Questions for the Record from Senator Charles E. Grassley
for Paul Light
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. OLC's Use of Legislative History

Professor Light, do you think the Office of Legal Counsel's use of legislative history in its July 20, 2015 opinion is accurate or complete? Why, or why not?

The Office of Legal Counsel's legislative history is both incomplete and selective: (1) The history does not include the 1976 HEW Inspector General Act that set certain precedents for the 1978 Act; (2) The history assumes that the Justice, Treasury, and Defense Departments were left out of the act because Congress decided that the departments either had no need for an Office of Inspector General (Justice and Treasury) or already had inspectors general (each service at the Defense Department; however, the legislative record strongly suggests that these three departments were left out at the president's request because of the political sensitivity involved in a fight between the departments and Congress; (3) the Office of Legal Counsel "cherry-picked" the legislative history in support of its argument, and did not read the legislative reports carefully; instead, the Office selected statutory language that supported its case and presented statements from the legislative reports in the order that suited its case—e.g., it concluded that the Senate dropped a 1978 House provision because it would have given an Inspector General "power that no other official had" when, in fact, prior statements were clear that the Senate believed that the provision was unnecessary, and, according to my interpretation, was therefore not in conflict with anything in the Act's intention or language. Despite these and other misinterpretations and selective readings, the Office of Legal Counsel arbitrarily concluded that Congress created a conflict between the 1978 Inspector General Act and any other statutes that excepted certain information from disclosure. Nothing could be further from the case. The Inspectors General were give full access to information AND responsibility to secure confidentiality and prevent nondisclosure once they received said information. The word "withhold" does not appear anywhere in the legislative history except to criticize withholding of information more generally by previous administrations—presumably the Nixon Administration during Watergate. Nonetheless, the Office of Legal Counsel put the word "withhold" in a critical sentence making its case that withholding of information was a power given the Attorney General in 1988. Thus did the Office reconstruct history, indeed create history to support its case.

2. Legislative Fix to the IG Access Problem.

Professor Light, I want to get your thoughts on a potential legislative fix to the access problem that so many Inspectors General have experienced as a result of agencies not complying with the Inspector General Act of 1978.

Questions

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?

   No. Congress only needs to redefine the IG's responsibility to protect the confidentiality and prevent the nondisclosure of sensitive information in accordance with any statute that imposes limitations on disclosure. In addition, nothing in the IG statute or any amendments should be read as giving any officer of government from denying access to information as defined in the IG statute.

   I suspect that such a statement would be sufficient to cure the current conflict, but am not a legislative counsel to assure this hunch.

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?

   Stated above.

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?

   Possibly, but I am not qualified to make such a case.