



May 24, 2021

The Honorable Carolyn Maloney
Chair, House Committee on Oversight and Reform
2157 Rayburn House Office Building
Washington, D.C. 20515

The Honorable James Comer
Ranking Member, House Committee on Oversight
and Reform
2105 Rayburn House Office Building
Washington, D.C. 20515

Dear Chair Maloney, Ranking Member Comer, and Members of the Committee:

Ahead of the Committee's business meeting on May 25, National Taxpayers Union (NTU) and R Street Institute urge the Committee to work in a bipartisan manner to advance various improvements to the laws protecting inspectors general (IG) from political interference. Many of these potential reforms are embedded in the recently introduced IG Independence and Empowerment Act.¹

The IG system has protected taxpayers against waste, fraud, abuse, and misuse of federal funds for decades. Unfortunately, Congressional enhancements and improvements to IG protections have not kept pace with the scale of challenges facing the independent and persistent work of federal IGs -- nor have they kept pace with the extraordinary expansion in the size and scope of the federal government.

NTU and R Street are pleased to support several provisions in the IG Independence and Empowerment Act that we believe would better protect IGs from political interference, whether by the Biden administration or any future presidential administration. These reforms include:

- Requiring more reporting from the executive branch to Congress when a President removes an IG or places them on non-duty status;
- Requiring more reporting from the President when they fail to fill an IG vacancy after more than seven months;
- Allowing the Department of Justice's (DOJ) IG to investigate DOJ personnel, closing a long-troublesome loophole in federal law and better enabling the DOJ IG to call out abuse of power or undue political influence at the Justice Department;
- Requiring improvements to how IG whistleblower protection coordinators educate Office of Inspector General (OIG) employees on whistleblower complaints *internal* to that OIG;
- Requiring IGs to report to Congress when an agency refuses to cooperate with an IG investigation; and
- Improving transparency at the Council of the Inspectors General on Integrity and Efficiency (CIGIE), a watchdog for the watchdogs that helps ensure the IG system continues to work effectively for taxpayers and is free from partisan or political bias.

¹ Congress.gov. (Introduced April 19, 2021). "H.R.2662 - IG Independence and Empowerment Act." Retrieved from: <https://www.congress.gov/bill/117th-congress/house-bill/2662> (Accessed May 20, 2021.)

Many of these reforms would not only better protect IGs from interference with their independent and non-partisan work, but would better enable lawmakers in Congress to conduct rigorous oversight over the Biden administration and the administration of all future presidents.

We also appreciate that lawmakers sponsoring the IG Independence and Empowerment Act have continued an important and ongoing conversation about for-cause removal protections for IGs. We understand that this subject is of some considerable legal and constitutional debate, and hope that lawmakers work together in a bipartisan manner on a number of reforms -- including those mentioned above -- that could better protect IGs from being fired for investigating a President, their allies, or their top deputies.

We are further pleased to see that enhancing IG protections is of bipartisan and bicameral interest -- the Securing Inspector General Independence Act (SIGIA) from Sens. Chuck Grassley (R-IA) and Gary Peters (D-MI) retains strong bipartisan support and includes provisions similar to those mentioned above. NTU and R Street stand ready to work with lawmakers of all ideological stripes to ensure a strong piece of legislation reaches President Biden's desk this year.

Thank you for your consideration of our views, and should you have any questions we are at your service.

Sincerely,

Andrew Lautz
Director of Federal Policy
National Taxpayers Union

Jonathan Bydlak
Director, Governance; Resident Senior Fellow
R Street Institute

CC: Members of the House Committee on Oversight and Reform



May 19, 2021

The Honorable Carolyn Maloney
2308 Rayburn House Office Building
Washington, DC 20515

Dear Chairwoman Maloney:

I am writing on behalf of the Project On Government Oversight (POGO) to express our enthusiastic support of H.R. 2662, the IG Independence and Empowerment Act.¹

POGO is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

The work of our independent federal watchdogs—inspectors general (IGs)—has continually resulted in substantial financial savings for the federal government. For example, the self-reported return on investment in fiscal year 2020 was \$17 for every \$1 spent on IG activities.² That is not to say that the system has reached its full potential. Especially at a time when the public is gravely concerned about government corruption, it is critical that these watchdogs have the resources, independence, and accountability they need to root out all forms of corruption in our government.

