

TESTIMONY OF DANIEL W. LUCAS, INSPECTOR GENERAL

BEFORE THE
COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON GOVERNMENT OPERATIONS & FACILITIES

PUBLIC HEARING ON B24-0129, THE
“INSPECTOR GENERAL ENHANCEMENT ACT OF 2021”

July 14, 2021

Good afternoon Chairperson White and Members of the Committee. I am Daniel W. Lucas, Inspector General for the District of Columbia. I am pleased to virtually appear at the Committee’s public hearing on Bill 24-0129, the “Inspector General Enhancement Act of 2021” (hereafter referred to as the “Bill”). The purpose of this Bill is to close the gap between our criminal investigation legislative mandate and our criminal investigation legal authority. In other words, this Bill seeks to remedy the situation where the law prevents OIG criminal investigators from doing what the law requires them to do.

Joining me to assist during this testimony are Karen Branson, the Office of the Inspector General (OIG) General Counsel, and LaVan Griffith, the Director of the OIG’s Medicaid Fraud Control Unit (or MFCU). Ms. Branson has served as the OIG’s General Counsel since December 2000 and brings a a historical perspective, as she has seen how the agency’s investigative statutory framework has evolved. Mr. Griffith, the OIG’s Director of the Medicaid Control Fraud Unit, has 30 years of experience as a criminal investigator and criminal investigator executive. Mr. Griffith has been with the OIG since 2017, following his retirement from the National Passenger Railroad Corporation (Amtrak) OIG as their Assistant Inspector General for Investigations (head of investigations). During his tenure with Amtrak, in addition to leading Amtrak’s criminal

investigative mission, Mr. Griffith successfully led efforts to improve Amtrak’s law enforcement statutory framework.

BACKGROUND ON THE PROPOSED LEGISLATION

First, I think it is essential to explain the evolution of the OIG’s work and corresponding authorities that has brought us to this current state – a state which is akin to asking this Body to provide oversight of District agencies without the authority to hold oversight hearings.

Our criminal investigation mission was codified in 1995, when Congress added the requirement for the OIG to “promptly refer suspected violations of District or federal law to the [United States] Attorney General.”¹ This new mandate made it clear that the OIG was responsible for conducting criminal investigations.

Investigating alleged crimes against the District’s programs and operations introduced certain risks to the OIG investigators – namely, their safety and the safety of others as they execute their mission. To increase OIG criminal investigators' safety and increase the effectiveness of OIG criminal investigations, this Body codified into law in 1999, that OIG investigators could “carry a firearm within the District of Columbia or a District government facility located outside of the District;” “make an arrest without a warrant if the [OIG investigator] has probable cause to believe a felony violation . . . is being committed in his/her presence” and the investigator is engaged in the performance of his or her official duties within the District or a District government facility located outside of the District;” and “to serve as an affiant for, apply to an

¹ See District of Columbia Financial Responsibility and Management Assistance Act of 1995, § 303, Pub. L. No. 104-8, 109 Stat. 97, 150 (1995).

appropriate judicial officer for, and execute a warrant for the search of premises or the seizure of evidence if the warrant is under the authority of the District of Columbia or of the United States upon probable cause.”²

Over time, while executing our criminal investigation mandate, my predecessors began to identify a gap between our criminal investigation legislative mandate and our criminal investigation legal authorities. Consequently, in 2001, the OIG sought to close the gap and provide for the ability to execute arrest warrants with probable cause and add OIG criminal investigators to the District’s definition of “law enforcement officers.”³ For reasons unclear to me, this legislation did not make it beyond its initial public hearing -- so the gap persisted.

Once I was appointed as the Inspector General in November 2014, in an attempt to maintain fidelity to the criminal investigative mandate, I also recognized the gap identified by my predecessors. We sought guidance from the Office of the Attorney General (OAG), which confirmed our analysis. Therefore, in 2016, we proposed legislation to close the gap akin to the OIG’s 2001 efforts, namely the ability to seek and execute arrest warrants with probable cause and to add OIG criminal investigators to the District’s definition of “law enforcement officers.”⁴ The former Committee on Finance and Revenue held a roundtable on this proposed legislation in October 2016. In January 2017, the OIG was moved to the Committee on Government

² D.C. Council, Office of the Inspector General Powers Amendment Act of 1998, B12-622, (D.C. 1999), https://lims.dccouncil.us/downloads/LIMS/6186/Signed_Act/B12-0622-SignedAct.pdf.

