

Calendar No. 902

106TH CONGRESS }
2d Session }

SENATE

{ REPORT
106-470

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. 3144

TO AMEND 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
POWERS



OCTOBER 3 (legislative day, SEPTEMBER 22), 2000.—Ordered to be printed

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OCTOBER 3 (legislative day, SEPTEMBER 22), 2000.—Ordered to be printed

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

REPORT

[To accompany S. 3144]

The Committee on Governmental Affairs, to which was referred the bill (S. 3144) to amend the Inspector General Act 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, having considered the same, reports favorably thereon without an amendment recommends that the bill do pass.

CONTENTS

I. Purpose and summary	1
II. Background and need for legislation	2
III. Legislative history and committee consideration	4
IV. Section-by-section analysis	4
V. Regulatory impact statement	7
VI. CBO cost estimate	7
VII. Changes in existing law	8

I. PURPOSE AND SUMMARY

S. 3144 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, 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.

II. BACKGROUND AND NEED FOR LEGISLATION

A. HISTORY OF LAW ENFORCEMENT AUTHORITY FOR INSPECTORS GENERAL

Criminal investigators for the IGs covered by S. 3144 have been exercising law enforcement authorities for many years under designations as Special Deputy U.S. Marshals. Beginning in the mid-1980s 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 was so consistent and the volume of requests so large that “blanket” deputations evolved, deputizing all criminal investigators in a particular IG office in a single action. Since 1995, virtually all criminal investigators in the offices of the 23 covered IGs have exercised law enforcement authorities in cases under office-wide deputations. These deputations are renewed biannually.

Each time that an IG office receives a blanket deputation, it enters into a Memorandum of Understanding (MOU) with the Department of Justice and the FBI. These MOUs provide 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 IG office.

Currently, there are approximately 2,800 criminal investigators in the offices of presidentially-appointed IGs. According to testimony before the Committee, in the last decade, the IGs achieved more than 122,000 successful criminal prosecutions and were awarded over \$13 billion in investigative recoveries. In addition, federal agencies took more than 19,000 personnel actions based on IG investigations during the same period.

B. PROBLEMS WITH THE DEPUTATION PROCESS

Lack of oversight. Because the deputation is renewed biannually, the Attorney General and the FBI are provided with the opportunity every two years to make a determination whether each specific IG office continues to require law enforcement authority and is using it appropriately. However, information received by the Committee indicates that these biannual reviews are cursory. Beyond the renewal process, there is no current review of the use of the law enforcement authority by the IGs.

Delays in the renewal process. Biannual renewal of law enforcement authority can result in delays that could endanger ongoing criminal investigations. In fact, the Committee received information that in at least one case a criminal investigation was delayed while paperwork to renew a deputation was being completed.

Burden of oversight and administration on the U.S. Marshals Service. One of the reasons for the lack of 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 revealed that it is not possible for the Marshals Service to maintain proper oversight over all of the deputized agents in the IG offices. Further, the administrative burden is great.

Potential liability. Concerns were raised before the Committee that the blanket deputation process could lead defendants to chal-

lenge actions taken by agents pursuant to their law enforcement authority. To date, no such challenges have been made.

C. NEED FOR THE LEGISLATION

S. 3144 would address each of the problems associated with the current deputation process.

Additional oversight. S. 3144 requires that the IG offices listed in the statute collectively enter into an 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 IG offices that later receive the authority. The results of the periodic peer reviews must be communicated in writing to the applicable IG and to the Attorney General. The Attorney General is also required to promulgate guidelines which shall govern the exercise of law enforcement powers established in S. 3144. 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. 3144. The Committee understands from representatives of the Department of Justice, including the FBI, and the IG community that the MOUs that have governed the use of the authority granted by deputation are acceptable. Therefore, the Committee expects that the guidelines initially promulgated pursuant to S. 3144 will, at a minimum, contain the training and operational provisions in the MOUs. The operational provisions in the guidelines should at least include the MOUs' current parameters for notification, referral, and coordination, and for adherence to the Attorney General guidelines on General Crimes, Racketeering Enterprise, and Domestic Security/Terrorism Investigations and the Attorney General guidelines on sensitive investigative techniques, including undercover officers and sensitive targets.

