GAO

United States
General Accounting Office
Washington, D.C. 20548

324144

Office of the General Counsel

B-256322

April 15, 1994

The Honorable Jack Brooks
Chairman, Committee on the Judiciary
House of Representatives

Dear Mr. Chairman:

This responds to your request that we review certain jurisdictional issues pertaining to the Justice Department's Inspector General (IG) and the Office of Professional Responsibility (OPR). Your request stemmed from controversy within the Justice Department concerning the two offices' jurisdiction over misconduct matters involving Department employees, and asked that we examine the circumstances surrounding the jurisdictional dispute as well as options for its resolution.

At your request, we:

--reviewed the jurisdictional structure created by the Inspector General Act Amendments of 1988, which established a statutory IG at Justice but retained OPR to investigate certain misconduct allegations;

--analyzed actions the Justice Department took in 1992 to define the respective jurisdiction of the IG and OPR, to determine whether they were consistent with the jurisdictional structure imposed by the 1988 legislation;

--reviewed and evaluated OPR's concerns about the feasibility of transferring its functions to the IG; and

--assessed options for resolving the jurisdictional issues between the two offices.

We gathered the information necessary to review these issues by analyzing the pertinent law and its legislative history, examining the Justice Department's 1992 issuances and other documentation bearing on the jurisdictional dispute, and

conducting interviews with Justice Department officials.[1] We did not assess the quality of the work done by either OPR or the Office of Inspector General (OIG),[2] and we excluded from our review functions OPR performs outside the investigation of employee misconduct, such as providing ethics advice and counsel to the Attorney General. The results of our review, described in detail in Enclosure I, are summarized below.

By way of background, the foundation for Justice's audit and investigative structure is the Inspector General Act of 1978, as amended by the Inspector General Act Amendments of 1988 ("1988 Amendments"), Pub. L. No. 100-504, 102 Stat. 2515, 5 U.S.C. App. II. The 1988 Amendments established a statutory IG at Justice and generally gave the IG the same charter and powers as other statutory IGs. While the legislation transferred to OIG most of the Department's internal audit and investigative units, it retained as separate units the OPR at Main Justice, the Federal Bureau of Investigation's Inspection Division, and the Drug Enforcement Administration's OPR.

While according Justice's IG broad authority to investigate misconduct matters involving Department employees, the 1988 Amendments imposed two significant limitations on the IG's authority. The first limitation, contained in section 8D(a) of the Inspector General Act, as amended, allows the Attorney General to assume control over or halt any IG investigation or the issuance of any subpoena requiring information about: (1) ongoing civil or criminal investigations or proceedings; (2) undercover operations; (3) the identity of confidential sources, including protected witnesses; (4) intelligence or counterintelligence matters; or (5) other matters "the disclosure of which would

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[1]We interviewed the Counsel and Deputy Counsel, OPR, and the Inspector General, Deputy Inspector General, and Assistant Inspector General for Investigations. We attempted to meet with the prior Attorney General to obtain his views on the jurisdictional issues, but were unable to do so before he left office. We did meet with the current Attorney General and other Justice officials responsible for reviewing the situation.

[2]At your request and the request of the Senate Committee on Governmental Affairs, GAO did a separate review of the management and operation of Justice's OIG. See GAO/AIMD-93-78R and GAO/AIMD-93-53R (Sept. 3, 1993).

constitute a serious threat to national security."[3] The second limitation imposed by the 1988 Amendments restricts the scope of the IG's jurisdiction by reserving to OPR the authority to investigate misconduct allegations against Justice employees serving in "an attorney, criminal investigative, or law enforcement position." Inspector General Act, section 8D(b)(3).

The committee reports accompanying the 1988 Amendments indicate that Congress had a narrower purpose in preserving OPR than was expressed in the language of section 8D(b)(3). Specifically, Congress indicated that it was acceding to the Justice Department's proposal that OPR, rather than the IG, should continue to review allegations pertaining to the exercise of prosecutorial or litigative discretion in particular cases. See, e.g., H.R. Conf. Rep. No. 1020, 100th Cong., 2d Sess. 25 (1988). In addition, while approving a divided audit and investigative structure at Justice, Congress recognized that this structure lacked the centralized control normally vested in IGs and that the separate audit and investigative units would not share basic IG characteristics, such as independence in the form of statutory permanence and congressional reporting responsibilities. Consequently, Congress emphasized that the Attorney General would be able to merge OPR and the other audit and investigative units into OIG pursuant to section 9(a)(2) of the Inspector General Act,[4] and that such a merger would be "consistent with the inspector general concept." See H.R. Conf. Rep. 1020 at 24.

Following the appointment of a permanent IG at Justice in 1990, jurisdictional disputes developed and cooperation between the IG and OPR declined. Rather than acting to shift the matters within OPR's jurisdiction to the IG, the Justice Department addressed the disputes in 1992 by defining OPR's authority in expansive terms that in some respects exceeded the jurisdictional limitations imposed by the 1988 Amendments. For example, in a November 1992 memorandum signed by the then Deputy Attorney General, OPR was given investigative jurisdiction over all employees in entire Justice components regardless of whether they were

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[3]In addition, the Attorney General may halt any IG investigation if deemed necessary to prevent "significant impairment to the national interests of the United States." Section 8D(a)(2).

[4]Section 9(a)(2) allows an agency or department head to transfer to an IG "such other offices or agencies, or functions, powers, or duties thereof" as will promote the purposes of the Act.

serving in "an attorney, criminal investigative, or law enforcement position" under section 8D(b)(3) of the Act. In addition, the memorandum defined employees "in an attorney . . . position" subject to OPR's jurisdiction as including any Justice employee who either functions as an attorney or has been admitted to practice law.

