

INSPECTOR GENERAL ACCESS TO INFORMATION:
“ALL” MEANS “CRUCIAL AND FUNDAMENTAL”

TESTIMONY BEFORE THE UNITED STATES SENATE JUDICIARY COMMITTEE

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Introduction

I am pleased to appear before this distinguished committee today to shed light on a familiar, and, dare I suggest distracting debate about Office Inspector General (OIG) access to information. As Yogi Berra once said, this is déjà vu all over again. The senior officers of government come and go, often staying in their posts just long enough for a promotion, but almost always arrive in office wondering just what the OIGs do, and all-too-often how they might control these “rogue” agents of Congress.

I come before you today as the author of a detailed history of the Inspector General (IG) concept, *Monitoring Government: Inspectors General and the Search for Accountability*. I wish I could say the book was a best seller, but have taken an oath to tell the truth today. So noted, I believe the book, and the research that surrounds it does provide context for today’s discussion.

I also come before you as a scholar of government reform more generally, and view the IGs as essential to the economy, efficiency, and effectiveness of government. As I note will soon note, the 1978 Inspector General Act was not the most visible of the many government reform statutes passed during the “sunshine in government era,” and was opposed by every executive-branch officer whose department or agency would be covered under the act. Visible or not at the time, it now stands as one of the most important of the post-Watergate statutes enacted during the congressional resurgence of the period.

Much as I might applaud the Justice Department’s effort to determine the boundaries of IG access to what its Office of Legal Counsel (OLC) calls “statutorily protected information,” I believe the OLC drew the lines much too tightly. As I will explain below, I believe Congress intended to give the IGs full and unfettered access to any and all information they would need to meet their statutory obligations. Congress did not require the IGs to ask for permission to see sensitive documents, nor did it give any department or agency head the authority to withhold information. Rather, it required the IGs to follow all statutory provisions to prevent the disclosure of sensitive information.

To summarize my testimony, I could find absolutely no evidence that Congress ever imagined that department and agency heads would withhold access in an effort to prevent disclosure of protecting sensitive, even confidential information. Rather, Congress expected the IGs to follow all relevant statutory provisions to perform this task themselves. They were to receive all information, but prevent any disclosure.

My question is why Congress would diminish this “broad mandate” in any way? Why would Congress give the IGs “access to confidential interagency memoranda” that might even be exempt from disclosure to the public under its recent strengthening of the Freedom of Information Act Congress. And why would it call this hypothetical example “irrelevant” to access?

I believe that answer is so simple that it could be easily lost in the minutia of the OLC's long memorandum: Congress believed that the protection of sensitive information was the IG's responsibility, even at the Justice Department where they would operate under the under the "authority, direction, and control" of the nation's top law enforcement official.

After all, the IGs were to be appointed by the president solely on the basis of integrity and expertise, confirmed by the Senate through sequential consideration by the authorizing committees and the Governmental Affairs Committee, sworn to uphold the law as senior officers of government, and removable at any time by the president with a clear and public explanation of cause. Although they would always be under the "general supervision" of their department or agency head, that supervision did not permit any abridgment of an IG's access.

Today's Assignment

We are here today to discuss the OLC's July 20 memo justifying sharp limits on IG access to the sensitive information enumerated in Section 8E(a)(1) of the statute. In a word, implementation of the memorandum would create a "tectonic" shift in IG access to "all records, reports, audits, reviews, documents, papers, recommendations, or other materials" needed to fulfill an IG's dual responsibilities to promote economy, efficiency, and effectiveness in the administration of agency programs and operations, and prevent and detect fraud and abuse in agency programs and operations as well.

Translated into a South Dakotan's plain English, the memorandum assumes that the Justice Department's must ask for permission to receive confidential information, and await the Attorney General's blessing as long as it takes. As such, the IG must show cause for access to sensitive information, thereby relieving the Attorney General of any obligation to show cause for denial or delay.