The Attorney General will retain the authority to suspend or rescind law enforcement authority upon determining that the work of a particular IG office would not be hampered without the authority, that available assistance from other law enforcement agencies is sufficient to meet its law enforcement needs, that adequate internal safeguards and management procedures do not exist to ensure proper exercise of its authority, or that the IG office has not complied with the guidelines promulgated pursuant to S. 3144. The peer review process established under S. 3144 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 an IG office's deputation, there will no longer be any danger that the renewal process will interrupt an ongoing criminal investigation.

Burden of oversight and administration on the U.S. Marshals Service. S. 3144 would end the deputation process currently in place and therefore remove the existing burden on the U.S. Marshals Service.

Potential liability. Once the law enforcement authority for the affected IG offices is in statute, there will be no question as to the

validity of actions taken pursuant to the Inspector General Act and relevant guidelines.

III. LEGISLATIVE HISTORY AND COMMITTEE CONSIDERATION AMENDMENTS AND COMMITTEE ACTION

On July 19, 2000, the Committee on Governmental Affairs 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 of 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 of 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 on Governmental Affairs considered this legislative proposal and, by unanimous voice vote, ordered it reported as an original bill. That bill is S. 3144.

IV. SECTION-BY-SECTION ANALYSIS

Section 1(a) of S. 3144 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 conducted 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 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 an offense or 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, including administrative subpoena power, 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 S. 3144.

The law enforcement powers under subparagraphs (1)(A) and (B) are restricted to eligible agents “while engaged in official duties.” This reflects the view that limited-jurisdiction federal agents generally should not be authorized to carry firearms or make warrantless arrests while off-duty. 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 statute. It is not intended to limit in any way IG powers already established. By the same token, the bill does not expand the investigative jurisdiction of any IG’s office. 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 IG offices 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 1984 Guidelines for Legislation Involving Federal Criminal Law Enforcement Authority, which have been applied by the executive branch since that time 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 IG office, and that there will not be a periodic Attorney General reauthorization process. The lack of periodic 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 IG offices that now exercise law enforcement powers through deputation. These offices have already met the standards of section 6(e)(2), described above.

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, incorporated into the MOUs negotiated as part of the deputation process, currently govern the 23 deputized IG offices. The intent of paragraph (4) is, in essence, to carry forward the current guidelines. The term “guidelines” is used to make clear that these are not regulations subject to public notice, comment, or rulemaking procedures under the Administrative Procedure Act.

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 IG office 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 IG offices 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 IG offices that already have been granted law enforcement powers to establish a periodic external review process to ensure that they have adequate internal safeguards and management procedures for the exercise of those powers. The same review process is to apply to any IG office 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 in an MOU among the IGs within 180 days following the enactment of S. 3144. 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 other statutory 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 IG offices 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 office at the Department of Agriculture exercise law enforcement powers established by agency-specific statutes.

Promulgation of initial guidelines. Subsection 1(b) of S. 3144 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 MOUs 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 memoranda of understanding will remain in effect until the guidelines under section 6(e)(4) have been promulgated.

Effective dates. Subsection 1(c)(1) of S. 3144 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, October 3, 2000.

Hon. FRED THOMPSON,
*Chairman, Committee on Governmental Affairs,
U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for 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 John R. Righter.

Sincerely,

STEVEN M. LIEBERMAN
(For Dan L. Crippen, Director).

Enclosure.

*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 authorize 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 since the mid-1980s through the granting of special deputy status 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 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 to periodically peer review the exercise of the law enforcement powers by each office.

Because the bill would codify powers already exercised by IG offices, and replace one system of review and oversight with another, CBO estimates that implementing it would have no significant effect on federal costs. The bill would not affect direct spending or receipts, so pay-as-you-go procedures would not apply. 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 John R. Righter. The estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

VII. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 3144, 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 APPENDICES

* * * * *

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 conducted 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 conducted 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, and Social Security Administration 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.

