

**Testimony of Danielle Brian, Executive Director,  
Project On Government Oversight,  
before the Senate Committee on the Judiciary regarding  
“All’ Means ‘All’: The Justice Department’s Failure to Comply With Its Legal Obligation  
to Ensure Inspector General Access to All Records Needed For Independent Oversight”  
August 5, 2015**

Chairman Grassley, Ranking Member Leahy, and Members of the Committee, thank you for inviting me to testify today. My name is Danielle Brian and I am the Executive Director of the Project On Government Oversight (POGO). Founded in 1981, POGO is a nonpartisan independent watchdog that champions good government reforms. POGO’s investigations into corruption, misconduct, and conflicts of interest achieve a more effective, accountable, open, and ethical federal government.

It’s been nearly four decades since Congress passed the Inspector General Act, establishing independent watchdog offices throughout the federal bureaucracy to audit and investigate agency programs, seek improvements to those programs, and root out waste, fraud, and abuse.

The work of an Inspector General (IG) office can be measured in dollars and cents, such as the \$14.8 billion that IGs recovered for U.S. taxpayers in fiscal year 2013.<sup>1</sup> In other cases, effective IG oversight goes beyond the numbers, shining a light on problems such as the FBI’s abuse of its powers under the Patriot Act,<sup>2</sup> the improper installation of systems to protect U.S. troops from improvised explosive devices in Afghanistan,<sup>3</sup> and a culture of corruption at the former Minerals Management Service at the Interior Department,<sup>4</sup> to name just a few examples.

IG offices are unique among federal watchdogs because they wear two hats, reporting both to their agency heads and to Congress. Chairman Grassley, you and others have observed that IGs serve as Congress’s “eyes and ears within the executive branch.”<sup>5</sup>

Recognizing the vital role that IGs play, POGO has worked for years to study and improve the IG system.<sup>6</sup> I testified recently about one major impediment to IG independence and

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<sup>1</sup> Council of the Inspectors General on Integrity and Efficiency, *Progress Report to the President, Fiscal Year 2013*. <https://www.ignet.gov/sites/default/files/files/CIGIE%202013%20Progress%20Report.pdf> (Downloaded July 30, 2015)

<sup>2</sup> Department of Justice, Office of the Inspector General, *A Review of the Federal Bureau of Investigation’s Use of National Security Letters*, March 2007. <https://oig.justice.gov/special/s0703b/final.pdf> (Downloaded July 31, 2015)

<sup>3</sup> Special Inspector General for Afghanistan Reconstruction, *Improvised Explosive Devices: Unclear Whether Culvert Denial Systems to Protect Troops Are Functioning or Were Ever Installed*, July 2013. <http://www.sigar.mil/pdf/investigations/SIGAR-SP-13-8.pdf> (Downloaded July 30, 2015)

<sup>4</sup> Department of the Interior, Office of Inspector General, *Investigative Report: Gregory W. Smith*, August 7, 2008. <http://online.wsj.com/public/resources/documents/Interiorreport2-20080910.pdf> (Downloaded July 30, 2015)

<sup>5</sup> Senator Chuck Grassley, “Q&A: Inspectors General,” August 15, 2014. <http://www.grassley.senate.gov/news/commentary/qa-inspectors-general> (Downloaded July 30, 2015)

effectiveness: long-standing vacancies at IG offices headed by acting leaders who are auditioning for the permanent job.<sup>7</sup>

In my testimony today, I will highlight another threat to IG independence: agencies that limit or delay IG offices' access to records.

## **BACKGROUND: IMPORTANCE OF INSPECTOR GENERAL ACCESS**

In order to serve as the eyes and ears of Congress—and, by extension, the American public—an IG office must have an unrestricted view of the agency it oversees. This principle is enshrined in Section 6(a)(1) of the Inspector General Act, which states that each IG office shall have “access to all records, reports, audits, reviews, documents, papers, recommendations, or other material... which relate to programs and operations with respect to which that Inspector General has responsibilities under this Act.”<sup>8</sup> And as the title of this hearing reminds us: all means all.

We recognize that some IG offices have misused or abused their oversight powers, which is why it's so important that Congress watch the watchdogs. But when an IG office makes a request for agency records within the scope of its statutory responsibilities, including records that are classified or otherwise protected from public dissemination, the office should not have to negotiate with agency leaders for full and timely access. Agency records provide the raw materials IG offices need to fulfill their statutory responsibilities. The very purpose of having an independent IG is undermined if the office has to seek the agency's permission in order to carry out its mission. Agency actions that restrict an IG office's access to records in turn limit Congress's and the public's ability to oversee the executive branch and hold it accountable.

Many federal agencies handle records that are highly sensitive and legitimately withheld from public dissemination. That doesn't mean they should be withheld from IG offices, or by extension from Congress, both of which offer independent oversight and recommendations to improve agency operations. Secret agency programs are particularly susceptible to waste, fraud, and abuse, but IG offices cannot uncover or correct these problems without access to agency records. Agency actions that deny access to those records violate our system of checks and balances.

