



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

June 7, 2018

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

The Honorable Elijah Cummings  
Ranking Member, House Committee on Oversight and Government Reform  
U.S. House of Representatives  
Washington, D.C. 20515

The Honorable Steve Russell  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Chairman Gowdy, Ranking Member Cummings, and Representative Russell,

We appreciate your efforts to address the Inspector General (IG) community's long-standing interest in obtaining testimonial subpoena authority (TSA) for all IGs and would like to outline our views on H.R. 4917, the IG Subpoena Authority Act.<sup>1</sup> For many years, the Legislation Committee of the Council of the Inspectors General on Integrity and Efficiency (CIGIE) has included TSA among its legislative priorities.

The authority in H.R. 4917 would assist government oversight by providing a critical tool to address fraud, waste, and abuse by authorizing all IGs to subpoena the attendance and testimony of certain witnesses, as necessary, to fulfill the functions of the Inspector General Act of 1978, as amended (IG Act). CIGIE supports the language in the bill aligning the scope of TSA with the IG's existing documentary subpoena authority, found in Section 6(a)(4) of the IG Act.<sup>2</sup> While requiring that any subpoena be necessary in the performance of IG work, the language does not limit who may be subpoenaed, other

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<sup>1</sup> H.R. 4917 as ordered reported by the United States House Committee on Oversight and Government Reform on Feb. 6, 2018.

<sup>2</sup> IG Act Section 6(a)(4) authorizes the Inspector General, in carrying out the provisions of the IG Act: "to require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and other data in any medium (including electronically stored information), as well as any tangible thing and documentary evidence necessary in the performance of the functions assigned by this Act, which subpoena, in the case of contumacy or refusal to obey, shall be enforceable by order of any appropriate United States district court: *Provided*, That procedures other than subpoenas shall be used by the Inspector General to obtain documents and information from Federal agencies...."

than with respect to current Federal employees (as they are already generally required to cooperate with OIGs).

Congress has already granted some IGs TSA under the IG Act or through other laws. The Department of Defense Office of Inspector General (DOD OIG) was provided TSA under Section 1042 of the National Defense Authorization Act of 2010, codified at Section 8(i) of the IG Act. As noted in the Congressional record, DOD OIG has used this authority judiciously and sparingly.<sup>3</sup> The Department of Health and Human Services OIG also has testimonial subpoena power in certain circumstances.<sup>4</sup> Moreover, IGs overseeing appropriations under the American Recovery and Reinvestment Act of 2009 received TSA to be exercised through the now-sunsetted Recovery Accountability and Transparency Board.<sup>5</sup>

Following the practice of those IGs who already have or had TSA, CIGIE is committed to ensuring that the authority will be used appropriately and fairly. In short, CIGIE echoes Ranking Member Cummings's belief that IGs would "act responsibly and use this authority only when absolutely necessary," and that appropriate safeguards provide checks on potential abuse.<sup>6</sup>

### The Need for TSA

While the current IG documentary subpoena authority under the IG Act is a powerful tool, it is a tool with inherent limitations. Most notably, Federal employees who are the subjects of IG investigations can retire or resign while being investigated. In such cases, limitations on IG documentary subpoena authority or other IG Act authorities can thwart IG investigations. For example, this could impact the ability to pursue the investigations considered under the Official Personnel File Enhancement Act.<sup>7</sup>

These limitations have had negative, real world effects on IG oversight and can impact Congressional initiatives. As Chairman Gowdy has recognized, "[y]ou're only as good as your access to information and witnesses."<sup>8</sup> An informal survey of the IG community revealed TSA would have strengthened IG oversight throughout the Federal government as illustrated in the following examples:

- One agency's OIG conducted an investigation of a senior staff member who allegedly modified official documents and impersonated an official, before retiring during the investigation. The former senior staff member was not receptive to being interviewed after retiring. Because the OIG lacked TSA, the OIG could not compel testimony from the retired senior staff member to conduct an effective investigation.
- In connection with an OIG's review of alleged safety issues at an agency facility, the OIG was unable to interview the central person identified in the allegation or that person's supervisor

