice in New York. Hamilton provided Washington with a draft answer to the House, which had stated in part: "A discretion in the Executive Department how far and where to comply in such cases is essential to the due conduct of foreign negotiations." Letter from Alexander Hamilton to George Washington (Mar. 7, 1796), in 20 The Papers of Alexander Hamilton, at 68 (Harold C. Syrett ed., 1974).

Although the Executive's concerns with the confidentiality of diplomatic materials certainly loomed large in the 1796 dispute, it would overstate the point to view the entire controversy as turning exclusively on the issue of "executive privilege." Washington rested his position partly on the alternative ground that the Constitution gave the House no role in the treaty-making process. Moreover, it appears that the controversy "had a somewhat 'academic' character because the Senate had received all the papers, and the House members apparently could inspect them at the Senate." Casper at 65.

[*12]

Congressional recognition of this power in the President extends well into recent times. n18 Moreover, since the Washington Administration, Presidents and their senior advisers have repeatedly concluded that our constitutional system grants the executive branch authority to control the disposition of secret information. Thus, then-Attorney General Robert Jackson declined, upon the direction of President Franklin Roosevelt, a request from the House Committee on Naval Affairs for sensitive FBI records on war-time labor unrest, citing (among other grounds) the national security. n19 Similarly, then-Assistant Attorney General William Rehnquist concluded almost thirty years ago that "the President has the power to withhold from [Congress] information in the field of foreign relations or national security if in his judgment disclosure would be incompatible with the public interest." n20

n18 See, e.g., S. Rep. No. 86-1761 at 22 (1960) (the Senate Committee on Foreign Relations, after failing to persuade President Kennedy to abandon his claim of executive privilege with respect to information relating to the U-2 incident in May, 1960, criticized the President for his refusal to make the information available but acknowledged his legal right to do so: "The committee recognizes that the administration has the legal right to refuse the information under the doctrine of executive privilege.").

[*13]

n19 See Position of the Executive Department Regarding Investigative Reports, *40 Op. Att'y Gen. 45, 46 (1941).*

n20 Memorandum from John R. Stevenson, Legal Adviser, Department of State, and William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, Re: The President's Executive Privilege to Withhold Foreign Policy and National Security Information at 7 (Dec. 8, 1969).

The Supreme Court has similarly recognized the importance of the President's ability to control the disclosure of classified information. In considering the statutory question whether the Merit Systems Protection Board could review the revocation of an executive branch employee's security clearance, the Court in Department of the Navy v. Egan also addressed the President's constitutional authority to control the disclosure of classified information:

> The President . . . is the "Commander in Chief of the Army and Navy of the United States." U.S. Const., Art. II, § 2. His authority to classify and control access to information bearing on national security . . . flows primarily from this constitutional investment of power in the President and exists quite [*14] apart from any explicit congressional grant . . . . This Court has recognized the Government's "compelling interest" in withholding national security information from unauthorized persons in the course of executive business . . . . The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief. n21

n21 *Department of the Navy v. Egan, 484 U.S. at 527* (citations omitted).

Similarly, in discussing executive privilege in United States v. Nixon, a unanimous Supreme Court emphasized the heightened status of the President's privilege in the context of "military, diplomatic, or sensitive national security secrets." n22 Although declining in the context of that criminal case to sustain President Nixon's claim of privilege as to tape recordings and documents sought by subpoena, the Supreme Court specifically observed that the President had not "placed his claim of privilege on the ground that they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities." n23

n22 *United States v. Nixon, 418 U.S. 683, 706 (1974);* see also *id. at 710, 712 n.19.*
[*15]

n23 *Id. at 710;* see also *United States v. Reynolds, 345 U.S. 1 (1953)* (recognizing privilege in judicial proceedings for "state secrets" based on determination by senior Executive officials).

Other statements by individual Justices and the lower courts reflect a similar understanding of the President's power to protect national security by maintaining the confidentiality of classified information. n24 Justice Stewart, for example, discussed this authority in his concurring opinion in New York Times v. United States (the "Pentagon Papers" case):

> It is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy . . . . In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident.
>
> I think there can be but one answer to this dilemma, if dilemma it be. The responsibility must be where the power is. If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution [*16] the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully . . . . It is clear to me that it is the constitutional duty of the Executive . . . to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense. n25

n24 See, e.g., *Webster v. Doe, 486 U.S. 592, 605-06 (1988)* (O'Connor, J., concurring in part and dissenting in part) ("The functions performed by the Central Intelligence Agency and the Director of Central Intelligence lie at the core of 'the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.'. . . The authority of the Director of Central Intelligence to control access to sensitive national security information by discharging employees deemed to be untrustworthy flows primarily from this constitutional power of the President . . . .") (citation omitted); *New York Times Co. v. United States, 403 U.S. at 741* (Marshall, J., concurring) (case presented no issue "regarding the President's power as Chief Executive and Commander in Chief to protect national security by disciplining employees who disclose information and by taking precautions to prevent leaks"); *Greene v. McElroy, 360 U.S. 474, 513 (1959)* (Clark, J., dissenting) (it is "basic" that "no person, save the President, has a constitutional right to access to governmental secrets"); *Guillot v. Garrett, 970 F.2d 1320, 1324 (4th Cir. 1992)* (President has "exclusive constitutional authority over access to national security information"); *Dorfmont v. Brown, 913 F.2d 1399, 1405 (9th Cir. 1990)* (Kozinski, J., concurring) ("Under the Constitution, the President has unreviewable discretion over security decisions made pursuant to his powers as chief executive and Commander-in-Chief."), cert. denied, *499 U.S. 905 (1991).*

[*17]

n25 *New York Times Co. v. United States, 403 U.S. at 728-30* (Stewart, J., concurring) (footnote omitted).

III.

In applying these constitutional principles to S. 1668 and H.R. 3829, we take as a given that Congress has important oversight responsibilities and a corollary interest in receiving information that enables it to carry out those responsibilities. n26 Those interests obviously include Congress's ability to consider evidence of misconduct and abuse by the executive's agents. H.R. 3829, however, demonstrates that it is possible to develop procedures for providing Congress information it needs to perform its oversight duties, while not interfering with the President's ability to control classified information when necessary to perform his constitutionally assigned duties.

n26 See, e.g., *McGrain v. Daugherty, 273 U.S. 135 (1927).*

A.

In analyzing S. 1668, there is no need to resolve the precise parameters of the President's authority to control access to classified diplomatic and national security information. Instead, we have focused on the specific problem presented by the bill, which, in defined circumstances, [*18] gives a unilateral right of disclosure to every executive branch employee with access to classified information. n27 The reach of S. 1668 is sweeping: it would authorize any covered federal employee to foreclose or circumvent a presidential determination that restricts congressional access to certain classified information in extraordinary circumstances.

n27 We do not use the word "right" in the sense of a legally enforceable right. Rather, the term is intended to convey our understanding that the bill would purport to require the President to inform employees that they have standing authorization or permission to convey national security information directly to Congress without receiving specific authorization to convey the particular information in question. We have not analyzed the possible implications this legislation might have with respect to judicial enforcement of employee legal rights.

S. 1668 is inconsistent with Congress's traditional approach to accommodating the executive branch's interests with respect to national security information. In the National Security Act, for example, Congress itself recognized the need for heightened secrecy in certain "extraordinary [*19] circumstances affecting vital interests of the United States," and authorized the President to sharply limit congressional access to information relating to covert actions in such cases. n28 An example of accommodation between the branches that is even more directly applicable to the present context is the National Security Act's recognition that the intelligence agencies on occasion need to redact sources and methods and other exceptionally sensitive intelligence information from materials they provide to the Intelligence Committees. n29

n28 See *50 U.S.C. § 413b*(c)(2) (1994) ("If the President determines that it is essential to limit access to the finding to meet extraordinary circumstances affecting vital interests of the United States, the finding may be reported to the chairmen and ranking members of the intelligence committees, the Speaker and minority leader of the House of Representatives, the majority and minority leaders of the Senate, and such other member or members of the congressional leadership as may be included by the President.") Even with this more protective standard, President Bush expressly reserved his constitutional authority to withhold disclosure for a period of time. See S. Rep. No. 102-85 at 40 (1991). See also *50 U.S.C. § 413b*(c)(3) (1994) ("Whenever a finding is not reported pursuant to paragraph (1) or (2) of this section, the President shall fully inform the intelligence committees in a timely fashion and shall provide a statement of the reasons for not giving prior notice.").

[*20]

n29 See *50 U.S.C. § 413a* (1994) ("To the extent consistent with due regard to the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States Government involved in intelligence activities shall . . . keep the intelligence committees fully and currently informed of all intelligence activities . . . .").

In contrast, S. 1668 would deprive the President of his authority to decide, based on the national interest, how, when and under what circumstances particular classified information should be disclosed to Congress. n30 This is an impermissible encroachment on the President's ability to carry out core executive functions. In the congressional oversight context, as in all others, the decision whether and under what circumstances to disclose classified information must be made by someone who is acting on the official authority of the President and who is ultimately responsible to the President. The Constitution does not [*21] permit Congress to authorize subordinate executive branch employees to bypass these orderly procedures for review and clearance by vesting them with a unilateral right to disclose classified information -- even to Members of Congress. Such a law would squarely conflict with the Framers' considered judgment, embodied in Article II of the Constitution, that, within the executive branch, all authority over matters of national defense and foreign affairs is vested in the President as Chief Executive and Commander in Chief. n31

n30 Cf. *United States ex rel. Touhy v. Ragen, 340 U.S. 462, 468 (1951)*("When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure . . ., the usefulness, indeed the necessity, of centralizing determination as to whether subpoenas duces tecum will be willingly obeyed or challenged is obvious.")

n31 This is not to suggest that Congress wholly lacks authority regarding the treatment of classified information, see *New York Times Co. v. United States, 403 U.S. at 740* (White, J., concurring), but rather that Congress may not exercise that authority in a manner that undermines the President's ability to perform his constitutionally assigned duties.

[*22]

It has been suggested that S. 1668 (at least with modest revisions) would strike an acceptable balance between the competing executive and legislative interests relating to the control of classified information, and would thus survive review under ordinary separation of powers principles. n32 That balance under S. 1668, however, would be based on an abstract notion of what information Congress might need to know relating to some future inquiry and what information the President might need to protect in light of some future set of world events. Such an abstract resolution of the competing interests at stake is simply not consistent with the President's constitutional responsibilities respecting national security and foreign affairs. He must be free to determine, based on particular -- and perhaps currently unforeseeable -- circumstances, that the security or foreign affairs interests of the Nation dictate a particular treatment of classified information.

n32 See Whistleblower Protections for Classified Disclosures: Hearings Before the Senate Select Comm. on Intelligence, 105th Cong. 8 (1998) (statement of Prof. Peter Raven-Hansen).

Furthermore, S. 1668 also undermines the traditional, [*23] case-by-case process of accommodating the competing needs of the two branches -- a process that reflects the facts and circumstances of particular situations. As one appellate court has observed, there exists "an implicit constitutional mandate to seek optimal accommodation [between

the branches] through a realistic evaluation of the needs of the conflicting branches in the particular fact situation." n33 Rather than enabling balances to be struck as the demands of specific situations require, S. 1668 would attempt to legislate a procedure that cannot possibly reflect what competing executive and legislative interests may emerge with respect to some future inquiry. It would displace the delicate process of arriving at appropriate accommodations between the branches with an overall legislated "solution" that paid no regard to unique -- and potentially critical -- national security and foreign affairs considerations that may arise. This approach contrasts with that of H.R. 3829, which would balance the competing legislative and executive interests at stake in a manner that would permit rational judgments to be made in response to real world events.

n33 *United States v. American Tel. & Tel. Co., 567 F.2d 121, 127 (D.C. Cir. 1977)* (emphasis added).

[*24]

B.