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<sup>6</sup> Project On Government Oversight, *Inspectors General: Many Lack Essential Tools for Independence*, February 26, 2008. <http://www.pogo.org/our-work/reports/2008/go-ig-20080226.html> (Hereinafter IG Independence Report); Project On Government Oversight, *Inspectors General: Accountability is a Balancing Act*, March 20, 2009. <http://www.pogo.org/our-work/reports/2009/go-igi-20090320.html>; and Project On Government Oversight, *Watching the Watchdogs: The Good, The Bad, and What We Need from the Inspectors General*, January 14, 2014. <http://www.pogo.org/our-work/reports/2014/watching-the-watchdogs-the-good-the-bad-and-what-we-need.html>

<sup>7</sup> Testimony of Danielle Brian, Executive Director, Project On Government Oversight, before the Senate Homeland Security and Governmental Affairs Committee regarding “Watchdogs Needed: Top Government Investigator Positions Left Unfilled for Years,” June 3, 2015. <http://www.pogo.org/our-work/testimony/2015/testimony-of-danielle-brian-watchdogs-needed.html>

<sup>8</sup> Inspector General Act of 1978, as Amended, § 6(a)(1), Appendix to U.S.C. Title 5. [https://www.ignet.gov/sites/default/files/files/igactasof1010\(1\).pdf](https://www.ignet.gov/sites/default/files/files/igactasof1010(1).pdf) (Downloaded July 30, 2015) (Hereinafter Inspector General Act)

## ACCESS BARRIERS AT THE JUSTICE DEPARTMENT

In 1988, when Congress extended the Inspector General Act to cover the Department of Justice (DOJ) and other agencies, it placed a limitation on the DOJ Office of Inspector General's (OIG) authority.<sup>9</sup> Under Section 8E of the Act, the Attorney General can prohibit the OIG from carrying out an audit or investigation that would require access to sensitive information, including ongoing civil or criminal proceedings, undercover operations, confidential sources, intelligence or counterintelligence matters, or "other matters the disclosure of which would constitute a serious threat to national security." When the Attorney General exercises this authority, she must provide a written justification to the OIG, a copy of which must be transmitted to this Committee and others in Congress.<sup>10</sup>

### OIG's Track Record of Effective and Responsible Oversight

Although the Attorney General has the authority to quash DOJ OIG probes, the OIG has shown that it can effectively and responsibly oversee some of the most sensitive DOJ operations.

OIG officials have stated that the office relied on grand jury materials and other sensitive records when it examined the FBI's potential targeting of domestic advocacy groups,<sup>11</sup> the FBI's efforts to access records of reporters' toll calls during a media leak probe,<sup>12</sup> the President's Surveillance Program,<sup>13</sup> and the firing of U.S. Attorneys,<sup>14</sup> among other important and high-profile cases, some of which were requested by Congress.<sup>15</sup> The OIG has said that it "scrupulously protected sensitive information and has taken great pains to prevent any unauthorized disclosure of classified, grand jury, or otherwise sensitive information."<sup>16</sup> There's been no evidence to indicate that the OIG has been anything but responsible in its handling of sensitive cases.

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<sup>9</sup> Inspector General Act Amendments, Public Law 100-504, 100<sup>th</sup> Congress, October 18, 1988.

<http://www.gpo.gov/fdsys/pkg/STATUTE-102/pdf/STATUTE-102-Pg2515.pdf> (Downloaded July 30, 2015)

<sup>10</sup> Inspector General Act, § 8E

<sup>11</sup> Department of Justice, Office of the Inspector General, *A Review of the FBI's Investigations of Certain Domestic Advocacy Groups*, September 2010. <https://oig.justice.gov/special/s1009r.pdf> (Downloaded July 30, 2015)

<sup>12</sup> Department of Justice, Office of the Inspector General, *A Review of the Federal Bureau of Investigation's Use of Exigent Letters and Other Informal Requests for Telephone Records*, January 2010.

<https://oig.justice.gov/special/s1001r.pdf> (Downloaded July 30, 2015)

<sup>13</sup> Offices of Inspectors General of the Department of Defense, Department of Justice, Central Intelligence Agency, National Security Agency, and Office of the Director of National Intelligence, *Unclassified Report on the President's Surveillance Program*, July 10, 2009. <https://oig.justice.gov/special/s0907.pdf> (Downloaded July 30, 2015)

<sup>14</sup> Department of Justice, Office of the Inspector General, *An Investigation into the Removal of Nine U.S. Attorneys in 2006*, September 2008. <https://oig.justice.gov/special/s0809a/final.pdf> (Downloaded July 30, 2015)

<sup>15</sup> Department of Justice, Office of the Inspector General, "The OIG's Legal Views Regarding Access to Information" (Hereinafter "The OIG's Legal Views"), attached to Statement of Michael E. Horowitz, Inspector General, Department of Justice, before the House Committee on Oversight and Government Reform concerning "Obstructing Oversight: Concerns from Inspectors General," September 10, 2014, p. 7 of pdf (Hereinafter Horowitz Statement); and Department of Justice, Office of the Inspector General, "Summary of the Department of Justice Office of the Inspector General's Position Regarding Access to Documents and Materials Gathered by the Federal Bureau of Investigation," attached to Horowitz Statement, October 2011, p. 17 of pdf.

<https://oig.justice.gov/testimony/t140910.pdf> (Hereinafter "Summary of OIG's Position") (All downloaded July 30, 2015)

<sup>16</sup> "Summary of OIG's Position," p. 19 of pdf

## **FBI's Legal Objections**

For years, the FBI has given the OIG unfettered access to some of its most sensitive records. But this practice changed several years ago when FBI officials started raising legal objections to the OIG's authority.

In memos to the OIG, FBI lawyers cited provisions that generally restrict the dissemination of grand jury materials, communications intercepted under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, consumer information collected under the Fair Credit Reporting Act (FCRA), federal taxpayer information, child victim and juvenile court information, patient medical information, Foreign Intelligence Surveillance Act information, foreign government and international organization information, attorney-client information, human source identity information, Bank Secrecy Act information, and information subject to non-disclosure agreements, memoranda of understanding, and court orders.<sup>17</sup>

In some cases, the FBI said it would still be able to grant the OIG access, but that access would be conditioned on the approval of FBI or DOJ officials. DOJ IG Michael Horowitz testified that the FBI's posture has impeded or delayed recent OIG investigations,<sup>18</sup> including probes into DOJ's use of the material witness statute in international terrorism investigations,<sup>19</sup> the FBI's use of national security letters to obtain records from telephone companies, Internet service providers, financial institutions, and consumer credit reporting agencies,<sup>20</sup> and the ATF's conduct in Operation Fast and Furious.<sup>21</sup>