Even though all IGs operate under the general supervision of their department or agency heads, the OLC correctly notes that Congress also gave the Justice Department additional authority to prevent the disclosure of sensitive information by (1) placing the IG under the Attorney General's "authority, control, and direction with respect to audits or investigations, or the issuance of subpoenas, which require access to sensitive information," and (2) giving the Attorney General the extraordinary discretionary power to "prohibit" and any current or planned audit, investigation, or issuance of a subpoena to preserve the confidentiality or prevent the disclosure of sensitive information, albeit under obligation to report the prohibition to the IG and Congress.

Search as I did for any further powers to limit the IG's access to this sensitive information, Congress apparently assumed that the Attorney General would be required to both give the IG all information, and prevent disclosure. The two are never linked in any reports, floor statements, correspondence, interviews, or legislation that I read. It is only through bold assertion that the OLC apparently believes that the statutory authorities

sum to a much broader power to deny the access that Congress guaranteed. The IG cannot disclose information that he or she does not have.

Let me be quite clear here again: My reading of the 1978 Act, its amendments, and the associated legislative history shows absolute congressional confidence in the IG's ability to handle sensitive information with all appropriate care, be it under in the ordinary pursuit of economy, efficiency, effectiveness, etc., or through full access to the records, audits, records, reports, audits, reviews, etc. enumerated in the Act and its amendments. Nondisclosure rules would always apply to the IG's use of any information, but withholding would not.

Indeed, as I will soon note, even the OLC seemed to accept this assessment in a memorandum on nondisclosure of sensitive information to Congress released only months after the Justice Department was brought under the IG Act in 1988. Asked by the IGs whether they could disclose sensitive information to Congress, the OLC concluded that such disclosures were unwarranted absent "extraordinary circumstances." Why address the issue, one wonders, unless the OLC assumed that the IGs would have access to the information in the first place?

Moreover, the 1978 Act and its amendments gave department and agency heads exceedingly strong options for assuring IG integrity. Department and agency heads are free to ask Congress and the president to investigate any IG misconduct, petition the Council of Inspectors General Committee on Integrity and Efficiency for formal review, seek indictments from the Department of Justice, and even ask the president to remove the IG. In short, there are many ways to discipline the IGs for breaking the rules on nondisclosure, but I am absolutely sure that Congress never intended that withholding would be an acceptable form of discipline. Nor, for that matter, would be endless delays, permission slips, or other forms of bureaucratic sclerosis.

How Congress Decided

Like many of the good-government statutes I have listed as the most important reforms enacted from World War II to the present, the executive branch was hardly thrilled with the idea of a highly placed officer in charge of an establishment's audit and investigatory agenda. Indeed, every department about to be swept into the act sent witnesses against it, one of whom later told me that the statute "boggles the mind."

The only executive-branch witness who endorsed the 1978 Act walked to the House Subcommittee on Governmental Efficiency and the District of Columbia from his office just across the street at the Department of Health, Education, and Welfare (HEW). As this committee knows, the HEW OIG was created in 1976 to create a high-level, consolidated, and quasi-independent audit and investigation unit.

If I may take liberties by summarizing Secretary Joseph A. Califano's testimony, the department had not only survived the creation of the first OIG, but had become more economical, efficient, and effective, not to mention less wasteful and vulnerable.

Taxpayers obviously benefited, too. Questioned by the acknowledged father of the 1978 Act, North Carolina's H. L. Fountain, and supported by his gifted counsel, James Naughton, the indefatigable Califano testified that his IG, Tom Morris had not "impaired," "inhibited," or otherwise created "any significant problems" for the department. To the contrary, the IG had exceeded all expectations even though Califano kept "calling him and asking him to do more."

According to Califano, Morris had materially improved HEW accountability while reducing fraud, waste, and abuse. Morris used his authority to conduct and supervise audits and investigations without interference to improve program performance, and kept Califano fully informed of his actions. He also used his unrestricted access to all information to attack vulnerabilities in the nation's two largest social programs, Social Security and Medicare.

