

# United States Senate

WASHINGTON, DC 20510

September 24, 2021

The Honorable Merrick Garland  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue N.W.  
Washington, DC 20530-0001

Dear Attorney General Garland:

The Office of Legal Counsel (OLC) released an opinion on May 1, 2017 about the authority of individual Members of Congress to engage in oversight of the Executive Branch.<sup>1</sup> It concluded that “[i]ndividual members of Congress, including ranking minority members, do not have the authority to conduct oversight in the absence of a specific delegation by a full house, committee, or subcommittee.”<sup>2</sup> Not only does this opinion misinterpret the constitutional responsibilities of Congress for monitoring the activities of the Executive Branch but it fails to provide clarity on whether those same limitations apply to information requests made to Offices of Inspectors General (OIG).

The OLC opinion, which advises departments and agencies that they can ignore requests from Ranking Members, is based on grounds unsupported by the Constitution. Instead of respecting the separation of powers, the opinion ignores that our system of government vests Congress with all legislative responsibilities.<sup>3</sup> Recognizing the importance of broad congressional access to information about activities in the Executive Branch, the Supreme Court acknowledged that “the power of inquiry is an essential and appropriate auxiliary to the legislative function.”<sup>4</sup> Unfortunately, the opinion authored by then-Acting Assistant Attorney General Curtis E. Cannon inhibits Congress from fulfilling its duty of overseeing the programs it legislates into law,

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<sup>1</sup> Shortly after the Department of Justice (DOJ) issued the opinion, Senator Charles Grassley sent a letter to the White House requesting that officials rescind it. Although former Assistant Attorney General Steven Engel promised a thorough review, the opinion remains valid. *See* Letter from Sen. Charles E. Grassley, Chairman, Jud. Comm., to Donald J. Trump, President of the United States (June 7, 2017), *available at* [https://www.grassley.senate.gov/imo/media/doc/2017-06-07%20CEG%20to%20DJT%20\(oversight%20requests\).pdf](https://www.grassley.senate.gov/imo/media/doc/2017-06-07%20CEG%20to%20DJT%20(oversight%20requests).pdf). In fact, DOJ issued a more expansive opinion in 2019, which concluded that departments and agencies should process requests from individual members of Congress through the Freedom of Information Act (FOIA). *See* Requests by Individual Members of Congress for Executive Branch Information, 43 O.L.C. 1 (2019). Notably, however, Chairman Pat Roberts and Ranking Member Debbie Stabenow of the Senate Agriculture Committee wrote to former Secretary of Agriculture Sonny Perdue shortly after the DOJ released the original opinion to emphasize that Ranking Members are entitled to responses in their performance of oversight. *See* Letter from Sen. Pat Roberts, Chairman, Ag. Comm, and Sen. Debbie Stabenow, Ranking Member, Ag. Comm. to Sonny Perdue, Sec’y, Dep’t of Ag. (May 19, 2017), *available at* <https://www.commerce.senate.gov/services/files/519358B5-44F2-45A7-ADBD-CA1F3F895AD7>.

<sup>2</sup> Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch, 41 O.L.C. 1 (2017).

<sup>3</sup> *See* U.S. CONST. art. I, § 1.

<sup>4</sup> *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

specifically by treating Ranking Members of congressional committees no differently than private citizens.<sup>5</sup>

First, the OLC opinion ignores longstanding judicial precedent. The U.S. Court of Appeals for the D.C. Circuit recognized decades ago in *Murphy v. Dep't of the Army* that

All Members have a constitutionally recognized status entitling them to share in general congressional powers and responsibilities, many of them requiring access to executive information. It would be an inappropriate intrusion into the legislative sphere for the courts to decide without congressional direction that, for example, only the chairman of a committee shall be regarded as the official voice of the Congress for purposes of receiving such information, as distinguished from its ranking minority member.<sup>6</sup>

Congress provided the direction the court contemplated by elevating Chairs and Ranking Members above other members. Recognizing the legislature's ability to self-organize how it conducts its legislative and oversight functions is a long respected principle that has helped maintain institutional balance in our system of government.<sup>7</sup> Importantly, the judiciary refrained from deciding which Members can speak on behalf of Congress—an important lesson for the Executive Branch at this point in our democratic experiment.