The Attorney General and Deputy Attorney General ultimately decided to grant the OIG access to requested records in those cases. But Horowitz has raised understandable concerns that this process undermines Section 6(a) of the Inspector General Act, compromises the OIG's independence, results in delays, and consumes an inordinate amount of time for OIG and DOJ personnel.<sup>22</sup>

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<sup>17</sup> Letter from Valerie Caproni, General Counsel, Federal Bureau of Investigation, to Carol F. Ochoa, Assistant Inspector General, Department of Justice, regarding dissemination restrictions, March 4, 2011; and Memorandum from Andrew Weissmann, General Counsel, Federal Bureau of Investigation, and Catherine Bruno, Special Assistant to the General Counsel, Federal Bureau of Investigation, to Michael Horowitz, Inspector General, Department of Justice, regarding legal restrictions on dissemination of FBI information, attached to Horowitz Statement, February 29, 2013, pp. 53-71 of pdf. <https://oig.justice.gov/testimony/t140910.pdf> (Downloaded July 30, 2015)

<sup>18</sup> Horowitz Statement, p. 1

<sup>19</sup> Department of Justice, Office of the Inspector General, *A Review of the Department's Use of the Material Witness Statute with a Focus on Select National Security Matters*, September 2014. <http://www.justice.gov/oig/reports/2014/s1409r.pdf> (Downloaded July 30, 2015)

<sup>20</sup> Department of Justice, Office of the Inspector General, *A Review of the Federal Bureau of Investigation's Use of National Security Letters: Assessment of Progress in Implementing Recommendations and Examination of Use in 2007 through 2009*, August 2014. <https://oig.justice.gov/reports/2014/s1408.pdf> (Downloaded July 30, 2015)

<sup>21</sup> Department of Justice, Office of the Inspector General, *A Review of ATF's Operation Fast and Furious and Related Matters*, September 2012, re-issued in November 2012. <https://oig.justice.gov/reports/2012/s1209.pdf> (Downloaded July 30, 2015)

<sup>22</sup> Horowitz Statement, p. 2

## Related Access Disputes

The Justice Department is not the only agency that has delayed or tried to narrow an IG office's access to records in recent years.

In 2013, the Peace Corps' then-general counsel issued a legal opinion that limited OIG access to restricted reports of sexual assault. The opinion asserted that courts are the only entities permitted to access the restricted information under the Kate Puzey Act,<sup>23</sup> even though the law explicitly requires the OIG to review how the agency handles these reports. That same year, the Environmental Protection Agency's OIG—which oversees the Chemical Safety Board (CSB)—reported that the CSB was refusing to provide records of email communications among high-level agency officials, and communications between those officials and outside counsel. CSB officials raised concerns that the release of these records to the OIG would “waive the agency's attorney-client privilege vis-à-vis third parties adverse to the agency and the executive branch.”<sup>24</sup>

These OIGs were ultimately able to carry out their probes, but the extended process raised serious concerns. Peace Corps IG Kathy Buller testified that it took “two years of discussions with the agency and members of Congress, two congressional hearings, negative press coverage, a hold being placed on the nomination of the Director, and, ultimately, the signing of a memorandum of understanding (MOU) between the agency and OIG” for her office to obtain access.<sup>25</sup>

In August 2014, 47 IGs—nearly two-thirds of IGs operating under the Inspector General Act—sent a letter to Congress expressing their alarm over the access restrictions imposed on the DOJ, EPA, and Peace Corps IG offices. “[R]estrictive readings of the IG Act represent potentially serious challenges to the authority of every Inspector General and our ability to conduct our work thoroughly, independently, and in a timely manner,” the IGs wrote. “Refusing, restricting, or delaying an Inspector General's access to documents leads to incomplete, inaccurate, or significantly delayed findings or recommendations,” the IGs added, “which in turn may prevent the agency from promptly correcting serious problems and deprive Congress of timely information regarding the agency's performance.”<sup>26</sup>

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<sup>23</sup> Testimony of Kathy A. Buller, Inspector General, Peace Corps, before the House Committee on Oversight and Government Reform regarding “Challenges to Access and Independence Faced by the Peace Corps Inspector General,” February 3, 2015, p. 3.

[http://files.peacecorps.gov/multimedia/pdf/policies/PCIG\\_Buller\\_Peace\\_Corps\\_IG\\_Statement\\_02\\_03.pdf](http://files.peacecorps.gov/multimedia/pdf/policies/PCIG_Buller_Peace_Corps_IG_Statement_02_03.pdf) (Downloaded July 30, 2015) (Hereinafter Buller Testimony)

<sup>24</sup> Letter from Arthur A. Elkins, Jr., Inspector General, Environmental Protection Agency, to Rafael Moure-Eraso, Chairman, Chemical Safety and Hazard Investigation Board, regarding seven-day letter for refusal to produce records, September 5, 2013, p. 2. [http://www.epa.gov/oig/reports/2014/EPAOIG\\_Seven\\_Day\\_Letter\\_9-5-2013.pdf](http://www.epa.gov/oig/reports/2014/EPAOIG_Seven_Day_Letter_9-5-2013.pdf) (Downloaded July 30, 2015)

<sup>25</sup> Buller Testimony, p. 1

<sup>26</sup> Letter from 47 Inspectors General to the Chairmen and Ranking Members of the House Committee on Oversight and Government Reform and Senate Committee on Homeland Security and Governmental Affairs regarding limitations on access to records, August 5, 2014, p. 1.