The IG Independence and Empowerment Act represents a comprehensive approach to some of the biggest issues the inspector general community faces today, and I urge Congress to prioritize enacting it. Among other necessary improvements, this legislation would insulate inspectors general from unwarranted removal; improve their ability to conduct full investigations; and ensure that in the event of a vacancy, temporary leadership in these offices is qualified and conflict-free.

¹ IG Independence and Empowerment Act, H.R. 2662, 117th Cong. (2021). <https://www.congress.gov/bill/117th-congress/house-bill/2662/text>

² Council of the Inspectors General on Integrity and Efficiency, *Fiscal Year 2020 Annual Report to the President and Congress* (2021). https://www.ignet.gov/sites/default/files/files/FY20_Annual_Report_to_the_President_and_Congress.pdf.pdf

The public and Congress depend on inspectors general to ensure our federal agencies are functioning effectively. We strongly urge Congress to pass this legislation expeditiously so that these watchdogs have the necessary independence and authorities to do their critical work.

Sincerely,

A handwritten signature in blue ink that reads "Danielle Brian". The signature is fluid and cursive, with the first name "Danielle" and last name "Brian" clearly distinguishable.

Danielle Brian
Executive Director



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



U.S. Department of Justice

Office of the Inspector General

November 29, 2018

The Honorable Trey Gowdy
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, DC 20515

The Honorable Elijah E. Cummings
Ranking Member
Committee on Oversight and Government Reform
U.S. House of Representatives
2471 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman and Ranking Member Cummings:

I write to express my strong support for H.R. 3154, the "Inspector General Access Act of 2017" (Access Act), which your Committee approved unanimously on September 27, 2018. The Access Act would amend the Inspector General Act (IG Act) to provide the Department of Justice (DOJ) Office of the Inspector General (OIG) with authority to investigate allegations of misconduct against DOJ attorneys for their actions as lawyers, just as the OIG has authority under the IG Act to investigate allegations of misconduct made against any non-lawyer in the Department, including law enforcement agents at the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), and the U.S. Marshals Service (USMS). Currently, under Section 8E of the Inspector General Act, the OIG does not have the authority to investigate allegations of misconduct made against DOJ attorneys acting in their capacity as lawyers; this role is reserved exclusively for the Department's Office of Professional Responsibility (OPR).

The Access Act has received broad, bipartisan support over successive Congresses because it promotes independent oversight, transparency, and accountability within DOJ and for all of its employees. For these same reasons, in 1994, the then-*General Accounting Office*, now the Government Accountability Office (GAO), issued a report that found that preventing the OIG from investigating attorney misconduct was inconsistent with the independence and accountability that Congress envisioned under the IG Act.

The OIG has long questioned this carve-out because OPR lacks statutory independence and does not regularly release its reports and conclusions to the public. Moreover, to our knowledge, the DOJ Inspector General is the only Inspector General in the entire federal government that does not have the authority to investigate alleged professional misconduct by attorneys who work in the agency it oversees. Providing the OIG with 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 Inspector General.

Alleged professional misconduct by DOJ prosecutors, like any alleged misconduct by DOJ agents, should be subject to statutorily independent oversight.

Over fifteen years ago, the Department and Congress recognized the importance of statutorily independent OIG oversight over all DOJ law enforcement components (FBI, DEA, USMS, and ATF) when Attorney General Ashcroft authorized the OIG to conduct additional law enforcement oversight in 2001 and Congress legislated it in 2002. Yet, allegations against Department prosecutors for professional misconduct continue to be handled exclusively by OPR. As a result, presently, if an allegation of misconduct is made against the FBI Director, it is reviewed by the OIG; by contrast, if an allegation of professional misconduct is made against the Attorney General, it is handled by OPR, a Departmental component that the Attorney General supervises.

The rationale supporting independent oversight for alleged misconduct by law enforcement applies with equal force to alleged wrongdoing by federal prosecutors, regardless of the nature of the alleged misconduct. There is no principled reason to have two standards of oversight at DOJ – one for federal agents, who are subject to statutorily independent and transparent oversight by the OIG, and one for federal prosecutors, who are not for allegations of professional misconduct. This is particularly true given the extraordinary power that Department lawyers have to charge individuals with crimes, to seek incarceration, and to pursue the seizure of assets and property.

The OIG's independence, established by statutory authorities and protections, facilitates objective and credible investigations of misconduct allegations, as well as unbiased reports that identify and make useful recommendations for improving the Department. The OIG is headed by a Senate-confirmed Inspector General who can only be removed by the President, with prior notice to Congress. The OIG's statutory independence is bolstered by the OIG's dual obligation to report findings and concerns both to the Attorney General and to Congress. The independent OIG is able to make critical investigative and audit findings without fear of reprisal.

