

Calendar No. 443

107TH CONGRESS }
2d Session }

SENATE

{ REPORT
107-176 }

AMENDING THE INSPECTOR GENERAL ACT
OF 1978 (5 U.S.C. APP.) TO ESTABLISH PO-
LICE POWERS FOR CERTAIN INSPECTOR
GENERAL AGENTS ENGAGED IN OFFICIAL
DUTIES AND PROVIDE AN OVERSIGHT
MECHANISM FOR THE EXERCISE OF THOSE
POWERS

R E P O R T

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 2530

AMENDING THE INSPECTOR GENERAL ACT OF 1978 (5 U.S.C. APP.)
TO ESTABLISH POLICE POWERS FOR CERTAIN INSPECTOR GEN-
ERAL AGENTS ENGAGED IN OFFICIAL DUTIES AND PROVIDE AN
OVERSIGHT MECHANISM FOR THE EXERCISE OF THOSE POW-
ERS



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JUNE 25, 2002.—Ordered to be printed

Mr. LIEBERMAN, from the Committee on Governmental Affairs,
submitted the following

R E P O R T

[To accompany S. 2530]

The Committee on Governmental Affairs, to which was referred the bill (S. 2530) to amend the Inspector General Act of 1978 (5 U.S.C. App.) to establish police powers for certain Inspector General agents engaged in official duties and provide an oversight mechanism for the exercise of those powers, reports favorably thereon without an amendment and recommends that the bill do pass.

I. PURPOSE AND SUMMARY

S. 2530 provides specific statutory authority for the Attorney General to grant certain law enforcement powers to presidentially-appointed Federal inspectors general (IGs) and their investigative personnel. The purposes of the bill are to alleviate administrative burdens, to provide additional oversight of the use of law enforcement authority by IGs, and to ensure that criminal investigations are not interrupted by lapses in the current deputation process. S. 2530 is nearly identical to S. 3144 which was reported out of Committee during the 106th Congress.

II. BACKGROUND AND NEED FOR LEGISLATION

A. HISTORY OF LAW ENFORCEMENT AUTHORITY FOR INSPECTORS GENERAL

Criminal investigators for the Offices of Inspectors General (OIGs) covered by S. 2530 (with the exception of those in the In-

spector General's Office for the Tennessee Valley Authority as discussed below) have been exercising law enforcement authorities for many years under designations as Special Deputy U.S. Marshals. Beginning in the mid-1980s the U.S. Marshals Service within the Department of Justice approved these deputations on a case-by-case basis. However, as the role of IGs has evolved, the need for such appointments became so consistent and the volume of requests so large that "blanket" deputations evolved. Since 1995, virtually all criminal investigators in the offices of the twenty-three covered IGs have exercised law enforcement authorities in cases under office-wide deputations. These deputations are renewed periodically.

Each time that an OIG receives a blanket deputation, it enters into a Memorandum of Understanding (MOU) with the Department of Justice and the FBI. These MOUs specify the training and operational requirements by which the deputized agents must abide. Failure to follow the guidelines contained in the MOUs could result in rescission of the deputation for the OIG.

Currently, there are approximately 2,800 criminal investigators in the offices of presidentially-appointed IGs. According to annual reports filed by the President's Council on Integrity and Efficiency, over the last five years the IGs achieved more than 25,000 successful criminal prosecutions and obtained more than \$12 billion in investigative recoveries (money accrued to the federal government as a result of investigations). In addition, IGs were responsible for more than 35,000 suspensions and debarments of individuals or companies from doing business with the federal government during the same period.

B. PROBLEMS WITH THE DEPUTATION PROCESS

Lack of oversight. Because the deputation is renewed periodically, the Attorney General and the FBI are provided with the opportunity at the time of renewal to make a determination whether each specific IG office continues to require law enforcement authority. However, hearing testimony before the Committee indicates that each review is cursory. Beyond the renewal process, there is no current review of the use of the IGs' law enforcement authority.