H.R. 3829 does not present the constitutional infirmity posed by S. 1668. H.R. 3829 does not vest any executive branch employee who has access to classified information with a unilateral right to determine how, when and under what circumstances classified information will be disclosed to Members of Congress and without regard for how such a disclosure might affect the President's ability to perform his constitutionally assigned duties.

Instead, H.R. 3829 would establish procedures under which employees who wish to report to Congress must first submit their complaint to an inspector general, who would review it for credibility and then submit the complaint to the agency head before it is forwarded to Congress. This process would allow for the executive branch review and clearance process that S. 1668 would foreclose. H.R. 3829 would further authorize heads of agencies and the Director of Central Intelligence, upon the completion of that process, to decide not to transmit an employee's complaint to the Intelligence Committees, or allow the employee to contact the Committees directly, "in the exceptional case and in order to protect vital law enforcement, foreign affairs, or national [*25] security interests." n34 If such a decision were made, then the head of agency or Director of Central Intelligence would be required to provide the Committees with the reason for the determination.

n34 In light of S. 1668's focus on the intelligence community and classified information, the Department's analysis of the bill's constitutionality has focused on its interference with the President's authority to protect confidential national security and foreign affairs information. Of course, other constitutionally-based confidentiality interests can be implicated by employee disclosures to Congress. H.R. 3829 appropriately recognizes that such disclosures also should not compromise vital law enforcement interests.

Not only would H.R. 3829 thus avoid the constitutional infirmity of S. 1668 by allowing for review by the President or officials responsible to him, it would also allow for the operation of the accommodation process traditionally followed between the legislative and executive branches regarding disclosure of confidential information. Upon receipt of the explanation for a decision not to allow an employee complaint to go forward, the Intelligence Committees could contact [*26] the agency head or Director of Central Intelligence to begin the process of seeking to satisfy the Committees' oversight needs in ways that protect the executive branch's confidentiality interests. The bill's procedures are thus consistent with our constitutional system of separation of powers.

IV.

We recognize that Congress has significant interests in disclosure of evidence of wrongdoing or abuse. There is an inevitable tension, however, between preserving the secrecy necessary to permit the President to perform his constitutionally assigned duties and permitting the disclosures necessary to permit congressional oversight. Under relevant constitutional doctrine, Congress may not resolve this tension by vesting in individual federal employees the power to control disclosure of classified information. For this reason, we have concluded that S. 1668 is unconstitutional. H.R. 3829 does not contain this constitutional infirmity and is constitutional.

RANDOLPH MOSS

Deputy Assistant Attorney General

Office of Legal Counsel

Office of the Attorney General
Washington, D. C. 20530
December 8, 2003

MEMORANDUM FOR THE HEADS AND INSPECTORS GENERAL OF EXECUTIVE DEPARTMENTS AND AGENCIES

ASSISTANT ATTORNEYS GENERAL

UNITED STATES ATTORNEYS

DIRECTOR, FEDERAL BUREAU OF INVESTIGATION

FROM: THE ATTORNEY GENERAL John Ashcroft

SUBJECT: Guidelines for Offices of Inspector General with Statutory Law Enforcement Authority

I have today signed the attached Guidelines for Offices of Inspector General with Statutory Law Enforcement Authority to guide the exercise of criminal law enforcement authority by the presidentially appointed Inspectors General. These guidelines are the product of the hard work of many members of the law enforcement community engaged in the investigation and prosecution of crimes against government programs.

These guidelines govern the exercise of new statutory police powers by the Inspectors General, the coordination of overlapping responsibilities by federal law enforcement components, and the important role of federal prosecutors in providing guidance in the use of sensitive criminal investigative techniques. United States Attorneys and Assistant United States Attorneys should use these guidelines in working with Inspectors General to achieve fruitful investigations and prosecutions.

Crimes against government programs result in some of the most complicated and sensitive of criminal investigations and prosecutions. I want to emphasize that the American people expect the highest standards to be met by their government, and they expect us to aggressively investigate and prosecute those who would abuse or otherwise tarnish the public trust. As we go forward, I would like all of the participants in this great task to renew their commitment to the rule of law and the dignity of our mutual endeavor. I expect the combined efforts of the Inspectors General and the Federal Bureau of Investigation to root out corruption with the guidance of the United States Attorneys and the Criminal Division. Each of us has a role in this team effort and we must all be committed to that teamwork to make it succeed.

Attachment

Office of the Attorney General
Washington, D. C. 20530

ATTORNEY GENERAL GUIDELINES FOR OFFICES OF INSPECTOR GENERAL WITH STATUTORY LAW ENFORCEMENT AUTHORITY

I. PURPOSE

These guidelines, required by section 6(e)(4) of the Inspector General Act of 1978 (the "Act"), as amended in 2002, govern the exercise of law enforcement authorities for those Offices of Inspector General that have been granted statutory law enforcement authorities pursuant to that Act. These Guidelines replace the Memoranda of Understanding under which the Department of Justice deputized certain Office of Inspector General investigators as Special Deputy United States Marshals and that described the training and operational requirements applicable to the deputized Office of Inspector General investigators.

II. BACKGROUND

The Department of Justice has primary responsibility for enforcement of violations of federal laws by prosecution in the United States district courts. The Federal Bureau of Investigation is charged with investigating violations of federal laws. Offices of Inspector General have primary responsibility for the prevention and detection of waste and abuse, and concurrent responsibility for the prevention and detection of fraud and other criminal activity within their agencies and their agencies' programs. The Inspector General Act of 1978, 5 U.S.C. app. 3, established criminal investigative jurisdiction for the offices of presidentially appointed Inspectors General. However, prior to enactment of section 812 of the Homeland Security Act of 2002 (Pub. L. No. 107-296), the Inspector General Act did not provide firearms, arrest, or search warrant authorities for investigators of those offices.[1] The Inspectors General of the various executive agencies relied on Memoranda of Understanding with the Department of Justice that provided temporary grants of law enforcement powers through deputations. As the volume of investigations warranting such police powers increased, deputations were authorized on a "blanket" or office-wide basis.

With the enactment of section 6(e) of the Inspector General Act, the Attorney General, after an initial determination of need, may authorize law enforcement powers for eligible personnel of each of the various offices of presidentially appointed Inspectors General. The determination of

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[1] Certain Offices of Inspector General had (prior to 2002) and continue to have OIG-specific grants of statutory authority under which they exercise law enforcement powers.

need hinges on the respective office meeting the three prerequisites enumerated in section 6(e)(2). Those Offices of Inspector General listed in section 6(e)(3) of the Act are exempt from the requirement of an initial determination of need by the Attorney General.

Offices of Inspector General receiving law enforcement powers under section 6(e) must exercise those authorities in accordance with Guidelines promulgated by the Attorney General. This document sets forth the required Guidelines.

III. APPLICATION OF GUIDELINES

These Guidelines apply to qualifying personnel in those offices of presidentially appointed Inspectors General with law enforcement powers received from the Attorney General under section 6(e) of the Inspector General Act of 1978, as amended. Qualifying personnel include the Inspector General, the Assistant Inspector General for Investigations under such Inspector General, and all special agents supervised by the Assistant Inspector General for Investigations, provided that those individuals otherwise meet the training and qualifications requirements contained in these Guidelines. These mandatory guidelines do not limit Offices of Inspector General from exercising any statutory law enforcement authority derived from a source other than section 6(e). These Guidelines may be revised by the Attorney General, as appropriate. These Guidelines may be supplemented by agency-specific agreements between an individual Office of Inspector General and the Attorney General.

If the Attorney General determines that an Office of Inspector General exercising law enforcement powers under section 6(e), or any individual exercising such authorities, has failed to comply with these Guidelines, the Attorney General may rescind or suspend exercise of law enforcement authorities for that office or individual.

IV. LAW ENFORCEMENT TRAINING AND QUALIFICATIONS

A Basic and Refresher Training

Each Office of Inspector General must certify completion of the Basic Criminal Investigator Training Program at the Federal Law Enforcement Training Center by each Inspector General, Assistant Inspector General of Investigations, and Special Agent/Investigator who will be exercising powers under these Guidelines. As an alternative, this training requirement may be satisfied by certification of completion of a comparable course of instruction to the Federal Law Enforcement Training Center Basic Criminal Investigator Training Program. Additionally, the Office of Inspector General will provide periodic refresher training in the following areas: trial process; federal criminal and civil legal updates; interviewing techniques and policy; law of arrest, search, and seizure; and physical conditioning/defensive tactics. The specifics of these programs should conform as much as

practicable to standards such as those set at the Federal Law Enforcement Training Center or the Federal Bureau of Investigation Training Academy at Quantico, Virginia.

B. Firearms Training and Qualification Requirements

All individuals exercising authorities under section 6(e) must receive initial and periodic firearms training and qualification in accordance with Federal Law Enforcement Training Center standards. This training will focus on technical proficiency in using the firearms the Special Agent will carry, as well as the policy and legal issues involved in the use of deadly force. The initial training for this requirement must be met by successful completion of an appropriate course of training at the Federal Law Enforcement Training Center or an equivalent course of instruction (that must include policy and law concerning the use of firearms, civil liability, retention of firearms and other tactical training, and deadly force policy).

In addition to basic firearms training, each covered Office of Inspector General will implement a program of quarterly firearms qualifications by all individuals exercising authorities under section 6(e). Such program will be conducted in accordance with recognized standards.

C. Deadly Force Policy

The Offices of Inspector General will abide by the deadly force policy established by the Department of Justice.

V. RANGE OF LAW ENFORCEMENT POWERS

Section 6(e) of the Act provides that the Attorney General may authorize covered individuals to:

1. carry a firearm while engaged in official duties as authorized under this Act or other statute, or as expressly authorized by the Attorney General;

2. make an arrest without a warrant while engaged in official duties as authorized under this Act or other statute, or as expressly authorized by the Attorney General, for any offense against the United States committed in the presence of such individual, or for any felony cognizable under the laws of the United States if such individual has reasonable grounds to believe that the person to be arrested has committed or is committing such felony; and

3. upon probable cause to believe that a violation has been committed, seek and execute warrants for arrest, search of a premises, or seizure of evidence issued under the authority of the United States.

Individuals exercising law enforcement authorities under section 6(e) may exercise those powers only for activities authorized under the Inspector General Act of 1978 or other statute, or as expressly authorized by the Attorney General.[2]

The Inspector General of each agency covered by these Guidelines, any Assistant Inspector General for Investigations under such Inspector General, and any special agent supervised by such an Assistant Inspector General are authorized to carry their firearms while off-duty when the Inspector General determines that they need to do so for operational or safety reasons.

The possession of firearms on aircraft while on official duty shall be governed by Transportation Security Administration guidelines and common carrier regulations applicable to the transport of firearms.

VI. ADHERENCE TO ATTORNEY GENERAL GUIDELINES

In addition to any other Department of Justice directives or guidance referenced in these Guidelines, Offices of Inspector General will adhere to the Attorney General's Guidelines on General Crimes, Racketeering Enterprise, and Terrorism Enterprise Investigations; the Attorney General's Guidelines Regarding the Use of Confidential Informants; the Attorney General's Memorandum on Procedures for Lawful, Warrantless Monitoring of Verbal Communications; any other Attorney General Guidelines applicable to criminal investigative practices; and updated or amended versions of any of the aforementioned documents.

VII. NOTIFICATION AND CONSULTATION REQUIREMENTS WITH RESPECT TO ALLEGATIONS OF CRIMINAL VIOLATIONS

The Inspector General Act directs expeditious reporting to the Attorney General whenever an Office of Inspector General has reasonable grounds to believe there has been a violation of federal criminal law.