<http://www.grassley.senate.gov/sites/default/files/issues/upload/IG%20Access%20Letter%20to%20Congress%2008-05-2014.pdf> (Downloaded July 30, 2015)



## **Congress's Attempted Fix**

In the FY 2015 appropriations law, Congress stipulated that no funds could be used to deny the DOJ OIG timely access to records.<sup>27</sup> The OIG reported that this provision (Section 218) had produced some positive results. Shortly after the law was enacted, the Drug Enforcement Administration (DEA) gave the OIG access to previously contested records related to the DEA's use of administrative subpoenas and its Confidential Source program.<sup>28</sup>

However, the FBI continued to assert that the OIG was not legally entitled to grand jury, Title III, and FCRA information, according to the OIG's report.<sup>29</sup> For instance, the FBI continued to withhold materials from OIG investigations into alleged whistleblower retaliation,<sup>30</sup> and from an OIG probe to examine the FBI's use of telephonic metadata collected under Section 215 of the Patriot Act.<sup>31</sup>

DOJ's budget request for FY 2016 seeks to remove the appropriations language clarifying the OIG's authority to access records. In an explanatory note, DOJ stated it was "unaware of any specific materials that the OIG believed necessary to its reviews, but to which the OIG has not been granted access." The Department said it "intends to work with the OIG to develop statutory language that would more clearly address the Inspector General's concerns regarding access to such information."<sup>32</sup> However, DOJ leadership "has made no attempt to provide the OIG with a legislative proposal that the Department believes will resolve the legal issue," the OIG reported.<sup>33</sup>

## **OLC Defends Access Restrictions**

Now the Justice Department's Office of Legal Counsel (OLC) has concluded that the FBI was correct to limit or delay the OIG's access to sensitive records.<sup>34</sup>

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<sup>27</sup> Consolidated and Further Continuing Appropriations Act, 2015, § 218, Public Law 113-235, 113<sup>th</sup> Congress, December 16, 2014. <http://www.gpo.gov/fdsys/pkg/PLAW-113publ235/pdf/PLAW-113publ235.pdf> (Downloaded July 30, 2015)

<sup>28</sup> Department of Justice, Office of the Inspector General, *180 Day Report to Congress on the Impact of Section 218 of the Department of Justice Appropriations Act for Fiscal Year 2015*, June 2015.

<https://oig.justice.gov/press/2015/2015-06-16.pdf> (Downloaded July 30, 2015) (Hereinafter OIG 180 Day Report)

<sup>29</sup> OIG 180 Day Report

<sup>30</sup> Letter from Michael E. Horowitz, Inspector General, Department of Justice, to the Chairmen and Ranking Members of the House and Senate Committees on Appropriations, February 3, 2015.

<https://oig.justice.gov/press/2015/2015-02-03.pdf> (Downloaded July 30, 2015)

<sup>31</sup> Letter from Michael E. Horowitz, Inspector General, Department of Justice, to the Chairmen and Ranking Members of the House and Senate Committees on Appropriations, February 25, 2015.

<https://oig.justice.gov/press/2015/2015-02-25.pdf> (Downloaded July 30, 2015)

<sup>32</sup> Department of Justice, "Summary of General Provisions, FY 2016 President's Budget," p. 8 of pdf.

[http://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/01/30/8.2016\\_summary\\_of\\_general\\_provisions.pdf](http://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/01/30/8.2016_summary_of_general_provisions.pdf) (Downloaded July 30, 2015)

<sup>33</sup> OIG 180 Day Report, p. 4

<sup>34</sup> Department of Justice, Office of Legal Counsel, *Memorandum Opinion for the Deputy Attorney General: The Department of Justice Inspector General's Access to Information Protected by the Federal Wiretap Act, Rule 6(e) of the Federal Rules of Criminal Procedure, and Section 626 of the Fair Credit Reporting Act*, July 20, 2015.

<http://www.justice.gov/sites/default/files/olc/opinions/attachments/2015/07/23/2015-07-20-doj-oig-access.pdf> (Downloaded July 30, 2015) (Hereinafter OLC Opinion)

The OLC's opinion states that the general access afforded by Section 6(a) of the Inspector General Act is superseded by specific restrictions on the dissemination of Title III, grand jury, and FCRA information. The OLC concluded, for instance, that the OIG may not be entitled to obtain these records when conducting financial audits and other administrative and civil reviews that are only tangentially related to DOJ's criminal and law enforcement activities. "[N]either the text of the IG Act, nor its legislative history, nor its general purpose offers a clear indication that Congress intended to override the separate statutory confidentiality requirements," the OLC wrote.<sup>35</sup> With respect to the appropriations measure prohibiting the Justice Department from limiting the OIG's access, the OLC said this was not "unambiguous" evidence that Congress intended to repeal or amend the specific disclosure restrictions.<sup>36</sup>

### **Reactions to OLC Opinion**

Chairman Grassley, you and other congressional leaders on both sides of the aisle have rightly condemned the OLC's opinion, according to which "all records" does not mean "all records."<sup>37</sup> POGO believes the opinion makes a mockery of the entire IG system: these offices cannot possibly be effective watchdogs on behalf of Congress and the American public if agencies restrict IG access to records, forcing them to negotiate with agency leaders for access on a case-by-case basis.<sup>38</sup>

In comments to POGO, Professor Charles Tiefer—a former deputy general counsel of the House of Representatives—said the OLC opinion treats DOJ as if it were "above the law." Under the logic of the opinion, "DOJ can engage in any manner of abuses where the response should be disciplinary or civil, or where the treatment of wrongful private entities or contractors should be civil fraud penalties, and apparently DOJ would provide the information internally to its own sympathetic officials but not to the more critical ones at OIG because it would say that OIG isn't criminally prosecuting," Tiefer said. DOJ can now use the "Midas Touch" approach to turn material secret by issuing or even threatening to issue a grand jury subpoena, he added. Furthermore, he said, the opinion "will cover up any inadequacies or abuses or simple incompetence or waste by the vastly expanded intelligence system since 9/11."<sup>39</sup>

