



DEPARTMENT OF JUSTICE | OFFICE OF THE INSPECTOR GENERAL

May 24, 2021

The Honorable Carolyn Maloney, Chairwoman
Committee on Oversight and Reform
U.S. House of Representatives

The Honorable James Comer, Ranking Member
Committee on Oversight and Reform
U.S. House of Representatives

Dear Chairwoman Maloney and Ranking Member Comer:

I write to express my strong support for H.R. 2662, the IG Independence and Empowerment Act of 2021, in advance of the House Oversight and Reform Committee's upcoming business meeting to consider this important legislation. For over four decades, since the 1978 passage of the Inspector General Act, Congress has routinely, and on a bipartisan basis, passed legislation to strengthen the authorities and jurisdiction of Inspectors General (IG) to ensure that our community has the tools necessary to root out waste, fraud, and abuse in the federal government.

As the chief investigative body of the House of Representatives, the Oversight and Reform Committee has a shared mission with the IG community and a proud tradition of support for IG reform efforts. This support has come from a long line of Chairs and Ranking Members from both parties without regard to the political party of the current administration. The leadership of this Committee has long recognized that IG reform legislation, and the principles it promotes – accountability, transparency, and efficiency in government programs – are not partisan.

For example, the Committee on Oversight and Reform's leadership was critical in the 2016 efforts to pass the Inspector General Empowerment Act, which, among other important reforms, clarified our community's access to all agency information and records without exception. Without this reform, it would have been exceedingly difficult to complete many of my office's recent high profile reviews, including our reviews of the Department of Justice's (DOJ or Department) and Federal Bureau of Investigation's (FBI) actions in advance of the 2016 election and our December 2019 "Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation." To ensure that my office, and all IGs, are able to continue our efforts to promote more accountable and effective government, I encourage continued bipartisan support for IG reform legislation from this Committee.

I am appreciative of the Committee's efforts to improve IG authorities and independence broadly, but write to emphasize two provisions in H.R. 2662 that are particularly important to the DOJ Office of the Inspector

General (OIG): (1) expanding DOJ OIG's jurisdiction to cover investigations of professional misconduct by DOJ attorneys; and (2) providing IGs with testimonial subpoena authority.

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

H.R. 2662 incorporates the provisions of the IG Access Act, H.R. 3064 and S. 426, which extend DOJ OIG's jurisdiction to include allegations of professional misconduct by Department attorneys. Last Congress, as one of its first legislative actions, the House of Representatives passed the IG Access Act by unanimous voice vote with no opposition. And, earlier this month, a bipartisan group of Representatives, including the Chairwoman and Representatives Ross, Issa, Raskin, Hice, and Connolly, reintroduced the legislation as a standalone bill. The Senate has also reintroduced this legislation, under the leadership of Chairman Durbin and Senator Lee, with support from nearly every Democratic and Republican member of the Senate Judiciary Committee.

The IG Access Act has received broad, bipartisan support over successive Congressional sessions because it promotes independent oversight, transparency, and accountability within DOJ for all of its employees, including Department prosecutors. The DOJ OIG is the only Inspector General in the federal government that does not have the authority to investigate alleged misconduct, including professional misconduct, by attorneys who work in the agency it oversees. As I have stated many times in past Congressional testimony, there is no principled basis for authorizing OIG oversight of DOJ law enforcement personnel, such as FBI agents, while excluding DOJ lawyers from that same OIG oversight. Providing the DOJ OIG with the authority to exercise jurisdiction in attorney professional misconduct cases would enhance the public's confidence in the outcomes of these investigations and provide the OIG with the same authority as every other IG.

In 2018, I wrote to the leadership of this Committee and provided a detailed basis for my support for this important legislation. Those reasons remain equally important today, and I have attached that correspondence to this letter (*See Letter from DOJ OIG to the Honorable Trey Gowdy and the Honorable Elijah Cummings, November 29, 2018*). Rather than reiterate those points here, I would like to address several issues that were raised by the National Association of Assistant United States Attorneys (NAAUSA) in an opinion piece published by Law360 on April 14, and in a letter to this Committee, dated May 3, 2021 (the opinion piece and article are also attached to this letter). As a former Assistant United States Attorney (AUSA), I understand the unique pressures faced by Department prosecutors in their efforts to enforce the nation's criminal laws. Because of this, I believe I am also well positioned to respond to the concerns raised by the NAAUSA.