A. Offices Of Inspector General/Federal Bureau of Investigation Mutual Notification Requirements

As the primary investigative arm of the Department of Justice, the Federal Bureau of Investigation has jurisdiction in all matters involving fraud against the Federal Government, and shares jurisdiction with the Offices of Inspector General in the

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[2] Section 6(e) does not, of itself, provide plenary authority to make arrests for non-federal criminal violations. Legal authority for officers to respond to such offenses generally depends on state law. A federal agency may, however, as a matter of policy, permit its officers to intervene in serious criminal conduct that violates state law under certain circumstances.

investigation of fraud against the Office of Inspector General's agency. In areas of concurrent jurisdiction, the Offices of Inspector General and the Federal Bureau of Investigation must promptly notify each other in writing upon the initiation of any criminal investigation. The notification requirement is a continuing obligation when new subjects are added to an investigation. Absent exigent circumstances, "promptly" shall be considered to be within 30 calendar days. Notification by the Offices of Inspector General shall be in writing and addressed to the Federal Bureau of Investigation in the district in which the investigation is being conducted. Notification by the Federal Bureau of Investigation shall be in writing and shall be addressed to the appropriate regional office of the Office of Inspector General. Notifications shall include, at a minimum and where available, (a) subject name, date of birth, social security number, and (b) any other case-identifying information including, but not limited to, (i) the date the case was opened or the allegation was received, and (ii) the allegation that predicated the case. For investigations in which allegations arise that are beyond the scope of the Office of Inspector General's jurisdiction, the Office of Inspector General will immediately notify the appropriate investigative agency of the allegations.

B. Consultation with Prosecutors

In criminal investigations, a federal prosecutor must be consulted at an early stage to ensure that the allegations, if proven, would be prosecuted. Such consultation will also ensure coordination of investigative methods.

VIII. USE OF SPECIALIZED INVESTIGATIVE PROCEDURES AND TECHNIQUES

A. Court-Ordered Electronic Surveillance

Court-authorized interceptions of wire, oral, or electronic communications are among the most intrusive investigative techniques currently available to law enforcement. The rigors of the approval process, expenditures of financial and manpower resources, and the probability of challenges by the defense bar make this technique subject to intense scrutiny. Surreptitious electronic surveillance using closed-circuit television presents similar considerations. Accordingly, any investigation involving the interception of communications pursuant to 18 U.S.C. §§ 2510, *et seq.*, electronic surveillance using closed-circuit television in situations where a warrant is required, or any other court-ordered electronic surveillance, shall be conducted only after consulting with the Federal Bureau of Investigation and appropriate United States Attorney's Office (or Criminal Division litigating component). Subsequent to such notification, the Federal Bureau of Investigation may choose to join the investigation, but is not required to do so. However, in an instance in which the Office of Inspector General intends to engage in court-authorized electronic surveillance without the participation of the Federal Bureau of

Investigation, one of the following federal investigative agencies must participate in the investigation and supervise the application for and use of the surreptitious electronic surveillance: the Drug Enforcement Administration; Bureau of Alcohol, Tobacco, Firearms, and Explosives; Bureau of Immigration and Customs Enforcement; United States Postal Service; United States Secret Service; or Internal Revenue Service.

B. Undercover Investigative Operations

The Attorney General's Guidelines on Federal Bureau of Investigation Undercover Operations (the "Undercover Guidelines") ensure that the Federal Bureau of Investigation considers the efficacy, as well as the legal and policy implications, of every proposed undercover operation, and ensure that the use of the undercover investigative technique is subject to a management on-site review and oversight on a regular basis. It is the intent of this provision that undercover operations conducted by the Offices of Inspector General be subject to the same standards that govern the use of this investigative technique by the Federal Bureau of Investigation.

Accordingly, the community of Inspectors General granted law enforcement powers under section 6(e) of the Inspector General Act shall establish an Undercover Review Committee (the Committee) composed of 6 senior headquarters managers selected by the community of Inspectors General, with no two members of the Committee being employed by the same Office of Inspector General, for the purpose of reviewing undercover operations involving sensitive circumstances[3] in investigations that are not being conducted jointly with the Federal Bureau of Investigation. The Committee shall also include such representatives from the litigating sections of the Criminal Division of the Department of Justice as are designated by the Assistant Attorney General of the Criminal Division. If an undercover investigation being reviewed by the Committee is being conducted by an Office of Inspector General that is not represented on the Committee, a representative of that Office of Inspector General who is a senior management official shall be added as a full member of the Committee to review that undercover operation. The Federal Bureau of Investigation may designate a representative to participate in the Committee in a consultative role.

Before conducting an undercover operation lasting longer than six months, or involving any of the sensitive circumstances set forth in the Undercover Guidelines, the Office of Inspector General must first notify the Federal Bureau of Investigation. The Federal Bureau of Investigation may choose to join the investigation, in which case the

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[3] "Sensitive circumstances" are set forth in the Undercover Guidelines, and include investigations involving certain public officials, a significant risk of violence, authorized criminal activity, operation of a proprietary business, the risk for significant civil liability, and other circumstances as defined in those Guidelines.

undercover operation would be subject to review by the Criminal Undercover Operations Review Committee of the Federal Bureau of Investigation. If the Federal Bureau of Investigation opts not to join the case, the undercover operation will be reviewed by the Committee. No undercover operation involving sensitive circumstances may be conducted without the approval of one of these committees.

The approval for each undercover operation involving sensitive circumstances must be renewed for each six-month period, or less, during which the undercover operation is ongoing. The standards of the Committee for approval of the undercover operation shall be the same as those set forth in the Undercover Guidelines. The Committee shall operate in the same fashion as the Criminal Undercover Operations Review Committee as outlined in the Undercover Guidelines.

Each Office of Inspector General whose law enforcement effort contemplates the use of the undercover investigative technique in investigations not involving the sensitive circumstances set forth above shall establish procedures that are consistent with the procedures established for such undercover investigations not involving sensitive circumstances as are set forth in the Undercover Guidelines.

C. Especially Sensitive Targets

(1) Upon notification pursuant to Part VII, Subpart A of these Guidelines, or otherwise, the Federal Bureau of Investigation may choose to join, but would not be required to join, any investigation that involves:

(a) especially sensitive targets, including a member of Congress, a federal judge, a member of the executive branch occupying a position for which compensation is set at Executive Level IV or above, or a person who has served in such capacity within the previous two years;

(b) a significant investigation of a public official for bribery, conflict of interest, or extortion relating to the official's performance of duty;

(c) a significant investigation of a federal law enforcement official acting in his or her official capacity; or

(d) an investigation of a member of the diplomatic corps of a foreign country.

(2) Investigations involving certain other classes of persons may result in serious security concerns, especially regarding the operation of the Federal Witness Security Program. Therefore, an Office of Inspector General investigation will be coordinated with the

Office of Enforcement Operations of the Criminal Division, Department of Justice, when the investigation:

(a) involves a person who is or has been a member of the Witness Security Program if that fact is known by the Office of Inspector General;

(b) involves a public official, federal law enforcement officer, or other government employee or contract employee who is or has been involved in the operation of the Witness Security Program;

(c) involves the use or targeting, in an undercover capacity, of a person who is in the custody of the Federal Bureau of Prisons or the United States Marshals Service, or is under Federal Bureau of Prisons' supervision; or

(d) involves the use or targeting, in an undercover capacity, of a Federal Bureau of Prisons employee, if any part of the activity will occur within the confines of, or otherwise would be likely to affect the security of, a Bureau of Prisons-administered facility.

Investigations that require coordination with the Office of Enforcement Operations pursuant to Part VIII, Subpart C.(2)(a)-(d) may be conducted without the participation of the Federal Bureau of Investigation. In such instances, notification of the investigation should not be made to any other agency without the explicit approval of the Office of Enforcement Operations.

D. Consensual Monitoring in Certain Situations

Consensual monitoring of conversations in some circumstances can present unusual problems. Accordingly, if the Office of Inspector General contemplates the use of consensual monitoring involving a consenting or non-consenting person in the custody of the Bureau of Prisons or the United States Marshals Service, the use of any type of consensual monitoring in the investigation, whether telephonic or non-telephonic, must be coordinated with the Office of Enforcement Operations at the Department of Justice.

Consistent with the Attorney General's Memorandum on Procedures for Lawful, Warrantless Monitoring of Verbal Communications, the use of any non-telephonic consensual monitoring in an Office of Inspector General investigation requires the prior approval of the Director or an Associate Director of the Office of Enforcement Operations if any of the following sensitive circumstances are present:

(a) the monitoring relates to an investigation of a member of Congress, a federal judge, a member of the Executive Branch occupying a position for which compensation is set at Executive Level IV or above, or a person who has served in such capacity within the previous two years;

(b) the monitoring relates to an investigation of the Governor, Lieutenant Governor, or Attorney General of any State, or Territory, or a judge or justice of the highest court of any State or Territory, and the offense investigated is one involving bribery, conflict of interest, or extortion relating to the performance of his or her official duties;

(c) any party to the communication is a member of the diplomatic corps of a foreign country;

(d) any party to the communication is or has been a member of the Witness Security Program and that fact is known to the agency involved or its officers;

(e) the consenting or non-consenting person is in the custody of the Bureau of Prisons or the United States Marshals Service; or

(f) the Attorney General, Deputy Attorney General, Associate Attorney General, any Assistant Attorney General, or the United States Attorney in the district where an investigation is being conducted has requested the investigating agency to obtain prior written consent before conducting consensual monitoring in a specific investigation.

IX. PROSECUTOR CONCURRENCE FOR CERTAIN TECHNIQUES

The use and control of informants, sources, and cooperating witnesses is recognized by the courts as lawful and often essential to the effectiveness of properly authorized law enforcement investigations. However, certain guidelines must be applied because the use of informants and cooperating witnesses may involve intrusion into the privacy of individuals, or cooperation with individuals whose reliability and motivation can be open to question. In the following situations, *inter alia*, the prior concurrence of a federal prosecutor must be obtained to avoid problems such as entrapment, danger to the public, and abuse of police authority:

1. when an informant is authorized to participate in criminal activities;

2. when an informant or cooperating witness is a person entitled to claim a federally recognized legal privilege of confidentiality, such as an attorney, member of the clergy, or psychiatrist;

3. when aggregate payments for services or expenses to be made to a source who could be a witness in a legal proceeding exceed $25,000; or

4. when the use of any member of the news media as a source is planned (and in such a situation the prior written approval of a federal prosecutor must be obtained).

X. RELATIONS WITH THE NEWS MEDIA

The Department of Justice has issued guidelines that prescribe policy and instructions concerning the release of information by Department of Justice employees relating to criminal and civil proceedings (*see* 28 C.F.R. § 50.2). Office of Inspector General personnel must familiarize themselves with and follow these guidelines. In addition, in the course of joint investigations between an Office of Inspector General and the Federal Bureau of Investigation, wherever a "news release" would be permitted pursuant to the guidelines noted above, the Office of Inspector General must coordinate the release with the Federal Bureau of Investigation and the Department of Justice.

XI. REPORTING REQUIREMENTS

Each Office of Inspector General shall make an annual written report to the Attorney General due on November 1 of each year, detailing the investigative and prosecutive activities of that Office of Inspector General. The report shall, at a minimum, contain information on the number of (1) federal criminal investigations initiated, (2) undercover operations undertaken, and (3) times any type of electronic surveillance was used. Additionally, the report shall provide information on all significant and credible allegations of abuse of authorities conferred by section 6(e)(1) of the Inspector General Act by Office of Inspector General investigative agents and what, if any, actions were taken as a result. The names of the agents need not be included in such report.

XII. PEER REVIEWS

In accordance with section 6(e)(7) of the Inspector General Act, covered Offices of Inspector General must implement a collective memorandum of understanding, in consultation with the Attorney General, under which each Office of Inspector General will be periodically reviewed by another Office of Inspector General or a committee of Offices of Inspector General. Reviews should occur no less often than once every 3 years. The purpose of the review is to ascertain whether adequate internal safeguards and management procedures exist to ensure that the law enforcement powers conferred by the 2002 amendments to the Inspector General Act are properly exercised. Results of the review will be communicated to the Attorney General, as well as to the applicable Inspector General.