Second, the notion that only committee or subcommittee Chairs matter when it comes to conducting oversight is a red herring. Currently, the U.S. Senate operates under an agreement allowing one party to provide committee leadership as the de facto “majority” since neither party holds more seats than the other. The OLC opinion claims, however, that only Chairs are “constitutionally authorized” to perform oversight because Ranking Members are not “endowed with the full power of Congress.” Nowhere does the Constitution mention committees, subcommittees, or their leadership. Congress simply decided to organize itself this way “because of the high volume and complexity of its work.”<sup>8</sup> In one of the Supreme Court's most important rulings that defines the role of Congress in performing oversight, the majority even acknowledged that

[t]he theory of a committee inquiry is that the *committee members* are serving as the representatives of the parent assembly in collecting information for a legislative

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<sup>5</sup> Certain departments and agencies processed Ranking Member document requests in the 117<sup>th</sup> Congress under the Freedom of Information Act (FOIA), which then activates a series of exemptions that permit redaction. This not only is demeaning to the legislative branch of government but it subjects Ranking Members to a statute broadly intended to provide information access to members of the public.

<sup>6</sup> 613 F.2d 1151, 1157 (D.C. Cir. 1979). The Justice Department's OLC opinion from 2019, *supra* note 1, heavily cites this opinion to support the claim that requests from individual members of Congress are answerable under FOIA. The discussion focuses on statutory interpretation, however, which does not alter arguments presented here.

<sup>7</sup> See THE FEDERALIST NO. 51 (James Madison). (“[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”).

<sup>8</sup> See Judy Schneider, Cong. Research Serv., RS20794, *The Committee System in the U.S. Congress* 1 (Oct. 14, 2009) (“Because of the high volume and complexity of its work, Congress divides its legislative, oversight, and internal administrative tasks among committees and subcommittees.”).

purpose. Their function is to act as the eyes and ears of the Congress in obtaining facts upon which the full legislature can act.<sup>9</sup>

The Court made no distinction between committee members in the majority or minority party. Yet for those in the minority without access to the same information that the majority party can request and obtain from federal agencies under the OLC opinion, performing effective oversight—especially in times of divided government—becomes a futile exercise. The even split between Republicans and Democrats in the Senate makes the imbalance of information access even more profound.

Third, Congress structured its committees with a Chair and Ranking Member to provide strategic leadership. Although the Chair sets the agenda, the Ranking Member does not simply disengage from legislative and oversight activities that fall within the committee’s jurisdiction. The Ranking Member retains a powerful role, one that is distinct from other members of the committee, in part by employing specialized investigative and legal staff who “occupy a central position in the conduct of oversight.”<sup>10</sup>

Fourth, the OLC opinion erroneously characterizes the primary method in which Congress obtains information from the Executive Branch. Each body regularly receives information voluntarily in response to requests—a method entirely different from the compulsory process on which the opinion is based. In practice, the scope of information required by committees to perform effective oversight is much broader than information obtainable through a subpoena, underscoring the severe degree to which the opinion limits a Ranking Member’s ability to access information.

Although the opinion’s focus on the compulsory process leads to a misguided conclusion about congressional oversight, a cursory review of Senate committee rules reveals that the consent of the Ranking Member is almost always required to initiate the compulsory process at all.<sup>11</sup> Ranking Members also regularly participate in negotiations to receive documents or testimony, as well as in the determination of whether, and when, the compulsory process is necessary. This makes clear that Congress intends for Ranking Members to play an active role in oversight. With blatant disregard for this arrangement, the OLC opinion instead advises departments and agencies to treat Ranking Members no differently than unelected members of the public.

At the same time, the opinion leaves unanswered whether a Ranking Member on a committee or subcommittee is entitled to more than voluntary cooperation from Inspectors General. The Supreme Court has drawn battle lines for disputes between branches of government, acknowledging that “Congress and the President have an ongoing institutional relationship as the ‘opposite’ and ‘rival’ political branches established by the Constitution.”<sup>12</sup> The relationship between Congress and Inspectors General, however, is more symbiotic. Their design as “independent and objective units” tasked by Congress with detecting waste, fraud, and abuse

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<sup>9</sup> *Watkins v. United States*, 354 U.S. 178, 200 (1957).

<sup>10</sup> Cong. Research Serv., RL30240, *Congressional Oversight Manual 21* (Mar. 29, 2021).

