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The New Statutory Law Enforcement Authority for OIG Criminal Investigators

For many years, Offices of Inspector General (OIG) sought without success to obtain statutory law enforcement authority for their criminal investigators. In the absence of such authority, OIG investigators had to be deputized as special Deputy United States Marshals to exercise the law enforcement powers necessary to handle their criminal cases. These powers included the authority to carry a firearm, make arrests, and seek and execute search warrants.

In November 2002, the Homeland Security Act, which created the Department of Homeland Security, included provisions that provided statutory law enforcement authority for most Presidentially-appointed Inspectors General (IG).¹ The legislation marked a significant change in the authorities underlying the exercise of law enforcement powers by IGs. It was also a

¹See P.L. 107-296 § 812. This legislation provided statutory law enforcement authority to 25 Presidentially-appointed IGs who are members of the President's Council on Integrity and Efficiency (PCIE). Three other IGs had been previously granted law enforcement authority in separate statutes: the Agriculture Department in 1981 (P.L. 97-98); the Department of Defense in 1997 (P.L. 105-85); and the Treasury Inspector General for Tax Administration (TIGTA) in 1998 (P.L. 105-206). See "Inspectors General Comparison of Ways Law Enforcement Authority is Granted" GAO-02-437 (May 2002). Two IGs—at the Central Intelligence Agency and the Corporation for National and Community Service—did not seek statutory law enforcement authority and were not included in the legislation. The United States Postal Service IG, who is appointed by the agency head and is therefore not a member of the PCIE, was granted statutory law enforcement authority in March 1997 by the Board of Governors of the Postal Service, as authorized by 18 U.S.C. § 3061.

long-overdue recognition of the critical role played by OIG criminal investigators in Federal law enforcement efforts.

This article discusses the background to this important legislation and the reasons for its passage. The article also describes the specifics of the legislation as well as the creation of Attorney General Guidelines that govern the exercise of statutory law enforcement authority by OIGs. Finally, it notes several outstanding issues that should be clarified in the future.

Previous Attempts to Obtain Statutory Law Enforcement Authority

The Inspector General Act of 1978, as amended, requires Presidentially-appointed (PCIE) IGs to “appoint an Assistant Inspector General for Investigations who shall have the responsibility for supervising the performance of investigative activities relating to such programs and operations [of the agency].”²⁵ These include investigations of criminal wrongdoing as well as administrative misconduct.

However, the Inspector General Act did not provide OIG agents with law enforcement authority to make arrests, carry firearms, and execute search warrants. Initially, OIGs were required to obtain this law enforcement authority for individual agents on a case-by-case basis. OIG agents were appointed as Deputy United States Marshals for a specific case and could exercise law enforcement powers only for that case.

The need for case-by-case deputations remained so consistent, and the number of requests so large, that the process became unduly burdensome. Beginning in 1995, the United States Marshals Service (USMS) gave most PCIE IGs “blanket” (office-wide) deputations for their criminal investigators. The blanket deputations lasted for 1 year and were renewed annually by the USMS. In January 2001, the USMS extended the blanket deputations for a 3-year period.

²⁵ U.S.C. App. § 3 (d)(2).

To obtain the blanket deputations, each IG signed a Memorandum of Understanding (MOU) with representatives from the Criminal Division of the Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI) to govern the exercise of law enforcement authority by OIG agents.³

Yet, IGs considered deputation an unsatisfactory mechanism for providing law enforcement authority for the approximately 2,800 OIG criminal investigators. The IGs therefore sought legislation to provide statutory law enforcement authority to their criminal investigators. Such legislation was justified for several reasons. First, OIG criminal investigators regularly conducted complex investigations that required the ongoing use of law enforcement authorities. Statutory law enforcement authority would ensure continuity in these investigations and prevent potential disruption when the blanket deputations expired.

Second, statutory law enforcement authority would reduce the administrative and paperwork burden on the USMS, which had to deputize each OIG agent. Statutory authority also would prevent delays in providing new agents the necessary law enforcement authority when they were hired.