XIII. NO THIRD-PARTY RIGHTS CREATED

These Guidelines are adopted for the purpose of the internal management of the Executive Branch. These Guidelines are not intended to, do not, and may not be relied upon to, create any rights, substantive or procedural, enforceable at law or in equity by any party in any matter civil or criminal, nor do these Guidelines place any limitations on otherwise lawful investigative or litigation prerogatives of the Department of Justice or otherwise lawful investigative prerogatives of the covered Offices of Inspector General.

Dec. 8. 2003
Date

John Ashcroft
Attorney General

OPINION OF THE OFFICE OF LEGAL COUNSEL

JURISDICTION OF INTEGRITY COMMITTEE WHEN INSPECTOR GENERAL LEAVES OFFICE AFTER REFERRAL OF ALLEGATIONS

The Integrity Committee has authority to review, refer for investigation, and report findings with respect to, administrative allegations of wrongdoing made against a former Inspector General when the Committee receives the allegations during the subject's tenure as Inspector General, even if the subject later leaves office.

2006 OLC LEXIS 3; 30 Op. O.L.C. 1

September 5, 2006

ADDRESSEE:
[*1]

MEMORANDUM OPINION FOR THE CHAIRMAN, INTEGRITY COMMITTEE OF THE PRESIDENT'S COUNCIL ON INTEGRITY AND EFFICIENCY

OPINIONBY: ELWOOD

OPINION:

You have asked us whether the Integrity Committee of the President's Council on Integrity and Efficiency ("Integrity Committee" or "Committee") has authority to review, refer for investigation, and report findings with respect to, administrative allegations of wrongdoing made against a former Inspector General ("IG"), when the Committee received the allegations during the subject's tenure as Inspector General and the allegations relate to actions taken while in office. *See* Letter for Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, from Chris Swecker, Chairman, Integrity Committee, President's Council on Integrity & Efficiency at 3 (Oct. 24, 2005) ("Referral Letter"). We conclude that the Committee has continuing authority with respect to allegations the Committee received while the subject of the allegations was serving as Inspector General, even if the subject leaves office after receipt of those allegations.

I.

The President's Council on Integrity and Efficiency ("Council" or "PCIE"), as established by Executive Order 12301 [*2] in March 1981, consisted of specified Inspectors General and other federal officials. *See* 3 C.F.R. 144 (1982). In a May 1992 executive order, the President expanded the membership of the Council to include all presidentially appointed Inspectors General and other government officials. Exec. Order No. 12805, 3 C.F.R. 299 (1993). In the same order, the President established the parallel Executive Council on Integrity and Efficiency ("ECIE"), which includes all "civilian statutory Inspectors General not represented on the PCIE." *Id.* § 2(b)(2). The Deputy Director for Management of the Office of Management and Budget is the Chairperson of both groups. Originally, the PCIE and ECIE were charged with developing plans to help eliminate waste and fraud in governmental programs, assisting in the establishment of a corps of effective Inspector General staff members, and related matters. Exec. Order No. 12301, § 2; Exec. Order No. 12805, § 3. Later, the Chairperson of the PCIE and ECIE established the Integrity Committee as a component of the two Councils composed of certain Council members. Referral Letter at 2.

In 1996, the President expanded the authority and mandate of the Councils [*3] to undertake investigative functions through the Integrity Committee. *See* Exec. Order No. 12993, 3 C.F.R. 171 (1997). Executive Order 12993 authorizes the Integrity Committee to address certain "administrative" (i.e., non-criminal) allegations n1 against Inspectors General, as well as administrative allegations against staff members of an Office of Inspector General ("OIG") whose investigation might pose a conflict of interest for the OIG in which they serve. *See id.*, pmbl. The order directs that the Integrity Committee, "[t]o the extent permitted by law, and in accordance with this order, . . . shall receive, review, and refer for investigation allegations of wrongdoing against IGs and certain staff members of the OIGs." *Id.* § 1(a). The order directs that the Integrity Committee "shall review all allegations of wrongdoing it receives against an IG who is a member of the PCIE or ECIE, or against a staff member of an OIG acting with the knowledge of the IG or when the

allegation against the staff person is related to an allegation against the IG." *Id.* § 2(a). n2 Once an allegation is received, the Integrity Committee is required to "determine if there is a substantial [*4] likelihood that the allegation . . . discloses a violation of any law, rule or regulation, or gross mismanagement, gross waste of funds or abuse of authority." *Id.* § 2(c). If the Integrity Committee determines that an allegation "does not warrant further action, it shall close the matter" and notify the Chairperson of the PCIE/ECIE of its determination. *Id.* § 2(d). If the Integrity Committee determines that the allegation meets that standard, however, it must take one of two actions. Ordinarily, the Committee "shall refer the allegation to the agency of the executive branch with appropriate jurisdiction over the matter." *Id.* § 2(c). If, however, "a potentially meritorious administrative allegation cannot be referred to an agency of the executive branch with appropriate jurisdiction over the matter, the Integrity Committee shall certify the matter to its Chair, who shall cause a thorough and timely investigation of the allegation to be conducted in accordance with this order." *Id.*

n1 The Integrity Committee has defined "administrative misconduct" to mean "noncriminal misconduct, or misconduct the Public Integrity Section declines to pursue on a criminal basis, that evidences a violation of any law, rule, or regulation; or gross mismanagement; gross waste of funds; or abuse of authority, in the exercise of official duties or while acting under color of office." Policy and Procedures for Exercising the Authority of the Integrity Committee of the President's Council on Integrity and Efficiency at 7 (Nov. 5, 2004) ("Policy and Procedures").

[*5]

n2 The order also directs Inspectors General to "refer" administrative allegations against "senior staff member[s]" to the Committee when "review of the substance of the allegation cannot be assigned to an agency of the executive branch with appropriate jurisdiction over the matter" and the Inspector General "determines that an objective internal investigation, or the appearance thereof, is not feasible." Exec. Order No. 12993, § 2(b).

Executive Order 12993 authorizes the Director of the FBI, through his designee, who serves as Chairperson of the Integrity Committee, to "consider" administrative allegations and "where appropriate, to investigate" them. At the request of the Chairperson, federal agencies may detail personnel to the Committee, including personnel from various OIGs, who will be "subject to the control and direction of the Chairperson, to conduct an investigation." *Id.* § 3(b). At the conclusion of the investigation, a report is to be issued to the Integrity Committee (either by the Chairperson or, if the matter was referred for investigation to an agency, the head of that agency). *Id.* § 4. Reflecting the fact that an Inspector General is supervised [*6] by the head of the agency in which he serves, *see 5 U.S.C. app. § 3*(a) (2000 & Supp. III 2003), the Chairperson of the PCIE/ECIE may disseminate such a report to the head of the agency employing the subject for possible adverse action. Exec. Order No. 12993, § 4(d). The agency head must then certify to the Chairperson that he has personally reviewed the report and indicate what action (if any) has been taken and what further action is being considered. *Id.*

You have informed us that the Integrity Committee received allegations regarding a sitting Inspector General and initiated the procedures contemplated by Executive Order 12993. Because the Committee has jurisdiction over only non-criminal allegations, the Committee, following its written procedures, first referred the allegations to the Public Integrity Section of the Department of Justice's Criminal Division. The Public Integrity Section declined to pursue a criminal investigation and returned the matter to the Committee. n3 The Committee then determined that there was a "substantial likelihood that the allegations disclose a gross waste of funds or abuse of authority." Referral Letter at [*7] 3. Based on that determination, the Integrity Committee referred the matter for investigation by the Inspector General of another agency. Letter for Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, from Chris Swecker, Chairman, Integrity Committee, President's Council on Integrity & Efficiency at 1 (Dec. 19, 2005). n4

n3 The Integrity Committee's written procedures establish this initial referral procedure in order to sort criminal allegations from the non-criminal matters over which the Committee has jurisdiction. *See* Policy and Procedures at 6-7. If the Department of Justice declines prosecution, the Committee makes a determination regarding whether further investigation is warranted pursuant to section 2(c) of the Order. *See id.*

n4 A few weeks after being notified that the Integrity Committee had referred the allegations to another agency's IG, the subject of the investigation formally requested that the Integrity Committee refer the matter to a different agency's IG for investigation. The Committee granted that request shortly after the subject of the inves-

tigation left office. Email for John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, from William Corcoran, Public Integrity Section, Criminal Division (Apr. 17, 2006).

[*8]

Nearly three months after the Committee made its "substantial likelihood" determination and referred the matter for investigation, the Inspector General whose conduct is at issue left office. *See* Email for John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, from William Corcoran, Public Integrity Section, Criminal Division (Mar. 21, 2006) ("Corcoran email"). The Committee has asked this Office for an opinion on whether it may continue to pursue administrative allegations against the former Inspector General based on allegations of wrongdoing that allegedly occurred (and that the Committee received) while the subject of the investigation was in office. n5 Referral Letter at 3.

n5 This memorandum does not address whether the Integrity Committee would have authority to act when an IG leaves office before the Committee receives any allegations about that person's conduct in office.

II.

The Constitution vests the President with "[t]he executive Power" of the United States, U.S. Const. art. II, § 1, and enjoins him to "take Care that the laws be faithfully executed." *Id.* § 3. To assist the President in the discharge of his duties, the [*9] Constitution authorizes the President to "nominate, and by and with the Advice and Consent of the Senate, [to] appoint . . . Officers of the United States," and authorizes the President, acting alone, to appoint "such inferior Officers," as Congress specifies. *Id.* § 2. Although the Constitution is silent about the President's authority to remove those whom he has appointed, the Supreme Court has held that ordinarily, "the power of appointment carrie[s] with it the power of removal." *Myers v. United States, 272 U.S. 52, 119 (1926); see also id.* at 164 (noting President's "general administrative control of those executing the laws"); *Morrison v. Olson, 487 U.S. 654, 692 (1988)* (explaining that the President, at least to some degree, must be able "to control or supervise" Executive Branch personnel in order to discharge his constitutional duty to take care that the laws are faithfully executed). "The reason for the principle is that those in charge of and responsible for administering functions of government who select their executive subordinates need in meeting their responsibility to have the power to remove those [*10] whom they appoint." *Myers, 272 U.S. at 119.* As the Court has explained, "when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal." *Id. at 122.*

By the same token, the Constitution gives the President the "inherent authority to supervise and direct the performance of his appointees in office, and to investigate allegations of possible misconduct related to that performance." *Procedures for Investigating Allegations Concerning Senior Administration Officials*, 6 Op. O.L.C. 626, 628 (1982). Even in the absence of any congressional authorization, therefore, the President may investigate allegations of misconduct and other lesser forms of inefficiency or infidelity by Executive Branch officers and employees. *See* Memorandum for the Attorney General from Daniel L. Koffsky, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Statutory Authority of the Federal Bureau of Investigation to Undertake Non-criminal Investigations of the* [*11] *Inspectors General* at 3 (May 26, 1993) ("*Koffsky Memorandum*"). Because "each Inspector General ultimately is responsible to the President" and "each is subject to removal by the President," *see id.* at 4 (citing *5 U.S.C. app. § 3*(b)), "the President may take the actions necessary to investigate allegations of non-criminal misconduct by Inspectors General as an incident of his authority as head of the Executive Branch." *Id.*

The President's authority to "oversee the performance of . . . appointees in office"--and specifically, the authority to investigate them--may be delegated. 6 Op. O.L.C. at 631 & n.13. *See generally* Memorandum from Office of Legal Counsel, *Re: President's Authority to Delegate Functions* at 3 (Jan. 24, 1980) (concluding that the President generally has the inherent authority to delegate the performance of functions vested in him to the extent "reasonably necessary in executing the express powers granted to him under the Constitution and Laws of the United States for the proper and efficient administration of the executive branch of the government"). Executive Order 12993 delegates to the Integrity Committee part [*12] of the President's inherent authority, the power to receive and investigate allegations of non-criminal wrongdoing by Inspectors General (and, under certain circumstances, OIG staff members). While the authority to investigate Executive Branch officials presumably can be created or supplemented by statute, *see generally Morrison v. Olson, 487 U.S. at 695-96*, we are aware of no statute investing the Integrity Committee with such authority. n6 Rather, the Integrity Committee's investigative power is entirely a product of Executive Order 12993. It therefore has only such authority to investigate that is granted by that order. *See* 6 Op. O.L.C. at 628-29.