Following the IG's strong protest over the terms of the November memorandum, the same Justice official, as Acting Attorney General, issued Attorney General Order No. 1638-92 on December 11, 1992. While the order modified the prior memorandum in several respects, it still adopted an expansive definition of OPR's jurisdiction. For example, the order dropped the provision giving OPR jurisdiction over employees with legal credentials who do not actually serve in attorney positions, thus conforming this aspect of OPR's jurisdiction to the terms of the statute. However, the order still provides that allegations of misconduct against all employees in attorney positions are to be referred initially to OPR "regardless of whether the misconduct involved that person's legal work or other, nonlegal duties or actions."

In addition, the December 1992 order continues to preclude the IG from initiating investigations of employees in entire Justice components--including, for example, the U.S. Attorneys' offices and the Office of Solicitor General--regardless of whether the employee occupies an attorney, criminal investigative, or law enforcement position. Instead, the order provides that allegations about these employees must be referred initially to OPR, which will then refer back to the IG any allegation that "concerns waste, fraud or abuse" and does not "implicate the prosecutive, investigative, or litigative functions of the Department."

One apparent effect of the order is to preclude, or at best delay, the IG from investigating allegations about employees who do not fall within the three categories statutorily reserved to OPR. For example, under the order an allegation of fraud on the part of a contracting or disbursing officer in a U.S. Attorney's office would be referred initially to OPR, potentially delaying investigation by the IG. Further, OPR could retain allegations about employees outside the three statutory categories, without any referral to the IG, when it determines that the allegations involve a matter other than fraud, waste, or abuse, such as an improper personnel action, or that they "implicate prosecutive, investigative, or litigative functions" of the Department. In our view, neither the language nor the history of the relevant statutory provision supports extension of OPR's jurisdiction to the broad categories of allegations referred to in the order.

One fundamental question is whether OPR should be merged into OIG, or if not, what form their individual jurisdictions should take. In the course of our review, OPR raised several concerns about the merger of its functions into OIG. As discussed in detail in Enclosure I, we believe that all of OPR's concerns can be accommodated within the framework of the Inspector General Act. For example, while OPR asserts that an IG with expanded access to sensitive information could jeopardize ongoing cases by releasing it, section 5(e) of the Inspector General Act prohibits Justice's IG from publicly disclosing various categories of sensitive information including information associated with ongoing criminal investigations. Also, Justice has informed us that the IG conforms to the Department's practices regarding the secrecy of sensitive law enforcement information.

More fundamentally, OPR expressed concern about the sensitivities that attach to reviews involving the exercise of prosecutorial and litigative discretion and the IG's ability to accommodate them. We agree that such reviews can be sensitive, given the nature of the functions and judgments involved and the need to protect the government's position in ongoing cases. However, we do not believe an inspector general's office is institutionally less capable of reviewing matters that pertain to discretionary legal judgments, provided it has the necessary experience and expertise to do so. Furthermore, in addition to the disclosure restrictions discussed above, the Inspector General Act provides safeguards that can be invoked to protect the Justice Department's interests in particularly sensitive matters. Specifically, section 8D(a) of the Act authorizes the Attorney General to assume control of or halt any IG investigation requiring access to specified categories of sensitive information, including information that pertains to ongoing civil or criminal investigations or proceedings, or to matters the disclosure of which would constitute a serious threat to national security.

Against this background, we see two basic options for addressing the jurisdictional issues between OPR and OIG. First, short of merger, OPR's jurisdiction over allegations of employee misconduct could be modified either legislatively or administratively to include only those matters involving the exercise of prosecutorial or litigative discretion.[5] This option would accommodate the sensitivities identified by OPR and would conform OPR's jurisdiction to the legislative purposes behind its

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[5]An administrative modification of OPR's jurisdiction could be accomplished pursuant to section 9(a)(2) of the Inspector General Act, quoted in footnote 4.

retention. At the same time, however, this option could simply change the venue for jurisdictional disputes between OPR and OIG. In addition, preserving OPR as a separate unit, even with reduced jurisdiction, would maintain an organizational structure lacking the full measure of centralized control, independence, and accountability to the Congress envisioned by the Inspector General Act.

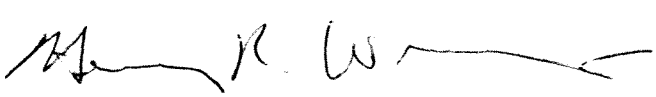
As Congress recognized in enacting the 1988 Amendments, the second option of merging OPR's functions with respect to employee misconduct investigations into OIG would promote the basic principles underlying the Act. While the IG would acquire OPR's authority to review matters involving the exercise of prosecutorial or litigative discretion, as discussed above, we do not believe the IG is less capable of performing such reviews or safeguarding the information needed to conduct them. However, any merger of the two offices should be structured to ensure that the IG has the necessary experience and expertise to do such reviews, and that the Attorney General retains the ability to assume control over or halt particularly sensitive IG investigations under the circumstances prescribed by the Inspector General Act.

By letter dated April 5, 1994, the Department of Justice commented on a draft of this report. The full text of the Department's letter is included as Enclosure II. While not disputing the report's basic analysis, the April 5 letter raised several points. These points are addressed in Enclosure I. The Department's letter stated that it was considering a number of proposals to improve the situation between OIG and OPR, but had not yet reached a decision. Subsequent to the April 5 letter, the Department indicated that it has decided not to merge the two offices.

Unless you publicly announce its contents earlier, we will not release this report to the public until 30 days from the date of issuance. At that time, we will make copies available to the public on request.

Please contact me on (202) 512-5156 or Ms. Lynn Gibson, Associate General Counsel, on (202) 512-5422 if you or your staff have any questions concerning this report.