³ D.C. Council, Office of the Inspector General Independence and Law Enforcement Amendment Act of 2001, [B14-0314](https://lims.dccouncil.us/downloads/LIMS/10425/Introduction/B14-0314-INTRODUCTION.pdf), (D.C. 2001), <https://lims.dccouncil.us/downloads/LIMS/10425/Introduction/B14-0314-INTRODUCTION.pdf>.

⁴ D.C. Council, Comprehensive Inspector General Independence and Empowerment Amendment Act of 2016, [B21-0813](https://lims.dccouncil.us/downloads/LIMS/36178/Introduction/B21-0813-Introduction.pdf), (D.C. 2016), <https://lims.dccouncil.us/downloads/LIMS/36178/Introduction/B21-0813-Introduction.pdf>.

Operations. The OIG briefed the gap to the Committee Chair; however, the legislation was not reintroduced.

Since 2016, we have instituted policies and procedures designed to mitigate the impact of the gap between our criminal investigation legislative mandate and our criminal investigation legal authorities. Our policies and procedures, and the corresponding limitations placed on our investigative tasks, caused our partners conducting joint investigations with us to raise concerns about our ability to execute the scope of our criminal investigative mandate. Internally, our criminal investigators also raised concerns about their ability to safely conduct criminal investigations. Collectively, these concerns were aimed at ensuring the OIG could independently, and when appropriate, respond as co-equal partners to investigate crimes against District programs and operations, rather than be a liability in the event that routine investigative activities escalated into hostile situations both in and outside of the District.

Consequently, with the additional concerns raised by our partners and staff, I undertook another review of our enabling legislation and other relevant statutory authorities. Our conclusion, reinforced by OAG opinion, determined that our statutory criminal investigative framework gap was even wider than previously thought. This conclusion caused us to further restrict our criminal investigative activities. To date, we have exhausted all potential solutions within my span of authority to mitigate the impact of the gap.

Now, I would like to walk the Committee through what a criminal investigation looks like and examples of authorities provided to investigators to execute certain investigative tasks.

TYPICAL CRIMINAL INVESTIGATION PROCESS

In practical terms, investigations of alleged violations of federal or District law require criminal investigators to perform specific tasks to be executed by criminal investigators. These investigative tasks include issuing rights advisements, interviewing complainants and witnesses, conducting surveillance, serving subpoenas, executing search warrants and collecting evidence, testifying before a grand jury, arresting individuals pursuant to a criminal complaint or grand jury indictment, and preparing cases for prosecution and liaising with prosecutors in preparation for and during a trial.

Criminal investigators must execute these tasks while ensuring the public's safety as well as their own. Further, criminal investigators must execute these tasks while protecting an individual's constitutional rights, in addition to preserving the sanctity of the criminal investigation and the potential for prosecution.

EXAMPLES OF CRIMINAL INVESTIGATOR AUTHORITIES

Now, let's discuss statutory authorities to perform criminal investigative functions. Statutory authorities permit or restrict the ability of criminal investigators to act – they set the boundaries within which they may execute their criminal investigative mandate. What follows is an outline of authorities granted to those who perform criminal investigation duties.

Federal IG criminal investigators received statutory law enforcement powers through the enactment of the *Homeland Security Act of 2002*.⁵ Section 812 of this law statutorily provided

⁵ Homeland Security Act of 2002, Pub L. No. 107-296, § 812, 116 Stat. 2135, 2222 (2002).

federal IG criminal investigators with the authority to carry a firearm while engaged in official duties; make an arrest without a warrant while engaged in official duties if the criminal investigator has reasonable grounds to believe the person to be arrested has committed or is committing such a felony; and upon probable cause to believe that a violation has been committed, seek and execute warrants for arrest, conduct a search of premises, or seizure of evidence. To ensure the proper exercise of law enforcement powers, the law also required federal IGs to undergo peer reviews to assess the adequacy of internal safeguards and management procedures. Because the DC OIG’s statutory framework was modeled after the federal Inspector General Act of 1978 and we are bound by standards promulgated by the federal OIG community⁶ (the Council of the Inspectors General on Integrity and Efficiency or CIGIE), we are required to undergo similar triennial assessments to assess the adequacy of our law enforcement safeguards and management procedures.