n6 The Inspector General Act of 1978, Pub. L. No. 95-452, *92 Stat. 1001, 5* U.S.C. app. (2000 & Supp. III 2003), does not vest the Integrity Committee with authority to conduct investigations; indeed, Inspectors General and OIG personnel have only limited statutory authority to investigate allegations outside their agencies on a detail basis. We noted in our 1982 opinion that "the Inspector General Act authorizes an Inspector General and his staff to conduct investigations into allegations of misconduct only when those allegations involve fraud and abuse in the programs and operations of the particular agency or department in which the Office is located." 6 Op. O.L.C. at 629. *See generally 5 U.S.C. app. § 4*(a). We explained that "funds appropriated for the activities of an Office of Inspector General in one agency would ordinarily not be available to conduct an investigation into allegations of misconduct by personnel in another agency." 6 Op. O.L.C. at 629. Thus, we concluded that "[t]here is no authority under the Inspector General Act, or under any appropriations act of which we are aware, for an Assistant Inspector General for Investigations, or any member of an Inspector General's staff, to conduct investigations which do not 'relate to' the 'programs and operations' of the agency in which he is employed." *Id.* at 629 n.9. We noted, however, that personnel in one agency's Office of Inspector General "might lawfully be directed by his own agency to investigate . . . allegations against another Inspector General on a detail basis." *Id.* at 629-30 & nn.10-11.

Nor does the FBI have statutory authority to conduct investigations of administrative allegations. We concluded in a 1993 opinion that *28 U.S.C. § 533*, which authorizes the Attorney General to direct the FBI to "conduct such other investigations regarding official matters under the control of the Department of Justice . . . as may be directed by the Attorney General," did not permit him "to direct the FBI to conduct investigations of noncriminal misconduct by the Inspectors General." *Koffsky Memorandum* at 1. We noted, however, that "the President may direct the FBI to undertake investigations into non-criminal allegations against the Inspectors General." *Id.* at 5.

[*13]

Soon after the creation of the President's Council on Integrity and Efficiency, this Office made clear that (in the absence of a legislative enactment) a presidential delegation was the exclusive potential source of authority to investigate Inspectors General and OIG staff members. *See Procedures for Investigating Allegations Concerning Senior Administration Officials*, 6 Op. O.L.C. 626 (1982). In 1982, this Office evaluated a PCIE proposal to have "non-criminal allegations" of wrongdoing by Inspectors General referred to the PCIE for initial consideration and potential investigation. *Id.* at 627. We concluded that, while one provision of the executive order creating the PCIE "might be interpreted to authorize the Council to develop procedures to investigate misconduct by Inspectors General," *id.* at 629 n.7, that order had not provided to the PCIE any explicit authority to coordinate or to conduct investigations of Inspectors General. *See* Exec. Order No. 12301 (authorizing the PCIE to develop policy proposals for streamlining government and eliminating waste, but not mentioning the power to investigate). We could not "construe [the order] . . . to bestow authority on [*14] the Council actually to conduct such investigations," because "[s]uch a delegation of substantive presidential authority to an agency *not otherwise authorized to engage in such activities* would, in our view, have to be explicit." 6 Op. O.L.C. at 629 n.7 (emphasis added). Because the executive order was not explicit, we concluded that it "does not accomplish such a delegation." *Id.* at 628-29. Since then, the President explicitly delegated some investigatory authority to the Committee in Executive Order 12993, and so it is no longer the case that the Committee is "not otherwise authorized to engage in such activities." *Id.* at 629 n.7.

The sole mechanism that Executive Order 12993 provides for the Integrity Committee to obtain jurisdiction over allegations is through the referral of those allegations to the Committee under section 2 of that order. It states:

> The Integrity Committee shall review all allegations of wrongdoing it receives against an IG who is a member of the PCIE or ECIE or against a staff member of an OIG acting with the knowledge of the IG or when the allegation against the staff person is related to an allegation against the IG, except that where an allegation [*15] concerns a member of the Integrity Committee, that member shall recuse himself from consideration of the matter.

Exec. Order No. 12993, § 2(a).

The language of section 2(a) does not itself clearly indicate whether, for the Integrity Committee to have jurisdiction, the IG must be a member of the PCIE or ECIE only at the time allegations are received or whether the IG must still be serving at some later point when the allegations are reviewed for the Integrity Committee to exercise jurisdiction over allegations. Other language in section 2 is more illuminating. Section 2(c) states that "[t]he Integrity Committee *shall determine* if there is a substantial likelihood that the allegation, *referred to it* under paragraph[] (a) . . . of this section, discloses a violation of any law" or other misconduct or abuse "and *shall refer* the allegation to the agency of the executive branch with appropriate jurisdiction over the matter." (Emphasis added.) Allegations that the Integrity Committee receives against a then-sitting IG are properly understood to be "referred to" it when they are received. *See The American Heritage College Dictionary* 1146-47 (3d ed. 1997) ("refer" means, [*16] among other things, "[t]o submit (a matter in dispute) to an authority for arbitration, decision, or examination"); *Webster's Third New International Dictionary* 1907 (1993) ("to send or direct for treatment, aid, information, decision"). The mandatory language of section 2(c) indicates that the Integrity Committee's obligation to make a determination of probable merit--and to refer potentially meritorious allegations for investigation--arises when an allegation against a then-sitting IG is "referred to it under paragraph[] (a)." The unqualified, expansive, and mandatory language of the first half of section 2(a) ("*shall* review *all* allegations of wrongdoing it receives"), together with the language of section 2(c), thus indicates that the relevant decision-point is the time of receipt. Executive Order 12993 is thus most naturally read to permit the Integrity Committee to retain jurisdiction over allegations against an IG who is a member of the PCIE or ECIE at the time of the allegations' receipt, even if he leaves office soon afterwards. In addition, sections 2(c) and 2(d) explicitly establish a mechanism for disposing of allegations that the Integrity Committee determines [*17] not to be "potentially meritorious"; the failure explicitly to provide for disposing of allegations involving a subject who is no longer a member of the PCIE or ECIE could reasonably be interpreted as an indication that the Integrity Committee is obligated to assess the likely merits of all allegations that it properly receives under section 2(a).

There is also another basis for concluding that the Integrity Committee retains jurisdiction in this matter. We understand that the Inspector General who is the subject of the Committee's pending investigation remained a member of the PCIE for nearly three months after the Committee made its determination that the allegations against him likely had merit under section 2(c) of the order and referred them for investigation. *See* Corcoran email. The order provides without qualification that if the Integrity Committee determines there is a "substantial likelihood that the allegation" has merit, it "*shall refer* the allegation to the agency of the executive branch with appropriate jurisdiction over the matter." Exec. Order No. 12993, § 2(c) (emphasis added). Thus, under the mandatory language of the order, once the Integrity Committee determined [*18] that there was a "substantial likelihood that the allegation[s]" against the then-sitting member of the PCIE had merit, the Committee was authorized--indeed, obligated--to refer the allegations for investigation. The remaining terms of the delegation likewise speak in mandatory and unqualified terms, directing specific actions with respect to any allegations the Committee has referred for investigation. *See, e.g.*, Exec. Order No. 12993, § 4(a) ("The report containing the results of the investigation conducted under the supervision of the Chair of the Integrity Committee shall be provided to the members of the Integrity Committee for consideration."), *id.* § 4(b) ("the head of an agency" receiving allegations for investigation "shall provide a report to the Integrity Committee"), *id.* § 4(c) ("The Integrity Committee shall assess the report received under [section 4](a) or (b) . . . and determine whether the results require forwarding of the report, with Integrity Committee recommendations, to the Chairperson of the PCIE/ECIE for resolution."), *id.* § 4(e) ("The Chairperson of the PCIE/ECIE shall report to the Integrity Committee the final disposition of the matter."). [*19] The language of the order does not suggest that a potentially meritorious allegation would not be investigated because the subject of the allegation departs after the Committee has made its determination of likely merit and referred the matter for investigation. Accordingly, we conclude that an Inspector General's departure after a determination of likely merit and referral under section 2(c) does not divest the Committee of authority over pending allegations. n7

n7 Although it presents a closer question, for similar reasons, we believe that the Integrity Committee would have authority to receive new allegations after an Inspector General has left office, if those allegations are related to matters that the Committee already had properly received under section 2(a), or if they are related to allegations for which there already has been a determination of probable merit under section 2(c). Executive Order 12993 contemplates that an investigation will be conducted of potentially meritorious allegations the Committee has properly received. Exec. Order No. 12993, §§ 1(a), 2(b)(2), 2(c). The order appears to contemplate that any such investigation will be "thorough and timely." *Id.* § 2(c). It is reasonable to conclude that a "thorough" investigation would consider new allegations related to the original referral that came to the attention of investigators during the course of their inquiry.

[*20]

Some provisions of Executive Order 12993 might be read to suggest that, even if the Integrity Committee properly received allegations against an Inspector General then serving on the PCIE, it loses the authority to initiate an investigation upon the subject's departure from that post. For example, section 1(a) of the order provides that "the Integrity Committee shall receive, review, and refer for investigation allegations of wrongdoing against IGs"; section 3(a) likewise provides that the Chairperson of the Integrity Committee "is authorized and directed to consider and, where appropriate, to investigate administrative allegations against the IGs," and the term "the IGs" might be read to include only current Inspectors General. However, the term "IGs," when not used in conjunction with language suggesting the term applies only to incumbents, easily could be read to include a person who was being investigated for actions taken while serving as Inspector General, even if he had since left that post. *See, e.g., Robinson v. Shell Oil Co., 519 U.S. 337, 341-45 (1997)* (concluding that term "employees" in *42 U.S.C. § 2000e-3* [*21] (a) includes former employees); *Duckworth v. Pratt & Whitney, Inc., 152 F.3d 1, 6 (1st Cir. 1998)* (holding that agency reasonably concluded that term "employees" in Family and Medical Leave Act includes former employees; "absent an express 'temporal qualifier,' such as 'current,' Congress' use of the word 'employees' does not inherently exclude former and prospective employees") (internal citation omitted); *Passer v. Am. Chem. Soc'y, 935 F.2d 322, 330-31 (D.C. Cir. 1991)* (holding that term "employees" in Age Discrimination in Employment Act includes former employees). Although we do not give this factor determinative weight, the conclusion that the Integrity Committee could continue to oversee an investigation after receipt of allegations (and after a determination of probable merit) is consistent with the stated purposes of Executive Order 12993, which include "to ensure that administrative allegations against IGs . . . are appropriately and expeditiously investigated and resolved." Exec. Order No. 12993, pmbl. If the Committee were required to relinquish jurisdiction over a matter even after the Committee had "review[ed]" [*22] the allegations, *id.* § 2(a), and "determine[d]" that that there is a substantial likelihood that they have merit, *id.* § 2(c), the subject of an investigation could both potentially delay the investigation and affect the choice of investigating authority through the timing of his resignation. Unnecessary cost and delays could result if another investigative authority were required to begin the investigation anew after substantial progress already had been made under the auspices of the Integrity Committee. Although, as noted below, conflict of interest concerns may be obviated by the Inspector General's departure, under such circumstances, interests in efficiency would counsel in favor of the Committee's retaining jurisdiction over the matter until its conclusion.