Sincerely yours,



Henry R. Wray
Senior Associate General Counsel

Enclosures

JURISDICTIONAL ISSUES RELATING TO JUSTICE'S IG AND OPR

I. Background

The Inspector General Act of 1978 ("1978 Act"), as amended, establishes independent, presidentially appointed inspectors general (IGs) within federal departments and agencies.[1] Under the Act, offices of inspectors general (OIGs) are responsible for conducting and supervising audits and investigations; recommending policies to promote economy, efficiency, and effectiveness and to prevent fraud; and detecting fraud and abuse in their agencies' programs and operations. In addition, the Act requires IGs to prepare semiannual reports which summarize their activities during the preceding 6-month period. The reports are forwarded to the department or agency head, who is responsible for transmitting them to the appropriate congressional committees.

The 1978 Act was enacted following a series of events which emphasized the need for more independent and coordinated audits and investigations in federal departments and agencies. In the early 1970's the Secretary of Agriculture abolished the department's administratively established inspector general's office, demonstrating the impermanent nature of nonstatutory inspectors general. In 1976 Congress established the first statutory IG at the Department of Health, Education, and Welfare (now the Department of Health and Human Services), and in 1977 it created an IG at the Department of Energy. A congressional study issued in 1977 concluded that other federal departments and agencies would benefit from statutory IGs, finding that the agencies' audit programs lacked central leadership, were not sufficiently independent, and did not operate under procedures that would ensure serious problems were brought to the attention of Congress. See H.R. Rep. No. 584, 95th Cong., 1st Sess. 5-7 (1977).

The 1978 Act addressed the deficiencies identified in the 1977 study by establishing statutory IGs at a number of departments and agencies. As articulated by Congress in connection with amendments to the act and by GAO in a series of reports, there are several core principles of effective

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[1]The Inspector General Act is contained in 5 U.S.C. App. II, §§ 1-12.

government auditing that underlie the act.[2] Despite different organizational structures, IGs share the common, statutorily-based characteristics of being organizationally independent, serving as the central source of leadership and coordination for all of an agency's audit and investigative functions, and reporting directly to the agency head and the Congress.

While the 1978 Act and subsequent amendments established IGs for numerous departments and agencies, Congress deferred establishing IGs at the Departments of Justice and Treasury pending further study of the need for a centralized audit and investigative function at those departments. Congress extended the Inspector General Act to both departments through the Inspector General Act Amendments of 1988 ("1988 Amendments"), Pub. L. No. 100-504, 102 Stat. 2515. According to the House report on the 1988 Amendments, Congress found Justice's internal audit program deficient because audit and investigative functions were divided among 14 different units, and these units lacked the organizational independence and centralized leadership envisioned by the 1978 Act. See H.R. Rep. No. 771, 100th Cong., 2d Sess. 8,9 (1988).

In extending the Inspector General Act to the Justice Department, Congress considered and rejected constitutional and policy objections which were raised by the Justice Department and are discussed in Part III, below. In general, the 1988 Amendments gave the Justice Department's IG the same charter and powers as other statutory inspectors general. However, in recognition of the sensitivity of Justice's law enforcement functions, Congress included in the 1988 Amendments two significant limitations on the authority of Justice's IG.

The first limitation, contained in section 8D(a) of the Inspector General Act, as amended, allows the Attorney General to exercise "authority, direction, and control" over the IG in the conduct of, or to prohibit the IG from performing, any audit or investigation requiring access to certain categories of sensitive information. Specifically, the Attorney General may assume control over or halt any audit or investigation or the issuance of any subpoena requiring information about: (1) ongoing civil or criminal

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[2]See H.R. Rep. No. 771, 100th Cong., 2d Sess. (1988), accompanying the 1988 amendments to the Inspector General Act. See also, Justice Department: An Assessment of the Need for a Statutory Inspector General (GAO/AFMD-86-8, Feb. 24, 1986); The Inspector General Act Amendments of 1987 (GAO/T-AFMD-87-14, May 12, 1987).

investigations or proceedings; (2) undercover operations; (3) the identity of confidential sources, including protected witnesses; (4) intelligence or counterintelligence matters; or (5) other matters "the disclosure of which would constitute a serious threat to national security."[3] If the Attorney General decides to exercise control over or halt an investigation a statement of reasons for the decision must be provided to the IG, who in turn must submit the statement to the appropriate congressional committees.

The second limitation imposed by the 1988 Amendments pertains to the scope of the IG's jurisdiction. While the legislation transferred most of Justice's internal audit and investigative units to the IG, it retained a separate Office of Professional Responsibility (OPR) at Justice and preserved the Federal Bureau of Investigation's Inspection Division and the Drug Enforcement Administration's OPR. In retaining Main Justice's OPR as a separate unit, Congress indicated that it was acceding to Justice's proposal that OPR continue to review allegations concerning the merits of prosecutorial or litigative decisions.[4] In this regard, the conference report explained that:

> "The conferees do not intend that the IG should render judgments on the exercise of prosecutorial or other litigative discretion in a particular case or controversy. Examples include an attorney's decision regarding the adequacy of evidence to litigate a case or the decision to grant immunity to one defendant in return for testimony against another defendant. Unless a unique set of circumstances dictates otherwise, the conferees intend that reviews of such prosecutorial or other litigative discretion in a particular case or controversy is an appropriate role for, and may be delegated by, the Attorney General." H.R. Conf. Rep. No. 1020 at 25.

While the objective behind OPR's retention as a separate unit was to allow it to continue reviewing allegations

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[3]In addition, the Attorney General may halt any IG investigation if deemed necessary to prevent "significant impairment to the national interests of the United States." Section 8D(a)(2).