Despite this sterling performance, the Justice Department opposed the 1978 IG Act expansion. According to the OLC's 1977 "Memorandum Opinion for the Attorney General on the Inspector General Act," the IG concept itself was unconstitutional, in part because the IGs reported to both Congress and the president, and in part because they operated with substantial protections and access to all information related to their work: "It is our opinion that the provisions in this bill, which make the Inspectors General subject to divided and possibly inconsistent obligations to the executive and legislative branches, violate the doctrine of separation of powers and are constitutionally invalid."

The rest of this 1977 OLC memorandum listed the Justice Department's standard objections to the basic IG concept, including the IG's access "to a broad range of materials available to the agency" and "subpoena power to obtain additional documents and information." Despite this indictment of access to information, the OLC did not recommend modifications to this authority in its short list of hoped-for modifications. Rather, the OLC focused on establishing stronger executive control over the OIGs:

The principal problem with the proposed legislation is that the Inspector General is neither fish nor fowl. While the Inspector General is supposed to be under the general supervision of the agency head, the Inspector General reports directly to Congress. He is to have free access to all executive information within the agency, yet he is not subject to the control of the head of the agency or, for that matter, even to the control of the President.

Even as the OLC offered objection after objection, it generally ignored the access to information question. Access was access, and information was information, and all was just all. Instead, the OLC focused fire on control and reporting. Its cure for constitutional distress resided in a simple amendment statement that each IG would be "an executive officer subject to the supervision of the agency head and subject to the ultimate control of the Chief Executive Officer."

The Justice Department won almost everything it sought on this one issue in the IG expansion as follows:

Each Inspector General shall report to and be under the general supervision of the head of the establishment involved or, to the extent such authority is delegated, the officer next in rank below such head, but shall not report to, or be subject to supervision by, any other officer of such establishment. Neither the head of the establishment nor the officer next in rank below such head shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation.

However, even as Congress put the IGs under general supervision, it refused to use the word “ultimate” in describing the degree of such supervision. I believe Congress refused largely because the word would too powerful, and could be used to justify control of an IG’s audit and investigatory agenda by some future OLC perhaps.

The OLC also lost its battle to limit the president’s appointment power. To be sure, the IGs would be presidential appointees subject to Senate confirmation, Congress required that they be appointed “solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations.”

IG access to information emerged from the debates untouched. The word “all” was still the key modifier for describing the “records, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities under this Act.”

A Brief Note on Legislative History

Much as I admire the OLC’s recent effort to mine the IG Act’s legislative history, I believe a deeper reading might have tempered, if not turned its conclusions. Anyone can misread legislative history, of course, especially when perusing the conference reports on which the OLC conclusions stand. Recalling Ronald Reagan’s joke that an apple and banana could go into a conference and come out a pear, these drivers of compromise often provide the most interesting tales. However, most legislative historians are generally reluctant to search the cutting-room floor for abandoned language, especially when the language was jettisoned because it was deemed unnecessary.

However, the OLC showed no such reluctance in crafting its legislative history, however, and seemed to find an artifact whenever it needed extra support in making the case against unfettered IG access to information. The OLC was particularly loose, and I believe wrong, in its reading of the Senate Governmental Affairs Committee’s 1978 decision to remove a House provision that would have exempted IGs from all statutory limits on disclosure. This decision anchors the OLC’s argument that Congress wanted to place limits on IG access to information, but was much mundane than the OIG would make it seem.

According to the OLC's legislative history, the Senate committee decided to delete the House language "because it would have given the IGs a 'power that no other official of the executive branch has—the authority to require the transfer of personal information from any agency...without regard for the protections of the Privacy Act.'" While the quote is correct, the OLC's "because" is totally out of place. Indeed, according to the full text at page 13 of the committee's report, the committee's first reference to the deletion was not elegant, but mundane:

The committee interprets House language as seeking to create an exemption for the new Inspector and Auditors General comparable to the existing exemption granted to the Comptroller General. The committee believes such a step is unnecessary and did not include this section in the bill as reported.