Other provisions of Executive Order 12993 also might be read to permit the Committee to exercise jurisdiction only over investigations involving sitting IGs. Section 4(d) provides for an agency head to supply certain information "[w]here the Chairperson of the PCIE/ECIE determines that dissemination of the report to the head of the subject's employing agency or entity is appropriate." Section 4(e) provides that "[t]he [*23] Chairperson of the PCIE/ECIE shall report to the Integrity Committee the final disposition of the matter, including what action, if any, has been or is to be taken by the head of the subject's employing agency or entity." One might argue that the references to "the head of the subject's employing agency or entity" suggest that the order contemplates that the subject of the investigation would still be serving in the Government. We do not believe those provisions provide sufficient basis for limiting the scope of the Committee's authority to persons still serving as Inspectors General. Neither of those two provisions purports to apply in every case; one simply provides for dissemination of a report to the head of the subject's employing agency *if* doing so "is appropriate," and the other simply requires a report of what action "if any" has been or is to be taken by the head of that agency. Thus, neither provision suggests that in all instances the person being investigated must still be employed by a government agency for the investigation to go forward.

While the departure of an Inspector General after allegations are referred does not affect the authority of the Integrity Committee [*24] to oversee the investigation, it very well may affect decisions that the Committee makes with respect to the investigation. For example, if the Committee determines "there is a substantial likelihood that" an allegation it has received has merit, it is required to "refer the allegation to the agency of the executive branch with appropriate jurisdiction over the matter." Exec. Order No. 12993, § 2(c). The Inspector General's office where the subject served may have been disqualified from being the "appropriate jurisdiction" to receive the investigation while the subject was in office. The departure of the Inspector General who is the subject of the investigation may well remove that disability so that "the agency of the executive branch with appropriate jurisdiction over the matter," *id.*, is the agency where the subject previously served as Inspector General. Which agency or agencies may have "appropriate jurisdiction" over the current investigation is not a question presented by your request, however, and so we do not resolve the issue here.

* * *

For the reasons discussed above, we conclude that under Executive Order 12993, the Integrity Committee has authority to pursue allegations [*25] that it receives against an incumbent Inspector General, even if the subject of the investigation then leaves office.

JOHN P. ELWOOD

Deputy Assistant Attorney General

Office of Legal Counsel

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawThe PresidencyAppointment of OfficialsConstitutional LawThe PresidencyRemoval of OfficialsGovernmentsFederal GovernmentExecutive Offices

Section 5

Statutes and Regulations Relating to OIG Responsibilities

STATUTES AND REGULATONS
RELATING TO OIG RESPONSIBILITIES

American Recovery and Reinvestment Act of 2009 (P.L. 111-5)
Allows public to raise concerns about the utilization of ARRA funds that the Inspector General of the agency administering that particular ARRA program must the address. Establishes Recovery Accountability and Transparency Board. Allows IG to investigate reprisals for whistle blowing in regards to ARRA funds.

Excerpt:
Sec. 1514. Inspector General Reviews.
(a) Reviews.--Any inspector general of a Federal department or executive agency shall review, as appropriate, any concerns raised by the public about specific investments using funds made available in this Act. Any findings of such reviews not related to an ongoing criminal proceeding shall be relayed immediately to the head of the department or agency concerned. In addition, the findings of such reviews, along with any audits conducted by any inspector general of funds made available in this Act, shall be posted on the inspector general's website and linked to the website established by section 1526, except that portions of reports may be redacted to the extent the portions would disclose information that is protected from public disclosure under [15 U.S.C § 522-2a].

* * *

Sec. 1553. Protecting State and Local Government and Contractor Whistleblowers.
(a) Prohibition of Reprisals.--An employee of any non-Federal employer receiving covered funds may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing, including a disclosure made in the ordinary course of an employee's duties, to the Board, an inspector general, the Comptroller General, a member of Congress, a State or Federal regulatory or law enforcement agency,
(1) In general.-- A person who believes that the person has been subjected to a reprisal prohibited by subsection (a) may submit a complaint regarding the reprisal to the appropriate inspector general. Except as provided under paragraph (3), unless the inspector general determines that the complaint is frivolous, does not relate to covered funds, or another Federal or State judicial or administrative proceeding has previously been invoked to resolve such complaint, the inspector general shall investigate the complaint and, upon completion of such investigation, submit a report of the findings of the investigation to the person, the person's employer, the head of the appropriate agency, and the Board

111 P.L. 5, § 1514, 1553 (2011)

Chief Financial Officers Act of 1990 (P.L. 101-576)
Added to 31 U.S.C. § 3521 a requirement that each financial statement prepared by an agency in accordance with 31 U.S.C. § 3515 (see discussion of Government Management Reform Act of 1994, below) shall be audited in accordance with generally accepted government auditing standards by the IG or by an independent external auditor, as determined by the agency IG. A report on the audit is to be submitted to the head of the agency, and may be reviewed by the Comptroller General of the United States.

Excerpt:
(e) Each financial statement prepared under section 3515 by an agency shall be audited in accordance with applicable generally accepted government auditing standards--
(1) in the case of an agency having an Inspector General appointed under the Inspector General Act of 1978 (5 U.S.C. App.), by the Inspector General or by an independent external auditor, as determined by the Inspector General of the agency; and
(2) in any other case, by an independent external auditor, as determined by the head of the agency.

31 U.S.C. § 3521 (2011)

Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (P.L. 111-203)
Requires Treasury IG to review any liquidation of a financial institution initiated by FSCOC. If liquidated financial company was supervised by agency for which Treasury IG has responsibility (e.g. OCC), Treasury IG must compile a report reviewing the supervision of the agency over the company prior to liquidation.

Excerpt:
[*211] Sec. 211. MISCELLANEOUS PROVISIONS.
(e) Treasury Inspector General Reviews.--
(1) Scope.-- The Inspector General of the Department of the Treasury shall conduct, supervise, and coordinate audits and investigations of actions taken by the Secretary related to the liquidation of any covered financial company under this title, including collecting and summarizing--
(A) a description of actions taken by the Secretary under this title;
(B) an analysis of the approval by the Secretary of the policies and procedures of the Corporation under section 203 and acceptance of the orderly liquidation plan of the Corporation under section 210; and
(C) an assessment of the terms and conditions underlying the purchase by the Secretary of obligations of the Corporation under section 210.
(2) Frequency.-- Not later than 6 months after the date of appointment of the Corporation as receiver under this title and every 6 months thereafter, the Inspector General of the Department of the Treasury shall conduct the audit and investigation described in paragraph (1).
(3) Reports and testimony.-- The Inspector General of the Department of the Treasury shall include in the semiannual reports required by section 5(a) of the Inspector General Act of 1978 (5 U.S.C. App.), a summary of the findings and assessments under paragraph (1), and shall appear before the appropriate committees of Congress, if requested, to present each such report.
(4) Termination of responsibilities.-- The duties and responsibilities of the Inspector General of the Department of the Treasury under this subsection shall terminate 1 year after the date on which the obligations purchased by the Secretary from the Corporation under section 210 are fully redeemed.(f) Primary Financial Regulatory Agency Inspector General Reviews.-
(f) Primary Financial Regulatory Agency Inspector General Reviews.--
(1) Scope.-- Upon the appointment of the Corporation as receiver for a covered financial company supervised by a Federal primary financial regulatory agency or the Board of Governors under section 165, the Inspector General of the agency or the Board of Governors shall make a written report reviewing the supervision by the agency or the Board of Governors of the covered financial company, which shall--
(A) evaluate the effectiveness of the agency or the Board of Governors in carrying out its supervisory responsibilities with respect to the covered financial company;
(B) identify any acts or omissions on the part of agency or Board of Governors officials that contributed to the covered financial company being in default or in danger of default;
(C) identify any actions that could have been taken by the agency or the Board of Governors that would have prevented the company from being in default or in danger of default; and
(D) recommend appropriate administrative or legislative action.
(2) Reports and testimony.-- Not later than 1 year after the date of appointment of the Corporation as receiver under this title, the Inspector General of the Federal primary financial regulatory agency or the Board of Governors shall provide the report required by paragraph (1) to such agency or the Board of Governors, and along with such agency or the Board of Governors, as applicable, shall appear before the appropriate committees of Congress, if requested, to present the report required by paragraph (1). Not later than 90 days after the date of receipt of the report required by paragraph (1), such agency or the Board of Governors, as applicable, shall provide a written report to Congress describing any actions taken in response to the recommendations in the report, and if no such actions were taken, describing the reasons why no actions were taken.

12 U.S.C. § 5391 (2011)

Ethics in Government Act of 1978 (P.L. 95-521)
Allows Office of Government Ethics to request assistance for agency OIG's.

Excerpt:
(a)The authority of the Director under this section includes the authority to request assistance from the inspector general of an agency in conducting investigations pursuant to the Office of Government Ethics responsibilities under this Act. The head of any agency may detail such personnel and furnish such services, with or without reimbursement, as the Director may request to carry out the provisions of this Act[.]

5 U.S.C. app. § 403 (2011)

Federal Deposit Insurance Corporation Improvement Act of 1991 (P.L. 102-242)
Requires the OIG to conduct Material Loss Reviews (MLR) in certain cases of failure of financial institutions regulated by the Office of the Comptroller of the Currency (OCC) or the Office of Thrift Supervision (OTS) which result in material losses to the deposit insurance fund.

Excerpt:
(k) Review required when Deposit Insurance Fund incurs material loss.
(1) In general. If the Deposit Insurance Fund incurs a material loss with respect to an insured depository institution on or after July 1, 1993, the inspector general of the appropriate Federal banking agency shall--
(A) make a written report to that agency reviewing the agency's supervision of the institution (including the agency's implementation of this section), which shall--
(i) ascertain why the institution's problems resulted in a material loss to the Deposit Insurance Fund; and
(ii) make recommendations for preventing any such loss in the future; and
(B) provide a copy of the report to--
(i) the Comptroller General of the United States;
(ii) the Corporation (if the agency is not the Corporation);
(iii) in the case of a State depository institution, the appropriate State banking supervisor; and
(iv) upon request by any Member of Congress, to that Member.

* * *

(3) Deadline for report. The inspector general of the appropriate Federal banking agency shall comply with paragraph (1) expeditiously, and in any event (except with respect to paragraph (1)(B)(iv)) as follows:
(A) If the institution is described in paragraph (2)(A)(i), during the 6-month period beginning on the earlier of--
(i) the date on which the institution ceases to repay assistance under section 13(c) [12 USCS § 1823(c)] in accordance with its terms, or
(ii) the date on which it becomes apparent that the assistance will not be fully repaid during the 24-month period described in paragraph (2)(A)(i).
(B) If the institution is described in paragraph (2)(A)(ii), during the 6-month period beginning on the date on which it becomes apparent that the present value of the outlays of the Deposit Insurance Fund with respect to that institution will exceed the present value of receivership dividends or other payments on the claims held by the Corporation.

12 U.S.C. 1831(o) (2011)

Federal Financial Management Improvement Act of 1996 (P.L. 104-208) the annual audits of an agency's financial statements report on whether its financial management systems comply with Federal financial management systems requirements, applicable accounting standards, and the United States Government Standard General Ledger at the transaction level (31 U.S.C. 3512 (a)(1), (2)(A)-(F)). The Act also amended section 5 of the IG Act, 5 U.S.C. Appendix, to require Inspectors General to report to Congress instances when their agencies have not met targets in making their accounting systems complaint with the requirements of the Act.

Excerpt:
Sec. 804. Reporting requirements.

* * *

(b) Reports by the Inspector General. Each Inspector General who prepares a report under section 5(a) of the Inspector General Act of 1978 (5 U.S.C. App.) shall report to Congress instances and reasons when an agency has not met the intermediate target dates established in the remediation plan required under section 3(c). Specifically the report shall include--
(1) the entity or organization responsible for the non-compliance;
(2) the facts pertaining to the failure to comply with the requirements of subsection (a), including the nature and extent of the non-compliance, the primary reason or cause for the failure to comply, and any extenuating circumstances; and
(3) a statement of the remedial actions needed to comply.