At the outset, I want to note that I was pleased to see that the NAAUSA, as stated in its opinion piece, fully agrees with the OIG that oversight of misconduct by DOJ lawyers should be handled by a statutorily-independent entity within DOJ, just as misconduct allegations against FBI and other DOJ law enforcement agents and non-lawyers are currently handled. The opinion piece states, "the National Association of Assistant United States Attorneys supports establishing the [Office of Professional Responsibility] as a

completely independent office, similar to the OIG, that is not subject to the supervision of the attorney general.” The NAAUSA therefore proposed that “the chief of professional responsibility would be a presidential appointment with U.S. Senate confirmation, just like the inspector general, and outside the chain of command of the attorney general.” While I completely agree with the NAAUSA on this principle, there already exists such a statutorily-independent entity within DOJ that has a demonstrated ability to conduct such oversight, namely the OIG.

Let me briefly address some of the other issues and misconceptions raised by the NAAUSA, and clearly state how the OIG would handle this new authority:

- **The OIG would assign only attorneys to review professional misconduct cases, using the exact same standards currently used by the DOJ Office of Professional Responsibility (OPR).** The primary goal of the IG Access Act is to promote public confidence in investigations of attorney misconduct in the circumstances where the OIG’s statutory independence would serve this purpose. The goal of this legislation is not to upend the current system or process for most allegations of professional misconduct, which will continue to be handled by OPR. The NAAUSA letter wrongly states that the legislation “conflates” OIG criminal and administrative misconduct investigations, which are typically staffed by OIG criminal special agents, with investigations of professional misconduct. To emphasize the point, the NAAUSA letter asks rhetorically, “Are OIG agents or other professionals of the OIG truly proficient in the ethical concepts and rules of professional conduct associated with an OPR review?” To be clear, this question is irrelevant, because OIG agents would not be assigned to investigate these misconduct cases. The OIG employs dozens of attorneys whose backgrounds and experiences are similar to the lawyers in OPR, including former prosecutors and Department attorneys specializing in attorney ethics, in both the OIG’s leadership and our Oversight and Review Division, which would be handling the professional misconduct allegations. This group of OIG attorneys are from the same OIG division that led our review of the FISA abuse allegations, the Clinton email and Comey memos investigations, our review of the Bureau of Alcohol, Tobacco, Firearms, and Explosives’ (ATF) Operation Fast and Furious, and other sensitive and complex matters. They have also handled the numerous ethics issues that have arisen in our reviews and investigations. Moreover, the OIG is committed to adopting the same substantive criteria currently used by OPR to ensure consistency in how professional misconduct allegations are assessed by our offices. In short, if the IG Access Act is adopted, there will continue to be only one standard applied in attorney misconduct cases, and those matters will only be investigated by experienced attorneys.
- **The OIG would work effectively and efficiently with OPR to review attorney misconduct allegations, as it has done with the internal affairs offices at each of the Department’s components.** The IG Access Act would result in a process for reviewing attorney misconduct allegations that is identical to the system that currently exists across DOJ for non-attorney misconduct allegations. The OIG would develop a standard process with OPR, as exists with each of the other internal affairs offices across the Department’s law enforcement components, for reviewing incoming allegations and the OIG

would then decide whether it would investigate the allegations. The concern expressed in NAAUSA's letter that the "lives and professional decisions of DOJ attorneys will be fodder for turf wars between OPR and DOJ OIG" is not born out by decades of experience, during which the OIG has coordinated effectively with the internal affairs offices at the FBI, ATF, Drug Enforcement Administration, Federal Bureau of Prisons, U.S. Marshals Service , and other Department components. These processes with the other components have not resulted in different investigative standards, "turf wars," or inconsistent application of legal standards. In fact, the disciplinary processes at the FBI and DEA, in particular, have substantially improved since the OIG obtained statutory oversight authority over those components in 2002, in significant part due to the greater transparency and accountability that has resulted from the OIG's oversight. From a good government standpoint, the process for identifying the investigating office in attorney misconduct matters would become more efficient, not less, because the legislation would clarify the OIG's ability to investigate these matters, and eliminate the sometimes painstaking, inefficient discussions that currently take place between the OIG and Department leadership when an allegation is made that lies somewhere in between the OIG's and OPR's current jurisdiction.

