Questions for the Record from Senator Charles E. Grassley
for Michael Horowitz
U.S. Senate Committee on the Judiciary
Hearing on "'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"
Submitted on August 12, 2015

1. Direct Access to DOJ's Data Management System

Inspector General Horowitz, I want to get your thoughts on a potential legislative fix to the access problem your office has experienced.

Question

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

Response: A law that authorized direct IG access to agency data management systems would address the access challenges that our Office of the Inspector General (OIG) and other OIG offices have faced. It also would result in timelier access to information. Further, enabling such OIG access would facilitate the data analytics work that several OIG offices, including our office, are currently undertaking. The timely use of such data by Inspectors General to identify those who improperly receive federal assistance, federal grants or contracts, or duplicative payments will improve program efficiency, enhance recovery of improper payments, and empower Inspectors General to better address waste, fraud, and abuse in federal programs.

2. Redactions In a Recent Document Production to the OIG

At the hearing, you testified that, one day before the hearing, the enhanced process established by the Deputy Attorney General's adoption of the July 20, 2015, OLC opinion resulted in a document production that contained numerous redactions.

Question

a. What was the nature and scope of the request?

Response: The recent production was made in connection with the OIG's review of the Federal Bureau of Investigation's (FBI) use of information derived from the National Security Agency's collection of telephony metadata obtained from certain telecommunications service providers under Section 215 of the Patriot Act. The document production that I referenced during my testimony was made by the FBI in

response to a request the OIG sent to the FBI on October 10, 2014, for certain e-mail communications from the FBI's classified e-mail systems.

b. When was the request made?

Response: The request for the e-mail communications was made on October 10, 2014.

c. When were the documents provided to the OIG?

Response: The FBI made partial productions in response to the request, and following discussions between the OIG and FBI about the request, the OIG set a deadline for production of all material of January 23, 2015. However, on January 27, 2015, the FBI informed the OIG that it would need an extension of time for completing production, but was unable to provide an estimate of how much additional time was needed. Over the next several weeks, the OIG pressed the FBI to provide an estimated date by which it would produce the outstanding documents and to explain why the additional time was required. One of the reasons for the FBI's inability to meet the January 23rd deadline was its desire to continue its review of e-mails requested by the OIG to determine whether they contained any information that the FBI maintained the OIG was not legally entitled to access, such as grand jury, Title III electronic surveillance, and Fair Credit Reporting Act information. On February 25, 2015, the OIG reported this situation to the Committees on Appropriations, as required by Section 218 of the Department of Justice Appropriations Act, 2015, Pub. L. No. 113-235, § 218, 128 Stat. 2130, 2200 (2014).

Subsequent to that letter, and as the OIG reported in status letters to the Committees on Appropriations on April 13, 2015, and May 28, 2015, the FBI made additional productions, but none of these completed the production of records responsive to our October 10, 2014, request. The document production that I referenced in my testimony included records – certain attachments to e-mail communications – that had previously been withheld from the OIG in their entirety because they contained categories of information the FBI did not believe the OIG was legally entitled to access. When the FBI finally produced these previously withheld documents on August 4 and August 6, 2015 (the day before and the day after the hearing), they contained redactions for certain categories of information, described in answer 2(d) below, that the FBI continued to maintain the OIG was not allowed to access.

d. What was the purported basis for the redactions?

Response: The FBI redacted Bank Secrecy Act information (information that was subsequently provided by the FBI on August 13, 2015) and information that was marked as Originator Controlled (ORCON) that the FBI determined originated with other U.S. Government agencies or that originated with foreign governments.

e. How many redactions were made?

Response: The FBI redacted information that was marked as ORCON and that it determined originated with other U.S. Government agencies in approximately 752 of the e-mail attachments that it recently produced. The FBI redacted information that it determined originated with foreign governments in approximately 47 of the e-mail attachments that it produced. The FBI also redacted information that it determined was Bank Secrecy Act information in approximately 37 of the e-mail attachments that it produced. However, as mentioned above, the FBI subsequently removed (on August 13, 2015) the redactions for this category of information and reproduced the affected documents.

f. Are you confident that you have all the information you need from the Department to carry out your statutory duties with respect to the review in question?

Response: As of today, we are not aware of any responsive documents in the possession of the FBI that it is withholding. However, we do not consider the document production complete until we receive all responsive documents without any information redacted, and that has not yet occurred.

g. Do you believe your office is entitled to this information without any redactions? If so, why?