Only after this first "because" did the committee insert its eloquent language on the "power-that-no-other-official-has." Even here, however, the committee did not express any notable concern about IG violations of the Privacy Act. As the committee explained, "all information within the agency" would be available to the IGs under at least three of the Privacy Act's 11 exemptions that already permitted disclosure without consent of the individual concerned.

The OLC also failed to note the Senate committee's much earlier "because," perhaps because it provided a more candid explanation for eliminating other House provisions. Simply put, the committee jettisoned "certain features" of the House legislation to ease the tensions between the future IGs and their agencies, and between the executive and legislative branches.

The committee made special note here of its decision to remove the House provision ordering the IG to "provide such additional information or documents as may be requested by either House of Congress, or with respect to the matters within their jurisdiction, by any committee or subcommittee thereof." The committee explained the deletion as follows:

Coupled with the Inspector and Auditor General's statutory access to all the papers of the department relevant to his function, this provision prompted concern in the executive branch that the Inspector General could be used as a conduit of sensitive executive branch materials to Congress. Deletion of that provision allays these fears.

I cannot find any evidence that the Senate committee ever worried that the IGs might fail to protect sensitive information. After all, protecting information was essential to an IG's mission. Nor can I find any evidence that the committee ever imagined that a senior officer of government would deny access to information as a way to prevent disclosure of sensitive information. The IGs were to be watchdogs, after all, not lap dogs.

Despite this augmented legislative history, the OLC will no doubt assert that Congress intended to limit IG access to information by deleting blanket protections. I can assure this committee that deeper legislative digs will not provide any support for the OLC case. Nevertheless, the OLC seems so fully committed to a narrow definition of congressional intent that it no doubt argue that the deletions are only a small piece of the grand puzzle that has come together to render the word “all” of little consequence.

My interviews with the authors of the 1978 Act, their legislative counsel, and other members of Congress are unlikely to move the OLC either. Nevertheless, my research strongly suggests that Congress generally defined the word “all” as “everything.” This interpretation also comes from my long association as an American Political Science Congressional Fellow, senior consultant to the Governmental Affairs Committee during the 100th Congress, and as an interviewer both before and after I completed *Monitoring Government*.

In addition, I readily acknowledge that I never participated in any of the many drafting sessions that led to final passage of the 1988 IG Act amendments. However, I did engage in frequent staff palaver with my colleagues as they struggled to resolve and “harmonize” the Justice Department’s new list of objections with the final draft. Caveats noted, I never heard anyone mention Title III in these conversations, even though the provisions are central to the OLC’s current case for withholding.

Words Matter

Given my review of the OLC’s legislative history, I am also convinced that Congress used the word “all” quite deliberately, and defined “all” both crucial and fundamental for an IG’s success. No matter how hard the OLC has worked to narrow the definition of this one simple word, I believe the legislative history is so clear that the Attorney General would need congressional action to create the authority to withhold IG access as a form of preventing disclosure of sensitive information.

Before asking for such action, the Attorney General would be well advised to review the OLC’s own extraordinary battle to redefine the word “all” to mean “nothing.” On page 46 of its July 20 memorandum, for example, the OLC states that “the word ‘all,’ read literally, extends to every record available to an agency, whether protected by a withholding statute or not.” On page 47, the OLC reviews several recent Supreme Court decisions that question the validity of “expansive modifiers” and “facially broad” words such as “all” and “any.” On page 48, the OLC concludes that “broad, general terms like “all” and “any” do not provide the clear statement of congressional intent needed to override specific, detailed statutory limitations or prohibitions on the disclosure of sensitive information about which Congress has expressed a special concern for privacy.”