Louis Fisher, who worked for four decades at the Library of Congress as Senior Specialist in Separation of Powers and Specialist in Constitutional Law, told POGO he does not find the OLC's opinion to be persuasive. He said the memo raises questions about whether DOJ would even defer to clearer and more specific statutory language from Congress. "Basically, OLC

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<sup>35</sup> OLC Opinion, p. 62

<sup>36</sup> OLC Opinion, p. 68

<sup>37</sup> Senator Chuck Grassley, "Grassley, Johnson, Goodlatte, Conyers Concerned about New Opinion that Denies Records to Inspectors General, Blocks Oversight, and Circumvents Congressional Intent," July 23, 2015. <http://www.grassley.senate.gov/news/news-releases/grassley-johnson-goodlatte-conyers-concerned-about-new-opinion-denies-records> (Downloaded July 30, 2015)

<sup>38</sup> Project On Government Oversight, "Department of Justice's Decision Undercuts, Weakens Federal Watchdogs," July 24, 2015. <http://www.pogo.org/blog/2015/07/doj-weakens-watchdogs.html>

<sup>39</sup> Email from Charles Tiefer, Professor, University Baltimore School of Law, to Michael Smallberg, Investigator, Project On Government Oversight, regarding OLC opinion on Inspector General access, July 30, 2015.

argues that when some statutory limits conflict with other statutory limits, DOJ interpretations will prevail over OIG access to agency documents,” Fisher said.<sup>40</sup>

At one point in its opinion, the OLC asserts that DOJ may disclose Title III information to OIG agents “in connection with many, but not all, OIG investigations and reviews.”<sup>41</sup> Fisher said this language is “far too vague, giving DOJ on each case the power to grant or deny access to OIG.” The OLC argues that the Inspector General Act does not provide a clear indication of congressional intent. But, according to Fisher, the OLC’s opinion does not provide any clarity when it comes to standards for OIG access. “The memo does not hang together,” he concluded.<sup>42</sup>

As it turns out, this is not the first time the OLC has challenged the authority of federal watchdogs. Prior to the passage of the Inspector General Act, the OLC opined that the proposed dual-reporting requirement of IG offices would violate the separation of powers doctrine, and objected to the notion that IG offices would have “unrestricted access to executive branch materials and information.”<sup>43</sup> In another opinion, the OLC held that the GAO—then known as the General Accounting Office—was restricted by law from accessing intelligence information.<sup>44</sup> Years later, then-Comptroller General Gene Dodaro wrote that this opinion was hindering the GAO’s ability to review the FBI’s counterterrorism program.<sup>45</sup> It is hard to know how many other OLC opinions have challenged the oversight powers of federal watchdogs, since the OLC has not released all of its opinions to the public.<sup>46</sup>

The effects of the OLC’s latest opinion are already being felt within the IG community. The Commissioner of the Internal Revenue Service (IRS) has cited the opinion to justify denying a request from the Treasury Inspector General for Tax Administration related to the IRS’s processing of search and seizure warrants.<sup>47</sup> And the Commerce Department apparently deferred to the OLC in denying a request from the Commerce IG’s office related to trade remedy

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<sup>40</sup> Email from Louis Fisher, Scholar in Residence, Constitution Project, to Michael Smallberg, Investigator, Project On Government Oversight, regarding OLC opinion on Inspector General access, July 30, 2015. (Hereinafter Fisher Email)

<sup>41</sup> OLC Opinion, p. 19

<sup>42</sup> Fisher Email

<sup>43</sup> Department of Justice, Office of Legal Counsel, *Memorandum Opinion for the Attorney General: Inspector General Legislation*, February 21, 1977, p. 2 of pdf. <http://www.justice.gov/sites/default/files/olc/opinions/1977/02/31/op-olc-v001-p0016.pdf> (Downloaded July 30, 2015)

<sup>44</sup> Department of Justice, Office of Legal Counsel, *Memorandum Opinion for the Executive Secretary, National Security Council: Investigative Authority of the General Accounting Office*, August 16, 1988. [http://www.justice.gov/sites/default/files/olc/opinions/1988/08/31/op-olc-v012-p0171\\_0.pdf](http://www.justice.gov/sites/default/files/olc/opinions/1988/08/31/op-olc-v012-p0171_0.pdf) (Downloaded July 31, 2015)

<sup>45</sup> Letter from Gene L. Dodaro, Acting Comptroller General, to Senators Charles E. Grassley and Richard C. Shelby, regarding GAO access to information, June 15, 2010. <http://fas.org/sgp/gao/access.pdf> (Downloaded July 31, 2015)

<sup>46</sup> Sunlight Foundation, “39% of Office of Legal Counsel Opinions Kept from the Public,” August 15, 2012. <https://sunlightfoundation.com/blog/2012/08/15/39-of-office-of-legal-counsel-opinions-kept-from-the-public/>; and Sunlight Foundation, “For Transparency’s Sake, Release DOJ’s Secret Opinions,” February 7, 2013. <http://sunlightfoundation.com/blog/2013/02/07/for-transparencys-sake-release-dojs-secret-opinions/> (All downloaded July 31, 2015)

<sup>47</sup> Letter from John A. Koskinen, Commissioner, Internal Revenue Service, to Charles E. Grassley, Chairman, Senate Judiciary Committee, regarding TIGTA audit of IRS criminal investigation, July 30, 2015.



determinations.<sup>48</sup> These cases demonstrate that the OLC’s opinion has had immediate and dangerous consequences for the independence of IG offices throughout the federal government.

## **OTHER LIMITATIONS ON OIG AUTHORITY**

Some IG offices face additional restrictions that limit their ability to fully oversee agency operations.