Delays in the renewal process. Periodic renewal of law enforcement authority can result in delays during the renewal process which could endanger ongoing criminal investigations.

Administrative burden on the U.S. Marshals Service. One of the reasons for the lack of proper oversight of use of the law enforcement authority by the IGs is the extensive burden placed on the U.S. Marshals Service. There are approximately 2,800 qualified IG agents currently deputized. Testimony before the Committee during a hearing held in the 106th Congress revealed that it is not possible for the Marshals Service to maintain proper oversight over all of the deputized agents in the OIGs.

C. NEED FOR THE LEGISLATION

In short, S. 2530 would codify the law enforcement authority now exercised by qualified agents within certain OIGs (authority to, under certain circumstances, (i) carry a firearm while engaged in official duties; (ii) make an arrest without a warrant while engaged in official duties; and (iii) seek and execute search and arrest war-

rants). It would also ensure that the current rules that govern the exercise of that authority remain in place. In addition, it would provide more oversight of the exercise of that authority than currently exists in the deputation process by requiring periodic peer reviews that would result in reports submitted to the relevant IG and the Attorney General. It would further provide the Attorney General the authority to suspend or rescind law enforcement authority if an office failed to comply with guidelines or no longer needed the authority.

S. 2530 would specifically address the following issues:

Additional oversight. S. 2530 requires that the OIGs listed in the statute collectively enter into a MOU, in consultation with the Attorney General, to establish an external review process for ensuring that adequate internal safeguards and management procedures continue to exist within each office and any OIGs that later receive the authority. The results of the periodic peer reviews shall be communicated in writing to the applicable IG and to the Attorney General.

The Attorney General would also be required to promulgate guidelines which shall govern the exercise of law enforcement powers established in S. 2530. Historically, the FBI has been involved in drafting the guidelines contained in the MOUs that have governed the grant of authority by deputation. The Committee expects that the Attorney General will continue to consult with the Director of the FBI when promulgating guidelines pursuant to S. 2530. The Committee expects that the guidelines promulgated pursuant to S. 2530 will, at a minimum, contain the requirements in the existing MOUs. Specifically, the guidelines should provide training and operational requirements. The operational guidelines should include requirements for notification, referral, coordination, and adherence to the Attorney General guidelines on General Crimes, Racketeering Enterprise, and Domestic Security/Terrorism Investigations and Attorney General guidelines on sensitive investigative techniques, including undercover operations and sensitive targets.

The Attorney General would retain the authority to suspend or rescind law enforcement authority upon determining that the work of an IG office is no longer hampered without the authority, available assistance from other law enforcement agencies is sufficient to meet its law enforcement needs, adequate internal safeguards and management procedures do not exist to ensure proper exercise of its authority, or that an OIG has not complied with the guidelines promulgated pursuant to S. 2530. The peer-review process established under S. 2530 should provide the Attorney General with more information to make such a determination than is now available under the deputation process.

Elimination of delays in the renewal process. Because there will no longer be a need to renew each deputation, there will no longer be any potential danger that the renewal process will interrupt an ongoing criminal investigation.

Administrative burden on the U.S. Marshals Service. S. 2530 would end the deputation process currently in place and therefore remove the existing burden on the U.S. Marshals Service.

Increased need in light of recent measures by the FBI to refocus its efforts on counterterrorism. The role of IGs is even more impor-

tant in light of the terrorist attacks of September 11, 2001. The Department of Justice and the FBI are currently refocusing their priorities and resources on counterterrorism. As a result, it is clear that other law enforcement agencies will be called on to play an increased role in handling certain law enforcement matters that the FBI previously would have handled. IGs are and will continue to be an important part of that effort. S. 2530 will provide stability and oversight to help carry out that goal.