Conversely, OPR has no statutory independence or protections. The OPR Counsel is appointed by and answers to the Attorney General, and can be removed or disciplined by the Attorney General. Although a November 27, 2018 letter from DOJ's Office of Legislative Affairs (OLA) on H.R. 3154 states that "OPR has always acted independently," it does not point to any protections, statutory or otherwise, that exist to ensure OPR's independence from the Attorney General, nor has DOJ proposed strengthening OPR's independence by adding such protections. Indeed, the letter fails to explain or even address why DOJ believes it is better to have a non-statutorily independent entity handle attorney professional misconduct cases rather than a statutorily independent organization, as is the case for law enforcement professional misconduct allegations.

The OIG's independent and transparent oversight enhances the public's confidence in the DOJ's programs and improves its operations.

In addition to independence, the OIG considers transparency a crucial component of its oversight mission. With limited exceptions, the OIG ensures that the public is aware of the results of our work. The majority of our reports are posted on our public website at the time of release to ensure that Congress and the public are informed of our findings, in a comprehensive and timely manner. The OIG, consistent with the IG Act, publishes on our website summaries of investigations resulting in findings of administrative misconduct by senior government employees and in matters of public interest even when the subject is not prosecuted. We post such summaries without identifying the investigative subject consistent with the legal requirements under the Privacy Act. Because of this commitment to transparency, there are currently hundreds of OIG reports, audits, and reviews posted on our web site. There are also summaries of dozens of OIG investigative reports posted, including recent reports involving significant misconduct by senior DOJ officials.

In contrast, there are currently only a total of five reports (other than annual reports) posted on [OPR's website](#). Four of those five reports are from 2008 and were the result of OPR's joint work with the OIG, and which the OIG posted on our website consistent with the IG Act and our practice. The fifth report was completed by OPR in 2013 and only released in 2015 in response to a Freedom of Information Act (FOIA) request. Moreover, although the OLA letter states that "OPR discloses a substantial amount of information about its work and findings in its annual report," this information is not reported in a timely or comprehensive manner. Congress and the public only find out about some, but not necessarily all, of OPR's work when it issues an annual report.

An example of this dichotomy can be found in a case involving an Oregon lawyer who was arrested by the FBI and wrongly imprisoned after mismatched fingerprints linked him to the 2004 bombing at a Madrid train station. The OIG investigated the allegations of FBI agent misconduct, while the Department's

OPR investigated the allegations of attorney misconduct. This bifurcation led to inconsistent treatment. The OIG report on the actions of the FBI agents was published on the OIG's website, but OPR did not publish the report on the conduct of the DOJ attorneys who were involved in the same case.

Transparency ensures greater accountability, and sends an important deterrent message to other Department employees. The credibility of the Department's disciplinary process is inevitably reduced when the responsible component operates under the direction of the Department's senior leadership and is not subject to public scrutiny because of limited transparency.

The OIG has demonstrated its excellence in reviewing complex legal and factual issues, including employee ethics and misconduct matters.

Over the past 30 years, the OIG has shown that it is capable of fair and independent oversight of the DOJ. The jurisdictional limitation of Section 8E(b)(3) is an unnecessary historical vestige of the fact that OPR was in existence prior to the statutory creation of the OIG in 1988. Those who unsuccessfully tried in 2002 to forestall Congress from providing the OIG with oversight of alleged misconduct by FBI and DEA agents contended that those cases required specialized expertise – just like the Department argues currently that prosecutorial oversight requires specialized expertise – and that argument was roundly rejected and has proven to be entirely without merit. The decision by Congress to extend OIG jurisdiction in 2002 to encompass misconduct by FBI and DEA agents has allowed for significant and important oversight of DOJ's law enforcement operations, and has had significant positive impact on the integrity of those agencies' operations.

The OIG has consistently demonstrated our ability to handle complex legal and factual issues related to our misconduct reviews, including those involving FBI and DEA agents as well as, on occasion, ethics issues involving DOJ lawyers. In addition to our recent investigation of the FBI's actions prior to the 2016 presidential election, which involved evaluating the professional conduct by FBI agents, FBI lawyers, and FBI senior officials, we have investigated the FBI's actions involving its former agent Robert Hanssen, the FBI's activities related to James "Whitey" Bulger, the DEA's oversight of its confidential informant program, the DEA and other components' handling of sexual misconduct and harassment cases, the operation of the FBI laboratory, ATF's actions involving Operation Fast and Furious, and the FBI's use of its national security authorities (National Security Letters, Patriot Act Section 215, FISA Amendment Act Section 702).