[4]See H.R. Rep. No. 771 at 9-10; H.R. Conf. Rep. No. 1020, 100th Cong., 2d Sess. at 24 (1988). As described in the House report, OPR at the time had principal responsibility for reviewing allegations relating to abuse of prosecutorial discretion, grand jury procedure, and legal conflicts of interest. H.R. Rep. No. 771 at 10.

pertaining to the exercise of prosecutorial or litigative discretion, Congress framed OPR's statutory jurisdiction in broader terms. Specifically, under section 8D(b)(3) of the Inspector General Act, as amended, the Justice Department's IG is required to refer to OPR allegations of misconduct concerning Justice Department employees (other than OPR employees) who are "employed in an attorney, criminal investigative, or law enforcement position."

In excluding OPR and the FBI and DEA units from the jurisdiction of Justice's OIG, the 1988 Amendments departed in several respects from core principles underlying the Inspector General Act. For example, although independence in the form of statutory permanence is a basic attribute of inspector general offices, the House report on the 1988 Amendments observed:

> "It should be noted that OPR operates under procedures established at the discretion of the Attorney General--procedures that can be changed whenever an Attorney General might decide to do so . . .[A] Justice Department Inspector General would not be subject to such administrative vagaries." H. Rep. No. 771 at 10.

Additionally, the 1988 Amendments subjected only the IG to congressional reporting requirements. Although no statutory reporting requirement was imposed on OPR or the other two separate units, the conference report expressed the expectation that OPR would contribute to the IG's semi-annual reports to Congress. Specifically, the conference report directed that OPR provide to the IG a summary of matters referred to OPR and their resolution, where available, for inclusion in the semi-annual reports. H.R. Conf. Rep. No. 1020 at 25.

Finally, Congress recognized that Justice's new audit structure lacked the centralized control normally vested in IGs and emphasized that the Attorney General would be able to merge OPR and the other audit and investigative units into the OIG pursuant to section 9(a)(2) of the Inspector General Act.[5] Thus, the House report on the 1988 Amendments, while approving the retention of audit and investigative units outside Justice's OIG, observed that "the optimal situation is the consolidation of all internal audit and investigative units within the offices of

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[5]Section 9(a)(2) allows an agency or department head to transfer to an IG "such other offices or agencies, or functions, powers, or duties thereof" as will promote the purposes of the Act.

inspector general." H.R. Rep. No. 771 at 9. The conference report offered a similar perspective, stating that:

> "In the future the Attorney General may determine that OPR and the other audit, internal investigation, and inspection units remaining outside the OIG should be consolidated in the OIG. Pursuant to section 9(a)(2) of the Inspector General Act, the Attorney General is authorized to effect the transfer of resources and functions necessary to achieve this consolidation. Such a transfer would be consistent with the inspector general concept . . . " H.R. Conf. Rep. 1020 at 24.[6]

To date, no Attorney General has merged OPR or the other separate units into the inspector general's office. Rather, as discussed below, in 1992 the Justice Department defined OPR's jurisdiction expansively and in terms that restricted the statutory jurisdiction of the IG.

II. Respective Jurisdiction of OPR and the IG

Beginning in 1989 and during part of 1990, an interim inspector general appointed by the Attorney General headed Justice's OIG. During this period, the IG's office and OPR worked under a broadly worded memorandum of understanding (MOU) that gave OPR jurisdiction over employees in attorney, criminal investigative, and law enforcement positions, and authorized the IG to handle allegations against other Justice Department employees. The MOU called for the IG to provide OPR with the personnel needed for OPR to conduct its investigations.

In June 1990, the President appointed a permanent IG for the Justice Department. Several months after his appointment, the IG proposed to the Deputy Attorney General that Justice either merge OPR into the OIG or that, in keeping with the congressional purpose behind OPR's retention, Justice limit OPR's jurisdiction to matters involving the exercise of prosecutorial discretion and violations of ethical standards. In explanation, the IG expressed the view that Justice did not need two "IG-like" offices; that the existing jurisdictional arrangements between the offices had

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[6]See also 134 Cong. Rec. 28,021 (1988) (Statement of Sen. Glenn, observing that the consolidation of OPR and the other audit units into OIG would be consistent with the inspector general concept and urging that "the Attorney General give early and careful consideration to this action.")

created confusion among Department components as to the investigative responsibility of each; and that OPR and the IG disagreed on the scope of their respective jurisdiction. To illustrate the latter point, the IG noted that OPR disagreed with his position that the OIG should have jurisdiction over employees who have attorney, criminal investigative, or law enforcement backgrounds but serve in management positions.

The Department of Justice did not act on the IG's proposals, and cooperation between OPR and OIG declined. In early 1992 OPR proposed modifications to the MOU between the offices, but the IG refused to approve the MOU as modified. In addition, the IG declined to provide staff assistance to OPR, and, according to the Counsel, OPR, stopped coordinating cases with that office. Further, while the conference report on the 1988 Amendments instructed OPR to provide information on its cases for inclusion in the IG's semi-annual report, OPR did not do so.

In November 1992, former Deputy Attorney General George Terwilliger issued a memorandum prescribing the jurisdictional lines between OPR and OIG after consulting with OPR and the Office of Legal Counsel, but not the IG. Following the IG's strong protest over the terms of the memorandum, Mr. Terwilliger, as Acting Attorney General, issued Attorney General Order No. 1638-92 on December 11, 1992. The order modified the prior memorandum in several respects but retained several of its key features. In our view, both the November memorandum and the December order defined OPR's authority in expansive terms that in some respects exceeded the jurisdictional limitations imposed by the 1988 Amendments.