### **Competing Watchdogs**

In a 2008 report on IG independence—based in part on a survey submitted to all statutory IGs—POGO noted that “[s]everal agencies have, in addition to their IG office, another investigative unit whose functions occasionally overlap with that of the IG.”<sup>49</sup>

For instance, under Section 8E(b)(3) of the Inspector General Act, the DOJ OIG is required to refer to an internal investigative unit—the Office of Professional Responsibility (OPR)—any “allegations of misconduct involving Department attorneys, investigators, or law enforcement personnel, where the allegations relate to the exercise of the authority of an attorney to investigate, litigate, or provide legal advice.”<sup>50</sup>

In a subsequent report, based on POGO’s review of data obtained under the Freedom of Information Act, we found that OPR documented more than 650 infractions from fiscal year 2002 through fiscal year 2013, with the majority of matters falling under the categories of recklessness or intentional misconduct. But the public would be hard-pressed to know which Justice Department attorneys have crossed ethical or legal lines because OPR, as a matter of policy, doesn’t release identifying information in its reports. The result is that DOJ, its lawyers, and OPR are insulated from meaningful public scrutiny and accountability.<sup>51</sup>

It is hard enough for the DOJ OIG to do its job when it has to fight with Department leaders for access to agency records. It’s even harder for the office to hold DOJ accountable when it is legally restricted from investigating an entire category of alleged wrongdoing by DOJ personnel.

At the State Department, IG Steve Linick has testified that, “[u]nlike other OIGs, my office is not always afforded the opportunity to investigate allegations of criminal or serious administrative misconduct by Department employees.” Under Department guidance, the internal Bureau of Diplomatic Security or Under Secretary for Management “may initiate an

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<sup>48</sup> Letter from the Council of the Inspectors General on Integrity and Efficiency to the Chairmen and Ranking Members of the Senate Committee on Homeland Security and Governmental Affairs and the House Committee on Oversight and Government Reform regarding the OLC’s opinion on IG access, August 3, 2015; and Letter from David Smith, Acting Inspector General, Department of Commerce, to the Chairman and Ranking Member of the Senate Committee on Commerce, Science and Transportation regarding the Commerce Department’s denial of OIG access to business proprietary information, June 24, 2015.

<sup>49</sup> IG Independence Report

<sup>50</sup> Inspector General Act, § 8E(b)(3)

<sup>51</sup> Project On Government Oversight, *Hundreds of Justice Department Attorneys Violated Professional Rules, Laws, or Ethical Standards*, March 13, 2014. <http://www.pogo.org/our-work/reports/2014/hundreds-of-justice-attorneys-violated-standards.html>

investigation without notifying us or giving us the opportunity to evaluate the matter independently and become involved, if appropriate,” Linick said.<sup>52</sup> Meanwhile, EPA IG Arthur Elkins has raised concerns that an internal EPA unit, the Office of Homeland Security, was conducting investigations of its own “without any legal authority to do so, thereby interfering with—and in some cases fouling—OIG investigations.”<sup>53</sup>

We are concerned that these jurisdictional disputes, combined with agency actions that limit access to records, can inhibit the ability of IG offices to conduct independent oversight.

### **Special Provisions to Quash OIG Oversight**

As mentioned above, the Attorney General has the authority under Section 8E of the Inspector General Act to prohibit the DOJ OIG from carrying out audits or investigations that would require access to information concerning sensitive operations, including any “matters the disclosure of which would constitute a serious threat to national security.”<sup>54</sup> Top officials at other agencies—including the Secretary of Defense, Secretary of the Treasury, Postal Service Board of Governors, and Secretary of Homeland Security—have similar powers under the law.<sup>55</sup>

The DOJ OIG has stated that the special provisions in Section 8E “represent an acknowledgment of the fact that the Department often handles highly sensitive criminal and national security information, the premature disclosure of which could pose a threat to the national interests.”<sup>56</sup> In addition, the OIG has argued that the “exacting procedures” of Section 8E “represent an extraordinary departure from the baseline rule that the Inspectors General shall have unconditional access to documents and materials,” and “confirm that only the Attorney General, and not the FBI, has the power to prohibit the OIG’s access to relevant documents and materials.”<sup>57</sup> It appears the Attorney General has rarely exercised this authority.<sup>58</sup>

We are concerned, however, that current and future agency leaders who have this power could be tempted to abuse it, especially following the OLC’s opinion. Furthermore, these provisions could encourage undue IG deference to agency leaders. In response to questions at his 2006 confirmation hearing, David Laufman, a nominee to become Inspector General at the Department of Defense, told the Senate Armed Services Committee that the special powers

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<sup>52</sup> Statement of Steve A. Linick, Inspector General, Department of State and Broadcasting Board of Governors, before the Senate Committee on Foreign Relations, Subcommittee on State Department and USAID Management, International Operations, and Bilateral International Development, regarding “Improving the Efficiency and Effectiveness of the Department of State,” April 21, 2015, pp. 8-9. <http://www.foreign.senate.gov/download/linick-testimony> (Downloaded July 31, 2015)

<sup>53</sup> Statement of Arthur A. Elkins, Jr., Inspector General, Environmental Protection Agency, before the House Committee on Oversight and Government Reform regarding “Ongoing Negotiations Regarding Impediments to Full Inspector General Access with the Office of Homeland Security and Importance of Timely Reporting of Employee Misconduct,” April 30, 2015, p. 2. [http://www.epa.gov/oig/reports/2015/IG\\_Written\\_Testimony\\_for\\_Hearing\\_04-30-2015.pdf](http://www.epa.gov/oig/reports/2015/IG_Written_Testimony_for_Hearing_04-30-2015.pdf) (Downloaded July 31, 2015)

<sup>54</sup> Inspector General Act, § 8E(a)

<sup>55</sup> Inspector General Act, §§ 8(b), 8D(a), 8G(f)(3), 8I(a)