At the state level, OIG criminal investigators also find their law enforcement powers conferred via statute. For example, the Virginia Office of the State Inspector General’s investigations unit staff, as designated by the State Inspector General, “have the same powers as a sheriff or a law-enforcement officer in the investigation of allegations of criminal behavior affecting the operations of a state agency.”⁷ Similarly, in Indiana, inspector general investigators have been included within the definition of a “law enforcement officer.”⁸

Finally, at the local level, we see statutory law enforcement powers conferred to various District investigative agencies. For example, designated D.C. Fire and Emergency Medical Services

⁶ See D.C. Code § 1-301.115a(b)(1).

⁷ See VA. CODE ANN. §§ 2.2-311(A) and (C).

⁸ See IND. CODE ANN. § 35-31.5-2-185(a)(3).

(FEMS) arson investigators have the “same general police powers including arrest powers as regular members of the Metropolitan Police Department (MPD) for the express purpose of enforcing the fire safety laws in effect in the District of Columbia.”⁹ Similarly, Office of Tax and Revenue employees who conduct investigations of alleged misdemeanor and felony violations have the authority to carry “a firearm inside or outside of the District of Columbia in conformance with state and local laws”¹⁰ and “make an arrest without a warrant if the employee has probable cause to believe that a felony violation of a federal or District of Columbia statute is being committed in his or her presence [...] within the District of Columbia or, subject to state and local laws outside of the District of Columbia.”¹¹

In the above examples, the statutory authorities empower the respective criminal investigators to execute their statutory investigative mandate. I note that our research found no other investigative agency, similarly mandated as the DC OIG, that does not possess the requisite authority to perform their assigned responsibilities.

THE OIG’S INVESTIGATIVE MANDATE

As codified, the OIG’s investigative mandate is to independently “conduct and supervise . . . investigations relating to the programs and operations of District government departments and agencies, including independent agencies.”¹² The OIG’s investigative mandate also includes investigating alleged violations of Medicaid provider fraud,¹³ the misuse of Medicaid patient

⁹ See D.C. Code § 5-417.01(c).

¹⁰ See D.C. Code § 47-4108.01(1).

¹¹ See *id.* § 2.

¹² D.C. Code § 1-301.115a(a-1)(1).

¹³ See D.C. Code § 4-804(b).

funds, and the criminal abuse, neglect, and exploitation of persons residing in Medicaid-funded healthcare facilities.

Once an OIG criminal investigation has established reasonable grounds to believe there has been a violation of District or federal law, we are required by law to report such violations to the U.S. Attorney General.¹⁴ This reporting often occurs with our partners at the United States Attorney's Office (USAO) for the District of Columbia. Examples of the violations investigated by OIG criminal investigators include bribery of public officials and witnesses;¹⁵ embezzlement of public money, property, or records; false statements;¹⁶ wire fraud;¹⁷ theft or bribery concerning programs receiving federal funds;¹⁸ health care fraud;¹⁹ criminal abuse of a vulnerable adult or elderly person;²⁰ and financial exploitation of a vulnerable adult or elderly person.²¹ There is no other District entity charged with investigating these types of criminal violations against District programs, operations, and residents.

It is important to note that the OIG's criminal investigative mandate does not include typical police functions, like conducting patrols and engaging with the public in response to emergency calls. This mission is the exclusive province of MPD. Generally, OIG criminal investigators will only encounter the public during pre-planned investigative activities.

¹⁴ See D.C. Code § 1-301.115a(f).

¹⁵ See 18 U.S.C. § 201.

¹⁶ *Id.* § 1001.

¹⁷ *Id.* § 1343.

¹⁸ *Id.* § 666.

¹⁹ *Id.* § 1347.

²⁰ See D.C. Code § 22-933.

²¹ See D.C. Code § 22-933.01.

THE GAP BETWEEN OUR LEGISLATIVE MANDATE AND OUR LEGAL AUTHORITY

Based on our research, and confirmed by the OAG, we have concluded the OIG's current authorities limit OIG criminal investigators' ability to execute the full spectrum of required investigative tasks. The inability to conduct certain investigative tasks impedes the OIG's ability to meet its statutory criminal investigation mandate. Simply put – D.C. Code does not allow us to do what D.C. Code requires us to do.

At present, in order to execute our criminal investigative mandate, OIG criminal investigators are empowered with the authorities to:

- carry firearms in the District of Columbia or a District of Columbia government facility located outside of the District;
- execute a warrant for the search of premises or the seizure of evidence if the warrant is issued under authority of the District of Columbia or of the United States upon probable cause; and
- make arrests without a warrant if the employee has probable cause to believe that a felony violation is being committed in his or her presence and the employee is engaged in the performance of his or her official duties within the District of Columbia or a District government facility located outside the District.²²

These authorities, which set the boundaries within which OIG criminal investigators may act, place specific limitations that adversely impact our ability to execute certain investigative tasks.

