



Mr. Johnson, from the Committee on Homeland Security and Governmental Affairs, submitted the following

STATEMENT FOR THE RECORD

To accompany the filing of the Johnson Substitute Amendment to S. 579, the Inspector General Empowerment Act of 2015

On May 5, 2015, the Committee on Homeland Security and Governmental Affairs reported S. 579, the Inspector General Empowerment Act of 2015, to the Senate with a Committee Report.¹ Today, Senators Grassley, McCaskill, Ernst, Baldwin, Carper, Cornyn, Lankford, Collins, Ayotte, Kirk, Mikulski and I have filed a substitute amendment to the bill.

In addition to making minor adjustments to the language in the bill based on discussions with the inspectors general (IG) community, the Administration (including the Department of Justice), and others, the substitute amendment adds a new section 6, titled “Full and Prompt Access to All Documents.” This new section ensures that IGs receive full and timely access to *all* of their agency’s documents, and that no law or provision restricting access to documents applies to IGs unless the law or provision expressly states that it does.

It was imperative to submit a Statement for the Record to make clear the purpose of new section 6, as it is a key addition to the bill that was not included in the Committee-reported version of S. 579. Section 6 was added in direct response to the Department of Justice (DOJ) Office of Legal Counsel (OLC) opinion dated July 20, 2015, which found that the DOJ is bound by some non-disclosure provisions to limit the DOJ OIG’s access to certain documents.

For the reasons explained below, the OLC opinion is at odds with Congress’s statutory mandates expressed in section 6(a) of the Inspector General Act of 1978 and again in the DOJ’s 2015 appropriations bill that IGs are entitled to all documents available to the agency.

BACKGROUND ON S. 579

The Inspector General Empowerment Act of 2015 aims to “strengthen the independence of inspectors general (IGs) and to provide them with the tools necessary to root out waste, fraud and mismanagement within the federal government.”² There are, however, issues that remain which “threaten IG independence and prevent IGs from fully and effectively carrying out their missions.”³

One such issue is federal agency interference with OIG inquiries through agency control of documents and records. Regarding this all-to-often challenge, the Committee Report explained, “[t]he IG Act makes IG independence from the agency or DFE [designated federal entity] paramount, and it is clear both in language and intent that IGs should have unfettered access to

¹ S. REP. NO. 114-36 (2015).

² *Id.* at 1.

³ *Id.* at 3-11.

the agency's documents for purposes of carrying out their responsibilities under the Act.”⁴ Section 6(a) of the Inspector General Act of 1978 authorizes IGs to access:

all records, reports, audits, reviews, documents, papers, recommendations or other material available to the applicable establishment which relates to programs and operations with respect to which that Inspector General has responsibilities under this Act.⁵

Despite the clear mandate, some agencies have interfered with OIG inquiries. The interference has been well-documented.⁶ In response to these disputes, Congress attempted to put the matter to rest by voicing its belief that “all” really does mean “all” in the Consolidated and Further Continuing Appropriations Act of 2015.⁷ Section 218, related to the Department of Justice, declared that:

[n]o funds provided in this Act shall be used to deny the Inspector General of the Department of Justice timely access to all records, documents, and other materials in the custody of the Department or to prevent or impede the Inspector General's access to such records, documents and other materials. . . .⁸

The only exception to IG access to information was for any “express” limitation in the Inspector General Act.⁹ The section also directed the IG to alert Congress within five days of a failure to comply with the directive.¹⁰ Still, the DOJ continued to block access to documents.¹¹

In February 2015, when the Committee was considering S. 579, the OLC was conducting a review of IG access to sensitive information throughout the agency.¹² As the OLC's decision

⁴ *Id.* at 4.

⁵ 5 U.S.C. App. § 6(a)(1).

⁶ S. REP. NO. 114-36, 5-6 (2015); see, e.g., *Improving the Efficiency, Effectiveness, and Independence of Inspectors General: Hearing before the S. Comm. on Homeland Security and Governmental Affairs*, 114th Cong. (2015), available at <http://www.hsgac.senate.gov/hearings/improving-the-efficiency-effectiveness-and-independence-of-inspectors-general>; *Strengthening Agency Oversight: Empowering the Inspectors General Community: Hearing before the H. Comm. on Oversight and Government Reform*, 113th Cong. (2014), available at <http://oversight.house.gov/hearing/strengthening-agency-oversight-empowering-inspectors-general-community/>; *Access to Justice?: Does DOJ's Office of the Inspector General Have Access to Information Needed to Conduct Proper Oversight?: Hearing before the H. Comm. on the Judiciary*, 113th Cong. (2014), available at http://judiciary.house.gov/_cache/files/d2537da6-7f7f-4a32-b843-0366e2ee0403/ig-horowitz-testimony-w-attachments-hjc-september-9-2014.pdf; Letter from Sen. Charles E. Grassley, Chairman, Sen. Comm. on the Judiciary, to the Hon. James B. Comey, Director, Federal Bureau of Investigation (March 6, 2015); Letter from Michael G. Carroll, et al. to The Honorable Darrell Issa, The Honorable Elijah Cummings, The Honorable Thomas R. Carper, and The Honorable Tom Coburn (Aug. 5, 2014), available at <http://www.grassley.senate.gov/sites/default/files/issues/upload/IG%20Access%20Letter%20to%20Congress%2008-05-2014.pdf>.