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<sup>3</sup> In a 2015 case study, it was reported that, since 2010, a total of six testimonial subpoenas were authorized by the DoD IG and four of those testimonial subpoenas were never served because the interviewees voluntarily cooperated with the interview. See "A Case Study: DOD IG's Use of Testimonial Subpoena Authority," introduced by Chairman Grassley, Cong. Rec. for Dec. 15, 2015, p. S 8670. Since then, the DoD IG has authorized one additional testimonial subpoena that was served on the witness.

<sup>4</sup> HHS OIG was provided this authority through delegation by the Secretary of HHS under 42 U.S.C. Section 1320a-7a(j).

<sup>5</sup> Section 1524(c)(1) Pub. L. No. 111-5, 123 Stat. 115, 291 (Feb. 17, 2009). The authority was further extended over later additional supplemental appropriation bills.

<sup>6</sup> Testimony on H.R. 2395, Cong. Rec. for June 21, 2016, p. H 4006.

<sup>7</sup> Pub. L. 114-328, Div. A, Title XI, §1140(a), Dec. 23, 2016, 130 Stat. 2470, codified at 5 U.S.C. § 3322.

<sup>8</sup> House Committee on Oversight and Government Reform Hearing, *Top Management and Performance Challenges Identified Government-Wide by the Inspector General Community*, April 18, 2018.

since both had left Federal service and declined voluntary interviews. The unavailability of those key witnesses hampered the OIG's ability to fully investigate alleged safety issues or to address a key objective of the inspection, which was to identify factors that may have contributed to leadership being unaware of those issues.

- During another OIG's investigation into a small business owner who received two Federal grants for overlapping business proposals, key individuals declined to be interviewed by the OIG. One of the employees confessed to destroying company documents and creating new ones at the request of the owner. After the confession, other individuals involved declined to be interviewed. Without TSA or the cooperation of another employee or the owner, the OIG was unable to pursue obstruction and other potential charges against the subjects.
- Another agency's OIG faced obstacles when investigating fraud associated with a loan program. The loan officer was the only source of information to determine the individual associated with the borrower. The OIG was unable to effectively complete the investigation because the bank declined to make the loan officer available for an interview.
- A different OIG discovered a contractor was being paid for services it did not provide, and only minimal information could be collected through documentary subpoena authority. Attempts to contact the contractor were unproductive. If that OIG had TSA, the OIG could have compelled the contractor's representative to be interviewed.
- An OIG was reviewing third-party contractors retained by the agency to provide healthcare services to eligible individuals. The OIG could not determine if the contractors provided proper notifications to individuals about their eligibility for the services. Without the ability to compel the contractors to testify, the OIG could rely only on records, which did not contain specific information on which to base conclusions.
- Yet another OIG was unable to effectively examine potential false and fraudulent billing after discovering an unauthorized subcontractor was performing the majority of work under a large contract. As the subcontractor was not in a direct contractual relationship with the agency, the OIG had to rely on documentary subpoenas. If that OIG had TSA, it could have fully examined the potentially false and fraudulent billing.
- An investigation conducted on behalf of the Integrity Committee was unable to obtain evidence from a former senior level OIG employee who had retired from Federal service and declined to speak with investigators. The investigation concluded without the former senior level OIG employee's evidence.
- Another OIG encountered a significant obstacle while conducting an audit where several former government officials refused to be interviewed. Without the ability to compel their testimony, the OIG had to report their refusal to the appropriate Congressional oversight committee. Only after the OIG reported this refusal to Congress did these former government officials finally agree to be interviewed. If that OIG had TSA, it would not have needed Congressional intervention to complete its oversight work.