- **The IG Access Act is needed precisely because the Department has consistently denied the OIG's requests to investigate serious allegations of professional misconduct by lawyers, including the circumstances under which Jeffrey Epstein received a non-prosecution agreement from the Southern District of Florida.** The NAAUSA letter also asserts that because current law allows the OIG to investigate attorney professional misconduct with the approval of the Deputy Attorney General, there is no need for the IG Access Act. Although NAAUSA is correct that existing Department regulations allow the OIG to request authority from the Deputy Attorney General to conduct a professional misconduct investigation, the reality is that in every instance where the OIG has made a request pursuant to the regulation, the then Deputy Attorney General has denied the OIG's request, including the Epstein case. Moreover, requiring the OIG to request permission from Department leadership to handle a matter, and empowering the Deputy Attorney General to "block" OIG oversight of a serious misconduct allegation, undermines IG independence and is inconsistent with the Inspector General Act.

For these and all of the reasons reflected in my prior correspondence to the Committee, I thank you for advancing the IG Access Act, and encourage you and your Senate colleagues to pass this important reform as part of H.R. 2662, the IG Independence and Empowerment Act.

Testimonial Subpoena Authority

Within H.R. 2662, another critical good government reform for both my office, and the IG community more broadly, is the authority to subpoena witnesses for testimony in IG investigations and reviews. This Committee has been a leader on this critical issue for well over a decade, with nearly every Chair and Ranking Member of the Committee since 2009, including Representatives Towns, Issa, Cummings, Chaffetz,

Gowdy, Meadows, and the Current Chair, Ms. Maloney, either sponsoring or moving IG testimonial subpoena authority legislation through the Committee.

As I have noted on multiple occasions in testimony before this Committee, both in my past role as Chair of the Council of Inspectors General for Integrity and Efficiency (CIGIE) and as the DOJ IG, I strongly support granting IGs testimonial subpoena authority because the absence of such authority hinders the ability of OIGs to conduct complete oversight. Without this authority, OIGs are unable to obtain potentially critical evidence from former federal employees, employees of federal contractors and grant recipients, and other non-government witnesses unless they voluntarily agree to be interviewed. For example, a federal employee's resignation or retirement enables the former employee to avoid being interviewed by an OIG about serious misconduct the former employee allegedly engaged in while working for the federal government. Similarly, an OIG's inability to compel testimony from federal contractors and grant recipients can result in the OIG being unable to gather sufficient evidence to hold the contractor or grant recipient accountable for waste, fraud, and abuse in connection with the use of federal funds, and therefore affects our ability to recover misused federal funds. In addition, an OIG's access to relevant testimony from witnesses who are former federal employees, or employees of contractors and grant recipients, is often essential in order for OIGs to conduct complete investigations of employees, including conducting effective whistleblower retaliation investigations.

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

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

As these examples indicate, the need for this authority has crossed administrations of both parties. IG testimonial subpoena authority has been a top CIGIE legislative priority since the first year of the Obama administration. The Oversight and Reform Committee first introduced IG testimonial subpoena authority legislation in 2009 with the support of then-Chairman Towns and Ranking Member Issa. Bipartisan support for this reform has continued because Members of Congress from both parties have recognized that any effort to impede IG oversight also interferes with Congressional oversight (*See, e.g.*, statement of Rep. Mark Meadows, upon Committee approval of H.R. 5492, the “Inspector General Empowerment Act,” September 17, 2014, available at: <https://oversight.house.gov/news/press-releases/oversight-committee-approves-bipartisan-inspector-general-empowerment>).

I note that H.R. 2662, and the stand alone testimonial subpoena authority legislation introduced by Representative Gomez, H.R. 2089, both contain appropriate safeguards to ensure the judicious exercise of testimonial subpoena authority by IGs, including allowing the Attorney General an opportunity to object to the issuance of a subpoena. In sum, this bill would greatly enhance the OIGs’ ability to access important evidence, while also putting in place appropriate safeguards to protect against any negative impact to the Department’s criminal law enforcement equities.

I encourage all members of the Committee to support these important reforms, in the long bipartisan tradition of this Committee on such matters, and to improve government effectiveness and accountability. Thank you for your support for the DOJ OIG’s work and the work of all OIGs. If you have any questions, please feel free to contact me or Adam Miles, Senior Counselor to the Inspector General, at (202) 514-3435.

Sincerely,

Michael E. Horowitz
Inspector General

cc: The Honorable Gary Peters, Chairman
Senate Committee on Homeland Security and Governmental Affairs

The Honorable Rob Portman, Ranking Member
Senate Committee on Homeland Security and Governmental Affairs

The Honorable Richard Durbin, Chairman
Senate Judiciary Committee

The Honorable Charles Grassley, Ranking Member
Senate Judiciary Committee

The Honorable Jerrold Nadler, Chairman
House Judiciary Committee

The Honorable Jim Jordan, Ranking Member
House Judiciary Committee