31 U.S.C.S. § 3512 note (2011) (Federal Financial Management Improvement Act of 1996)

Federal Information Security Management Act of 2002 (FISMA) (P.L. 107-347) Requires the OIG**,** or an independent Public Accountant as determined by the IG, to perform an independent evaluation of each agency's information security program and practices. The evaluation shall include: (a) testing of the effectiveness of information security policies, procedures and practices of a representative subset of the agency's Information Systems; (b) an assessment (made on basis of the results of the testing) of the agency's compliance with FISMA requirements and related information security policies, procedures, standards and guidelines; and (c) separate presentations, as appropriate, regarding information security relating to national security systems.

Excerpt:
§ 3545. Annual independent evaluation
(a) (1) Each year each agency shall have performed an independent evaluation of the information security program and practices of that agency to determine the effectiveness of such program and practices.
(2) Each evaluation by an agency under this section shall include--
(A) testing of the effectiveness of information security policies, procedures, and practices of a representative subset of the agency's information systems;
(B) an assessment (made on the basis of the results of the testing) of compliance with-
(i) the requirements of this subchapter [44 USCS §§ 3531 et seq.]; and
(ii) related information security policies, procedures, standards, and guidelines; and
(C) separate presentations, as appropriate, regarding information security relating to national security systems.
(b) Subject to subsection (c)--
(1) for each agency with an Inspector General appointed under the Inspector General Act of 1978 [5 U.S.C. Appx. (IGA)], the annual evaluation required by this section shall be performed by the Inspector General or by an independent external auditor, as determined by the Inspector General of the agency; and
(2) for each agency to which paragraph (1) does not apply, the head of the agency shall engage an independent external auditor to perform the evaluation.
(c) For each agency operating or exercising control of a national security system, that portion of the evaluation required by this section directly relating to a national security system shall be performed--
(1) only by an entity designated by the agency head; and
(2) in such a manner as to ensure appropriate protection for information associated with any information security vulnerability in such system commensurate with the risk and in accordance with all applicable laws.

44 U.S.C. § 3545 (2011)

Federal Managers Financial Integrity Act of 1982 (P.L. 97-255)
Provides for establishment, implementation, and evaluation of accounting and administrative controls regarding financial management activities. Amends the Accounting and Auditing Act of 1950 to require federal agencies to establish internal accounting and administrative controls to: (1) prevent waste or misuse of agency funds or property; and (2) assure the accountability of assets.

Excerpt:
§ 3512. Executive agency accounting and other financial management reports and plans
(a) (1) The Director of the Office of Management and Budget shall prepare and submit to the appropriate committees of the Congress a financial management status report and a governmentwide 5-year financial management plan.

31 U.S.C. § 3512 (2011)

Government Management Reform Act of 1994 (P.L. 103-356) (Section 405)
Amended 31 U.S.C. § 3515 to require audited financial statements of certain government agencies, including the Department of Treasury, and tasked the Office of Management and Budget to designate entities within departments that must have audited financial statements.

Excerpt:
§ 3515. Financial statements of agencies
(a) [(1)] Except as provided in subsection (e), not later than March 1 of 2003 and each year thereafter, the head of each covered executive agency shall prepare and submit to the Congress and the Director of the Office of Management and Budget an audited financial statement for the preceding fiscal year, covering all accounts and associated activities of each office, bureau, and activity of the agency.
(b) Each audited financial statement of a covered executive agency under this section shall reflect--
(1) the overall financial position of the offices, bureaus, and activities covered by the statement, including assets and liabilities thereof; and
(2) results of operations of those offices, bureaus, and activities.
(c) The Director of the Office of Management and Budget shall identify components of covered executive agencies that shall be required to have audited financial statements meeting the requirements of subsection (b).

31 U.S.C. § 3515 (2011)

Government Performance and Results Act of 1993 (P.L. 103-62) (note: public laws may have been amended, see code section listed below for most current language).
Provides for the establishment of strategic planning and performance measurement in the Federal Government. Requires agency heads to submit to the Director of the Office of Management and Budget and Congress a strategic plan for performance goals of their agency's program activities. Requires such a plan to cover at least a five-year period and to be updated at least every three years.

Excerpt:
§ 1115. Federal Government and agency performance plans
(a) Federal Government Performance Plans.--In carrying out the provisions of section 1105(a)(28), the Director of the Office of Management and Budget shall coordinate with agencies to develop the Federal Government performance plan.

31 U.S.C. § 1115 (2011)

§ 1116. Agency performance reporting
(a) The head of each agency shall make available on a public website of the agency and to the Office of Management and Budget an update on agency performance.
(b)(1) Each update shall compare actual performance achieved with the performance goals established in the agency performance plan under section 1115(b) and shall occur no less than 150 days after the end of each fiscal year, with more frequent updates of actual performance on indicators that provide data of significant value to the Government, Congress, or program partners at a reasonable level of administrative burden.

31 U.S.C. § 1116 (2011)

Homeland Security Act of 2002 (P.L. 107-296)
Amends the Inspector General Act of 1978 to give the DHS IG oversight responsibility for internal investigations performed by the Office of Internal Affairs of the United States Customs Service and the Office of Inspections of the United States Secret Service. Authorizes each IG, any Assistant IG for Investigations, and any special agent supervised by such an Assistant IG to carry a firearm, make arrests without warrants, and seek and execute warrants. Allows the latter only upon certain determinations by the Attorney General (exempts the IG offices of various executive agencies from such requirement). Provides for the rescinding of such law enforcement powers. Requires the IG offices exempted from the determinations requirement to collectively enter into a memorandum of understanding to establish an external review process for ensuring that adequate internal safeguards and management procedures continue to exist to ensure the proper utilization of such law enforcement powers within their departments.

Excerpt:
(e) (1) In addition to the authority otherwise provided by this Act, each Inspector General appointed under section 3, any Assistant Inspector General for Investigations under such an Inspector General, and any special agent supervised by such an Assistant Inspector General may be authorized by the Attorney General to--
(A) carry a firearm while engaged in official duties as authorized under this Act or other statute, or as expressly authorized by the Attorney General;
(B) make an arrest without a warrant while engaged in official duties as authorized under this Act or other statute, or as expressly authorized by the Attorney General, for any offense against the United States committed in the presence of such Inspector General, Assistant Inspector General, or agent, or for any felony cognizable under the laws of the United States if such Inspector General, Assistant Inspector General, or agent has reasonable grounds to believe that the person to be arrested has committed or is committing such felony; and
(C) seek and execute warrants for arrest, search of a premises, or seizure of evidence issued under the authority of the United States upon probable cause to believe that a violation has been committed.
(2) The Attorney General may authorize exercise of the powers under this subsection only upon an initial determination that--
(A) the affected Office of Inspector General is significantly hampered in the performance of responsibilities established by this Act as a result of the lack of such powers;
(B) available assistance from other law enforcement agencies is insufficient to meet the need for such powers; and
(C) adequate internal safeguards and management procedures exist to ensure proper exercise of such powers.

5 U.S.C. app. § 6 (2011)

Improper Payments Elimination and Recovery Act of 2010 (P.L. 111-204)
Requires the IG to annually audit agency programs and identify programs susceptible to significant improper payments. IG will then develop plans for reducing those improper payments and make a report to GAO, Congress and agency head. Mandates recovery audit of any program that expends more then $1,000,000 annually.

Excerpt:
(a) Identification of susceptible programs and activities.
(1) In general. The head of each agency shall, in accordance with guidance prescribed by the Director of the Office of Management and Budget, periodically review all programs and activities that the relevant agency head administers and identify all programs and activities that may be susceptible to significant improper payments.

* * *

(2)(A) Conduct of audits. Except as provided under paragraph (4) and if not prohibited under any other provision of law, the head of each agency shall conduct recovery audits with respect to each program and activity of the agency that expends $ 1,000,000 or more annually if conducting such audits would be cost-effective.

31 U.S.C. § 3321 note (2011) (Improper Payments Information Act of 2002)

Program Fraud Civil Remedies Act of 1986 (P.L. 99-509)
Provides agencies that are the victims of false, fictitious, and fraudulent claims and statements with administrative remedy to recoup losses. Permits administrative proceedings against persons who make such claims.

Excerpt:
§ 3802. False claims and statements; liability
(a) [Caution: For inflation-adjusted civil monetary penalties, see 28 CFR 85.3.]
(1) Any person who makes, presents, or submits, or causes to be made, presented, or submitted, a claim that the person knows or has reason to know--
(A) is false, fictitious, or fraudulent;
(B) includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent;
(C) includes or is supported by any written statement that--
(i) omits a material fact;
(ii) is false, fictitious, or fraudulent as a result of such omission; and
(iii) is a statement in which the person making, presenting, or submitting such statement has a duty to include such material fact; or
(D) is for payment for the provision of property or services which the person has not provided as claimed, shall be subject to, in addition to any other remedy that may be prescribed by law, a civil penalty of not more than $ 5,000 for each such claim. Except as provided in paragraph (3) of this subsection, such person shall also be subject to an assessment, in lieu of damages sustained by the United States because of such claim, of not more than twice the amount of such claim, or the portion of such claim, which is determined under this chapter [31 USCS §§ 3801 et seq.] to be in violation of the preceding sentence.
(2) Any person who makes, presents, or submits, or causes to be made, presented, or submitted, a written statement that--
(A) the person knows or has reason to know--
(i) asserts a material fact which is false, fictitious, or fraudulent; or
(ii) (I) omits a material fact; and
(II) is false, fictitious, or fraudulent as a result of such omission;
(B) in the case of a statement described in clause (ii) of subparagraph (A), is a statement in which the person making, presenting, or submitting such statement has a duty to include such material fact; and
(C) contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement, shall be subject to, in addition to any other remedy that may be prescribed by law, a civil penalty of not more than $ 5,000 for each such statement.
(3) An assessment shall not be made under the second sentence of paragraph (1) with respect to a claim if payment by the Government has not been made on such claim.

31 U.S.C. § 3802 (2011)

Reducing Over-Classification Act of 2010 (P.L. 111-258)
Requires the IG to perform a internal audit of their classification policies, procedures and rules to determine if those regulations are being followed and if they can be improved to avoid misclassification. IG must then submit a report Congress and agency head.

Excerpt:
(b) Inspector General evaluations.
(1) Requirement for evaluations. Not later than September 30, 2016, the inspector general of each department or agency of the United States with an officer or employee who is authorized to make original classifications, in consultation with the Information Security Oversight Office, shall carry out no less than two evaluations of that department or agency or a component of the department or agency—
(A) to assess whether applicable classification policies, procedures, rules, and regulations have been adopted, followed, and effectively administered within such department, agency, or component; and
(B) to identify policies, procedures, rules, regulations, or management practices that may be contributing to persistent misclassification of material within such department, agency or component.
(2) Deadlines for evaluations.
(A) Initial evaluations. Each first evaluation required by paragraph (1) shall be completed no later than September 30, 2013.
(B) Second evaluations. Each second evaluation required by paragraph (1) shall review progress made pursuant to the results of the first evaluation and shall be completed no later than September 30, 2016.
(3) Reports.
(A) Requirement. Each inspector general who is required to carry out an evaluation under paragraph (1) shall submit to the appropriate entities a report on each such evaluation.
(B) Content. Each report submitted under subparagraph (A) shall include a description of—
(i) the policies, procedures, rules, regulations, or management practices, if any, identified by the inspector general under paragraph (1)(B); and
(ii) the recommendations, if any, of the inspector general to address any such identified policies, procedures, rules, regulations, or management practices.
(C) Coordination. The inspectors general who are required to carry out evaluations under paragraph (1) shall coordinate with each other and with the Information Security Oversight Office to ensure that evaluations follow a consistent methodology, as appropriate, that allows for cross-agency comparisons.
(4) Appropriate entities defined. In this subsection, the term 'appropriate entities' means--
(A) the Committee on Homeland Security and Governmental Affairs and the Select Committee on Intelligence of the Senate;
(B) the Committee on Homeland Security, the Committee on Oversight and Government Reform, and the Permanent Select Committee on Intelligence of the House of Representatives;
(C) any other committee of Congress with jurisdiction over a department or agency referred to in paragraph (1);
(D) the head of a department or agency referred to in paragraph (1); and
(E) the Director of the Information Security Oversight Office.".