As noted previously, section 8D(b)(3) of the Inspector General Act, as added by the 1988 Amendments, reserved to OPR jurisdiction over individuals "employed in an attorney, criminal investigative, or law enforcement position." The November 1992 memorandum expanded this statutory jurisdiction, placing under OPR's authority all employees in entire Justice components. For example, OPR was given jurisdiction over all employees of the DEA and FBI on the basis that all such employees are "principally involved either directly or indirectly in law enforcement activities." The memorandum assigned OPR jurisdiction over all employees of the U.S. Attorneys' offices, reasoning that each such employee is "directly involved in the support of" investigative, prosecutive, or litigative functions. Based on a similar rationale, it gave OPR jurisdiction over all employees of the United States Trustees' offices. In addition, the memorandum defined employees "in an attorney . . . position" subject to OPR's jurisdiction as

including any Justice employee who either functions as an attorney or has been admitted to practice law.

The December 1992 order modified some of the provisions of the November memorandum, but still retained an expansive definition of OPR's jurisdiction. For example, the order dropped the provision giving OPR jurisdiction over employees with legal credentials who do not actually serve in attorney positions, thus conforming this aspect of OPR's jurisdiction to the terms of statute. However, the order still provides that allegations of misconduct against all employees in attorney positions are to be referred initially to OPR "regardless of whether the misconduct involved that person's legal work or other, nonlegal duties or actions."

Moreover, the order continued to preclude the IG from initiating investigations of employees in entire components of the Department. Specifically, the order prohibits the IG from initiating investigations of any employee in a number of Justice components--including the Office of Solicitor General, the U.S. Attorneys' offices, the Office of Legal Counsel, the Office of Intelligence Policy Review, and the FBI and DEA--regardless of whether the employee is in an attorney, criminal investigative, or law enforcement position. Instead, allegations of misconduct by all employees in these components must be referred initially to OPR. The order provides that OPR will then refer back to the IG allegations about employees in the designated components if OPR determines that the allegation does not "implicate the prosecutive, investigative, or litigative functions of the Department" and that it "concerns waste, fraud or abuse."

The December 1992 order further provides that the IG is to initially receive allegations about employees (other than attorneys) in the Immigration and Naturalization Service, the Bureau of Prisons, the Justice Management Division, the Office of Justice Programs, the Executive Office for United States Attorneys, and the U.S. Trustees' offices. However, the IG must refer back to OPR allegations about any employee if it determines the allegation "implicates the prosecutive, investigative, or litigative functions of the Department," even if the employee's position is not classified as an attorney, criminal investigative, or law enforcement position.

One apparent effect of the order is to preclude, or at best delay, the IG from investigating allegations about employees who do not fall within the three categories statutorily reserved to OPR. For example, under the order an allegation of fraud on the part of a contracting or disbursing officer in a U.S. Attorney's office would be referred initially to OPR, potentially delaying investigation by the IG. Further,

OPR could retain allegations about employees outside the three statutory categories, without any referral to the IG, when OPR determines that the allegations involve a matter other than fraud, waste, or abuse, such as an improper personnel action. In our view, there is no statutory basis for these limitations on the IG's authority.

Furthermore, we see no legal basis for allowing OPR to retain allegations about employees who do not serve in an attorney, criminal investigative, or law enforcement position, on the grounds that the allegations "implicate prosecutive, investigative, or litigative functions" of the Department. The statute prescribing OPR's jurisdiction limits it to allegations about individuals employed in the covered positions; neither the language nor the history of the statute supports extension of OPR's jurisdiction to the broad categories of allegations referred to in the order.[7] Also, because the order fails to define the scope of the matters that would be viewed as bearing on the Department's

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[7]Indeed, as noted previously, Congress had a narrower purpose in preserving OPR than was expressed in the language of section 8D(b)(3) of the Inspector General Act, as amended. Essentially, Congress intended that OPR, rather than the IG, would review exercises of prosecutorial or litigative discretion in particular cases. See H.R. Rep. No. 771 at 9-10; H.R. Conf. Rep. No. 1020 at 25.

The early history of the 1988 Amendments indicates that, in acceding to Justice's request that OPR be retained, Congress rejected an alternative proposal that would have precluded the IG from reviewing allegations in broad areas of the Justice Department's functions. Specifically, in a 1981 report, the House Committee on Government Operations noted that the Justice Department had proposed that the IG be prohibited from auditing or investigating "activities arising from the exercise of discretionary authority vested in Department officials with respect to law enforcement, litigation, legal advice, and corrections." In response, the Committee stated:

> "The Committee finds the conditions unacceptable. While the Committee could not accede to the drastic limitation of the Inspector General's jurisdiction sought by the Department of Justice, it did agree to a request that the Office of Professional Responsibility not be made a part of the Office of Inspector General." H.R. Rep. No. 40, 97th Cong., 1st Sess. 11 (1981).

prosecutive, investigative, or litigative functions, the order is susceptible to broad interpretations that could greatly diminish the authority of the IG. For example, as indicated previously, the November memorandum preceding the order observed that U.S. Attorney offices are "uniquely and exclusively" involved with the Department's prosecutive, investigative, and litigative functions, and therefore "each employee of a U.S. Attorney's office is directly involved in the support of such functions."

One fundamental question relating to the jurisdictional issues between OPR and OIG is whether OPR should be merged into OIG, or if not, what form their individual jurisdictions should take. With respect to the merger option, OPR officials expressed several concerns about the assignment of OPR's functions to the inspector general's office. The concerns identified by OPR, and our assessment of them, are presented below.

III. Concerns Regarding OPR's Merger into OIG

OPR has raised four basic concerns about the transfer of its functions to the inspector general's office. As discussed below, OPR maintains that if the IG's authority were expanded to include OPR's functions:

(1) the Attorney General's authority to investigate and prosecute cases within Justice would be impaired;

(2) the IG could potentially disclose sensitive law enforcement information and thereby threaten the success of investigations and prosecutions;

(3) the IG, by reviewing discretionary judgments in individual cases, could interfere with or jeopardize ongoing external investigations and prosecutions; and

(4) the IG would not be able to gain access to grand jury materials on the same basis as OPR.