<sup>56</sup> “The OIG’s Legal Views,” attached to Horowitz Statement, p. 9 of pdf

<sup>57</sup> “Summary of OIG’s Position,” attached to Horowitz Statement, p. 23 of pdf

<sup>58</sup> Department of Justice, Office of the Inspector General, *The CIA-Contra-Crack Cocaine Controversy: A Review of the Justice Department’s Investigations and Prosecutions*, Epilogue, July 1998. <https://oig.justice.gov/special/9712/epilogue.htm> (Downloaded August 2, 2015)

afforded to the Secretary of Defense in the Inspector General Act required the IG to consult with the Pentagon before issuing a report on sensitive national security matters. Then-Senator Carl Levin (D-MI), who at the time was Ranking Member of the Committee, ended up opposing Laufman's nomination because of this response.<sup>59</sup>

### **Data Mismatch**

Under the Computer Matching and Privacy Protection Act (CMPPA), IGs must get approval from agency leaders in order to match the computer records of one federal agency against other federal and non-federal records. At a hearing earlier this year, the IG of the Social Security Administration explained how this law has limited his office's ability to assess and recover improper payments issued to ineligible recipients.<sup>60</sup> The IG community has long sought an exemption from the CMPPA so that IG offices can access records at other agencies without getting approval from the very officials they are supposed to oversee.<sup>61</sup>

### **WATCHING THE WATCHDOGS**

Although POGO is concerned about laws, regulations, and agency actions that limit the authority of OIGs to fulfill their statutory mission, it is worth noting that some IG offices have failed to live up to their mission. As I testified last week, some whistleblowers "have come to doubt the [Department of Veterans Affairs] IG's willingness to protect them or hold wrongdoers accountable."<sup>62</sup> In another example, the Department of Defense (DoD) OIG is under investigation by two federal offices that are reviewing whether the OIG improperly destroyed evidence related to the leak investigation of NSA whistleblower Thomas Drake.<sup>63</sup> The VA and DoD's watchdogs are also among the IG offices that have created barriers to their own work and shielded their agencies from accountability by withholding or delaying the public release of investigative reports.<sup>64</sup> These cases remind us that Congress must constantly watch the

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<sup>59</sup> Griff Witte, "Nomination Still Stalled For Pentagon Oversight Job," *The Washington Post*, November 14, 2006. <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/13/AR2006111301190.html> (Downloaded August 3, 2015)

<sup>60</sup> Statement of Patrick P. O'Carroll, Jr., before the Senate Committee on Homeland Security and Governmental Affairs, regarding "Improving the Efficiency, Effectiveness, and Independence of Inspectors General," February 24, 2015. <http://oig.ssa.gov/sites/default/files/testimony/O%27Carroll%2024%20Feb%202015%20Written%20Statement%20Final.pdf> (Downloaded July 31, 2015)

<sup>61</sup> Statement of Michael E. Horowitz, Inspector General, Department of Justice, before the Senate Committee on Homeland Security and Governmental Affairs, regarding "Concerning the Efficiency, Effectiveness, and Independence of Inspectors General," February 24, 2015. <https://oig.justice.gov/testimony/t150224.pdf>; and Zach Noble, "IGs want computer-matching rules eased," *Federal Computer Week*, June 10, 2015. <http://fcw.com/articles/2015/06/10/igs-rules-eased.aspx> (All downloaded July 31, 2015)

<sup>62</sup> Testimony of Danielle Brian, Executive Director, Project On Government Oversight, before the Senate Committee on Appropriations Subcommittee on Military Construction, Veterans Affairs, and Related Agencies on "Whistleblower Claims at the U.S. Department of Veterans Affairs," July 30, 2015. <http://www.pogo.org/our-work/testimony/2015/testimony-of-pogos-danielle-brian-on-whistleblower-claims.html>

<sup>63</sup> Marisa Taylor, "Possible Pentagon destruction of evidence in NSA leak case probed," *McClatchy*, June 15, 2015. <http://www.mcclatchydc.com/news/nation-world/national/national-security/article25186123.html> (Downloaded July 31, 2015)

<sup>64</sup> Donovan Slack, "Newly released VA reports include cases of veteran harm, death," *USA Today*, April 29, 2015. <http://www.usatoday.com/story/news/politics/2015/04/29/newly-released-va-reports/26594353/>; and Ray Locker,

watchdogs to ensure, for instance, that IG offices are not using their investigative powers in a way that harms whistleblowers or protects the agencies.<sup>65</sup>

## RECOMMENDATIONS

### **Clarify OIG Authority to Access Records**

Some IGs have raised concerns about amending the Inspector General Act because they believe the law has always been crystal clear about their offices' authority to access agency records.<sup>66</sup> In light of the OLC's opinion, however, we believe the time has come for Congress to reaffirm that "all" means "all" in Section 6(a) of the Inspector General Act.

Specifically, Congress should consider taking action to clarify that IG offices shall be granted access to all agency records notwithstanding any other existing or future law or any other prohibition on disclosure, including but not limited to the federal rules of criminal procedure, Title III, the FCRA, and laws such as the Kate Puzey Act that restrict the dissemination of personally identifiable information.

In addition, Congress should specify that agencies do not waive the attorney-client or other common law privileges when records are turned over to IG offices.

### **Empower the DOJ OIG to Investigate Allegations of Prosecutorial Misconduct**

The DOJ OIG should be given the explicit authority to investigate allegations of misconduct throughout the agency, including allegations of prosecutorial misconduct committed by DOJ attorneys. IG Horowitz and his predecessors have repeatedly testified in support of this proposal,<sup>67</sup> and bipartisan legislation introduced last year by Senators Mike Lee (R-UT) and Jon Tester (D-MT) would have given the OIG full authority to investigate allegations of attorney misconduct had it passed.<sup>68</sup>

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<sup>65</sup> "Catch-22' lives on with Pentagon inspector general," *USA Today*, August 15, 2013.

