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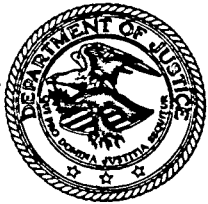
May 26, 1993

MEMORANDUM FOR: WEBSTER HUBBELL
ACTING ASSOCIATE ATTORNEY GENERAL

At our meeting May 20, you asked that we put into final form our opinion on the question whether the Attorney General may order the FBI to investigate allegations of non-criminal wrongdoing by Inspectors General. OMB Director Panetta had posed this question to the Attorney General. I am attaching our opinion, along with a letter for the Attorney General's signature.

D. L. Koffsky

Daniel L. Koffsky
Acting Assistant Attorney General
Office of Legal Counsel



Office of the Attorney General
Washington, D. C. 20530

The Honorable Leon E. Panetta
Director
Office of Management and Budget
Washington, D.C. 20503

Dear Director Panetta:

This letter responds to your April 15, 1993, request for the views of the Department of Justice on whether the Attorney General has the statutory authority to instruct the FBI to conduct administrative investigations of the Inspectors General.

I asked the Office of Legal Counsel to review this matter. As you will note in the attached opinion, OLC has concluded that the Attorney General does not have the statutory authority to instruct the FBI to conduct non-criminal, administrative investigations of the Inspectors General. The opinion discusses other possible options, including a presidential directive to the FBI instructing the Bureau to carry out the proposed inquiries.

Please let me know if this Department may be of further assistance in this matter.

Sincerely,

Janet Reno



U.S. Department of Justice
Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

May 26, 1993

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Statutory Authority of the Federal Bureau of Investigation to Undertake Non-criminal Investigations of the Inspectors General

The Director of the Office of Management and Budget (OMB) has asked "whether the Attorney General has the legal authority to direct the FBI to conduct investigations of administrative allegations" against the Inspectors General.¹ Currently, the Inspectors General investigate allegations of non-criminal wrongdoing by their own staffs. However, there is no formal procedure for handling such allegations against the Inspectors General themselves. Last fall, the Chairman of the President's Council on Integrity and Efficiency (PCIE) asked the FBI to undertake responsibility for such investigations. Attorney General Barr postponed implementation of this proposal pending a review of the supporting legal authority. The Director of OMB has requested that the Department now complete this review.

After reviewing the proposal and the statutory authority available to the Attorney General, we have concluded that the Attorney General does not have the authority to direct the FBI to conduct investigations of non-criminal misconduct by the Inspectors General. However, although the Attorney General does not have the necessary statutory authority, the President, as Chief Executive and head of the Executive Branch, has the authority to instruct the FBI to undertake these investigations.

I

The FBI is authorized by statute: (1) to detect and prosecute crimes against the United States; (2) to assist in the protection of the President; and (3) to "conduct such other

¹ See Letter to the Hon. Janet Reno, Attorney General, from Leon E. Panetta, Director, Office of Management and Budget 2 (Apr. 15, 1993).

investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General." 28 U.S.C. § 533. Because the proposal under review specifically deals with non-criminal violations, subsection (3) is the only grant of statutory authority that might support it. To come under subsection (3), however, the matters to be investigated must fall within the official responsibility of either the Department of Justice or the Department of State.²

Non-criminal, administrative misconduct by the Inspectors General, or by their staffs, will not generally constitute an "official matter[] under the control" of the Department of Justice or the Department of State, except for such misconduct by the Justice and State Inspectors General. Although it is conceivable that a particular allegation might fall within the Justice Department's authority under a particular statutory scheme, *i.e.*, misconduct that constitutes both an administrative and a criminal violation, we are aware of no general grant of authority to the Department to investigate, review, or determine allegations of non-criminal, administrative misconduct.

Thus, section 533(3) does not appear to be a sufficient grant of authority under which the Attorney General can order the FBI to undertake non-criminal, administrative investigations of the Inspectors General in agencies other than the Department of Justice or the Department of State. This would be true even if OMB or the Inspectors General themselves requested FBI assistance. This Office on numerous occasions has noted that, in the absence of a special presidential directive, the FBI's investigative authority is limited to that provided in section 533, even when the FBI's assistance has been requested. *See, e.g.*, Memorandum from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel, to Stanley E. Morris, Associate Deputy Attorney General (July 9, 1982) (FBI lacks authority to conduct investigations at the request of foreign countries); Memorandum from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, to Patricia M. Wald, Assistant Attorney General, Office of Legislative Affairs (May 4, 1978) (FBI authority to conduct background investigations for certain congressional committees should not be extended to investigations of individual Members' staffs); Memorandum for Rudolph Giuliani, Associate Deputy Attorney General, from Antonin Scalia, Assistant

² This Office has in the past interpreted subsection 533(3) to require that "either [the Justice] Department or the Department of State have an official interest in a matter before an investigation may be authorized" by the Attorney General. Memorandum for Dick Thornburgh, Attorney General, Re: Authority of the FBI to Conduct Background Investigations for Congress, 13 Op. O.L.C. 152, 153 n.3 (1989).