The first two arguments were raised by the Justice Department in opposition to creation of a statutory IG at Justice, and Congress rejected both in enacting the 1988 Amendments. First, in hearings on the amendments, Justice argued that an IG would divest the Attorney General of that office's paramount, constitutional authority to investigate and prosecute cases involving Department employees, and it expressed concern that the Attorney General would have no authority to halt or redirect investigations conducted by

the IG.[8] Congress disagreed that the Attorney General's authority would be undermined by the creation of a Justice inspector general, noting that the investigation and prosecution of cases are basic program responsibilities of the Justice Department and that IGs are statutorily prohibited from assuming such responsibilities.[9] In addition, as noted previously, Congress in enacting the 1988 Amendments gave the Attorney General authority to assume control of or halt certain IG investigations. See section 8D(a) of the Act, as amended.

The second argument reiterates the Justice Department's earlier concern that a statutory IG would be able to disclose sensitive information pertaining to ongoing criminal cases, and thereby jeopardize the government's position in those cases. In enacting the 1988 Amendments Congress determined that this concern could be accommodated within the framework of the Inspector General Act, which prohibits IGs from disclosing information that is protected by law and certain Executive orders, as well as any non-public information that pertains to ongoing criminal investigations. See H.R. Rep. No. 771 at 11, discussing section 5(e) of the Act. In addition, the House report on the 1988 Amendments observed that because the Act requires statutory IGs to be selected on the basis of their integrity as well as other specified qualifications, there is no reason to believe that they would be less trustworthy than other department officials in handling sensitive information. Id.

The third concern, relating to the IG's review of discretionary legal judgments, was also raised and debated in the context of the 1988 Amendments. In hearings on the 1988 legislation, Justice argued that IG reviews of the exercise of prosecutorial and other decisions by Justice attorneys could diminish the flexibility and candor needed

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[8]Inspector General Act Amendments of 1987: Hearings Before the Senate Comm. on Governmental Affairs, 100th Cong., 1st Sess. 29-30 (1987)(statement of Stephen J. Markman, Assistant Attorney General).

[9]See H.R. Rep. No. 771 at 9, discussing section 9(a)(2) of the Inspector General Act, which excludes "program operating responsibilities" from transfer to an IG. Addressing the same argument in a 1986 report, GAO observed that inspectors general serve an advisory role by promoting efficiency and effectiveness in a department's programs and operations and alerting the agency head when serious problems arise, and do not engage in law enforcement functions. See Justice Department: An Assessment of the Need for a Statutory Inspector General, cited in footnote 2, at 25.

for the proper exercise of prosecutorial discretion.[10] As discussed above, Congress responded to this concern by acceding to the Justice Department's proposal that OPR be preserved and envisioned that OPR, rather than the IG, would review matters relating to the exercise of prosecutorial or litigative discretion in particular cases.

OPR's published case statistics for recent years indicate that matters involving the exercise of prosecutorial or litigative discretion represent a relatively small proportion of the office's caseload. According to OPR's annual report for 1991, only about 13 percent of the complaints it received in that year involved "abuse of prosecutorial or investigative authority."[11] For 1990, OPR reported that about 16 percent of the complaints it received fell into that category and noted that the volume of these complaints, as well as those in another category pertaining to "unprofessional or unethical behavior," had increased substantially from the 1989 reporting year.[12] Further, the reports indicate that OPR handles some misconduct matters that touch on prosecutive or litigative judgments but still involve primarily the sorts of fraud, waste, and abuse issues that IGs traditionally investigate. For example, OPR's 1990 annual report, in illustrating the types of misconduct complaints it received, described the case of a prosecutor who allegedly accepted tickets to a sporting event from a person he knew to be involved in illegal narcotics activity.

Clearly, reviews relating to the exercise of prosecutorial and litigative discretion can be sensitive, given the nature of the functions and judgments involved and the need to protect the government's position in ongoing cases. However, we do not believe that an inspector general's office is institutionally less capable of performing such

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[10]See the Senate hearings cited in note 8, at 30-31.

[11]In commenting on our report, the Justice Department stated that the proportion of OPR's caseload consisting of matters involving the exercise of prosecutorial or litigative discretion has increased in recent years. However, since the 1991 OPR report is the most recent available to us, we cannot evaluate this statement.

[12]According to the 1990 report, complaints in the category of "abuse of prosecutorial or investigative authority" (16 percent), combined with complaints in the category of "unprofessional or unethical behavior" (10 percent), had increased 20 percent from the 1989 reporting year. According to OPR, case breakdowns by category are not available for prior years.

reviews, provided it has the necessary expertise and experience.

Furthermore, as discussed above, the Inspector General Act provides safeguards that could be invoked to protect the Justice Department's interests in particularly sensitive matters relating to the exercise of prosecutorial or litigative discretion. Under section 8D(a) of the Act, the Attorney General is authorized to assume control of or halt any IG investigation requiring access to the prescribed categories of sensitive information, including information that pertains to the investigation or prosecution of ongoing civil or criminal cases or to matters the disclosure of which would constitute a serious threat to national security.

As explained above, the IG also is prohibited from publicly disclosing various types of sensitive information, including information that pertains to ongoing criminal investigations. Moreover, according to the Justice Department, the IG conforms to the Department's practices concerning the secrecy of sensitive law enforcement information.

Finally, OPR believes that Justice's IG would not be able to obtain access to grand jury materials on the same basis as OPR, and that this would impede the IG in carrying out reviews of prosecutorial or other employee misconduct associated with grand jury proceedings. OPR cites as the basis for its access authority an Office of Legal Counsel (OLC) memorandum dated January 6, 1984, which concluded that OPR qualifies for access to grand jury materials under an exception to Rule 6(e) of the Federal Rules of Criminal Procedure consistent with the Supreme Court's decision in United States v. Sells Engineering, 463 U.S. 418 (1983).