Response: Yes, I do. Pursuant to the Inspector General Act, the OIG is entitled to review all responsive information in the FBI's possession that the OIG deems necessary to conduct its oversight function and there is no legal basis for withholding records or information from the OIG simply because the information originated with another U.S. Government agency or with a foreign government.

3. <u>Section 8E Authority</u>

Inspector General Horowitz, Section 6(a) of the IG Act clearly allows you to access all DOJ records. However, Section 8E of the IG Act does allow the Attorney General to prohibit any IG audit or investigation under certain limited circumstances. However, she has to exercise that authority in writing and there must be notice to Congress.

I understand that since 2010, the Attorney General has never exercised this authority despite having prevented the IG from proceeding with many reviews, by delaying the production of documents for months in some cases.

<u>Question</u>

a. Has the Attorney General ever exercised Section 8E authority? If so, how many times, when, and under what circumstances?

Response: The Attorney General has exercised the authority provided in Section 8E on one occasion in the 26 years since the establishment of the DOJ OIG. In December 1997, Attorney General Reno invoked the provision to delay for seven months the

issuance of the OIG report entitled "CIA-Contra-Crack Cocaine Controversy: A Review of the Justice Department's Investigations and Prosecutions." In November 1997, the OIG had nearly concluded its investigation of this matter and had provided a draft of the report to the Drug Enforcement Administration (DEA), the DOJ Criminal Division, and the United States Attorney's Office (USAO) for the Southern District of California. On December 8, 1997, the OIG learned that the DEA, the Criminal Division, and the USAO objected to the OIG releasing information about past cooperation with the DEA by an informant who was a subject of our investigation. The DEA, the Criminal Division, and the USAO argued that release of the report would significantly increase the personal risk to the informant and to the viability of an ongoing DEA criminal investigation. The OIG completed its report on December 17, 1997, and was prepared to publicly release the report on December 18, 1997. However, the Attorney General, citing law enforcement concerns, invoked Section 8E to defer the release of our report.

On July 14, 1998, the Attorney General wrote us a letter stating "the law enforcement concerns that caused me to make my determination no longer warrant deferral of the public release of your report." Her letter stated that we could therefore release the report, which we did in July 1998 with no changes from the original report that we had completed on December 17, 1997. More information regarding the sequence of events that resulted in the Attorney General's invocation of 8E of the Inspector General Act pertaining to this report can be found on the OIG's website at the following link: https://oig.justice.gov/special/9712/epilogue.htm.

b. Did any of these instances involve the withholding of records from the Office of the Inspector General, or delayed production of material requested by the Office of the Inspector General?

Response: To my knowledge, the Department did not withhold relevant records or delay the production of materials that were requested by the OIG as part of this review. As mentioned in Question 3a, at the time of the Attorney General's decision to invoke Section 8E, the OIG had concluded its investigation and was prepared to publicly release its report.

c. Why do you think the Department chose to engage in five years of legal wrangling over the scope of your right to access Department records rather than simply use the tool that Congress provided in the statute to protect sensitive information?

Response: While the OIG cannot speak to the internal deliberations of the Department or the development of the Department's management decisions, given the OIG's 26 year unblemished record of handling the Department's most sensitive information properly and in accordance with all legal requirements and restrictions (as the Department and FBI witnesses acknowledged at the August hearing), there would have been no basis for the Attorney General to invoke Section 8E(a)(2) to deny the OIG access to the information. For example, prior to 2010, the Department provided the OIG, without objection, highly sensitive information related to our reviews of the Hanssen spy matter, the 9/11 attacks, the President's Surveillance Program, our first two national security

letter reviews, the exigent letter review, and our Patriot Act reviews. Moreover, as we have noted publicly on several occasions, the OIG conducted multiple reviews prior to 2010 where the Department provided the OIG with grand jury, Title III, and credit information without raising any legal objection.

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Questions for Department of Justice Inspector General Horowitz

3. I pressed the Justice Department to end the DEA's bulk collection of Americans phone records, and I applauded Attorney General Holder when he did just that. That secret program was in place for decades, but it was never subject to judicial review or independent oversight of any kind. I understand that your office is now reviewing the DEA's use of its administrative subpoena authority to obtain broad collections of data.

   Q: Can you give us an update on the status of that review, and when you expect to complete it? Are you planning to make recommendations about new oversight mechanisms for this authority?

   Response: We are currently in the latter stages of fact-finding in this review, and expect to issue a final report in the first half of 2016. As we finalize our report and develop our recommendations, we will carefully consider the adequacy of oversight mechanisms for this authority.

   Q: Has this review been delayed by the dispute over documents that we have been discussing today? Has the IG received all of the documents it requested from DOJ for this review?