²² D.C. Code § 1-301.115a(f-1).

Further, without the statutory declaration of OIG criminal investigators as “law enforcement officers,” we are further restricted from executing additional investigative tasks. As a result, the OIG remains responsible for independently investigating allegations of criminal misconduct without the authority to do so.

Specific conditions that contribute to the gap between criminal investigation legislative mandate and our criminal investigation legal authority include:

- The ambiguity of OIG criminal investigators being mandated to perform a law enforcement function, yet lacking statutory designation as a “law enforcement officer.” Other District employees such as animal control officers and arson investigators are statutorily defined as “law enforcement officers.”²³ Ostensibly, these District employees’ investigative mandate is much narrower than the OIG’s, yet their classification as “law enforcement officers” provides the requisite authorities to execute their investigations unencumbered and unreliant on other law enforcement partners. Armed OIG criminal investigators, when operating in other jurisdictions (e.g., conducting interviews), potentially place themselves in legal jeopardy if they are not recognized as statutorily-designated “law enforcement officers.” OIG criminal investigators are required by statute to be trained law enforcement officers, and specifically undergo training that includes the safe handling of firearms and the use of deadly force, and are required to qualify on their firearms according to standards promulgated by MPD. Further, all OIG use-of-force incidents are investigated by MPD’s Internal Affairs Bureau.

²³ See D.C. Code § 23-501.

- OIG criminal investigators are provided the statutory authority to seek and execute a search warrant; however, both Federal Rule of Criminal Procedure and Superior Court Criminal Rule 41 require an application from a “law enforcement officer” or attorney for the government to request a search warrant. Without OIG criminal investigators being statutorily defined as a “law enforcement officer,” they are unqualified under both the federal rule and the Superior Court rule to do what D.C. Code authorizes them to do.

This gap introduces considerable risk to the District and OIG criminal investigators.

Unless the gap is eliminated, OIG criminal investigators risk being considered a private citizen while executing their investigative responsibilities.

- Inability to execute probable cause arrest warrants. Currently, OIG criminal investigators may make an arrest without a warrant if they have probable cause to believe that a felony is being committed in their presence while on duty within the District or in a District facility located outside the District. However, OIG criminal investigators are not permitted to execute an arrest pursuant to a judge’s issuance of an arrest warrant or a grand jury indictment. At present, OIG criminal investigators' ability to make an arrest is comparable to that of a private person, except the private person arguably has even greater authority as they may make arrests with probable cause for felonies *and* misdemeanors that are enumerated in the D.C. Code and committed in their presence.²⁴

²⁴ See D.C. Code § 23-582(b).

- Inability to exercise the full use-of-force continuum. OIG criminal investigators are statutorily mandated to be trained law enforcement officers as a condition of employment. Additionally, they receive continual training in the use-of-force and defensive tactics, and they carry firearms in the course of their official duties. However, the OAG has opined that the D.C. OIG statute does not authorize OIG investigators to carry and use less than lethal weapons such as oleoresin capsicum (OC) spray²⁵ and batons in the performance of their duties. Limitations on the OIG criminal investigator's ability to use less than lethal force to de-escalate a situation introduces considerable risk of non-proportional response given the threat. A non-proportional response could introduce civil liability to the District and criminal and civil liability to the OIG criminal investigator.
- The OAG has also opined that the geographic restriction found in the OIG's enabling statute related to the carriage of firearms has been preempted by the Law Enforcement Officers Safety Act of 2004.²⁶ However, should an OIG criminal investigator use their firearm in the course of their official duties outside of the District, significant risks remain about whether the jurisdiction would treat them as law enforcement officers or private citizens.
- Inability to directly enter into agreements with federal, state, or local law enforcement agencies. For example, the OIG does not have the authority to enter into agreements and participate in regional task forces, such as the Department of Justice's Health Care Fraud

²⁵ A separate D.C. Code provision authorizes OIG investigators to carry OC spray in the performance of their duties.

²⁶ See Law Enforcement Officers Safety Act of 2004, Pub. L. No. 108-277, 118 Stat. 865 (2004).

Strike Force.²⁷ As such, the OIG is unable to benefit from the synergies created amongst various entities that share a common goal of addressing corruption, fraud, and patient abuse, neglect, and financial exploitation. Further, absent the ability to enter into these agreements, the OIG is unable to ensure the District's equities and values are effectuated when conducting joint investigations – essentially leaving the District's interests in federal hands.