<http://www.usatoday.com/story/nation/2013/08/15/catch-22-pentagon-inspector-general-investigative-reports/2658523/> (All downloaded July 31, 2015)

<sup>66</sup> Mark Flatten, "Bad things happen to whistleblowers when watchdogs become attack dogs," *Washington Examiner*, December 3, 2014. <http://www.washingtonexaminer.com/bad-things-happen-to-whistleblowers/article/2556324> (Downloaded July 31, 2015)

<sup>67</sup> Statement of Arthur A. Elkins, Jr., Inspector General, Environmental Protection Agency, before the House Committee on Oversight and Government Reform, regarding "Is it Necessary to Clarify or Strengthen the Inspector General Act of 1978," September 10, 2014.

[http://www.epa.gov/oig/reports/2014/Written\\_Statement\\_for\\_EPA\\_IG\\_Arthur\\_Elkins\\_9-10-14.pdf](http://www.epa.gov/oig/reports/2014/Written_Statement_for_EPA_IG_Arthur_Elkins_9-10-14.pdf) (Downloaded July 31, 2015)

<sup>68</sup> Horowitz Statement; Statement of Michael E. Horowitz, Inspector General, Department of Justice, before the Senate Committee on Appropriations, Subcommittee on Commerce, Justice, Science and Related Agencies, regarding "The Department of Justice's Fiscal Year 2015 Budget Request," April 3, 2014. <https://oig.justice.gov/testimony/t140403.pdf>; and Statement of Glenn A. Fine, Inspector General, Department of Justice, before the Senate Committee on Homeland Security and Governmental Affairs regarding "Strengthening the Unique Role of the Nation's Inspectors General," July 11, 2007. <https://oig.justice.gov/testimony/0707/> (All downloaded July 31, 2015)

<sup>68</sup> Senator Mike Lee, "Lee, Tester Introduce Bill to Ensure Proper Investigations at DOJ," March 13, 2014. <http://www.lee.senate.gov/public/index.cfm/2014/3/lee-tester-introduce-bill-to-ensure-proper-investigations-at-doj> (Downloaded July 31, 2015)

### **Reconsider Whether Agency Leaders Should Have Authority to Quash OIG Oversight**

Congress should ask the Government Accountability Office to review how the Attorney General and other agency leaders have employed their authority under the Inspector General Act to prohibit IG offices from carrying out audits or investigations that would require access to information concerning sensitive operations. In light of the OLC's opinion, it may be time for Congress to reconsider whether agency leaders should have the explicit authority to unilaterally quash OIG audits and investigations.

### **Exempt IG Offices from Data Matching Restrictions**

Congress should exempt IG offices from the CMPPA so they can access records at other agencies without getting approval from the very officials they are supposed to oversee. This is one of several proposals included in bipartisan legislation introduced by Chairman Grassley, the Inspector General Empowerment Act of 2015 (S. 579).<sup>69</sup>

### **Oversee the OLC**

Not all OLC interpretations of law are made public, which is in itself a problem. Even Congress might not be aware of every OLC opinion that legitimized agencies withholding information against congressional intent. The Committee should take this opportunity to explore in greater detail how the OLC has been used to shield agencies from oversight by IG offices, the GAO, Congress, and other watchdogs. In addition, there should be stronger requirements for the OLC to release its opinions to the public.

### **Watch the Watchdogs**

Any expansion of IG authority should be coupled with other measures to hold IG offices and agencies accountable, such as stronger protections for whistleblowers (including FBI employees<sup>70</sup>), improved practices for investigating whistleblower retaliation claims, and stricter transparency requirements for the online posting of IG reports.<sup>71</sup> In addition, Congress should investigate acting IGs who have become too cozy with the agency leaders they're supposed to oversee, and continue putting pressure on the White House and agency heads to fill IG vacancies with independent and aggressive watchdogs.

### **Update OIG Reporting Requirements**

POGO has long raised concerns that the Inspector General Act induces many IG offices to spend a significant amount of time chasing "small-window" projects in order to boost their offices'

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<sup>69</sup> Inspector General Empowerment Act of 2015 (S. 579), 114<sup>th</sup> Congress. <https://www.congress.gov/bill/114th-congress/senate-bill/579> (Downloaded July 31, 2015)

<sup>70</sup> Project On Government Oversight, "FBI Whistleblower Protections 'Weaker Than at Any Other Agency,'" March 9, 2015. <http://www.pogo.org/blog/2015/02/fbi-whistleblower-protections-weaker-than-at-any-other-agency.html>

<sup>71</sup> Senator Tammy Baldwin, "U.S. Senator Tammy Baldwin Legislation on Strengthening Inspectors General Clears Senate Hurdle," March 4, 2015. <http://www.baldwin.senate.gov/press-releases/baldwin-legislation-on-strengthening-inspectors-general-clears-senate-hurdle>; Representative Ron Kind, "Rep. Ron Kind Unites Wisconsin House

Delegation in Response to Crisis at Tomah VA," April 22, 2015. <http://kind.house.gov/latest-news/rep-ron-kind-unites-wisconsin-house-delegation-in-response-to-crisis-at-tomah-va/>; and Government Accountability Project, "Justice Department IG Sets Significant Transparency Precedent," June 29, 2015.

<http://whistleblower.org/blog/042729-justice-department-ig-sets-significant-transparency-precedent> (All downloaded July 31, 2015)



metrics in semiannual reports (SARs) to Congress. In many cases, if an IG office can't monetize an issue, the office will often turn a blind eye to it, turn against the whistleblowers who brought it to them, or turn it into a criminal case to boost the office's referral metrics. Congress should explore how to revamp these ineffectual reporting requirements so that IG offices have an incentive to take on more meaningful work.