Putting IGs on par with other federal law enforcement agents. S. 2530 would eliminate the fragmented exercise of law enforcement powers that currently exists among the various federal law enforcement agencies. All agents who exercise law enforcement authority under the current MOUs must first attend and successfully complete the basic criminal investigator training program at the Federal Law Enforcement Training Center. Included in the basic criminal investigator program is a curriculum for firearms training. Except for the FBI, DEA and the United States Postal Inspectors, this is the basic training program that all other federal criminal investigators (e.g. the United States Secret Service, the United States Customs Service, the Bureau of Alcohol, Tobacco and the Firearms, United States Marshals Service—which have statutory law enforcement authority) attend. As a result, IG agents and agents from these law enforcement agencies are frequently included in the same training classes and undergo firearms training together.

Analogy to other recent legislation. In the Floyd D. Spence National Defense Authorization Act for FY 2001 (PL 106–398), Congress provided statutory authority to civilian agents operating within the military services to execute warrants and make arrests. These agents exercise law enforcement authority within agency-specific jurisdiction and operate under guidelines promulgated by the Attorney General. In S. 2530, Congress would be extending similar authority to similarly situated agents within the various covered OIGs.

III. LEGISLATIVE HISTORY AND COMMITTEE CONSIDERATION

On July 19, 2000 the Committee held a hearing to consider a legislative proposal to grant statutory law enforcement authority to presidentially-appointed IGs. The witnesses were the Honorable Joshua Gotbaum, Executive Associate Director and Controller of the U.S. Office of Management and Budget; the Honorable Gaston L. Gianni, Jr., Inspector General for the Federal Deposit Insurance Corporation and Vice Chair of the President's Council on Integrity and Efficiency; the Honorable Patrick E. McFarland, Inspector General of the U.S. Office of Personnel Management; the Honorable Kenneth Mead, Inspector General for the U.S. Department of Transportation; and Nicholas M. Gess, Associate Deputy Attorney General, U.S. Department of Justice. In addition, Committee staff conducted numerous interviews with interested parties. On September 27, 2000, the Committee considered the legislative proposal and, by unanimous voice vote, ordered it reported as an original bill. The Senate did not consider the legislation prior to the end of the Congress.

Committee staff continued to talk with interested parties, and S. 2530 was introduced on May 16, 2002. At its May 22, 2002, business meeting, the Committee once again considered this legislative

proposal and, by unanimous voice vote, ordered it reported. Present for the vote were Senators Levin, Akaka, Durbin, Carper, Dayton, Thompson, Cochran, Bennett and Lieberman.

IV. SECTION-BY-SECTION ANALYSIS

Section 1(a) of the bill amends the Inspector General Act of 1978 (IG Act), 5 U.S.C. App., by adding a new subsection 6(e) to that Act. The new subsection 6(e) establishes a statutory basis for the exercise of law enforcement powers by IG investigative personnel of the type they now are provided administratively through United States Marshals Service deputations.

Enumeration of law enforcement powers and their limitations. Paragraph (1) of the new subsection 6(e) of the IG Act provides that the Attorney General may authorize eligible IG personnel to:

(A) Carry a firearm while engaged in official duties authorized under the IG Act or another statute, or as expressly authorized by the Attorney General;

(B) Make an arrest without a warrant while engaged in official duties authorized under the IG Act or another statute, or as expressly authorized by the Attorney General, for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony; and

(C) Seek and execute warrants for arrest, search of a premises, or seizure of evidence issued under the authority of the United States upon probable cause to believe that a violation has been committed.

These law enforcement powers may be granted to IGs who are appointed by the President under section 3 of the IG Act, their subordinate Assistant IGs for Investigations, and special agents supervised by their Assistant IGs for Investigations. The term “special agent” is used to refer to individuals in the Office of Personnel Management official occupational classification “Series 1811 Criminal Investigator.”

