1. Legislative Fix to the IG Access Problem

a. The Congressional Research Service has identified at least 32 statutory provisions that impose limitations on disclosure, but CRS has stated that this list is not exhaustive. Do you know of an exhaustive list of all the limitations on disclosure that can be found in the U.S. Code that would need to be mentioned by name in legislation in order to satisfy OLC's version of the clear statement rule?

We are not aware of an exhaustive list that would contain every limitation on disclosure found in the U.S. Code. If Congress attempts to list all statutory limitations, it runs the risk of missing some limitations or failing to predict future ones. We would recommend a different approach. In my written statement, for instance, I recommended that Congress take 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."[1] We would also support language proposed by the Council of the Inspectors General on Integrity and Efficiency, stating "that no law or provision restricting access to information applies to Inspectors General unless that law or provision expressly so states, and that such unrestricted Inspector General access extends to all records available to the agency, regardless of location or form."[2] In addition, we urge Congress to specify that agencies do not waive the attorney-client or other common law privileges when records are turned over to IG offices.

If Congress wishes, it could issue a report to accompany the legislation with specific examples of statutory limitations that do not supersede IG access—including the federal rules of criminal procedure, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, and the Fair Credit Reporting Act—as long as it is clear that any such list of examples is not intended to be exhaustive.

b. If it is unrealistic to predict every potential statute that the Department might invoke to withhold records in the future, then how could we revise the law to leave no doubt that the Inspector General really should have access to "all" records the Department has?

As mentioned above, Congress could clarify that IG offices shall be granted access to all records "notwithstanding any other existing or future law or any other prohibition on disclosure."

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[1] 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. http://www.pogo.org/our-work/testimony/2015/testimony-of-pogos-danielle-brian.html

[2] 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, August 3, 2015.

c. Would it help if Congress were to write a law that allowed Inspectors General to connect directly into agency data management systems, so that Inspectors General could run queries themselves, without having to go to the agency to request that information?

We support a recommendation by Brian Miller, former Inspector General of the General Services Administration, who urged Congress to make the following amendment to the Federal Information Security Management Act of 2002:

Section 3544 of title 44, United States Code, is amended—

by striking "and" at the end of paragraph (a)(4);

by striking a period and inserting a semicolon at the end of paragraph (a)(5); and

by adding at the end of subsection (a) the following:

"(6) if the agency has an Inspector General appointed under the Inspector General Act of 1978 or any other law, ensure that the Office of Inspector General has unrestricted "read-only" access for review and analysis to all agency information systems from the Inspector General's accredited system. The Director of the Office of Management and Budget and the National Institute of Standards and Technology shall promulgate guidance to implement this paragraph."[3]

2. Other Limitations on IG Authority

a. Do you think there is a danger that the existing provision in the statute that allows the Attorney General to stop an Inspector General inquiry could be abused, and how would you propose to address that?

We are aware of only one instance in which an Attorney General exercised her authority under Section 8E(a) of the Inspector General Act. In that instance, she used this authority to delay the public release of an IG report concerning allegations that U.S. government officials ignored or protected drug dealers in Southern California who were associated with the Nicaraguan Contras. The Attorney General at the time ordered the delay in order to protect a DEA informant and ongoing DEA investigation.[4]

[3] Brian D. Miller, "Three Ideas to Improve Effective Inspector General Access to Both Information and Individuals," The Journal of Public Inquiry, Spring/Summer 2009, p. 16. https://www.ignet.gov/sites/default/files/files/sp09jpi.pdf (Downloaded August 13, 2015)

[4] 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 13, 2015)

We are concerned that the Attorney General and other agency leaders who have the power to quash IG probes could be tempted to abuse this power, especially in light of the Office of Legal Counsel's opinion. Time and time again, the IG offices that are subject to these special provisions—including the IGs at the Departments of Justice, Defense, Treasury, and Homeland Security—have shown they can responsibly handle audits and investigations of sensitive agency operations. Other watchdogs, such as the State Department IG's office, routinely handle sensitive matters but are not subject to any comparable limitations on their authority.

If Congress wishes to keep these special provisions in place, it should take several steps to ensure the provisions are not abused: stipulate that this authority can only be used to delay the public release of an IG report, not to quash an IG probe or restrict an IG's access to agency records; require agency leaders to notify the public in a timely fashion when they exercise this authority; and ask the Government Accountability Office to review how agency leaders utilize these special provisions.

b. What are some other impediments to the ability of Inspectors General to access the records necessary to carry out their audits and investigations, and how would you propose to address that?

In my written statement, I cited several other impediments to Inspector General access. For instance, the Department of Justice IG's office is required to refer any allegations of prosecutorial misconduct to the Department's Office of Professional Responsibility. In a 2014 report, we argued that OPR has failed to inform the public about hundreds of cases of recklessness or intentional misconduct by DOJ attorneys.[5] We believe the IG's office should be given the explicit authority to investigate allegations of misconduct throughout the agency, as proposed in bipartisan legislation introduced in the 113th Congress by Senators Mike Lee (R-UT) and Jon Tester (D-MT), the "Inspector General Empowerment Act of 2014" (S. 2127).[6]

Another limitation can be found in the Computer Matching and Privacy Protection Act, under which 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. Chairman Grassley, we support a measure in your bipartisan legislation, the "Inspector General Empowerment Act of 2015" (S. 579), that would exempt IG offices from this limitation.[7]

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[5] 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

[6] 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 August 19, 2015)

[7] 114th Congress, "Inspector General Empowerment Act of 2015" (S. 579), § 3(b), Reported to the Senate on May 5, 2015. https://www.congress.gov/bill/114th-congress/senate-bill/579/text (Downloaded August 19, 2015)