Each of those and many other reviews resulted in independent and transparent findings by the OIG, and resulted in changes to Department operations that enhanced their effectiveness and thereby increased the public's confidence in those programs. Moreover, OIGs throughout the government,

including at the Department of Homeland Security and the Securities and Exchange Commission, have authority to investigate misconduct allegations made against attorneys at those agencies and they have demonstrated that they are fully capable of dealing with such matters covering a wide range of complex legal issues. The DOJ OIG is the only OIG, to our knowledge, that is barred by the IG Act from reviewing misconduct by lawyers within the agency it oversees.

The Access Act would provide the OIG with oversight over Department lawyers in a manner that is entirely consistent with its oversight authority over Department non-attorneys.

The present oversight system that applies to allegations made against any DOJ non-lawyer, as provided for in the IG Act and Department regulations, is precisely the oversight mechanism that the Access Act seeks to apply to Department lawyers. Specifically, under the current system for DOJ non-lawyers, all non-frivolous misconduct allegations must be provided to the OIG for the OIG's review and determination as to whether it is of the type and nature that warrants and necessitates independent OIG investigation. Given the OIG's limited resources, the OIG handles only those allegations that warrant an independent OIG investigation, and therefore the OIG returns routine and less serious misconduct allegations to Department components, such as the FBI's Inspections Division and the DEA's OPR, for their handling and investigation. For those matters that the OIG retains, when the OIG completes its investigation, it sends its report to the component so that it can adjudicate the OIG's findings and take disciplinary action, as appropriate. The Access Act creates a similar practice, by maintaining the Department's OPR to handle misconduct allegations that do not require independent outside review as determined by the OIG, much as the internal affairs offices at the FBI, DEA, ATF, and USMS remain in place today.

We are unaware of any claims by Department leaders that this approach has resulted in "different investigative standards," "decrease[d] efficiency," or "inconsistent application" of legal standards. There is no evidence that it has impacted the components "ability to successfully defend any significant discipline decision before the Merit Systems Protection Board." Yet this parade of horrors is precisely what the OLA letter claims will occur if attorneys are treated in the same manner as Special Agents and non-attorneys at the Department, rather than continuing to receive the special oversight treatment granted to them under the current carve-out provision under the IG Act. This argument is meritless. Indeed, the disciplinary processes at the FBI and the DEA 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.

I very much appreciate your strong support for my Office and for Inspectors General throughout the federal government. If you have further

questions, please feel free to contact me or Adam Miles, Counselor to the Inspector General, at (202) 514-3435.

Sincerely,



Michael E. Horowitz
Inspector General

cc: The Honorable Charles Grassley
Chairman, Senate Judiciary Committee
Co-Sponsor, S. 3003

The Honorable Dianne Feinstein
Ranking Member, Senate Judiciary Committee

The Honorable Bob Goodlatte
Chairman, House Judiciary Committee

The Honorable Jerrold Nadler
Ranking Member, House Judiciary Committee

The Honorable Ron Johnson
Chairman, Senate Committee on Homeland Security and Governmental
Affairs

The Honorable Claire McCaskill
Ranking Member, Senate Committee on Homeland Security and
Governmental Affairs

The Honorable Cedric Richmond
Sponsor, H.R. 3154

The Honorable Jody Hice
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The Honorable Stephen Lynch
Co-Sponsor, H.R. 3154

The Honorable Mike Lee
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The Honorable Lisa Murkowski
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May 3, 2021

Chairwoman Carolyn Maloney
Committee on Oversight and Reform
2157 Rayburn House Office Building
Washington, DC 20515

Ranking Member James Comer
Committee on Oversight and Reform
2105 Rayburn House Office Building
Washington, DC 20515

RE: Inspector General Access Act of 2019, H.R. 202

Dear Chairwoman Maloney, Ranking Member Comer, and Members of the Committee:

On behalf of the National Association of Assistant United States Attorneys (NAAUSA), representing the interests of over 6,000 Assistant U.S. Attorneys working in the 94 U.S. Attorney Offices, I write you to express our strong concerns with and opposition to the Inspector General Access Act of 2019 as introduced.

NAAUSA believes that Assistant U.S. Attorneys and all DOJ attorneys should be held to the highest standards – and we believe the systems currently in place do support and enforce those standards fairly.