The authority does not extend to Assistant IGs for Audit or other IG audit personnel. Existing authorities in the IG Act have been adequate for the conduct of auditing activities, without the need for the law enforcement powers covered by subsection 6(e). Nor does the authority extend to IGs who are appointed by their agency heads. There have been legislative proposals to convert agency-appointed IGs to presidentially-appointed status and to create additional presidentially-appointed IG positions in federal organizations that do not now have an IG. Any new presidentially-appointed IG would be eligible for Attorney General authorization of law enforcement powers under subsection 6(e), regardless of whether their office was established before or after enactment of this bill.

The law enforcement powers under subparagraphs (1)(A) and (B) are restricted to eligible agents “while engaged in official duties.” This limitation continues the current “blanket deputation” MOU prohibition against carrying firearms and making arrests while agents are on leave or otherwise off-duty.

Paragraph (1) makes clear that it supplements authority otherwise provided by the IG Act. It is not intended to limit in any way

IG powers already established by the Act. By the same token, the bill does not expand the investigative jurisdiction of any IG. Law enforcement powers are authorized only for investigative activities within the scope of the IG Act or other statute, or as expressly authorized by the Attorney General.

Attorney General determination of need. Paragraph (2) of subsection 6(e) establishes standards for the Attorney General's initial determination of whether IGs have needs sufficient to justify the grant of law enforcement powers. The standards require that all of the following conditions be met:

(A) An IG office is significantly hampered in the performance of its responsibilities by the lack of such powers;

(B) Assistance from other law enforcement agencies is insufficient to meet the need for such powers; and

(C) Adequate internal safeguards and management procedures exist to ensure the proper exercise of such powers.

These standards are derived from the Attorney General's 1984 Guidelines for Legislation Involving Federal Criminal Law Enforcement Authority, which have been applied by the executive branch since 1984 to evaluate any request for new federal statutory law enforcement powers for existing or proposed federal entities.

The term "initial determination" is used to signify that the Attorney General's review is a single event for each OIG, and that there will not be a periodic Attorney General reauthorization process. The lack of periodic review and reauthorization is a significant distinction between the bill and the current deputation process.

Exemption of deputized IG offices from determination of need. Paragraph (3) of subsection 6(e) exempts from the requirement for an Attorney General initial determination of need the specified 23 OIGs that now exercise law enforcement powers through blanket deputation. These offices have already met the standards of section 6(e)(2), discussed above. In addition, the Inspector General for the Tennessee Valley Authority is exempted. The TVA OIG has been elevated to presidentially-appointed status and currently has individual agents that exercise law enforcement authority based on individual deputations as opposed to an office-wide blanket deputation.

Guidelines for the exercise of law enforcement powers. Paragraph (4) requires the Attorney General to promulgate, and revise as appropriate, guidelines to govern the exercise of the law enforcement powers granted under subsection 6(e). Attorney General guidelines currently govern the 23 deputized OIGs since they are incorporated into the MOU negotiated as part of the deputation process. The intent of paragraph (4) is, in essence, is to carry forward the current guidelines.

Suspension or rescission of law enforcement powers. Paragraph (5) of subsection 6(e) requires the Attorney General to suspend or rescind law enforcement powers of any OIG that no longer satisfies the eligibility requirements of paragraph (2) or that has not complied with the guidelines promulgated under paragraph (4).

Exemptions from judicial review. Paragraph (6) of subsection 6(e) precludes judicial review of determinations by the Attorney General under paragraph (2) or (5). Department of Justice oversight of the exercise of law enforcement powers by IGs is an executive

branch administrative process. It is not intended to create third party rights or to raise issues appropriate for litigation.

External reviews. Paragraph (7) of subsection 6(e) requires the IGs that already have been granted law enforcement powers through deputation to establish a periodic external review process to ensure that they have adequate internal safeguards and management procedures for the exercise of these powers. The same review process is to apply to any OIG that later receives such powers under subsection 6(e). The external review process will be conducted by members of the IG community. It must be established within 180 days following the enactment of the bill. The review process is to be developed in consultation with the Attorney General, who shall be provided a copy of the MOU that establishes it. The results of each review shall be communicated to the applicable IG and to the Attorney General.

