



*Council of the*  
**INSPECTORS GENERAL**  
*on INTEGRITY and EFFICIENCY*

September 18, 2009

The Honorable Joseph Lieberman  
Chairman, Senate Committee on Homeland Security and Governmental Affairs  
340 Dirksen Senate Office Building  
Washington, D.C. 20510

**Subject: Proposed Testimonial Subpoena Authority for Inspectors General**

Dear Senator Lieberman:

As Chair of the Legislation Committee of the Council of the Inspectors General on Integrity and Efficiency (CIGIE), I am writing to convey the results of a recent survey conducted to assess the level of support of the Inspector General (IG) community for expanded IG subpoena authority to include the attendance and testimony of non-Federal agency witnesses.

As further explained below, the survey results show that the IG community is overwhelmingly in favor of such an expansion of its existing subpoena authority as it would help the community conduct thorough investigations and audits that presently may be hampered by the lack of cooperation of private contractors, grantees, and former employees. The IG community is concerned, however, about any requirements for Department of Justice consultation and approval of the use of such authority as it would undermine the effectiveness of this expanded authority and an IG's independence under the Inspector General Act of 1978, as amended (IG Act).

***Background***

As you may know, recent proposed legislation would provide new testimonial subpoena authority to certain IGs. S. 1390 and S. 1391, the Department of Defense (DOD) Authorization Bills, would provide the DOD IG with authority to subpoena witnesses and testimony, after consultation with and without objection by, the Attorney General, before issuance. In contrast, H.R. 885 would provide IGs of five financial oversight entities (Federal Reserve Board, Commodity Futures Trade Commission, National Credit Union Administration, Pension Benefit Guaranty Corporation, and the Securities and Exchange Commission) the authority, without the need to consult with the Attorney General, to subpoena testimony from contractors, grantees, subcontractors, subgrantees, or entities regulated by the establishment.

Because these two legislative proposals differ significantly and do not include the rest of the IG community, the CIGIE Legislation Committee is concerned about a piece-meal

approach to expansion of IG subpoena authority. Such an approach would potentially create inconsistencies in the implementation and execution of the subpoena authority. Building upon a previous survey, the CIGIE conducted a more comprehensive survey of the IG community in an effort to develop a consensus on this issue.

While developing the survey, the CIGIE Legislation Committee researched the present state of testimonial subpoena authority in the Executive branch. We found a 2001 report by the Department of Justice (DOJ), *Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities*.<sup>1</sup> The report found approximately 335 existing subpoena authorities in the Executive Branch. Our review of this report found that none of the agencies that have testimonial subpoena authority have any limitation in statute for an external review or consultation before issuance of such subpoenas.

### ***Survey Results***

#### *a. Overwhelming Support For Testimonial Subpoena Authority*

We surveyed the 69 CIGIE members, and received substantive responses from 49 members, reflecting a greater than 70% participation rate. Our survey revealed that 94% of the respondents support "expanding the IG subpoena authority to include compelling testimony from non-Federal agency witnesses." Virtually all respondent IGs agreed that this new authority would enhance their ability to conduct thorough audits and investigations, particularly in procurement fraud matters dealing with private contractors or grantees.

Some IGs noted other independent sources supporting expanded testimonial subpoena authority for IGs:

- The scholar Paul Light strongly endorsed such authority for IGs in his book *Monitoring Government: The Search for Accountability (1993)*. On page 194, he stated: "Properly circumscribed to protect individual due process, limited testimonial subpoena power may be the kind of organizational enhancement that IGs need to accomplish their mission. With focus on making the case, not making the bust, testimonial subpoena power is a law enforcement tool the IGs increasingly need."
- The Legislation Committee of the Department of Justice National Procurement Fraud Task Force recommended in a 2008 report that Congress should give the IGs testimonial subpoena authority. The report explained: "Many fraud matters are brought against companies, and being able to compel interviews from

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<sup>1</sup> See [http://www.usdoj.gov/archive/olp/rpt\\_to\\_congress.htm](http://www.usdoj.gov/archive/olp/rpt_to_congress.htm).

employees or customers during investigations would be invaluable in investigating and prosecuting a case."<sup>2</sup>

- A report from the Project On Government Oversight entitled "Inspectors General: Many Lack Essential Tools for Independence" (February 26, 2008) concluded that testimonial subpoena authority is "vital" for OIGs.<sup>3</sup>

*b. Examples of Benefits of Testimonial Subpoena Authority*

More than 30 IGs provided examples of how the authority to compel testimony would have helped in their past investigations or audits. In general, IGs recounted problems with getting cooperation from private contractors and former employees in their audits or investigations. This lack of cooperation either led to incomplete audits or closed investigation cases. Following are some of these examples:

- The OIG at the Department of Homeland Security (DHS OIG) recounted its experience with its audit of the Integrated Deepwater System Program of the U.S. Coast Guard, a 25-year acquisition program costing approximately \$24 billion to replace and modernize the Coast Guard's aging and deteriorating fleet of ships and aircraft. In an audit of one part of the program, estimated at \$775 million in 2007, the DHS OIG discovered critical deficiencies and design flaws in major Coast Guard assets provided by the contractors, causing considerable increases in cost to the program. When DHS OIG conducted its review, the contractors limited their access to the prime contractors. Under these conditions, DHS OIG was prevented from reaching subcontractor personnel.
- The Department of Justice OIG (DOJ OIG) noted that in its administrative investigation of the firing of the U.S. Attorneys and its review of warrantless wiretapping practices, former DOJ officials declined to submit to voluntary interviews. This resulted in "holes" in DOJ OIG's administrative investigation.
- The U.S. Treasury Inspector General for Tax Administration (TIGTA) noted that, in the area of procurement fraud, the authority to compel testimony would have enabled them to obtain "critical investigative information from key individuals, such as high-level company officials or former employees of the companies." TIGTA also noted that the testimonial subpoena authority would have allowed it to obtain information from former IRS employees and private tax professionals.