This legislation erroneously conflates “fraud, waste and abuse” investigations into criminal and administrative misconduct traditionally handled by the Department of Justice (DOJ) Office of the Inspector General (OIG) with investigations into attorney professional misconduct handled by the specialized DOJ Office of Professional Responsibility (OPR). They are not the same, which Congress has historically recognized by maintaining the Section 8E carve out from the Inspector General Act for DOJ attorney professional misconduct to be investigated by OPR.

The OIG uses criminal investigators whose instincts and training are to look for potential crimes. OPR uses attorneys as investigators who are trained to apply the ethics and professional rules of attorney conduct. Their backgrounds and focal points are alarmingly different. These distinctions have a real potential for achieving different investigative results when applied to the same case. 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? This legislation provides no mechanism to ensure that is so.

OPR was established in 1975. Its stated purpose: to ensure that DOJ attorneys perform their duties in accordance with the highest professional standards expected of the nation’s principal law enforcement agency. OPR investigators have unique expertise in navigating complex legal and ethics standards applicable to attorneys within the DOJ that is unlike the process followed within the OIG for handling audits and fraud investigations. This includes navigating myriad state bar rules, which requires established relationships across the nation that OPR maintains. Decisions within OPR are made based on an independent analytical framework and established procedures and precedents developed and solidified since the

Office's creation. This has led to the formation of a highly independent, skilled OPR that reaches conclusions based on an impartial application of clearly defined principles.

OPR's expertise is in the ethical and professional rules of conduct that govern the practice of law by each DOJ attorney. These rules are specific to only attorneys, which is the obvious reason why DOJ, and no other Department in government, has an office like OPR to review allegations against attorneys. Whereas attorneys in private practice are subject to Bar investigations and proceedings for allegations of professional misconduct (conducted by trained Bar counsel), DOJ attorneys first face OPR.

Furthermore, OPR has a transparent process for disclosing summaries of its investigations, statistical information, and procedural information through various means such as annual reports, releases to the public published on the OPR website, and reports to Congress. To the extent that Congress is concerned about transparency related to specific individual cases, OPR is constrained by the same Privacy Act considerations as the OIG in terms of disclosing specific information about individual DOJ attorneys. Throughout its history, OPR has acted with independent, impartial and transparent procedures.

This legislation leaves it to the OIG's discretion to determine if it would like to review a case of professional misconduct. At best, this will create inconsistent results and rulings by removing the standardized and dependable method of reviewing cases of attorney professional misconduct. Moreover, it means the lives and professional decisions of DOJ attorneys will be fodder for turf wars between OPR and DOJ OIG, because Congress provides no guidance nor mechanism for adjudicating when both will want to conduct investigations.


It must also be noted that the law already allows the OIG to investigate attorney professional misconduct, with the approval of the Deputy Attorney General.

Expanding the OIG's oversight into attorney professional misconduct cases could undermine the consistent accountability standards necessary for reviewing DOJ attorney professional misconduct and maintaining high standards. It also would produce duplicative efforts and ineffectively capitalize on specialized offices with dedicated skill sets that all available data demonstrate serve the Department and taxpayers well.

For these reasons, we strongly oppose inclusion of the Inspector General Access Act within the broader IG Independence and Empowerment Act.

Thank you for considering the perspective of NAAUSA. Please do not hesitate to reach out to Jason Briefel (jbriefel@shawbransford.com) if we can be of further assistance on this matter.

Respectfully,

A handwritten signature in black ink, appearing to read "Lawrence J. Leiser".

Lawrence. J. Leiser
President



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DOJ Accountability Bill Is Flawed And Inadequate

By **Steven Wasserman** (April 14, 2021, 4:34 PM EDT)

The Inspector General Access Act, or S. 426, has been framed as necessary for increasing accountability and transparency within the U.S. Department of Justice, making it politically toxic to oppose.

However, this legislation is deeply flawed and does more to create a perceived sense of accountability than an actual one. Attorney accountability is an important premise for maintaining justice in our country, and it deserves more than inadequate legislative initiatives.

The IG Access Act, which is being considered in the Senate Judiciary Committee, would eliminate Section 8E of the Inspector General Act of 1978, which placed attorney professional misconduct investigations under the specialized Office of Professional Responsibility, or OPR, within the DOJ.

The National Association of Assistant United States Attorneys, which represents the interests of over 6,300 career assistant United States attorneys, including myself, is deeply concerned by the lack of understanding of the legislative history underpinning the creation of the OPR and the practical implications of the proposal should it be adopted.