⁷ Department of Justice Appropriations Act, Pub. L. No. 113-235, § 218, 128 Stat. 2130, 2200 (Dec. 16, 2014).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *'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: Hearing before the S. Comm. on the Judiciary*, 114th Cong. 4 (2015) (statement of Michael E. Horowitz, Inspector General, U.S. Department of Justice), available at <https://www.oig.justice.gov/testimony/t150805.pdf>.

was still forthcoming, and with the section 218 language still in effect, the Committee-reported S. 579 did not contain any changes to section 6(a) of the Inspector General Act. However, the Committee Report did make clear that:

Attempts by agencies to block or delay IG access to documents necessary for their statutorily mandated oversight is unacceptable. The Committee agrees with the IGs that ‘[r]efusing, restricting, or delaying an Inspector General’s access to documents leads to incomplete, inaccurate, or significantly delayed findings or recommendations, which in turn may prevent the agency from promptly correcting serious problems and deprive Congress of timely information regarding the agency’s performance.’ There does not appear to be any additional language the Committee could supply to the IG Act to make this clearer. Accordingly, the Committee reaffirms its belief that IGs must be given prompt, unfettered access to agency documents for purposes of carrying out their responsibilities under the Act, and reaffirms its intent to ensure agencies follow the law.¹³

OFFICE OF LEGAL COUNSEL OPINION

Despite the use of the word “all” in section 6(a) of the Inspector General Act of 1978 and in section 218 just last year, on July 20, 2015, the OLC concluded in a memorandum to the Deputy Attorney General that “the statutory exceptions in Title III, Rule 6(e), and section 626 of FCRA permit the Department to disclose to OIG the covered information it seeks in most, *but not all*, of the circumstances in which OIG might request it.”¹⁴ It further continued, “to the extent that [these provisions] prohibit Department officials from disclosing information to OIG, section 6(a)(1) of the IG Act does not override these prohibitions. . . . And in our view, the text of the IG Act contains no clear indication that Congress intended section 6(a)(1) to override [these provisions].”¹⁵ The OLC went on to find that section 218 of the appropriations act was similarly insufficient to establish a “clear statement of Congress’s intent to override those limitations on disclosure.”¹⁶

In other words, the OLC stated that the word “all” in section 6(a) of the Inspector General Act and Section 218 is limited in scope by individual statutes and provisions that generally restrict disclosure of certain documents, and that DOJ must determine if the OIG is entitled to documents by applying the rules in those other statutes and provisions on a case by case basis.¹⁷ This opinion, therefore, essentially endorsed the DOJ’s withholding of certain documents from the IG. This reasoning also left open the door for other agencies to deny their OIG documents pursuant to other disclosure-restricting provisions.

¹² *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: Hearing before the S. Comm. on the Judiciary, 114th Cong. 2,3 (2015) (statement of Mr. Kevin L. Perkins and Mr. Carlos Uriarte), available at <http://www.judiciary.senate.gov/meetings/all-means-all-the-justice-departments-failure-to-comply-with-its-legal-obligation-to-ensure-inspector-general-access-to-all-records-needed-for-independent-oversight>*

¹³ S. REP. NO. 114-36, 6 (2015).

¹⁴ Memorandum from the Department of Justice Office of Legal Counsel for Sally Quillian Yates Deputy Attorney General 2 (July 20, 2015) (emphasis added).

¹⁵ *Id.* at 3.

¹⁶ *Id.* at 54.

¹⁷ *Id.* at 39.

Following the OLC decision, the Senate Judiciary Committee held a hearing that brought to light serious questions about the impact the OLC opinion would have on the independence and effectiveness of all OIGs.¹⁸ Chairman Grassley's opening statement for the record summarized the deleterious impact 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 simply is unworkable.¹⁹

Other Members swiftly responded to the OLC opinion. On July 30, 2015, the authors of section 218 of the appropriations act, Chairman Richard C. Shelby and Ranking Member Barbara A. Mikulski of the Senate Subcommittee on Commerce, Justice, Science and Related Agencies, wrote a joint letter rejecting OLC's interpretation of section 218:

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 [W]e 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.²⁰