Third, OIG investigators had handled their duties professionally for many years and had developed an impressive record of success in criminal investigations. Moreover, OIG investigators are fully trained in the exercise of law enforcement powers. New OIG agents receive an extensive course of training at the Federal Law Enforcement Training Center (FLETC); experienced agents receive periodic refresher training; and OIG agents have to qualify quarterly with their firearms.

Finally, the proposed legislation provided for enhanced oversight of the OIGs’ exercise of law enforcement authority. The USMS had no authority over OIGs and had done little to oversee the

³Because of its role in overseeing the USMS and DOJ, the DOJ OIG did not enter into an MOU, but instead received its blanket deputation based on an order to the USMS from the Attorney General.

exercise of law enforcement authority by the deputized investigators, beyond providing the initial deputation and renewing the deputation periodically. Nor did the DOJ provide significant oversight. The legislation, by contrast, proposed that the Attorney General would oversee the exercise of statutory law enforcement authority and would implement Guidelines to govern OIG law enforcement powers. The legislation also proposed that external peer reviews of OIG criminal investigators, similar to the peer review process applying to OIG auditors, would be implemented to ensure that each OIG Investigations Division has proper internal safeguards and management controls in place.

Deputy Attorney General Eric Holder agreed that statutory law enforcement authority for OIGs was justified, and in February 2000 the DOJ submitted to Congress proposed legislation to provide such authority. On July 19, 2000, the Senate Committee on Governmental Affairs held a hearing on the proposed legislation. Testifying in support of it were DOJ Associate Deputy Attorney General Nicholas Gess, Executive Associate Director and Comptroller for the Office of Management and Budget Joshua Gotbaum, and three IGs (Gaston Gianni, the FDIC IG and Vice Chair of the PCIE; Patrick McFarland, the Office of Personnel Management IG and the chair of the PCIE Investigations Committee; and Kenneth Mead, the Transportation IG and the chair of the PCIE Legislation Committee).

Shortly after the hearing, Senator Fred Thompson, the Chair of the Senate Committee on Governmental Affairs, introduced legislation, S. 3144, based on the DOJ proposal. However, some FBI representatives expressed their opposition to the legislation to Members of Congress, and the bill stalled. When the 106th Congress adjourned at the end of 2000, the legislation died.

Passage of the Legislation

In the 107th Congress, on May 16, 2002, Senator Thompson and Senator Joseph Lieberman

reintroduced legislation to provide statutory law enforcement authority to OIG investigators.⁴ Unlike in the previous Congress, the bill passed the Senate quickly and without opposition. While the bill was awaiting action in the House of Representatives, its provisions were added to the Homeland Security Act, which was on a fast track for passage. No Member of Congress expressed opposition to the provisions providing statutory law enforcement authority, and the provisions survived intact when the Homeland Security Act was enacted in November 2002.

Passage of this statutory law enforcement legislation was attributable to several factors. First, it was supported by the entire PCIE community and was aided greatly by the groundwork that had been laid over several years by the hard work of many IGs, past and present, and their staffs. For example, OIG staff conducted scores of briefings for Congressional Members and staff about the need for the legislation. In addition, the PCIE Legislation Committee and the Investigations Committee actively and energetically championed the legislation. Several OIGs also avoided the temptation to seek law enforcement authority for themselves alone in separate legislation, and instead supported the bill for the entire OIG community.

Second, the legislation was aggressively promoted by several key Congressional supporters, particularly Senators Thompson and Lieberman. One staff member in particular, William Outhier from the Senate Governmental Affairs Committee, worked tirelessly in support of the legislation.

Third, the DOJ was persuaded of the need for the legislation and made its support for it clear. In particular, Deputy Attorney General Larry Thompson was instrumental in this effort. As a result of his support, the DOJ Criminal Division

⁴This legislation was virtually identical to the bill that stalled in the previous Congress. The bill included coverage for the Tennessee Valley IG because that IG had been converted to a Presidential appointment. Also added was the IG for the Department of Homeland Security.

re-thought its long-standing opposition to statutory law enforcement for OIG investigators.