Limitation on the scope of section 6(e). Paragraph (8) of subsection 6(e) provides that none of its provisions shall limit the exercise of law enforcement powers established pursuant to statutory or other authority, including Marshals Service special deputations. Specific case and matter special deputation remains available for IG agents, at the discretion of the Department of Justice, and may be used for agents or offices not authorized to exercise law enforcement powers under subsection 6(e), for operations beyond the scope of subsection 6(e), and for operations between the date of enactment of the bill and authorization of OIGs under subsection 6(e). Some agencies have agency-specific statutory law enforcement powers which will not be affected by subsection 6(e). For example, the Defense Criminal Investigative Service of the Department of Defense and the IG at the Department of Agriculture exercise law enforcement powers established by agency-specific statutes.

Promulgation of initial guidelines. Subsection 1(b) of the bill contains additional provisions governing the guidelines promulgated by the Attorney General under section 6(e)(4) of the IG Act as they relate to the memoranda of understanding that now govern the exercise of law enforcement powers by the 23 IG offices referred to in paragraph 6(e)(3). It requires that the Attorney General promulgate guidelines for these offices not later than 180 days after the date of enactment of the bill. It further requires that the guidelines include, at a minimum, the operational and training requirements in the memoranda of understanding governing these offices. Finally, subsection 1(b) provides that the current MOU will remain in effect until the guidelines under section 6(e)(4) have been promulgated. The TVA OIG does not currently exercise law enforcement under a MOU. Because it is the intent of the Committee that the exercise of statutory law enforcement authority should not begin until the Attorney General has promulgated guidelines, it is expected that the TVA OIG will not exercise authority described in paragraph (2) of subsection 6(e) (except pursuant to its individual deputations) until those guidelines have been promulgated.

Effective dates. Subsection 1(c)(1) provides that the provisions of subsection (a) of the bill, which add section 6(e) of the IG Act, shall become effective 180 days after the date of enactment of the bill. Subsection 1(c)(2) provides that subsection 1(b) of the bill, dealing with the initial Attorney General guidelines, shall take effect on the date of enactment.

V. REGULATORY IMPACT STATEMENT

Pursuant to paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact that would be incurred in carrying out the bill. The Committee finds that enactment of the bill will not have significant regulatory impact.

VI. CBO COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 29, 2002.

Hon. JOSEPH I. LIEBERMAN,
Chairman, Committee on Governmental Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 2530, a bill to amend the Inspector General Act of 1978 (5 U.S.C. App.) to establish police powers for certain inspector general agents engaged in official duties and provide an oversight mechanism for the exercise of those powers.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

S. 2530—A bill to amend the Inspector General Act of 1978 (5 U.S.C. App.) to establish police powers for certain Inspector General agents engaged in official duties and provide an oversight mechanism for the exercise of those powers

The bill would amend the Inspector General Act of 1978 to allow investigative agents in offices of federal inspectors general to exercise certain law enforcement powers, such as carrying a firearm and seeking and executing warrants for arrests. Investigative agents have exercised such powers through special deputation by the U.S. Marshals Service. The legislation would codify those powers and remove the responsibility for authorizing and overseeing the use of such powers from the Marshals Service. Under the bill, the individual inspector general (IG) offices would be responsible for supervising and controlling the day-to-day use of the law enforcement powers, with the Attorney General providing additional oversight. In addition, the bill would require IG offices to enter into an interagency memorandum of understanding to establish a process of periodic peer reviews of the use of the law enforcement powers by each office.