Similarly, on August 13, 2015, a bipartisan group of Members sent a letter to the Deputy Attorney General and DOJ IG Michael Horowitz regarding the OLC opinion.²¹ I signed the letter with my colleagues Ranking Member Tom Carper of the Committee on Homeland Security and Governmental Affairs and Chairman Charles Grassley and Ranking Member Patrick Leahy of the Committee on the Judiciary in the Senate; Chairman Bob Goodlatte and Ranking Member John Conyers of the Committee on the Judiciary and Chairman Jason Chaffetz and Ranking Member Elijah Cummings on the Committee on Oversight and Government Reform in the House of Representatives; and Senators John Cornyn, Claire McCaskill, Thom Tillis, and Amy Klobuchar.²² The letter made clear that the OLC "opinion undermines the long-standing

¹⁸ '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: Hearing before the S. Comm. on the Judiciary, 114th Cong. (2015), available at <http://www.judiciary.senate.gov/meetings/all-means-all-the-justice-departments-failure-to-comply-with-its-legal-obligation-to-ensure-inspector-general-access-to-all-records-needed-for-independent-oversight>.

¹⁹ *Id.* (statement of Senator Charles Grassley).

²⁰ Letter from Chairman Richard C. Shelby and Vice Chairwoman Barbara A. Mikulski of the Senate Subcommittee on Commerce, Justice, Science and Related Agencies to the Honorable Sally Quillian Yates, Deputy Attorney General (July 30, 2015).

²¹ Letter from Charles E. Grassley, et. al to the Honorable Sally Quillian Yates, Deputy Attorney General and the Honorable Michael Horowitz, Inspector General of the U.S. Department of Justice (Aug. 13, 2015).

²² *Id.*

presumption that Inspectors General have access to any and all information that they deem necessary for effective oversight, as specified in the Inspector General Act of 1978.”²³

We also noted that, because of the OLC opinion, Congress would “nee[d] to act to ensure that Inspectors General have complete and immediate access to all records in the possession of their respective agencies, unless a statute restricting access to documents expressly states that the provision applies to Inspectors General.”²⁴

SECTION 6 OF THE SUBSTITUTE AMENDMENT

The new section 6 of the substitute amendment leaves no doubt that the general access provision in the Inspector General Act supersedes any statutory limitation on access to documents in other provisions unless the other law expressly refers to IGs and expressly limits their access.

In drafting this substitute, we eschewed a construction that would have expressly identified the provisions discussed in the OLC opinion. The cosponsors decided against it because, as noted above, identifying every such provision that could be perceived as generally limiting disclosure of documents would be impossible. Moreover, we fear that identifying certain statutes might leave an agency with the inaccurate impression that the drafters are more concerned about the types of documents listed therein than the other types not explicitly mentioned. While the DOJ has not provided Congress with proposed language as we requested, DOJ representatives have said they support a legislative fix to address the problem created by the OLC opinion.²⁵

As a bipartisan group of Members in the Senate and House of Representatives have similarly stated, we disagree strongly with the conclusion reached in the OLC opinion. In conclusion, it is useful to revisit the OLC memorandum’s summation of its decision:

In sum, neither the text of the IG Act, nor its legislative history, nor its general purpose offers a clear indication that Congress intended to override the separate statutory confidentiality requirements applicable to Title III, Rule 6(e), and section 626 information. As a result, under both the principle requiring that a statute contain a clear statement in order to abrogate protections of highly sensitive information, and the rule of relative specificity, OIG remains subject to the limitations imposed by Title III, Rule 6(e), and section 626. The Department

²³ *Id.*

²⁴ *Id.*

²⁵ *‘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: Hearing before the S. Comm. on the Judiciary, 114th Cong. 5 (2015) (statement of Mr. Kevin L. Perkins and Mr. Carlos Uriarte), available at <http://www.judiciary.senate.gov/meetings/all-means-all-the-justice-departments-failure-to-comply-with-its-legal-obligation-to-ensure-inspector-general-access-to-all-records-needed-for-independent-oversight>; see also Letter from Peter J. Kadzik, Assistant Attorney General, to the Honorable Ron Johnson, Chairman of the Committee on Homeland Security and Governmental Affairs (Aug. 24, 2015) (“To that end, we reiterate our commitment to work with the OIG and Members of Congress on legislation that enables the Department to comply with the law while providing OIG with the documents it needs as quickly as possible. The Department is working expeditiously towards draft legislation . . .”).*

therefore may not disclose information covered by those statutes except in accordance with their provisions.²⁶

Let this new section 6 and this accompanying statement be exactly the kind of clear indication of congressional intent that section 6(a) of the Inspector General Act overrides the specific, carefully drawn limitations in Title III, Rule 6(e), and section 626, and *all* other non-disclosure provisions in any other statute or provision, irrespective of whether those provisions protect sensitive information - unless a non-disclosure provision explicitly states that it applies to IGs.

²⁶ Memorandum from the Department of Justice Office of Legal Counsel for Sally Quillian Yates Deputy Attorney General 52 (July 20, 2015).