Steven Wasserman

The DOJ employs attorneys in a range of positions, including as federal prosecutors, at a scale unlike other federal agencies. With the power to bring the weight of the federal government behind criminal prosecutions, the need to maintain the highest ethical and professional standards for DOJ attorneys is paramount.

That is why, in post-Watergate 1975, the OPR was created, and when the DOJ Office of the Inspector General was created in 1988, the OPR was maintained to serve as the unique, highly skilled office handling only allegations of attorney professional misconduct.

OPR investigators are experienced attorneys who have unique expertise in navigating complex legal and ethics standards applicable to attorneys within the DOJ. This includes navigating myriad state bar rules, which requires established relationships across the nation that the OPR maintains.

Decisions within the OPR are made based on an independent analytical framework and established procedures and precedents developed and solidified since the office's creation. These practices are vastly different from the process followed within the OIG for handling criminal audits and criminal fraud investigations.

Decades of precedent building and practiced procedure has led to the formation of a highly professional and skilled staff at the OPR that reaches conclusions based upon an impartial application of clearly defined principles. There is no evidence that the OPR conclusions are

affected by political considerations.

Indeed, organizations supporting the bill admit it addresses real and perceived issues of accountability around the conduct of federal attorneys, including federal prosecutors, but offers little supporting evidence of the issues they claim are real.

Rather than combatting perceived problems, Congress ought to identify a real problem before attempting to impose a solution. The issue of attorney accountability at the DOJ has not been subject to review by the U.S. Government Accountability Office in decades. A GAO review of the current OPR investigative process would assist Congress in identifying the existence, if any, of deficiencies in accountability and the proper steps for improvement.

Notwithstanding the purported goal of the IG Access Act to increase accountability, allowing the OIG to conduct attorney misconduct investigations will ultimately fail at achieving this end. The OIG is simply ill-equipped to handle these investigations.

The OIG uses criminal investigators whose instincts and training are to look for potential criminal conduct. The OPR uses attorneys as investigators who are trained to apply the ethics and state bar rules governing attorney conduct. The backgrounds and mission of the investigators for the respective offices are radically different. These distinctions have the significant potential for achieving different investigative results when applied to the same case.

Are OIG agents or other professionals of the OIG truly proficient in the ethical standards and rules of attorney professional conduct associated with an OPR review? This legislation provides no mechanism to ensure that is so. If the OIG were to develop this capability, how can Congress justify the duplicative expense?

Because the IG Access Act provides no guidance nor mechanism for determining when the OIG or the OPR should conduct a particular investigation, it means the careers and professional decisions of DOJ attorneys will be fodder for turf wars between the OPR and the OIG. This is to say nothing of the prospect that DOJ attorneys may also face parallel investigations by state bars.

The OPR has a transparent process for disclosing summaries of its investigations, statistical information and procedural information through various means such as annual reports, releases to the public published on the OPR website, and reports to Congress. To the extent that Congress is concerned about transparency related to specific individual cases, the OPR is constrained by the same Privacy Act considerations as the OIG concerning disclosing specific information about individual DOJ attorneys investigated for misconduct.

Rather than undoing decades of the professionalization by the OPR of investigating, reporting and holding attorneys accountable, the National Association of Assistant United States Attorneys supports establishing the OPR as a completely independent office, similar to the OIG, that is not subject to the supervision of the attorney general. Under this proposal, 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.

Congress could require similar transparency requirements on a new, independent Office of the Chief of Professional Responsibility as it already requires from the OIG for periodic reporting to Congress and the public. This model preserves and capitalizes on the unique expertise already existing within the OPR, including their specialized expertise focused on attorney professional misconduct and ethics, as opposed to conflating the expertise that resides within the OIG relating to investigating fraud, waste and abuse.

The OIG serves an important purpose at the DOJ — a department with a large contingent of employees involved in law enforcement. But the role of an attorney is distinguishable, as is demonstrated by the fact that all attorneys must be licensed by a state bar, and therefore must abide by a set of ethical and professional rules mandated by state bars and the federal courts in which they appear.

It seemed obvious to create an office within the DOJ to address the unique problems and challenges raised by allegations of misconduct against DOJ attorneys, who represent a large cadre of its employees. The OPR by all accounts has done that job well. Without any data to the contrary, it is wasteful and practically ineffective to seek to fix a system that is not broken.

Steven B. Wasserman is vice president for policy at the National Association of Assistant United States Attorneys, and an assistant U.S. attorney in the District of Columbia.

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