Congress obviously had a different definition:

Access to all relevant documents available to the applicable establishment relating to programs and operations for which the Inspector and Auditor General has

responsibilities is obviously crucial. The committee intends this subsection to be a broad mandate permitting the Inspector and Auditor General the access he needs to do an effective job, subject, of course, to the provisions of other statutes, such as the Privacy Act.

Even as the Senate committee receded on its “Inspector and Auditor General” title, it used the conference report to restate its view of access to information:

This independence is fundamental. There is a natural tendency for an agency administrator to be protective of the program that he or she administers. In some cases, frank recognition of waste, mismanagement, or wrongdoing reflects on the manager personally. Even if the manager is not implicated, revelations of wrongdoing, or waste may reflect adversely on the programs by undercutting public and congressional support. Under these circumstances, it is a fact of life that agency managers and supervisors in the executive branch do not always identify, or come forward with evidence of, failings in the programs they administer. For that reason, the responsibility for auditing and investigating must be assigned to individuals with clear independence whose responsibilities run directly to the agency head and ultimately to Congress. H.R. 8588 accomplishes this.

The potential that improvement will result from this legislation is not simply theoretical. From 1962 to 1974 the Office of Inspector General at the Department of Agriculture, created administratively, resulted in substantial improvements in audit and investigating in that Department. In response to scandals in Federal housing programs in the late 1960’s the Department of Housing and Urban Development also established an Office of Inspector General and committed substantial resources to the task of audit and investigation. Since that time, HUD has been credited generally with impressive progress in bringing fraud under control. The case of HEW, where Congress created the first statutory Inspector General, is also instructive. The Inspector General there has impressed many Members of Congress with his grasp of the problems in the Department, the progress that has been made, and the candor and independence, which his performance has reflected.

The legislative history may not be deep, but it provides a simple resolution in this distracting war of words: Pressed to define a term with obvious literal meaning, Congress would have defined “all” to mean the “crucial and fundamental information that the IGs need to fulfill their responsibilities.”

The OLC is right to a point about the Attorney General’s authority to prevent the disclosure of information. Congress gave the Attorney General this authority in Section 8D of the 1988 Act, which was titled “Special Provisions Concerning the Department of Justice.” These provisions gave the Attorney General unquestioned authority to “prevent the disclosure of any information” regarding ongoing civil or criminal investigations or proceedings, undercover operations, the identity of confidential sources, including

protected witnesses, intelligence or counterintelligence matters, or other matters the disclosure of which would constitute a serious threat to national security.

So noted, this power does not include denial of IG access to information, but has led the OLC forward nonetheless. The following comparison of the Senate committee’s 1988 legislative report and the 2015 OLC memorandum shows what I believe to be the OLC’s most significant misinterpretation.

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| <p><i>Conference Report on Special Provisions for the Justice Department</i></p> <p>[The amendments] include special provisions providing that the Justice IG is under the “authority, direction and control” of the Attorney General with respect to an audit, investigation, or issuance of a subpoena when the Attorney General, on a case-by-case basis, determines that the audit, investigation, or issuance of a subpoena requires access to specific delineated information.</p> <p>The conference agreement allows the Attorney General to halt an individual audit, investigation, or issuance of a subpoena to prevent the disclosure of such information or prevent significant impairment to the national interests of the United States, and requires that Congressional committees receive notice of such action.</p> | <p><i>OLC July 20, 2015 Memorandum on IG Access to Information</i></p> <p>As we have noted, this section [8E], among other things, authorizes the Attorney General to withhold records from OIG [sic], or otherwise direct and supervise an OIG investigation, if she determines that doing so would be “necessary to prevent the disclosure of certain sensitive information—such as “sensitive information concerning...ongoing civil or criminal investigations” or “the identity of confidential sources”—“or to prevent the significant impairment to the national interests of the United States.”</p> |
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Both summaries agree that the Attorney General may act to prevent the disclosure of sensitive information. Both summaries also agree that the Attorney General must give the IG written notice of any decision to halt an audit, investigation, or the issuance of a subpoena, and that the IG must forward a copy of the notice to House and Senate within thirty days. This harmony ends with the word “halt” in the 1988 conference agreement and the word “withhold” in the OLC memorandum.

