

STATEMENT OF MARY L. KENDALL
BEFORE THE U.S. SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES
CONCERNING THE
NOMINATION OF MARY L. KENDALL TO BE INSPECTOR GENERAL
U.S. DEPARTMENT OF THE INTERIOR
OCTOBER 20, 2015

Madam Chairman, Ranking Member Cantwell, and members of this Committee:

Thank you for the opportunity to be here today. I am honored to be considered by this Committee for confirmation as the Inspector General for the Department of the Interior (DOI).

I have been privileged to be a part of the senior executive corps for the Office of Inspector General (OIG) for 16 years, the last 6 ½ as the leader of this fine organization. During that tenure, the OIG has had 195 convictions, \$4.5 billion in criminal fines, penalties, and restitution, over \$119 million in questioned costs, and \$55 million in funds put to better use. On average over the past five years, the OIG for DOI ranked fifth for Return-on-Investment among the 72 Federal OIGs¹. My leadership style, underpinned by employing dignity and respect, has proven effective in motivating the OIG workforce to conduct meaningful work, produce influential reports, and effect significant change in the programs and operations of DOI, and which put the OIG in the top 15% of the “Best Places to Work” in 2014².

Recently, I have had the pleasure to meet with many of the Committee members, and/or your staff. I appreciate your time and consideration. We have discussed many issues, some dear to the hearts of your constituents, some which you embrace with enormous passion, and some that have made me and my nomination subject to controversy and criticism.

I have addressed the controversies that have followed me from the House Committee on Natural Resources with some of you, directly and candidly, in discussion, and with the information I provided to this Committee. (I incorporate my 8/2/12 and 9/11/14 testimony before the House Committee on Natural Resources for reference.) Whether I have done so to your individual satisfaction, I do not know. What I do know is that throughout, I have been true to myself, my principles, my best judgment, and the law. My personal style, to engage in civil discourse even when addressing difficult issues, has been criticized by some as being too accommodating of the Department of the Interior. Civility, in my experience, however, is not an accommodation, but rather, a strong and effective tool in communicating with and holding DOI accountable.

I have led the OIG to provide constructive critique to effect positive change in the Department programs and operations. One important result of this approach has been that the Department, through the Secretary, her senior staff, and that of the bureaus, routinely turn to the OIG to address management issues of concern, and concerns about potential wrongdoing. In fact, even members of the House Resources Committee (former Chairman Hastings, and present

¹ <http://www.brookings.edu/~media/research/files/papers/2015/04/30-inspectors-general-roi-hudak-wallack/cepmhudakwallackoig.pdf>

² <http://bestplacestowork.org/BPTW/rankings/overall/sub>

Chairman Bishop) urged the Secretary in November 2014 to turn an inquiry—one into the use of the Brinkerhoff Lodge in the Grand Teton National Park—over to the OIG, saying the Department did not have “the independence, experience, and tools required to conduct a thorough investigation...” which signals a level of trust in the work of my office.

Coming to this hearing, I have both the benefit and the burden of having a track record as the Acting Inspector General, and as such, I have made certain legal, policy, and management decisions that have not always been well received by some members of Congress, some members of my staff, some members of the public, and some officials of the Department and the Administration. Although I sometimes joke, it is with more than a touch of seriousness, when I say: if I am making everyone a little bit unhappy, I am probably doing my job.

As with many things in life, having the benefit of 20/20 hindsight, I may have made some of those decisions differently. Yet, in the moment, I have always acted on conscience and principle; guided by the best information available at the time; with the advice of trusted and tested advisors; and with integrity, independence, and objectivity as my guides. I have conducted myself not only in the best interest of the OIG for Interior, but also in the best interest of the greater IG community, both of which have provided me unflagging support, not only in my 6 years leading the OIG, but during my entire tenure in the IG community.

I do not expect to convince you by my words here, alone, of my independence and objectivity. Rather, I point to some of the most influential work the OIG has done, totaling well over 500 reports issued since my leadership began in 2009.

This work has spanned from violence prevention at Indian schools to the dangers posed by abandoned mines. It has included numerous investigations of ethical violations and crimes committed by Department officials at all levels, as well as by contract and grant recipients. We have examined health and safety threats against the well-being of millions of visitors to DOI’s parks and recreational facilities. We have thoroughly reviewed the status of safety and infrastructure integrity at the nation’s dams and bridges for which DOI bureaus are responsible. Our energy teams have performed work resulting in: the recovery of millions of dollars in royalties and revenues; assurance that the Federal government and Indian tribes are receiving their fair share of royalties for the mineral operations on federal and Indian lands; uncovering weaknesses in the Department’s renewable energy programs; constructive critique for the improvement of the management of oil and gas leases on federal land and the Outer Continental Shelf; and the record-breaking multi-billion dollar civil and criminal penalties against the companies responsible for the *Deepwater Horizon* explosion and oil spill, the greatest environmental disaster in this nation’s history. Earlier this month, the Department of Justice (DOJ) and the 5 Gulf States announced a \$20.8 billion civil settlement with BP, the largest settlement with a single entity in DOJ history.

As these examples demonstrate, the depth and breadth of the programs in the Department of the Interior are both vast and complex. Under my leadership, the OIG has focused its attention and resources on the highest risk and highest priority issues in the Department, and to address areas of greatest vulnerability to fraud, mismanagement, and misuse of Federal funds. This means, however, that certain things will necessarily go unaddressed. But with a staff of

approximately 275 employees, a robust Hotline, a dedicated Whistleblower Protection advocate, and an aggressive Fraud Awareness and Outreach program, the OIG has the eyes and ears of the roughly 70,000 DOI employees and another 70,000 DOI contractors and grantees on our side with the objective of preventing and detecting fraud, waste, abuse, and mismanagement.

