U.S. Department of Justice

Office of Legislative Affairs

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

The Honorable Gary Peters
Chairman
Committee on Homeland Security
and Intergovernmental Affairs
United State Senate
Washington, DC 20510

Dear Mr. Chairman:

The Department of Justice (Department) has the following comments on H.R. 23, the Inspector General Protection Act. For the reasons that follow, the Department opposes enactment of one section of this bill and has an additional comment about another section.

Section 2(a) of the bill would amend section 3(b) of the Inspector General Act, 5 U.S.C. app., to require the President to give thirty days advance notice to Congress before putting an Inspector General who was appointed by the President with Senate confirmation on "paid or unpaid non-duty 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.

Section 2(b) of the bill would make 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 putting the Inspector General on "paid or unpaid non-duty 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 effect as section 2(a)—it would preclude the appointing authority from immediately relieving an executive officer from duty, no matter what the circumstances.

Both of these amendments would thus require the President to allow an Inspector General to continue working for thirty days no matter what the grounds for a suspension might be—even if, for example, the President concludes that there is good cause for the suspension (and removal), such as if the Inspector General is abusing her authority, violating the law, or is

unwilling or unable to comply with the Inspector General's statutory duties. Such a restriction would be incompatible with the President's constitutional duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II. § 3; *see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 495–96 (2010) (holding that a removal restriction that "withdraws from the President any decision on whether that good cause exists" would mean that the President can "neither ensure that the laws are faithfully executed, nor be held responsible for [the officer's] breach of faith").

We recognize that the existing Inspector General Act requires the President or the agency head to notify Congress thirty days prior to removing an Inspector General. *See* 5 U.S.C. app. §§ 3(b), 8G(e)(2). But we have maintained that such a requirement is facially constitutional only because the President retains the authority to immediately suspend an Inspector General he intends to remove, while providing the thirty days' notice to Congress. We have explained that we would construe such a requirement not to restrict the President's ability to suspend an Inspector General without notice to Congress, in order to avoid serious separation of powers concerns. By requiring the President or the agency head to give thirty days advance notice to Congress before even putting an Inspector General on non-duty status, section 2 of H.R. 23 would remove the very feature that makes the current Inspector General Act's thirty-day notification period constitutional. *See Morrison v. Olson*, 487 U.S. 654, 692 (1988) (suggesting that "completely stripp[ing]" the "power to remove an executive official" would "provid[e] no means for the President to ensure the 'faithful execution' of the laws"). For these reasons, the Department opposes enactment of this section.

Additionally, Section 3(a) of the bill would add a new section, 5 U.S.C. § 3349e, requiring the President to communicate the reasons why a formal nomination has not been made to fill an Inspector General vacancy. 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, the President 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."

A statutory requirement that the President report on presidential deliberations concerning the selection of nominees, or the President's thought processes involving a future appointment, would raise significant separation of powers concerns. *Cf. Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 466 (1989) (explaining that construing the Federal Advisory Committee Act's disclosure requirements "to apply to the Justice Department's consultations with the [American Bar Association concerning judicial nominees] would present formidable constitutional difficulties" under the President's Article II power to nominate judges). We would, however, construe the term "reasons why" in the proposed section 3349e to permit the President to offer general reasons that would not reveal presidential thought processes.

Thank you for the opportunity to present our views. We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter. 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,

JOSEPH GAETA
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Joe Gaeta
Deputy Assistant Attorney General