50 U.S.C. § 435 note (2011) (Promotion of accurate classification of information).

Reports Consolidation Act of 2000 (P.L. 106-531)
Authorizes consolidation of financial and performance management reports made pursuant to inter alia., 31 U.S.C. § 3515 and 3521. It specifically requires agency IGs to report their views on the "most serious management and performance challenges facing the agency", and their assessment of the agency's progress in addressing those challenges. These IG statements are to be forwarded via the agency head, who can provide comment on them before transmitting them to Congress. The Treasury OIG also provides oversight of annual financial audits performed by contractors at the Office of the Comptroller of the Currency (OCC) and the Office of the Thrift Supervision (OTS). For OCC, audits are performed as part of OCC's compliance with **12 U.S.C. 14,** which requires that the Comptroller of Currency make an annual report to Congress.

Excerpt:
§ 3516. Reports consolidation
(a) (1) With the concurrence of the Director of the Office of Management and Budget, the head of an executive agency may adjust the frequency and due dates of, and consolidate into an annual report to the President, the Director of the Office of Management and Budget, and Congress any statutorily required reports described in paragraph (2). Such a consolidated report shall be submitted to the President, the Director of the Office of Management and Budget, and to appropriate committees and subcommittees of Congress not later than 150 days after the end of the agency's fiscal year.
(2) The following reports may be consolidated into the report referred to in paragraph (1):
(A) Any report by an agency to Congress, the Office of Management and Budget, or the President under section 1116, this chapter [31 USCS §§ 3501 et seq.], and chapters 9, 33, 37, 75, and 91 [31 USCS §§ 901 et seq., 3301 et seq., 3701 et seq., 7501 et seq., and 9101 et seq.].
(B) The following agency-specific reports:
(i) The biennial financial management improvement plan by the Secretary of Defense under section 2222 of title 10.
(ii) The annual report of the Attorney General under section 522 of title 28.
(C) Any other statutorily required report pertaining to an agency's financial or performance management if the head of the agency--
(i) determines that inclusion of that report will enhance the usefulness of the reported information to decision makers; and
(ii) consults in advance of inclusion of that report with the Committee on Governmental
Affairs of the Senate, the Committee on Government Reform of the House of Representatives, and any other committee of Congress having jurisdiction with respect to the report proposed for inclusion.
(b) A report under subsection (a) that incorporates the agency's program performance report under section 1116 shall be referred to as a performance and accountability report.
(c) A report under subsection (a) that does not incorporate the agency's program performance report under section 1116 shall contain a summary of the most significant portions of the agency's program performance report, including the agency's success in achieving key performance goals for the applicable year.
(d) A report under subsection (a) shall include a statement prepared by the agency's inspector general that summarizes what the inspector general considers to be the most serious management and performance challenges facing the agency and briefly assesses the agency's progress in addressing those challenges. The inspector general shall provide such statement to the agency head at least 30 days before the due date of the report under subsection (a). The agency head may comment on the inspector general's statement, but may not modify the statement.

31 U.S.C. § 3516 (2011)

(e) Each financial statement prepared under section 3515 by an agency shall be audited in accordance with applicable generally accepted government auditing standards--
(1) in the case of an agency having an Inspector General appointed under the Inspector General Act of 1978 (5 U.S.C. App.), by the Inspector General or by an independent external auditor, as determined by the Inspector General of the agency; and
(2) in any other case, by an independent external auditor, as determined by the head of the agency.

* * *
(i) (2) Any executive agency (or component thereof) that prepares a financial statement under section 3515 [31 USCS § 3515] for a fiscal year beginning on or after October 1, 2009, and that requests, with the concurrence of the Inspector General of such agency, the Government Accountability Office to conduct the audit of such statement or any related schedule required by section 3521 [31 USCS § 3521] may reimburse the Government Accountability Office for the cost of such audit.

31 U.S.C. § 3521 (2011)

Single Audit Act Amendments of 1996 (P.L. 104-156)
Requires that the Government Auditing Standards be followed in audits of state and local governments and nonprofit entities that receive federal financial assistance.

Excerpt:
§ 7502. Audit requirements; exemptions
(a) (1) (A) Each non-Federal entity that expends a total amount of Federal awards equal to or in excess of $ 300,000 or such other amount specified by the Director under subsection (a)(3) in any fiscal year of such non-Federal entity shall have either a single audit or a program-specific audit made for such fiscal year in accordance with the requirements of this chapter [31 U.S.C. §§ 7501 et seq.].
(B) Each such non-Federal entity that expends Federal awards under more than one Federal program shall undergo a single audit in accordance with the requirements of subsections (b) through (i) of this section and guidance issued by the Director under section 7505.
(C) Each such non-Federal entity that expends awards under only one Federal program and is not subject to laws, regulations, or Federal award agreements that require a financial statement audit of the non-Federal entity, may elect to have a program-specific audit conducted in accordance with applicable provisions of this section and guidance issued by the Director under section 7505.
(2) (A) Each non-Federal entity that expends a total amount of Federal awards of less than $300,000 or such other amount specified by the Director under subsection (a)(3) in any fiscal year of such entity, shall be exempt for such fiscal year from compliance with--
(i) the audit requirements of this chapter [31 U.S.C. §§ 7501 et seq.]; and
(ii) any applicable requirements concerning financial audits contained in Federal statutes and regulations governing programs under which such Federal awards are provided to that non-Federal entity.

* * *

(c) Each audit conducted pursuant to subsection (a) shall be conducted by an independent auditor in accordance with generally accepted government auditing standards, except that, for the purposes of this chapter [31 U.S.C. §§ 7501 et seq.], performance audits shall not be required except as authorized by the Director.

31 U.S.C. § 7502 (2011)

Standards for Ethical Conduct for Employees of the Executive Branch
Establishes general principles for ethical conduct of employees of the Executive Branch.

5 C.F.R. § 2635.101-.902 (2011)

State Small Business Credit Initiative Act of 2010 (P.L. 111-240)
Requires the Treasury IG to audit the States' use of Federal funds allocated under the State Small Business Credit Initiative.

Excerpt:
(c)(1)(C) Inspector general audits.—
(i) In general.--The Inspector General of the Department of the Treasury shall carry out an audit of the participating State's use of allocated Federal funds transferred to the State.
(ii) Recoupment of misused transferred funds required.--The allocation agreement between the Secretary and the participating State shall provide that the Secretary shall recoup any allocated Federal funds transferred to the participating State if the results of the an audit include a finding that there was an intentional or reckless misuse of transferred funds by the State.
(iii) Penalty for misstatement.--Any participating State that is found to have intentionally misstated any report issued to the Secretary under the Program shall be ineligible to receive any additional funds under the Program. Funds that had been allocated or that would otherwise have been allocated to such participating State shall be paid into the general fund of the Treasury for reduction of the public debt.
(iv) Municipalities.--In this subparagraph, the term "participating State" shall include a municipality given special permission to participate in the Program, under section 3004(d).
(D) Exception.--The Secretary may, in the Secretary's discretion, transfer the full amount of the participating State's allocated amount to the State in a single transfer if the participating State applies to the Secretary for approval to use the full amount of the allocation as collateral for a qualifying loan or swap funding facility.

12 USC § 5702 (2011)

Trade Secrets Act (P.L. 80-772)
Prohibits OIG's from disclosing confidential proprietary data obtained during the course of conducting their work unless such disclosure is authorized by law.

Excerpt:
§ 1905. Disclosure of confidential information
Whoever, being an officer or employee of the United States or of any department or agency thereof, any person acting on behalf of the Federal Housing Finance Agency, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311-1314), or being an employee of a private sector organization who is or was assigned to an agency under chapter 37 of title 5 [5 USCS §§ 3701 et seq.], publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment.

18 U.S.C. § 1905 (2011)

Treasury Forfeiture Fund Act of 1992 (P.L. 102-393)
Established a fund within the Department of Treasury to receive property forfeited by Treasury bureaus, and to make payments and awards associated with such forfeitures. Subsection (f) of the Act makes the fund subject to annual financial audits under the CFO Act.

Excerpt:
(f) The Fund shall be subject to annual financial audits as authorized in the Chief Financial OfficersAct of 1990 (Public Law 101-576).

31 U.S.C. § 9703 (2011)

United States Mint Reauthorization and Reform Act of 1992 (P.L. 102-390)
Requires the Treasury IG to perform, or designate a public accounting firm to perform, an annual financial statement audit of the Mint. Subsection (e) (3) of 31 U.S.C. § 5134 requires an audit of the annual financial statements of the Mint Public Enterprise Fund, to be done by the OIG or by an independent external audit, as designated by the Secretary.

Excerpt:
(3) Annual audits.
(A) In general. Each annual financial statement prepared under paragraph (1) shall be audited--
(i) by--
(I) an independent external auditor; or
(II) the Inspector General of the Department of the Treasury, as designated by the Secretary; and
(ii) in accordance with the generally accepted Government auditing standards issued by the Comptroller General of the United States.

31 U.S.C. § 5134 (2011)

Whistleblower Protection Act of 1989 (P.L. 101-12)
Protects the rights of, and prevents reprisals against, Federal employees who disclose governmental fraud, waste, abuse, and other types of corruption or illegality.

Excerpt:
§ 1213. Provisions relating to disclosures of violations of law, gross mismanagement, and certain other matters
(a) This section applies with respect to--
(1) any disclosure of information by an employee, former employee, or applicant for employment which the employee, former employee or applicant reasonably believes evidences--
(A) a violation of any law, rule, or regulation; or
(B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; and
(2) any disclosure by an employee, former employee, or applicant for employment to the Special Counsel or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures of information which the employee, former employee, or applicant reasonably believes evidences--
(A) a violation of any law, rule, or regulation; or
(B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

* * *

(h) The identity of any individual who makes a disclosure described in subsection (a) may not be disclosed by the Special Counsel without such individual's consent unless the Special Counsel determines that the disclosure of the individual's identity is necessary because of an imminent danger to public health or safety or imminent violation of any criminal law.

5 U.S.C. § 1213 (2011)

Section 6

Criminal Statutes Enforced by OIG

CRIMINAL STATUTES AFFECTING OIG

Title 18, Chapter 31 Embezzlement and Theft

- § 641 Public money, property or records
- § 643 Accounting generally for public money
- § 648 Custodians, generally, misusing public funds
- § 649 Custodians failing to deposit moneys; persons affected
- § 653 Disbursing officer misusing public funds
- § 654 Officer or employee of United States converting property of another
- § 656 Theft, embezzlement, or misapplication by bank officer or employee
- § 664 Theft or embezzlement from employee benefit plan
- § 665 Theft or embezzlement from employment and training funds; improper inducement; obstruction of investigations
- § 666 Theft or bribery concerning programs receiving Federal funds
- § 669 Theft or embezzlement in connection with health care

Title 18, Chapter 33 Emblems, Insignia and Names

- § 701 Official badges, identification cards, other insignia
- § 712 Misuse of names, words, emblems, or insignia

Title 18, Chapter 47 Fraud and False Statements

- § 1001 Statements or entries generally
- § 1002 Possession of false papers to defraud United States
- § 1003 Demands against the United States
- § 1028 Fraud and related activity in connection with identification documents and information
- § 1029 Fraud and related activity in connection with access devices
- § 1030 Fraud and related activity in connection with computers
- § 1031 Major fraud against the United States