   Response: During the course of this review, we have had disputes with the FBI and the DEA regarding document production that impacted our review. With the FBI, the dispute involved certain documents in the FBI's possession that were potentially relevant to our review. The FBI required approximately 2 months to process our request and then subsequently withheld the attachments to 7 e-mails responsive to our requests because they contained grand jury materials, which the FBI claimed the OIG was not legally entitled to review. That dispute required several months to resolve. When we did ultimately review the documents, we determined that they did not contain information of importance to the issues we are investigating. With regard to the DEA, our review was delayed by approximately 7 months when the DEA claimed that it could not produce certain highly relevant documents in its possession because the DEA did not create them. The DEA eventually agreed to produce the documents to the OIG. As of today, we are not aware of any responsive documents for this review in the possession of DOJ that the OIG has not received or had an opportunity to review.

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Questions for the Record for

Inspector General Michael E. Horowitz

Senator Mike Lee

August 6, 2015

Agency oversight can be effective only when it is independent and complete. That is, the overseeing entity must be independent from the people or practices being investigated and must have access to all necessary information. Current law requires the Department of Justice (DOJ) Inspector General to refer investigations of attorney misconduct to the Office of Professional Responsibility (OPR) within DOJ. Allowing OPR to have sole oversight of attorney misconduct violates both the principle of independence and the principle of completeness. OPR is not independent from the politics of DOJ, and denying the Inspector General access to misconduct investigations prevents him from having complete oversight. For these reasons, I have introduced the Inspector General Access Act, S. 618, with Senator Tester and Chairman Grassley.

- Why is the Inspector General Access Act important to your work?

  Response: The Inspector General Access Act would allow the Department of Justice Office of the Inspector General (DOJ-OIG) to exercise independent oversight into allegations of misconduct by Department of Justice (Department or DOJ) attorneys and further ensure accountability at the DOJ. Currently, the DOJ-OIG has primary oversight responsibility with respect to the conduct of all Department employees with one notable exception – the conduct of Department lawyers in their performance of their duties. Under current law, the DOJ-OIG does not have authority to investigate allegations of misconduct made against DOJ attorneys acting in their capacity as lawyers. Section 8E of the Inspector General Act exclusively reserves this function for the Department's own Office of Professional Responsibility (OPR). Striking this provision from the IG Act, as the Inspector General Access Act proposes, would provide the DOJ-OIG with jurisdiction to oversee all Department employees, which is consistent with the authority granted to other Inspectors General under the IG Act.

As you note, independence is a crucial component of effective agency oversight. Over ten years ago, the Department of Justice and Congress recognized the importance of independent oversight over DOJ law enforcement components, including the FBI and DEA, when Attorney General Ashcroft authorized the DOJ-OIG to conduct this oversight and in 2003 Congress legislated this authority. Those who tried to forestall DOJ-OIG oversight of alleged misconduct by FBI and DEA agents contended that those cases required specialized expertise – just like the Department argues currently that prosecutorial oversight requires specialized expertise – and that argument was roundly rejected and has proven to be without merit. The DOJ-OIG has consistently demonstrated our ability to handle complex legal and factual issues related to our misconduct reviews, including those involving FBI and DEA agents.

Despite the recognition by the Department of the importance of independent oversight of its law enforcement personnel, oversight of Department attorneys continues to be handled differently than allegations of misconduct by all other Department employees. That oversight, which is conducted by the OPR, is neither independent nor transparent. For example, the Department of Justice Inspector General is confirmed by the Senate, is accountable to the public, and can only be removed by the President after notification to Congress. Further, the IG has statutory reporting obligations to both agency leadership and Congress. In contrast, the OPR Counsel is selected and appointed by the Attorney General, answers to the Attorney General, and can be removed or disciplined by the Attorney General. OPR is only responsible to the Attorney General. Moreover, the DOJ-OIG is committed to transparency in our reports and operations. For example, the DOJ-OIG public website contains extensive information about the reports, operations, and functions of the DOJ-OIG, including a full archive of its completed reports and its ongoing work: http://www.justice.gov/oig/. None of this can be said of OPR. It is nearly impossible for the public to assess OPR's findings and conclusions. We believe that the credibility of the Department's disciplinary process is inevitably impacted when the responsible component operates under the direction of the Department's senior leadership and is not subject to public scrutiny.