Rule 6(e) of the Federal Rules of Criminal Procedure prohibits government attorneys and others associated with the grand jury process from disclosing matters occurring before a grand jury unless a court has ordered the disclosure or one of two exceptions is met. The relevant exception for automatic disclosure, in Rule 6(e)(3)(A)(i), allows grand jury materials to be disclosed to "an attorney for the government for use in the performance of such attorney's duty." As defined in Rule 54(c) of the Federal Rules of Criminal Procedure, an "attorney for the government" includes among others the Attorney General or "an authorized assistant of the Attorney General."

In Sells, the Supreme Court held that Justice Department attorneys preparing a civil suit against grand jury targets did not qualify as "attorney[s] for the government" entitled to acquire grand jury information without a court order.

The Court construed the automatic disclosure exception as being available only to "those attorneys who conduct the criminal matters to which the materials pertain," although it did recognize that attorneys other than those appearing before the grand jury, such as Department "supervisors" and members of the prosecution team, could also qualify under the exception. 463 U.S. at 427 and 429, n. 11. Among other reasons for its holding, the Court noted that if the exception were construed as allowing the government to acquire grand jury information for civil use without a court order it would be able to evade civil discovery rules and could have an incentive to misuse the grand jury process for civil purposes. 463 U.S. at 431-435.

In its 1984 memorandum, OLC concluded that OPR could continue to obtain grand jury information under the exception in Rule 6(e)(3)(A)(i), as interpreted by Sells, on essentially two grounds. First, OLC observed that the Sells Court's major policy concern was protection of the grand jury process from misuse for civil purposes, and that this concern would not apply where grand jury material is needed to oversee the conduct of attorneys and investigators assisting the grand jury. In OLC's view, use of grand jury information for oversight purposes would promote, rather than undermine, the integrity of grand jury proceedings.

Second, OLC determined that an OPR attorney would qualify as an "attorney for the government" under the Sells Court's definition of the exception, given the Court's recognition that the exception would be available not only to prosecutors but also to Justice Department supervisors. OLC reasoned that a supervisor's interests extend not only to the conduct of the criminal case, but also to evaluations of the staff's activities in the case. On this basis, OLC concluded that it would be appropriate for OPR, as a delegee of the Attorney General, to obtain access to grand jury materials for purposes of reviewing the conduct of Department attorneys and advising the Attorney General and other supervisors on the results of these reviews.

In our view, the reasoning OLC used to conclude that OPR attorneys qualify for automatic disclosure under Rule 6(e)(3)(A)(i) could also be extended to permit such disclosure to attorneys in Justice's OIG. Like OPR, the IG would be using grand jury information for oversight purposes, and this use, according to OLC, would not implicate the policy considerations underlying the Sells decision. Furthermore, the Attorney General can accord the IG the same kind of supervisory standing OLC attributed to OPR by assuming control of the IG's investigation under section 8D(a) of the Inspector General Act, as amended, based on the investigation's relationship to an ongoing civil or criminal case or one of the other types of matters

specified in that section. Finally, even if the Attorney General decided against assuming control over a particular investigation, there would be nothing to prohibit the IG from obtaining grand jury materials needed for the investigation through a court order.

Accordingly, we believe that the concerns OPR has raised concerning the transfer of its investigative functions to OIG can be accommodated within the framework of the Inspector General Act, and do not pose an impediment to such a transfer.

IV. Summary and Discussion of Options

The 1988 Amendments to the Inspector General Act, in creating a statutory IG at Justice, retained OPR as a separate unit to handle allegations involving employees serving in "an attorney, criminal investigative, or law enforcement position." In reserving this jurisdiction to OPR, Congress indicated that it had the narrower purpose of acceding to Justice's proposal that OPR, rather than the IG, should be responsible for reviewing matters involving the exercise of prosecutorial or litigative discretion. Congress recognized that this divided organizational structure departed from certain core principles underlying the Inspector General Act, and it suggested that Justice could fully promote those principles by merging OPR and the other separate units into Justice's OIG.

Rather than acting to shift the matters within OPR's jurisdiction to the IG, the Justice Department in 1992 defined OPR's authority in expansive terms that in some respects exceeded the jurisdictional limitations imposed by the 1988 Amendments. Thus, OPR was accorded jurisdiction over employees beyond those in the three categories statutorily reserved to it, and the IG's statutory investigative authority was diminished.

Against this background, two basic options for resolving the jurisdictional issues between OPR and OIG, and our observations about them, follow.

First, OPR's jurisdiction could be modified either administratively or legislatively to include only those matters involving the exercise of prosecutorial or litigative judgments.[13] This option would conform OPR's jurisdiction to the legislative purposes behind its retention, and would accommodate the Justice Department's

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[13]An administrative modification of OPR's jurisdiction could be accomplished pursuant to section 9(a)(2) of the Inspector General Act, quoted in footnote 5.

earlier concerns about the sensitivities involved in evaluations of discretionary legal judgments. At the same time, however, this option could simply change the venue for jurisdictional disputes between OPR and OIG. As noted previously, matters now reviewed by OPR may involve litigative or prosecutive judgments but also involve primarily the types of fraud, waste, or abuse that IGs traditionally investigate. In addition, preserving OPR as a separate unit, even with reduced jurisdiction, would maintain an organizational structure lacking the full measure of centralized control, independence, and accountability to the Congress envisioned by the Inspector General Act.

As Congress recognized in enacting the 1988 Amendments, the second option of transferring OPR's functions into OIG would promote the basic principles underlying the Inspector General Act. While the IG would acquire OPR's authority to review matters pertaining to the exercise of prosecutorial or litigative discretion, we do not believe the inspector general's office is institutionally less capable of performing such reviews or safeguarding the information needed to conduct them.