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<sup>2</sup> See <http://oig.gsa.gov/otherdocs/NPFTFLegWhitePapervFinal.pdf>.

<sup>3</sup> See <http://pogoarchives.org/m/go/ig/report-20080226.pdf>.

- Another OIG recounted how it had a reasonable basis to believe that a non-employee civilian was wrongfully holding potentially classified materials, but he refused to talk to the OIG and, as a result, the investigation had to be closed.
- Yet another OIG explained how the testimonial subpoena authority would have allowed their office to successfully investigate a case against a physician who was debarred from participating in federal health care programs and was suspected of running a new clinic through a “straw men” structure. The authority would have allowed them to demand cooperation from the clinic’s employees through testimonial interviews to determine the physician’s actual ownership interest with the clinic.

Other IGs noted that the testimonial subpoena authority would help them with access to witnesses who can explain the context and importance of documentary evidence as well as witnesses who may be reluctant to provide information for fear of reprisal (such as loss of business or employment) unless they were required to by subpoena.

*c. DOJ Consultation and Approval Before Subpoena Issuance*

Almost 70% of the respondents believe that any expanded testimonial subpoena authority should not be subject to any statutory limitation. Some IGs cited the 2001 DOJ report, discussed above, that revealed that no other agency with testimonial authority is limited by statute to any review or consultation with the Attorney General before subpoena issuance.

However, if a DOJ consultation and approval requirement, as outlined presently in the DOD Authorization Bills, would be the only possible way to obtain the authority, a majority of IGs (65%) would support the expanded testimonial subpoena authority. However, this support was tepid at best (for example, one respondent stated: “better than no authority”), and was qualified on the condition that no other avenue was possible to get this authority.

The majority of IGs who provided comments on the issue of DOJ consultation were clear that they did not support such consultation and approval and believed it would significantly limit the authority’s effectiveness. Moreover, some respondents expressed concern that a consultation requirement would infringe on the independence of an IG under the IG Act to conduct audits and investigations because DOJ could effectively veto an investigation if it did not approve a subpoena. Additionally, respondents noted that such consultation would be time consuming and burdensome, and unnecessary for audits, reviews, or administrative cases, as these would not be the subject of criminal or civil prosecution.

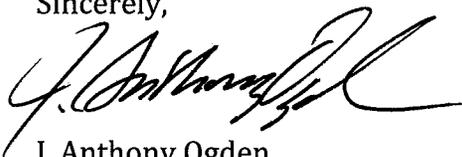
*d. Support for CIGIE-Issued Guidelines on the Proper Use of Testimonial Subpoena Authority*

A substantial majority of the respondents (86%) believe that guidelines on the proper use of the testimonial authority by IGs should be developed to ensure a uniform and consistent use of this authority. The guidelines may address such issues as applicable witness warnings, 5<sup>th</sup> Amendment self-incrimination issues, counsel and union representation, privilege issues, coordination with U.S. Attorneys, and other matters of concern.

Notably, the majority of respondents (62%) believe that CIGIE should develop these guidelines with appropriate DOJ consultation;<sup>4</sup> only 13% thought that DOJ should issue guidelines with CIGIE consultation. As one IG succinctly stated, if CIGIE develops guidelines there is a greater likelihood that they would reflect the “interests, concerns, and limitations” of the IG community. At the same time, some IGs believe that CIGIE consultation with DOJ to develop the guidelines is necessary as DOJ would ultimately be involved in the enforcement of these subpoenas in case of compliance refusal.

I believe the above accurately reflects the sentiment of the CIGIE on the issue of expanded IG subpoena authority to include the attendance and testimony of non-Federal agency witnesses. The CIGIE Legislation Committee appreciates the opportunity to present you the results of our survey on this important issue to the IG community. Identical letters have been sent to Senators Susan Collins and Claire McCaskill. Should you have any questions or need more information, please do not hesitate to contact me directly at 202-512-2288.

Sincerely,



J. Anthony Ogden  
Inspector General, United States Government Printing Office  
Chair, Legislation Committee  
Council of the Inspectors General on Integrity and Efficiency

c: The Honorable Phyllis Fong, Chairperson, CIGIE  
Carl Clinefelter, Vice Chairperson, CIGIE

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<sup>4</sup> One of the missions of CIGIE is to “increase the professionalism and effectiveness of personnel by developing policies, standards, and approaches to aid in the establishment of a well-trained and highly skilled workforce in the offices of Inspectors General.” 5 U.S.C. § 11(a)(2).