CBO estimates that implementing this bill would have no significant effect on federal spending because the bill would codify powers already exercised by IG offices, and replace one system of review and oversight with another. S. 2530 could affect direct spending because some IG offices operate within agencies that have direct spending authority; therefore pay-as-you-go procedures would apply. CBO estimates, however, that any effect on direct spending

would be negligible. The bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Matthew Pickford. The estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

VII. CHANGES TO EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 2530, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

TITLE V—GOVERNMENT ORGANIZATION AND EMPLOYEES APPENDIXES

* * * * *

INSPECTOR GENERAL ACT OF 1978

* * * * *

SEC. 6. AUTHORITY OF INSPECTOR GENERAL; INFORMATION AND ASSISTANCE FROM FEDERAL AGENCIES; UNREASONABLE REFUSAL; OFFICE SPACE AND EQUIPMENT

* * * * *

(e)(1) In addition to the authority otherwise provided by this Act, each Inspector General appointed under section 3, any Assistant Inspectors General for Investigations under such an Inspector General, and any special agent supervised by such an Assistant Inspector General may be authorized by the Attorney General to—

(A) carry a firearm while engaged in official duties as authorized under this Act or other statute, or as expressly authorized by the Attorney General;

(B) make an arrest without a warrant while engaged in official duties as authorized under this Act or other statute, or as expressly authorized by the Attorney General, for any offense against the United States committed in their presence of such Inspector General, Assistant Inspector General, or agent, or for any felony cognizable under the laws of the United States if such Inspector General, Assistant Inspector General, or agent has reasonable grounds to believe that the person to be arrested has committed or is committing such felony; and

(C) seek and execute warrants for arrest, search of a premises, or seizure of evidence issued under the authority of the United States upon probable cause to believe that a violation has been committed.

(2) The Attorney General may authorize exercise of the powers under this subsection only upon an initial determination that—

(A) the affected Office of Inspector General is significantly hampered in the performance of responsibilities established by this Act as a result of its lack of such powers;

(B) available assistance from other law enforcement agencies is insufficient to meet the need for such powers; and

(C) adequate internal safeguards and management procedures exist to ensure proper exercise of such powers.

(3) The Inspector General offices of the Department of Commerce, Department of Education, Department of Energy, Department of Health and Human Services, Department of Housing and Urban Development, Department of the Interior, Department of Justice, Department of Labor, Department of State, Department of Transportation, Department of the Treasury, Department of Veterans Affairs, Agency for International Development, Environmental Protection Agency, Federal Deposit Insurance Corporation, Federal Emergency Management Agency, General Services Administration, National Aeronautics and Space Administration, Nuclear Regulatory Commission, Office of Personnel Management, Railroad Retirement Board, Small Business Administration, Social Security Administration, and the Tennessee Valley Authority are exempt from the requirement of paragraph (2) of an initial determination of eligibility by the Attorney General.

(4) The Attorney General shall promulgate, and revise as appropriate, guidelines which shall govern the exercise of the law enforcement powers established under paragraph (1).

(5) Powers authorized for an Office of Inspector General under paragraph (1) shall be rescinded or suspended upon a determination by the Attorney General that any of the requirements under paragraph (2) is no longer satisfied or that the exercise of authorized powers by that Office of Inspector General has not complied with the guidelines promulgated by the Attorney General under paragraph (4).

(6) A determination by the Attorney General under paragraph (2) or (5) shall not be reviewable in or by any court.

(7) To ensure the proper exercise of the law enforcement powers authorized by this subsection, the Offices of Inspector General described under paragraph (3) shall, not later than 180 days after the date of enactment of this subsection, collectively enter into a memorandum of understanding to establish an external review process for ensuring that adequate internal safeguards and management procedures continue to exist within each Office and within any Office that later receives an authorization under paragraph (2). The review process shall be established in consultation with the Attorney General, who shall be provided with a copy of the memorandum of understanding that establishes the review process. Under the review process, the exercise of the law enforcement powers by each Office of Inspector General shall be reviewed periodically by another Office of Inspector General or by a committee of Inspectors General. The results of each review shall be communicated in writing to the applicable Inspector General and to the Attorney General.

(8) No provision of this subsection shall limit the exercise of law enforcement powers established under any other statutory authority, including United States Marshals Service special deputation.