Fourth, to its credit the FBI also revisited its historic opposition to the legislation. After the terrorist attacks of September 11, 2001, the FBI refocused its priorities and resources to counter-terrorism, and it recognized that other state and Federal law enforcement agencies—including OIGs—had a critical role in handling many matters that the FBI previously investigated. After a series of meetings with several IGs, the Assistant Director in charge of the FBI's Criminal Investigative Division and ultimately FBI Director Robert Mueller agreed to support the legislation. The FBI then followed through with its commitment. On October 4, 2002, Director Mueller wrote a letter to Senator Thompson announcing the FBI's support for the bill. This letter was instrumental in convincing key Members of Congress to support the legislation.

Finally, the bill made sense and was amply justified. The legislation did not expand the jurisdiction or authorities of OIG investigators. Rather, it recognized that OIG investigators had exercised law enforcement authority responsibly and professionally for many years and that they deserved permanent law enforcement authority. Moreover, as described in the next section, the bill provided reasonable mechanisms for improved operation and oversight of OIG law enforcement authority.

Provisions of the Legislation

The enacted legislation allows each covered PCIE IG, each Assistant Inspector General for Investigations (AIGI), and any agent supervised by the AIGI to:

1. Carry a firearm while engaged in official duties;
2. Make an arrest without a warrant while engaged in official duties; and
3. Seek and execute arrest warrants and search warrants.

See Section 812(a). These powers are provided to 25 Presidentially-appointed IGs specifically listed in the Act. In addition, the Attorney General can extend these statutory authorities to other IGs who are able to demonstrate the need for such authority. *Id.*

The legislation also directs the Attorney General to oversee the exercise of these authorities. The Attorney General is required to issue, and revise as appropriate, Guidelines governing the exercise of these powers. According to the legislation, these Guidelines have to include, at a minimum, the operational and training requirements that were contained in the existing MOUs between the IGs and DOJ. *See* Section 812(b).

The Attorney General can rescind or suspend the law enforcement powers granted by the legislation to any OIG, or to any individual investigator, if that OIG or investigator has not complied with the Guidelines or if there is no longer a need for the particular OIG to exercise the statutory authorities. *See* Section 812(a).

Finally, the OIGs granted law enforcement authority by the legislation must enter into an MOU among themselves to establish an external peer review process. According to the legislation, the exercise of law enforcement powers by each OIG has to be reviewed by another OIG or by a committee of IGs, and the results of each peer review must be communicated in writing to the applicable IG and to the Attorney General. *See* Section 812(a).

Attorney General Guidelines

The Attorney General Guidelines required by the legislation were developed in consultation with the OIG community. Consistent with the legislative requirement that the Guidelines be based on the existing MOUs, the Guidelines are developed by converting the MOUs into Guideline form, and then soliciting suggested changes from OIGs, the FBI, and the DOJ Criminal Division. During the drafting process, OIGs provided several suggested

changes, many of which are being incorporated in the Guidelines.

The following briefly discusses the highlights of the Attorney General Guidelines, as they are emerging this year, particularly focusing on changes to the requirements of the existing MOUs:

1. **Training.** Like the MOUs, the Guidelines require that OIG investigators who exercise law enforcement powers must complete a course of training at FLETC or a comparable course. Additionally, OIGs must provide periodic refresher training to their agents.
2. **Mutual Notification.** The Guidelines clarify the current requirement in the MOUs that OIGs and the FBI notify each other when they initiate any criminal investigation in any matter in which they have concurrent jurisdiction. The Guidelines state that the mutual notice must be in writing, to the appropriate local office, and shall include, at a minimum and where available, the subject's name, date of birth, social security number, and any other case-identifying information, such as the allegation on which the case was predicated and the date the case was opened or the allegation received.
3. **Joint Investigations.** The MOUs stated that in cases involving especially sensitive targets any OIG investigation had to be conducted jointly with the FBI.⁵ The Guidelines changed this requirement. According to the Guidelines, notice must be given to the FBI of allegations involving sensitive targets, and the FBI can join the

case. However, the requirement that the case must be conducted jointly with the FBI was eliminated.