However, given the sensitivities that surround reviews of prosecutorial or litigative judgments, any merger of OPR's functions into the inspector general's office should be structured to ensure that the IG has the necessary experience and expertise to review such judgments. For example, the staff and resources now possessed by OPR could be integrated into OIG as a separate unit responsible for reviewing allegations that pertain to prosecutorial or litigative decision-making. In addition, in order to safeguard the Justice Department's interests in particularly sensitive matters, the Attorney General would need to retain the ability to assume control over or halt IG investigations under the circumstances prescribed by the Inspector General Act.

V. Justice Department Comments and GAO Response

By letter dated April 5, 1994, the Justice Department submitted comments on a draft of this report. See Enclosure II. The Department's comments, and our responses, are as follows.

A. Scope of the Inspector General's Statutory Jurisdiction

Our report concludes that the IG does not threaten to usurp the constitutional authority of the Attorney General to investigate and prosecute cases involving Justice Department employees. The Department states that it has delegated to the IG certain law enforcement functions, including the

power to carry firearms, make arrests, and execute legal writs. We do not regard these powers as usurping the Attorney General's constitutional law-enforcement functions. Obviously, neither does the Department.

B. Current Policy and Practice Concerning the Jurisdictional Division Between OPR and OIG

The Department asserts that our report's criticism of the "initial referral" provisions of the December 1992 order fails to acknowledge that the order requires OPR to assign to OIG allegations that do not implicate the core discretionary functions of the Department regardless of the employee's position. As a result, according to the Department, the current order "closely matches" the congressional purpose of limiting OPR's jurisdiction to matters involving the exercise of prosecutorial or litigative discretion in particular cases.

Our report (see pages 7-9) does acknowledge and discuss the order's requirement that OPR refer an allegation to OIG when OPR determines that the allegation "does not implicate the prosecutive, investigative or litigative functions of the Department" and "when the allegation concerns waste, fraud or abuse." We point out several legal defects with respect to this provision. Specifically, it imposes an additional limitation on the IG's jurisdiction--reserving to OPR allegations "implicat[ing] the prosecutive, investigative or litigative functions of the Department"--that has no basis in the statute and that is subject to sweeping application. Also, with no basis in the statute, it permits OPR to retain allegations about employees that neither implicate prosecutive, investigative or litigative functions nor concern waste, fraud or abuse. These could include matters traditionally within the jurisdiction of an IG such as allegations of improper personnel actions. Therefore, we do not agree that the current order effectively limits OPR's jurisdiction to matters involving the exercise of prosecutorial or litigative discretion in particular cases.

The Department further states that our report does not evaluate how the division of jurisdiction has worked in practice or identify instances in which the referral system has adversely affected a particular case. It is true that our review did not include a case study, since it was designed to focus on the legal and policy aspects of the division of jurisdiction between OPR and OIG. As noted above, however, our review did identify several aspects of the current referral system that are inconsistent with the statute whatever their effect may be on individual cases. Further, as indicated previously, working relationships between the two offices have been severely strained.

Indeed, the Department's comments acknowledge that the order has not eliminated jurisdictional disputes between the offices.

C. Authority of the Attorney General to Control or Halt Investigations by the Inspector General

The Department suggests that the requirement in section 8D(a)(3) of the Act to notify Congress if the Attorney General assumes control over or halts an IG investigation of a law enforcement matter would force Justice to breach the secrecy of the matter. However, the statute does not prescribe the form or content of the notice; nor does it require the disclosure of any specific facts regarding the matter. Accordingly, we do not agree that the notice requirement forces the Department to breach secrecy.

D. Control of Sensitive Information

The Department says that by noting that OIG is prohibited from "publicly" disclosing certain sensitive information, our report could be construed to leave open the issue of more limited disclosure. It goes on to point out that OIG conforms to Department practices concerning the secrecy of sensitive law enforcement information. We recognize the Attorney General's authority under section 8D(a) of the Act to exercise control over the OIG with respect to sensitive law enforcement information.

E. Existence of Other Inspection Units

The Department maintains that some investigative functions may be better handled by internal investigative personnel than by OIG. It points out that, in addition to preserving OPR, the 1988 Amendments did not merge the Federal Bureau of Investigation's Inspection Division or the Drug Enforcement Administration's Office of Professional Responsibility into OIG. It also points out that several other internal inspection units that were initially merged into OIG have since been reconstituted. Our review focused on OIG in relation to the Main Justice OPR, rather than other investigative units within the Department. We note, however, that the general policy of the Inspector General Act is to place IG-type functions within the OIG. See e.g., sections 2(1)-(2) and 4(a)(1) of the Act. In fact, as discussed previously, the legislative history of the 1988 Amendments invited the Attorney General to consider merging into OIG the Department's other internal inspection units as well as OPR.

F. Additional Functions of OPR

The Department notes that our report does not address OPR's functions other than the investigation of employee misconduct. It points out that OPR performs functions different in kind from those performed by OIG, such as developing ethics standards and educational programs and advising the Solicitor General regarding possible appeals of adverse judicial decisions on attorney misconduct. We recognize that OPR performs non IG-type functions such as those described above, and we agree that these functions should not be transferred to OIG.

G. Proportion of OPR Matters Involving Discretionary Prosecutive or Litigative Judgments

The Department questions our reliance on OPR's 1991 annual report to indicate the proportion of OPR cases (13 percent) that involve prosecutorial or investigative discretion. The Department maintains that the great majority of OPR's current caseload falls within the general category of prosecutorial, investigative, and litigative discretion. We relied on the 1991 report since it is the most recent report made available to us. In any event, it is difficult to categorize OPR's caseload since, as discussed previously, the Department takes a very expansive view of what matters relate to the exercise of prosecutorial, investigative, or litigative discretion.