#### Subpoena Panel and Other Provisions

With respect to the IG subpoena panel created in the bill, and given the nature of the authority being granted, we understand the interest of Congress in putting in place an additional check on the use of TSA. While, in our view, the provision is unnecessary, we do not object to its inclusion. CIGIE requests, however, that two additional points related to the language of the legislation be reconsidered. First, the non-delegation clause in the proposed IG Act Section "6A(b)" may create problems for OIGs subject to

the Federal Vacancies Reform Act. Most relevantly, it could limit long-serving acting IGs from exercising the authority when the acting IG is no longer able to perform the “duties and functions” designated solely to the IG.<sup>9</sup> To avoid this issue, we recommend that this provision be removed. Second, with respect to the proposed IG Act Section “6A(e)”, having the CIGIE Chair issue guidelines to IGs, rather than promulgate regulations, would achieve Congress’s intent of standardizing and governing the use of TSA without requiring CIGIE to undergo a lengthy and resource-intensive rulemaking process. Moreover, it will be more economical to update or modify guidelines as needed.

### Support from Congress and Other Stakeholders

The benefits of this legislation are reflected in the support expressed by government oversight stakeholders for providing IGs with TSA. Importantly, bi-partisan support for providing IGs with TSA has come not just from the House Oversight and Government Reform Committee, but also from the unanimous consent it received in the House of Representatives last Congress.<sup>10</sup> Other important government oversight stakeholders have also expressed how government oversight would benefit from OIGs receiving TSA. For example the Office of Special Counsel wrote to Senate leadership describing how providing IGs with this authority will enhance IG efforts to reduce government waste and abuse, and how TSA has been helpful in reprisal investigations undertaken by the Office of Special Counsel.<sup>11</sup> Nongovernmental organizations emphasized in a May 2016 letter to Congress that OIGs are essential to a well-functioning Government, and noted that providing access to agency information, including through TSA, would allow OIGs to conduct proper oversight. As evidenced by both Congressional and stakeholder support, TSA will benefit the IG community in carrying out its oversight operations.

### Conclusion

CIGIE appreciates your continued support of our work and the House Committee on Oversight and Government Reform’s efforts to improve government oversight through H.R. 4917. In the decades since the IG Act’s passage, IGs have saved taxpayers hundreds of billions of dollars and improved the programs and operations of the Federal government through their independent oversight. Testimonial subpoena authority would further improve the ability of IGs to detect and prevent fraud, waste, and abuse in Federal operations. As Representative Russell stated, “Inspectors General are an essential partner for Congress and by extension to we the people that empower government,” and “we must provide Inspectors General with the tools they need to fully accomplish their mission. Testimonial subpoena authority is one such tool, and a critical one at that.”<sup>12</sup>

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<sup>9</sup> The Government Accountability Office recently noted that between Fiscal Years 2007 and 2016 there were 20 vacancies for IG positions that require Presidential appointment and Senate confirmation that lasted for over one year. See “Inspectors General: Information on Vacancies and IG Community Views on Their Impact,” GAO-18-270 (March 2018).

<sup>10</sup> H.R. 2395, the Inspector General Empowerment Act, 114<sup>th</sup> Congress (May 18, 2015).

<sup>11</sup> The Office of Special Counsel Letter to the Honorable Mitch McConnell and the Honorable Harry Reid (May 18, 2016).

<sup>12</sup> House Committee on Oversight and Government Reform, Full Committee Business Meeting (Feb. 6, 2018).

Thank you for your continued support of CIGIE and its member IGs. We remain available to continue to work with you and the Congress on the important issues addressed in this legislation. If you have any questions, please do not hesitate to contact me or Chris Fontanesi at 202-692-2900.

Sincerely,

A handwritten signature in blue ink that reads "Kathy A. Buller". The signature is written in a cursive, flowing style.

Kathy A. Buller  
Chair  
CIGIE Legislation Committee

Cc:

The Honorable Matt Cartwright, U.S. House of Representatives