4. **Sensitive Undercover Operations.** In cases involving an undercover operation involving "sensitive circumstances,"⁶ the MOUs required the cases to be conducted jointly with the FBI. The Guidelines were changed to allow the FBI to join a case involving a sensitive undercover operation but do not require that the case be conducted jointly with the FBI. The Guidelines also establish a separate OIG Criminal Undercover Operations Review Committee, similar to the review committee used for sensitive FBI undercover operations, to review OIG undercover operations involving "sensitive circumstances" when the FBI is not involved in the case.
5. **Adherence to DOJ Policies on Criminal Investigations.** The Guidelines restate the requirement in the MOUs that OIG criminal investigations must adhere to DOJ policies applicable to criminal investigative practices. These include the Attorney General Guidelines on General Crimes, Racketeering Enterprise, and Terrorism Investigations; the Attorney General Guidelines Regarding the Use of Confidential Informants; and the Attorney General's Memorandum on Procedures for Lawful, Warrantless Monitoring of Verbal Communications. As in the MOUs, the Guidelines require that OIGs abide by the deadly force policy established by the DOJ.
6. **Consultation with a Prosecutor.** As in the MOUs, the Guidelines require OIGs to consult with a prosecutor at an early stage in a criminal investigation to ensure that

⁵These included cases involving Members of Congress, Federal judges, or high-level Executive branch officials; a significant investigation of a public official for bribery, conflict of interest, or extortion; a significant investigation of a law enforcement official; and an investigation of a member of the diplomatic corps of a foreign country.

⁶These sensitive circumstances include undercover operations involving authorized criminal activity, the operation of a proprietary business, a substantial risk of harm to any individual, or the targeting of a high-level public official.

the allegations, if proven, would be prosecuted. The Guidelines, like the MOUs, also require specific prosecutor concurrence for certain investigative techniques involving the use of informants and cooperating witnesses.

7. **Annual Written Reports.** In the MOUs, the OIGs were required to make an annual written report to the DOJ Criminal Division that included details about the number of times that law enforcement authorities were used by the OIGs and the names of the Federal prosecutors assigned to the investigations. The Guidelines streamline this requirement, requiring only that each OIG's annual report contain data on the number of investigations, undercover operations, and electronic surveillances that were used, as well as any significant and credible allegations of abuse of law enforcement powers by an OIG agent. The annual report, due on November 1, is sent to the Attorney General.
8. **Agency-Specific Addenda.** The Guidelines permit the Attorney General and an individual OIG to enter into agency-specific agreements to cover individual circumstances of that OIG.
9. **Peer Reviews.** Consistent with the legislation, the Guidelines state that the OIGs provided statutory law enforcement authority by the legislation must implement a collective MOU establishing a peer review process. The purpose of these peer reviews is to ascertain whether internal safeguards and management procedures exist to ensure that law enforcement powers are exercised properly. Through the PCIE Investigations Committee, the affected IGs established a detailed peer review guide to comply with the legislation and the Attorney General Guidelines. Each covered IG agreed in a collective MOU to follow the peer review process.

The peer review guide was developed by criminal investigators and supervisors from several OIGs. The guide is designed to ensure that OIGs follow the procedures established by the Attorney General Guidelines, as well as by the "Quality Standards for Investigations" adopted by the PCIE and Executive Council on Integrity and Efficiency (ECIE).

As a result, each OIG will both undergo a peer review by another OIG and will also conduct a peer review of a different OIG. Generally, OIGs will review another OIG of a similar size. The peer reviews are to occur once every 3 years, beginning in November 2004.

Outstanding Issues

Several issues remain unresolved in connection with OIG statutory law enforcement authority. One issue is whether the mutual notification requirements in the Attorney General Guidelines will prove workable. When the Guidelines were being developed, the FBI argued that the mutual notification should be in writing rather than oral. It also insisted that it would comply with the written notification procedures and provide timely notice to the OIGs about FBI investigations that are within the OIG's and FBI's concurrent jurisdiction. In the past, according to many OIGs, the notification often was one-way—from the OIGs to the FBI—despite the MOU requirement that the notification be mutual. Many OIGs stated that they often learned of FBI investigations in their agencies belatedly, sometimes only after an arrest was made. While FBI officials now insist they will adhere to the written notification requirements in the Attorney General Guidelines, many OIGs believe this issue may continue to be problematic.