Madam Chairman and members of this Committee, I sit before you today as a career civil servant for over 29 years. I sincerely believe that public service is a public trust, requiring me, and my fellow public servants, to place loyalty to the Constitution, the law, and ethical principles above private gain. I have no other ambition than to continue my public service with dignity and respect for our employees and our stakeholders. I believe in the mission of the Inspectors General, I am committed to the OIG for Interior, and, if confirmed, I will continue to do the very best job I can to lead this respected organization in its ongoing efforts to prevent and detect fraud, waste, abuse, and mismanagement in the Department of the Interior.

Thank you for your attention and consideration. I am happy to answer any questions you may have.

Attachments (2)

August 2, 2012 Testimony before the House Resources Committee

September 11, 2012 Testimony before the House Resources Committee

TESTIMONY OF MARY L. KENDALL
ACTING INSPECTOR GENERAL
FOR THE DEPARTMENT OF THE INTERIOR
BEFORE THE HOUSE COMMITTEE ON NATURAL RESOURCES
“OVERSIGHT OF THE ACTIONS, INDEPENDENCE AND ACCOUNTABILITY
OF THE ACTING INSPECTOR GENERAL
FOR THE DEPARTMENT OF THE INTERIOR”
AUGUST 2, 2012

Mr. Chairman and members of the Committee, good morning, and thank you for holding this hearing today. As you know, Inspectors General, are appointed or designated “without regard to political affiliation and solely on the basis of integrity and demonstrated ability” in a number of fields, pursuant to Section 3 of the IG Act. Section 2 of the IG Act establishes the independence and objectivity expectation. Although neither appointed nor designated, Acting Inspectors General are expected to conduct themselves with integrity, independence and objectivity in a non-partisan manner.

For the past four months, I have weathered the scrutiny of this Committee which has used a unilateral approach to “investigate” me by requesting select documents from the Office of Inspector General (OIG), drawing conclusions from those documents without all the facts, and presenting those conclusions to the public via press releases, challenging my integrity, independence and objectivity. Therefore, I welcome the opportunity today to testify, respond to questions, and present all the facts, as I know them.

The letter requesting my attendance at this hearing said I should be prepared to answer questions about my role relative to 1) the 6-month drilling moratorium in the Gulf of Mexico following the Deepwater Horizon disaster and subsequent unprecedented oil spill, 2) the OIG investigation into the perceived misrepresentation that the moratorium decision had been peer reviewed, 3) my response to a Committee subpoena for documents, 4) the independence and effectiveness of an Acting Inspector General, and 5) my previous testimony before the Committee.

In short, I can address these issues as follows:

- 1) I stand behind the OIG investigation into the allegation that DOI senior officials, in an effort to help justify their decision to impose a six-month moratorium on deepwater drilling, misrepresented that the moratorium was reviewed and supported by the National Academy of Engineering scientists and industry experts. This alleged misrepresentation was contained only in the Executive Summary of a report commonly called the “30-Day Report.” Therefore, the Executive Summary was the focus of the OIG investigation. The question of whether there was an intentional misrepresentation came down to a review of emails exchanged between DOI and the White House in the late hours of May 26 and early hours of May 27, 2010 in which the Executive Summary was being edited. These emails revealed no evidence that the Executive Summary was intentionally edited to lead readers to believe that the moratorium recommendation had been peer reviewed.

- 2) This Committee has posted on its website a number of emails from the case agent who investigated the peer review issue that suggest he was not allowed to conduct every investigative step he wanted to take. None of the agent's complaints was made known to me during the course of the OIG investigation. Had they been brought to my attention, I would have addressed them directly with the case agent. But in the end, based on what the case agent presented to me, I was confident that our investigation was "well done, thorough, and to the point," which is precisely what I expressed to the case agent directly in an email.
- 3) Until this matter, in my 26 years with the Federal Government, I had never experienced an instance in which Executive Privilege came into play. We have since learned that the process by which such differences of position between the Legislative and Executive branches are resolved is both lengthy and complex. I reiterate my position that the dispute is between this Committee and the Department. The documents are not the OIG's; neither is the privilege the OIG's to assert or waive.
- 4) As Acting Inspector General, I have exercised all the independence and objectivity necessary to meet the OIG mission. I have elected to exercise this independence and objectivity in a way that maintains a healthy tension between the OIG and the Department we oversee. I believe, however, that independence and objectivity are not compromised by a respectful relationship with both the Department and Congress, the two entities we are charged with "keeping informed" pursuant to the IG Act. As a result, we have effected a great deal of positive change over the past 3 years by working with the Department in a spirit of respect to achieve such change.
- 5) Although I have testified before this Committee numerous times, I assume that the questions relate to my testimony on June 17, 2010, about which the Committee has said it has "serious questions." I addressed those questions in my letter of June 27, 2012 to the Committee and in my Full Statement today.

Mr. Chairman, I hope we can adjourn today having addressed all the questions the Committee may have about me, my independence and objectivity, and my integrity. Although the questions you have raised about me reflect on the OIG, it has become clear that your questions are really about me, if from nothing else than the title of this hearing.

Mr. Chairman, I have been an attorney and member of the bar, in good standing, approaching 30 years; I have been a public servant for over 26 years, all but three of those years in the law enforcement arena, without blemish on my record; and I was born and raised in the Midwest, where one's honor and word are sacrosanct. The past 17 weeks have been the most painful and difficult of my entire career, not only because of the attacks on my personal integrity, but because this has eclipsed all the outstanding work that the OIG has done and continues to do.

This concludes my remarks. I request that my corrected Formal Statement be accepted into the record, and I am prepared to answer any questions the members of the Committee may have.

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.