

TESTIMONY OF MARY L. KENDALL
DEPUTY INSPECTOR GENERAL FOR THE DEPARTMENT OF THE INTERIOR
BEFORE THE HOUSE COMMITTEE ON NATURAL RESOURCES
“THE OFFICE OF INSPECTOR GENERAL’S ONGOING FAILURE TO COMPLY WITH A
SUBPOENA FOR DOCUMENTS ABOUT A RECENT INVESTIGATION AND
OVERSIGHT OF THE SOLICITOR’S OFFICE ROLE AND RESPONSIBILITIES”
SEPTEMBER 11, 2014

This hearing arises out of a series of letters dated December 23, 2013, March 13, 2014, April 16, 2014, and July 18, 2014, and a subpoena dated March 25, 2014, issued by this Committee to the Office of Inspector General (OIG) for the Department of the Interior (DOI) seeking documents and information concerning an OIG investigation regarding the Stream Protection Rule that is being promulgated by DOI. The OIG has responded in detail to each of these letters and to the subpoena in letters of our own.

To summarize the position of my office, this Committee has subpoenaed information from our Stream Protection Rule report that DOI has claimed is privileged and should not be disclosed. This dispute is between the Committee and DOI, not the OIG, and we have urged the Committee to engage with DOI to resolve this issue. Instead, the Committee has continued to pressure the OIG to release privileged documents and information that, if released, would not only jeopardize the OIG’s ability to obtain privileged information from DOI in the future, but would also exacerbate a problem in the IG community regarding timely access to information from their agencies and departments.

We have explained repeatedly that the claim of privilege is DOI’s to assert—not the OIG’s—and we have repeatedly asked that the Committee attempt to resolve the issue with DOI. We also explained that we have a long-standing understanding with DOI that it would not decline to provide privileged documents to the OIG so long as we gave DOI an opportunity to identify cognizable privileges, as it has here. We have also repeatedly expressed our concern that release of privileged information in this instance by the OIG will seriously impair our access to the same in the future.

Of even greater concern is that to release information against the assertion of privilege by DOI would add to the argument that other Federal agencies and departments would use to withhold information from their respective OIGs. This is not simply my assessment; it is a conviction shared by my colleagues in other IG offices.

It is curious that this committee is pressuring the OIG to do something that would jeopardize access in the future for itself and other OIGs while your colleagues in both the House and Senate, in a bipartisan letter to OMB, have expressed their concern about the difficulties that Inspectors General have encountered in trying to obtain documents from their respective agencies.

The Chairman’s letters have contended that a claim of executive privilege has not been asserted as a basis for the continued withholding of the subject information. This contention fails to recognize how the Executive Branch asserts a claim of executive privilege. We have noted

that every President since Lyndon Johnson has asserted executive privilege in shielding documents from Congress. The practice of recent administrations is that only the President can assert executive privilege and will only do so after receiving a recommendation from the Attorney General. The current practice also involves efforts to resolve disputes through a judicially recognized process of accommodation. This process has been described by one Attorney General as: “The accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch” (*Assertion of Executive Privilege*, 5 Op. O.L.C. 27, 31 (1981)).

Whether privilege is properly asserted by DOI in this matter involving ongoing rulemaking can only be resolved by the parties to the dispute—this Committee and the Department—or through litigation in Federal court. The OIG does not take a position in such a dispute; we note, however, that other administrations have claimed the privilege in the context of ongoing rulemaking. In 1981, Attorney General William French Smith recommended and President Reagan asserted executive privilege to subpoenas from a congressional committee for documents concerning ongoing deliberations regarding regulatory action by the Interior Secretary. (See *Assertion of Executive Privilege*, 5 Op. O.L.C. 27.) As we have explained to the Committee and Committee staff multiple times, the OIG cannot usurp the President’s power to assert executive privilege if other efforts to resolve the dispute fail.

One of the Chairman’s letters asserted that our actions to avoid getting pulled into an ongoing dispute between this Committee and the Department is indicative of our lack of independence. We feel certain that the opposite is true—that our independence and neutrality in a dispute between the Committee and the Department that has constitutional implications can only be advanced by the position we have repeatedly expressed: the information the Committee seeks belongs to the Department, and the Committee should be seeking that information from the Department, not from the OIG. We have also made this position clear to DOI, which concurs that it alone has the responsibility and authority to resolve the issues in dispute.

Our position is also consistent with the position of other IG offices—if documents or information in the possession of the OIG that the agency claims as privileged is sought by a Congressional committee, the OIG would refer the committee to the agency. We are not aware of any other congressional committee issuing subpoenas to an Inspector General to obtain departmental or agency documents or information.

We recognize that the IG Act provides “that each Inspector General, in carrying out the provisions of this Act, is authorized—to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities under this Act.”

As a practical matter, however, other OIGs have had significant difficulty in gaining access to documents and employee interviews regardless of this statutory provision, as was addressed in the January 15, 2014 hearing before the House Committee on Oversight and Government Reform, *Strengthening Agency Oversight: Empowering the Inspectors General*. The testimony from this hearing makes clear that the language of the IG Act alone does not assure OIGs access to agency documents and information.

The OIG for DOI is somewhat unique in that we secured a memorandum from every one of the Secretaries of the Interior since Gayle Norton directing DOI employees to provide all requested information to the OIG, including privileged information. The OIG, in order to facilitate such access, has agreed to review such privilege assertions and determine whether such claims have a constitutional basis and are consistent with prior assertions by the Executive Branch.

The OIG's unique situation was even noted in the Staff Report for Chairman Darrell E. Issa, House Committee on Oversight and Government Reform, and Chairman Lamar Smith, House Committee on Science, Space and Technology, entitled *Whistleblower Reprisal and Management Failures at the U.S. Chemical Safety Board*, dated June 19, 2014. The report notes that the disclosure of privileged information to an OIG would not waive privilege because the OIG is technically part of its department or agency. The issue of providing privileged information to the OIG was also recently cited in an August 5, 2014 letter to Congress, signed by 47 IGs, which said: "While valid privilege claims might in certain circumstances appropriately limit the . . . OIG's **subsequent and further release** of documents, a claim of privilege provides no basis to withhold documents from the . . . OIG in the first instance" (emphasis added).

I again urge this Committee to use the procedural tools available to it to pursue access to documents and information from the Department of the Interior, rather than pressure the OIG to take action that would jeopardize our ability to do our job in the future, as well as the abilities of our OIG colleagues to do their jobs. The information that remains at issue is the Department's, not the OIG's; the assertion of privilege is the Department's, not the OIG's; and the waiver of privilege is the Department's, not the OIG's.