Another important issue is whether OIG criminal investigators may carry their firearms at all times, like many other Federal law enforcement agents. The legislation and the Attorney General Guidelines allow covered individuals to "carry a

firearm while engaged in official duties as authorized under this Act or other statute, *or as expressly authorized by the Attorney General.*” [Emphasis added.] Many IGs believe, for several reasons, that their covered agents should be able to carry their firearms at all times. Other law enforcement agents—such as FBI agents, Secret Service agents, and Department of Homeland Security immigration agents—are permitted to carry their weapons at all times. Like them, OIG agents are required to respond at all hours to incidents that need to be investigated and should be able to have their firearms with them to be able to respond quickly. Also, OIG agents may be confronted at any time by subjects of their investigations, some of whom are career criminals and who may be armed. This presents a safety issue to OIG agents. In addition, OIG agents should be prepared to respond to criminal or terrorist activities in their presence even when they are off duty. This rationale is particularly important in light of the heightened terrorist alerts after the September 11 attacks.

However, the DOJ Criminal Division has indicated that it opposes granting OIG agents authorization to carry weapons at all times. It also makes a legal argument that the statute does not give the Attorney General the authority to allow OIG agents to carry their weapons while not on official duty.⁷ In the Criminal Division’s view, carrying weapons off duty in most cases is beyond the authority established by the Inspector General Act, and an amendment to the Act or special deputations would be required to permit most OIG agents to carry weapons while not on official duty. However, many OIGs believe that the language of the statute and the Attorney General’s supervisory authority over the Department of Justice,

including the USMS, allow the Attorney General to permit OIG agents to carry weapons at all times, and that the Attorney General should do so.

This issue may be resolved by pending legislation, the Law Enforcement Officers Safety Act,⁸ which allows law enforcement officials to carry concealed weapons, notwithstanding any contrary state law. The legislation was designed to allow law enforcement officials to carry weapons off duty and when traveling across state lines. The legislation is sponsored by Senator Ben Campbell, Senator Orrin Hatch, and 31 other Senators from both parties. The Administration and the DOJ have not taken a position on this legislation.

In describing the need for this legislation, Senator Campbell stated that it would allow law enforcement agents to respond to terrorist incidents and also to protect themselves from the subjects of their investigations. Senator Leahy, in announcing his support for the bill, stated that it would “allow thousands of equipped, trained and certified law enforcement officers, whether on or off duty or retired, to carry concealed weapons in most situations, thus enabling them to respond immediately to a crime.” The Senate Judiciary report accompanying the bill aptly stated:

Law enforcement officers are never “off duty.” They are dedicated public servants trained to uphold the law and keep the peace. When there is a threat to the peace or to our public safety, law enforcement officers are sworn to answer that call. The Law Enforcement Officers Safety Act of 2003 enables law enforcement officers nationwide to be armed and prepared when they answer that call, no matter where, when, or in what form it comes.⁹

⁷In the Criminal Division’s view, the phrase “as expressly authorized by the Attorney General,” allows the Attorney General to expand the type of official duties during which an OIG agent can carry a weapon, but it does not allow the Attorney General to authorize OIG agents to carry weapons while off duty.

⁸This bill, S. 253, is currently pending in the Senate. A companion bill, H.R. 218, is pending in the House of Representatives.

⁹Senate Report 108-29 (The Law Enforcement Officers Safety Act of 2003).

Conclusion

The passage of statutory law enforcement legislation marked a watershed event in the history of OIGs. It recognized that OIG criminal investigators, who have a long record of responsibly

handling their law enforcement duties, are permanent and valued members of the Federal law enforcement community. With statutory law enforcement authority, OIG investigators are now in a better position to continue their impressive record of accomplishments. 🚓