All Department employees should be held to the same standards of accountability for misconduct, and we have long questioned the distinction between the treatment of misconduct by attorneys acting in their legal capacity, which is handled by OPR, and misconduct by all other Department employees, including law enforcement agents, which is handled by the DOJ-OIG. Moreover, Inspectors General across the federal government have the authority to handle misconduct allegations against lawyers acting as such within their agencies, and they have demonstrated that they are fully capable of dealing with such matters.

We are not alone in this view. In March 2014, the independent, non-partisan Project on Government Oversight (POGO) issued a report that was critical of OPR 's longstanding lack of transparency and recommended empowering our office to investigate misconduct by DOJ attorneys.

Eliminating the jurisdictional carve-out in Section 8E of the IG Act would enhance independent and objective oversight of the Department by ensuring that allegations of misconduct by all Department employees are treated similarly, fairly, and in a transparent manner.

Although the OLC recognizes that both your office and OPR have supervisory authority over DOJ, the OLC opinion concludes that grand jury testimony can be released to OPR but not to you because you lack authority to conduct criminal proceedings for the Department.

- Do you agree with the OLC opinion on this matter? Why or why not?

  Response: No, I do not agree with the OLC's conclusion. Despite the fact that myself and the other DOJ-OIG attorneys are employed by the government and the DOJ-OIG is responsible for performing similar oversight functions as OPR – the only difference being (as noted previously) that the DOJ-OIG is independent and OPR is not – the OLC opinion held that, unlike OPR attorneys, DOJ-OIG attorneys are not authorized to access the information under the grand jury law because we are not "attorneys for the government" under Rule 6(e) of the Federal Rules of Criminal Procedures.

In so doing, the opinion distinguishes between DOJ-OIG lawyers and OPR attorneys, who are entitled under a 1984 OLC opinion to obtain access to grand jury information to conduct oversight over alleged attorney misconduct. The OLC opinion reasons that DOJ-OIG attorneys are unlike OPR attorneys in that OPR attorneys may "in principle" be delegated the Attorney General's authority to conduct criminal proceedings for the Department. However, to our knowledge, OPR attorneys have not conducted criminal proceedings in their roles within OPR. Moreover, the 1984 OLC opinion concluding that OPR attorneys were legally authorized to receive grand jury material made no mention of the fact that they could conduct criminal proceedings. In addition, the recent OLC opinion reached its conclusion despite the fact that two Federal District Judges had concluded in 1998 and 1999, at the Department of Justice's urging, that DOJ-OIG lawyers were indeed "attorneys for the government" under Rule 6(e).

Notwithstanding the OLC opinion, Deputy Attorney General Sally Yates wrote on July 27, 2015, that her office will authorize disclosure of grand jury testimony that is relevant to your "supervision" of "law enforcement activities on a programmatic or policy basis."

- Do you believe this policy memorandum resolves the tension created by the OLC memo? Why or why not?

  Response: No, it does not. Rather, the memorandum institutionalizes the conclusion reached by OLC in its July 2015 opinion that the IG Act does not authorize the DOJ-OIG to receive grand jury, wiretap, or credit information, that the DOJ-OIG can obtain grand jury, wiretap, and credit information only if authorized by those statutes, that the DOJ-OIG will be able to obtain such information in certain but not all circumstances, and in every instance the decision about whether access is legal will be made by a Department employee and ***not*** *by the DOJ-OIG. According to the DAG's memorandum, "any attorney for the government may disclose (or authorize disclosure of) grand jury materials to the OIG" if that employee determines that an OIG*

investigation or review could assist in that employee's duties to enforce federal criminal law. Additionally, the memorandum states that the Office of the Deputy Attorney General (ODAG) would continue authorizing the disclosure of grand jury information to the DOJ-OIG when ODAG determines that a DOJ-OIG review might assist Department leadership in its supervision of the Department.

The DAG memorandum is a continuation of the Department's protocol, predating the OLC opinion, whereby Department employees decide whether access by the DOJ-OIG is warranted – placing agency staff in the position of deciding whether to grant the Inspector General access to information necessary to conduct our oversight of the agency. Requiring an Inspector General to obtain permission from agency staff in order to access agency information turns the principle of independent oversight that is contained within the IG Act on its head.

The OLC opinion impinges on a hallmark of the Inspector General Act – providing for independent access by Inspectors General to all information in an agency's possession that is necessary for our oversight work. For the first time since the IG Act was passed in 1978, "all" in Section 6(a) of the IG Act no longer means "all." Conditioning the release of Department records to the DOJ-OIG on the permission or determinations of Department leadership or agency employees threatens the ability of the DOJ-OIG to conduct independent oversight of the DOJ and may negatively impact the quality of our reviews and recommendations.