<sup>11</sup> See Michael L. Koempel, Cong. Research Serv., R44247, *A Survey of House and Senate Committee Rules on Subpoenas* (Jan. 29, 2018) (“Most Senate committees in their rules have also delegated authority to issue subpoenas to their chair and ranking minority member acting together.”).

<sup>12</sup> See *Trump v. Mazars*, 140 S. Ct. 2019, 2033-24 (2020).

within the Executive Branch alters the legal analysis, even though they operate within the departments and agencies under the President's control.<sup>13</sup>


Congress enacted the Inspectors General Act of 1978 so that "internal investigative functions [w]ould be assigned to an outsider with no vested interest in the programs they are evaluating."<sup>14</sup> Depriving Congress of information obtained and generated by the independent watchdogs it created to monitor activities within the Executive Branch impedes the branch that implemented the laws from performing its oversight duties effectively. This paradox is made especially profound by the fact that Inspectors General are required by law to report certain activities to Congress.<sup>15</sup> As it stands now, however, the opinion reduces their relationship with Congress to precisely the type of partisan exercise that Inspectors General are intended to circumvent.

In short, it seems as if the Justice Department drafted the opinion more to protect the Executive Branch from congressional scrutiny than provide constitutional order to the information sharing process. The opinion creates insurmountable challenges for Ranking Members in conducting effective oversight. To restore the balance of information access between majority and minority leadership on committees, and as proponents of fair, transparent government, we implore the Justice Department to take action.

The Biden Administration is purportedly committed to cooperation and transparency in government. Fulfilling these commitments made by the President, Vice President, and the Cabinet requires rescinding this opinion.<sup>16</sup>

We appreciate your attention to this request.

Sincerely,

  
Roger F. Wicker  
Ranking Member  
Commerce, Science, and Transportation Committee

  
Charles E. Grassley  
Ranking Member  
Judiciary Committee

<sup>13</sup> Cong. Research Serv., R46762, *Congressional Oversight Manual* 4 (Apr. 16, 2021).

<sup>14</sup> *Id.*

<sup>15</sup> See 5 U.S.C. App. § 5.

<sup>16</sup> See, e.g., Responses to Questions for the Record to Judge Merrick Garland, Nominee to be United States Attorney General, available at <https://www.judiciary.senate.gov/imo/media/doc/QFR%20Responses%202-28.pdf> ("As a general matter, I firmly believe in transparency wherever possible, and I would look forward to reviewing any proposals from Congress to increase transparency."); Remarks by President Biden in Address to a Joint Session of Congress (Apr. 28, 2021), available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/04/29/remarks-by-president-biden-in-address-to-a-joint-session-of-congress/> ("[W]e can also cooperate when it's in our mutual interest."); Clare Foran, *Harris Calls for DHS Secretary to Resign over Family Separations at the Border*, CNN (June 18, 2018) ("[T]he government should have a commitment to transparency and accountability.").



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Tim Scott  
Ranking Member  
Aging



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John Boozman  
Ranking Member  
Agriculture



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Richard Shelby  
Vice Chairman  
Appropriations



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James M. Inhofe  
Ranking Member  
Armed Services



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Pat Toomey  
Ranking Member  
Banking, Housing, and Urban Affairs



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Lindsey O. Graham  
Ranking Member  
Budget



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John Barrasso, M.D.  
Ranking Member  
Energy and Natural Resources



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Shelley Moore Capito  
Ranking Member  
Environment and Public Works



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Mike Crapo  
Ranking Member  
Finance



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James E. Risch  
Ranking Member  
Foreign Relations



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Richard Burr  
Ranking Member  
Health, Education, Labor, and Pensions



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Rob Portman  
Ranking Member  
Homeland Security & Governmental  
Affairs



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Lisa Murkowski  
Ranking Member  
Indian Affairs



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Marco Rubio  
Vice Chair  
Intelligence



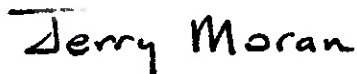
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Roy Blunt  
Ranking Member  
Rules and Administration



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Rand Paul, M.D.  
Ranking Member  
Small Business & Entrepreneurship



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Jerry Moran  
Ranking Member  
Veterans' Affairs

CC: The Honorable Dawn E. Johnsen  
Acting Assistant Attorney General  
Office of Legal Counsel  
U.S. Department of Justice