Prepared Statement by Senator Chuck Grassley of Iowa
Chairman, Senate Judiciary Committee
At a Hearing Titled: "'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

The Inspector General Act of 1978 created Inspectors General as independent and objective units within the executive branch. Since then, the American taxpayers have relied on IGs to carry out three important tasks:

One, is to conduct audits and investigations of agency programs.

Two, is to promote the integrity, efficiency, and effectiveness of those programs.

And three, is to keep Congress and agency heads fully informed about program operations, deficiencies, and the need for corrective action.
To help IGs achieve these goals, Section 6(a) of the IG Act authorizes Inspectors General to access "all" records belonging to their respective agency.

But two weeks ago, the Justice Department's Office of Legal Counsel issued a legal opinion claiming that "all" does not actually mean "all."

Today we will examine how this opinion is hindering the work of the Justice Department's Inspector General and threatens all Inspectors General.

The IG Act means what it says. The DOJ IG is legally entitled to access ALL Department records, period. If the Inspector General deems a document relevant to do his job, then the agency should turn it over immediately, without hesitation or review.

According to the DOJ Inspector General, the Department did exactly that, prior to 2010. However, in 2010, the Federal Bureau of Investigation suddenly changed that practice, after the IG uncovered some embarrassing information about the FBI's misuse of exigent letters. The FBI claimed it had the right to refuse to provide the IG information in over a dozen categories, including information related to wiretaps, grand jury material, and consumer credit reports. The FBI claimed its attorneys would review material first and then have the Attorney General or the Deputy Attorney General decide what could be released to the Inspector General.

Congress did not intend to create this sort of litigation-style standoff inside the Department. It is a waste of time and money for two divisions of the same government Department to be fighting over access to the Department's own records.

The Department's current practice is exactly the opposite of what the law envisions. Under the law, an inspector general must be independent, because agencies cannot be trusted to investigate themselves. If IGs have to ask for permission from senior leadership, they would not be truly independent.

The IG Act does allow the Attorney General - not the FBI - to prohibit the Inspector General from carrying out or completing an investigation, but only in certain limited circumstances. When that extraordinary step is taken, it must be done in writing to the Inspector General. And the Inspector General must forward that written notice to Congress.

The FBI would have us believe that, instead of written notice being required to *block* an IG investigation, it needs written permission to *comply* with an investigation. That is simply not how the law is designed to work.

The IG testified to Congress multiple times about these problems since taking office in 2012. So, Congress took action to resolve the dispute. We essentially bolded and underlined Section 6(a) of the IG Act that ensures access to documents. Not literally. But, Section 218 of this year's Justice Department Appropriations Act declared that no funds should be used to deny the IG timely access to all records. Section 218 also directed the Inspector General to report to Congress within five days whenever there was a failure to comply with this requirement.

In February and March alone, we received four of those reports that the FBI refused to comply. I wrote to the FBI twice about these notices, and still have not received answers to most questions.

So, Mr. Kevin Perkins, the FBI's Assistant Deputy Director, is here to account for these matters. Also here to testify is Mr. Michael Horowitz, the Inspector General for the Justice Department. I would like to find out from these two witnesses what the practice of the FBI was prior to 2010, and whether that practice complied with the procedures that the OLC opinion now argues is mandatory.

The FBI is not above the law. It has an obligation to comply not only with the Inspector General Act, but also with the restrictions Congress placed on its appropriations. That means, FBI employees cannot legally be spending their time withholding and reviewing documents before providing them to the IG. However, this is exactly what the FBI has been doing. And now, the OLC opinion actually endorses that practice. OLC needed 68-pages of tortured logic to support its claim that neither the IG Act, nor Section 218, means what it says.

Not surprisingly, last Thursday, the appropriations committee authors of Section 218 wrote a joint letter to the Deputy Attorney General that said the following:

> *"OLC's interpretation of section 218 - and the subsequent conclusion of our Committee's intention - is wrong.*
>
> *For OLC to determine our intentions as anything other than supporting the OIG's legal right to gain full access to timely and complete information is disconcerting.*
>
> *We expect the Department and all of its agencies to fully comply with section 218, and to provide the OIG with full and immediate access to all records, documents and other material in accordance with Section 6(a) of the Inspector General Act."*

That's about as clear of a statement you can get, and the intent of the IG Act is equally clear. But, unfortunately, only a few pages of OLC's 68-page opinion actually discuss the IG Act. Instead, most of the opinion – 46 pages – analyzes just three legal provisions whose general limitations on disclosure allegedly override the law's specific promise of Inspector General access. Those three provisions relate to, Title III wiretap information, Rule 6(e) grand jury information, and Fair Credit Reporting Act information.

It is unclear why so much ink was spilled on just these three provisions given that the FBI has cited nearly a dozen provisions in withholding records from the Inspector General. And there are dozens, if not hundreds, of generally applicable nondisclosure provisions throughout the U.S. Code that could also limit Inspector General access under the tortured logic of the OLC opinion.

OLC argues that nondisclosure statutes like these trump the IG Act unless Congress makes it extra clear that they don't, by specifically mentioning those statutes by name in the IG Act.

Think about that for a moment.

According to OLC, the IG Act would have to mention each and every non-disclosure statute by name before DOJ would believe that Congress really meant to ensure access to "all records."

That is simply unworkable.

We don't even have a definitive list of non-disclosure statutes that might need to be listed. The Congressional Research Service is studying that question at my request, but listing specific exemptions to dozens or hundreds of non-disclosure statutes would be too unwieldy. That's why we used the word, "all" – to cover everything without having to list each potential exception. It really *is* that simple.

Members should be able to ask the Office of Legal Counsel about this and many other problems with its opinion. Unfortunately, the Department refused to provide a witness from OLC for today's hearing. In response to the invitation, the Department said that the head of OLC, Mr. Karl Thompson, is out of the country today.

However, personnel from Inspectors General across government are here with us in the audience today. If you are here from the Inspector General community and made time to be here today, we welcome you. Would you please stand?

Thank you all for joining us.

In Mr. Thompson's absence, the Committee asked DOJ to provide an alternate witness from his office. However, the Department claimed that it did not have enough time to prepare a witness. After 14 months of working on this opinion, since May 2014, that office was not ready to discuss it publicly. That is astonishing.

I also invited the Deputy Attorney General to testify about procedures she announced in May to improve the IG's access to records. Four days after the OLC opinion, she updated these procedures to comply with that opinion. However, these new procedures add further delay and uncertainty to the situation. The Committee notified her of this hearing with plenty of advanced notice, and even moved the original date from last week to this week. Unfortunately, however, the Department said that she was unavailable to testify on either date.

So, Mr. Carlos Uriarte, an Associate Deputy Attorney General, is here to take our questions, and I thank him for coming.

Also here to testify is Mr. Dave Smith, the Acting Inspector General of the Commerce Department. Mr. Smith is here because his office is having trouble accessing documents from the Department of Commerce. In June, the Department of Commerce cited the then-pending OLC opinion as the reason why it would not share certain materials with his office.

This is a sign of things to come in terms of the effect the OLC opinion will have for IGs to access documents, across government. And we have three witnesses on our second panel to discuss the implications of the opinion: Professor Paul Light from New York University; Ms. Danielle Brian from the Project on Government Oversight; and Mr. Brian Miller, the former IG of the Government Services Administration.

I want to thank all of them for joining us today.

We all lose when IGs are delayed in doing their work. Impeding their access to records is unacceptable.

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