As the OLC notes, the 1988 amendments did put the Justice IG under the “authority, direction, and control of the Attorney General with respect to audits or investigations, or the issuance of subpoenas which require access to sensitive information...” However, I believe the OLC over-reached in arguing that such supervision involves denying access to information. I am convinced that Congress defined “authority, direction, and control”

as tight supervision, not as legislating. And denying access to information is very much a form of legislating, not supervision. Any other reading raises the question of statutory conflict between the IG's independence and the Attorney General's supervisory authority.

Unfortunately, Congress never defined this key phrase, perhaps because the committees understood the plain meaning of supervision in ordinary practice. More to the point of my humble analysis, I cannot find a shred of evidence in the legislative history that Congress would have defined supervision as authority to withhold information. The "broad mandate" was so strong that no form of supervision then or now in use would allow a withholding. Moreover, the legislative history is clear that Congress was not worried at all about leaks and accidental disclosures of sensitive information.

The committees obviously anticipated circumstances when an audit, investigation, or issuance of a subpoena might wreak havoc on confidentiality in giving the Attorney General the additional and extraordinary power to "prohibit the Inspector General from carrying out or completing any audit or investigation, or from issuing any subpoena, after such Inspector General has decided to initiate, carry out, or complete such audit or investigation or to issue such subpoena" to prevent the disclosure of sensitive information or "or to prevent the significant impairment to the national interests of the United States."

This special provision does not say that the Attorney General "must prohibit" such activities, but that the Attorney General "may prohibit." And the special provisions do not say the Attorney either must or may deny access to full information about the given issue, but that the Attorney General must or may halt an audit, investigation, or issuance of a subpoena to prevent disclosure and other impairment of the national interest. Not only is this power thus qualified, the committees made sure that any prohibitions would be disclosed, thereby reinforcing the seriousness of such action, while reducing the probability that an Attorney General might prohibit an IG review to hide wrongdoing. Congress knew that Attorneys General and other executive officers sometimes try to hide information, and never envisioned withholding as a tool of prevention. Supervision was the answer, not withholding.

Conclusion

I am not a legal scholar, and am not sure this testimony could withstand peer review. However, I am a historian and public policy scholar in good standing, and do know how to read legislative intent. I also know how Congress operates from my time as a congressional fellow and senior consultant to the Senate Governmental Affairs Committee. I have worked with Democrats and Republicans alike, including Rep. Barber B. Conable, Jr., Sen. Glenn, Sen. Fred Thompson, and Rep. Tom Davis, and will continue to work with any member who seeks good government.

Based on my experience and scholarship, I am absolutely sure that Congress intended the grant of access to be the overriding concern at the Department of Justice and elsewhere in government. Although this grant can be tempered through the Attorney General's

supervision, and voided through the Attorney General's power to prohibit OIG action at any point in the auditing, investing, or issuance process, the grant still stands. The burden of proof in denying access to "all" information rests on the Attorney General's shoulders, and involves an exceedingly high threshold, indeed.

My only suggestion to this committee, therefore, is to clarify the statute by inserting a definition of "author, direction, and control" to reject the use of such authority as deny IG access to full information. The issue here is not whether the Attorney General should prevent disclosure of sensitive information, nor whether the IGs should follow relevant provisions in other statutes regarding confidentiality and nondisclosure. At least to this author, the issue is whether the Attorney General can withhold information as a form of prevention. I find no evidence that Congress provided any such authority. Why would Congress give the Attorney General the power to prohibit IG action if it did not believe there was a risk of disclosure? And why would there be a risk of disclosure if the IG did not have access to the information. The special provisions were designed to prevent damage, not control access to information. And this conclusion undermines the OLC's definition of "all" and "nothing."