



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

APR 11 2010

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

Dear Mr. Chairman:

The Department of Justice ("Department") has the following comments on H.R. 1847, the Inspector General Protection Act. For the reasons that follow, the Department opposes enactment of this bill.

Section 2(a) of the bill would amend section 3(b) of the Inspector General Act (5 U.S.C. app. §§ 1-13) to require the President to give thirty days' advance notice to Congress before placing an Inspector General who was appointed by the President with Senate confirmation on "paid or unpaid nonduty status," along with the reasons for doing so. Section 3(b) already requires the President to give thirty days' advance notice to Congress before removing an Inspector General, along with the reasons for doing so. Section 2(a) of the bill thus would deprive the President of the ability to stop an Inspector General from performing the duties of the office even during the thirty days leading up to a removal, thereby thwarting the President's constitutional prerogative under Article II immediately to relieve a presidentially appointed executive officer of duty. *See Myers v. United States*, 272 U.S. 52, 135-36, 176 (1926); *cf. Morrison v. Olson*, 487 U.S. 654, 690 (1988) (It is "undoubtedly correct" that "there are some 'purely executive' officials who must be removable at will if [the President] is to be able to accomplish his constitutional role."). The Department therefore opposes enactment of section 2(a).

Section 2(b) of the bill makes a similar amendment to section 8G(e)(2) of the Inspector General Act, governing adverse action against an Inspector General who was appointed by the head of a "designated Federal entity" (defined in section 8G(a)(2)). The amendment would require the head of such an entity to give thirty days' advance notice to Congress before placing the Inspector General on "paid or unpaid nonduty status." Currently, section 8G(e)(2) requires the head of the entity to give thirty days' advance notice to Congress before removing an Inspector General, along with the reasons for doing so. This amendment would have the same

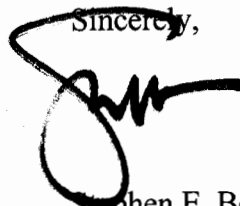
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relieve an executive officer of duty. The Department therefore opposes enactment of section 2(b) as well.

Finally, section 3(a) of the bill would add a new section 5 U.S.C. § 3349e, requiring a presidential explanation of failure to nominate an Inspector General. The provision would state that, “[i]f the President fails to make a formal nomination for a vacant Inspector General position” within 210 days after the vacancy arises, he shall communicate to Congress, “within 30 days after the end of such period,” both “the reasons why the President has not yet made a formal nomination” and “a target date for making a formal nomination.” By imposing an obligation on the President to report to Congress on the exercise of his nomination power—an exclusive prerogative of the President—the provision raises concerns under the separation of powers. *Cf. Pub. Citizen v. Dept. of Justice*, 491 U.S. 440 (1989). The Department therefore opposes the provision as an intrusion by Congress into the President’s deliberations concerning the selection of nominees. If enacted, the provision would have to be construed consistent with the President’s prerogatives under Article II of the Constitution.

Thank you for the opportunity to present our views. Please do not hesitate to contact this office if we may be of additional assistance to you. The Office of Management and Budget has advised us that from the perspective of the Administration’s program, there is no objection to submission of this letter.

Sincerely,



Stephen E. Boyd  
Assistant Attorney General

cc: The Honorable Jim Jordan  
Ranking Minority Member