- Finally, OIG criminal investigators are not afforded the status and protections commensurate with the scope and risks inherent to their job. An individual who seeks to harm an OIG criminal investigator as they execute their statutory mission may not be held to the same legal standard as if they harmed other “law enforcement officers.”

EFFECTS OF THE GAP

As we have demonstrated, criminal investigations are inherently risky because they seek to determine whether an individual's actions put their liberty at risk. The gaps that exist between the OIG's statutory mission and the limitations I have just discussed pose untenable risks to OIG criminal investigators' personal safety, expose OIG criminal investigators to unnecessary criminal and civil liability in the performance of their official duties, and pose a risk to the District. The OIG is unable to execute the continuum of investigative tasks and is reliant on our law enforcement partners to execute our statutory responsibility and assume these risks. Going forward, the successful criminal investigation outcomes the OIG has previously brought to the District will be reduced considerably or eliminated if there is no interest from another law

²⁷ See U.S. DEP'T OF JUSTICE, *Strike Force Operations*, <https://www.justice.gov/criminal-fraud/strike-force-operations> (last visited Jul. 9, 2021).

enforcement partner to assume responsibility, which could leave no viable path to complete an investigation.

The OIG has experienced considerable success over the past years despite the gap. In instances where we have been unable to execute certain investigative tasks, we have sought the support of our partner agencies. Thankfully, given the robust partnerships we have built up, our partners have been willing to execute these tasks and bear the corresponding risks and liabilities. Changes in resource allocation or priorities within our partner agencies will delay or put completion of our investigations at risk.

Finally, while we have been successful in conducting criminal investigations, we also have been fortunate to not have a use-of-force incident or allegation of violations of an individual's constitutional rights. Given the inherent risks to conducting criminal investigations, it is not a matter of 'if' but "when" our authorities become the subject of litigation. Should the OIG's legal authorities be challenged, I want to ensure the District government and the OIG's criminal investigators are on the soundest legal footing, so there is no ambiguity regarding the scope and limitations in carrying out the OIG's mission to conduct criminal investigations.

HOW TO CLOSE THE GAP

As Inspector General, I do not have the authority to mitigate these risks and fill the current gap that exists between our statutory mandate and statutory authorities. The legislation we have before the Committee today is the only avenue to ensure we can do what this Body has mandated us to do.

CONCLUSION

In conclusion, Chairperson White and members of the Committee, the solutions found in Bill 24-0129 will help close the gap that currently exists between our criminal investigation legislative mandate and our criminal investigation legal authority. The gap has existed since the addition of the OIG's criminal investigation mission and corresponding authorities. It is clear that previous legislative revisions called for an OIG that could independently execute criminal investigations related to the District's programs and operations.

Once enacted, this Bill will help reduce risks that may result in significant government liability, impact the personal safety of OIG criminal investigators, and subject OIG criminal investigators to criminal and civil liability. It will also ensure the success of the OIG in the future, reducing the need for hand-shake agreements between our office and our partners.

I can assure both you and the public watching at home that this legislation does not increase the law enforcement footprint within the District. This legislation simply confers the authority on our criminal investigators that is commensurate with their investigative responsibilities. On the contrary, armed with these legislative improvements, the OIG will be better positioned to lead its investigative work and reduce the reliance and corresponding presence of outside law enforcement entities.

In summary, OIG criminal investigators need to be able to safely and proportionally defend themselves and others, ensure the public's constitutional rights are protected, and ensure that evidence gathered during an investigation is admissible in a court of law. As it currently stands today, the OIG does not have the requisite authorities to independently execute its criminal

investigative mission. It is my responsibility to ensure OIG criminal investigators have the legal authority to perform their investigation duties. Where I find the law does not support an action, I will not ask my investigators to assume personal risk or risk to the District.

I will leave you with one last comment. Prior to the establishment of the OIG's criminal investigative mission, public integrity investigations were conducted by MPD – which was armed with the requisite authorities to meet its investigative mission.²⁸

My team and I look forward to working with you and the Committee to advance this legislation.

This concludes my testimony, and I will be happy to answer your questions.

²⁸ GOV'T OF THE DISTRICT OF COLUMBIA, OFFICE OF THE MAYOR, MAYOR'S ORDER 86-32, ESTABLISHMENT OF THE PUBLIC INTEGRITY BRANCH, INTERNAL AFFAIRS DIVISION, METROPOLITAN POLICE DEPARTMENT (Feb. 25, 1986).