Attorney General, Office of Legal Counsel (June 16, 1976) (FBI lacks statutory authority to conduct background investigations of potential Vice-Presidential nominees).

If OMB wishes to pursue the proposal to involve the FBI in non-criminal investigations of the Inspectors General, it may wish to consider seeking specific statutory authority, allowing the Attorney General to direct the FBI to undertake these responsibilities. Another option, to which we now turn, would be for the President to direct the FBI to undertake the investigations.

II

The President has the power to order the FBI to undertake responsibility for investigating non-criminal allegations against the Inspectors General.³ This power rests on two interconnected constitutional sources of authority: (1) the President's inherent authority as head of the Executive Branch to oversee the performance of Executive Branch officials; and (2) the constitutional injunction that he "take Care that the Laws be faithfully executed." See Myers v. United States, 272 U.S. 52, 163-64 (1926) ("Article II grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws . . . a conclusion confirmed by his obligation to take care that the laws be faithfully executed.").⁴ As this Office noted in an opinion addressing a similar issue, "[t]he President has inherent authority to supervise and direct the performance of his appointees in office, and to investigate allegations of possible misconduct related to that performance." Memorandum Opinion for the Special Counsel to the Assistant Attorney General, Criminal Division, from Ralph W. Tarr, Deputy Assistant Attorney General, Office of Legal Counsel, 6 Op. O.L.C. 626, 628 (1982) (Tarr Memorandum). In that opinion, we determined that the PCIE Chairman lacked the authority to order

³ Any such directive could be framed in terms of a general and continuing authorization for the FBI to undertake these duties, in order to avoid the necessity for the President to become involved in any particular case.

⁴ See also Morrison v. Olson, 487 U.S. 654, 689-90 (1988) (analysis of "removal" cases designed to ensure that "Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II.").

non-criminal investigations of the Inspectors General.⁵ We noted that, while the President has the authority to sanction such an arrangement, he had not done so. Id. at 628-29.⁶ We also concluded that "[s]uch a delegation of substantive presidential authority to an agency not otherwise authorized to engage in such activities would . . . have to be explicit." Id. at 629 n.7.

Pursuant to the IG Act, each of the Inspectors General is appointed by the President, by and with the advice and consent of the Senate. 5 U.S.C. app. § 3(a). The Inspectors General are part of the Executive Branch and, while each Inspector General reports to the head of his or her agency, each is subject to removal by the President. 5 U.S.C. app. § 3(b). Thus, each Inspector General ultimately is responsible to the President, and the President may take the actions necessary to investigate allegations of non-criminal misconduct by Inspectors General as an incident of his authority as head of the Executive Branch.

In addition, under the command in Article II, section 3 that the President take care that the laws be faithfully executed, the President has the authority as Chief Executive to authorize Executive Branch agents to undertake investigative and enforcement activities in addition to those provided by statute, where those activities assist in the execution of federal law. See In re Neagle, 135 U.S. 1 (1890) (President has inherent authority as Chief Executive to authorize federal agents to take action to carry out the law not specifically authorized by statute). See also Memorandum for Dick Thornburgh, Attorney General, Re: Authority of the Federal Bureau of Investigation to Override Customary or Other International Law in the Course of Extraterritorial Law Enforcement Activities, 13 Op. O.L.C. 195, 212-15 (1989) (preliminary print) (President has authority as Chief Executive to authorize federal agents to make arrests abroad that might contravene customary international law) (Thornburgh Memorandum). Here, the FBI would be acting in aid of the President's authority to ensure that officials in the Executive Branch act lawfully.⁷

⁵ Pursuant to the proposal then under consideration, the PCIE Chairman would have been able to request an Assistant Inspector General for Investigations of one agency to investigate allegations of non-criminal misconduct by the Inspector General of another agency. Id. at 627.

⁶ Certain funding problems, not immediately relevant here, also were raised and addressed in that opinion.

⁷ While both In re Neagle and the Thornburgh Memorandum addressed the President's authority to enforce the criminal laws, Article II, section 3, does not distinguish between criminal and (continued...)

Under each of these sources of authority, we believe that the President may direct the FBI to undertake investigations into non-criminal allegations against the Inspectors General.⁸

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⁷(...continued)

civil infractions. The President must take care that all of the laws, civil and criminal, be faithfully executed. Therefore, the reasoning of those opinions would support a presidential order authorizing the FBI to undertake investigations of non-criminal, administrative infractions by the Inspectors General.

⁸ We have not addressed the possibility that the head of each agency may be able to request a detail of FBI personnel to conduct non-criminal investigations of Inspectors General. As was noted in the Tarr Memorandum, the head of an agency, to whom the Inspector General directly reports, may have the authority to order an investigation of alleged administrative wrongdoing by the Inspector General. In addition, the agency head may be able to request the detail of investigative personnel from other agencies under the Economy Act, 31 U.S.C. § 686. Tarr Memorandum, supra, at 629-30 & nn.10-11. One drawback to this arrangement, as noted in the Tarr Memorandum, is that "an agency head might find it awkward to investigate allegations against his Inspector General without violating or appearing to violate" the statutory restrictions forbidding the head from interfering with the Inspector General's own investigations. Id. at 630 n.10.