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Testimony Before the House Committee on Veterans Affairs Of Professor Charles Tiefer of the University of Baltimore Law School

Re: Congressional Committee Right to Oversight of VA and VA OIG Programs Includes Necessary Nonpublic Documents

Mr. Chairman and Members:

Thank you for the opportunity to testify.

This testimony concerns the Committee's right to obtain oversight materials about VA and VA OIG (both referred to here sometimes as "VA") programs, beyond what the agencies choose to make public. Advice from the VA General Counsel raises various objections to the Committee obtaining documents for oversight, amounting to a comprehensive program of denying meaningful access.

For 15 years, I was counsel to Congress (1979-84, assistant Senate legal counsel; 1984-1995, General Counsel, and, Deputy General Counsel, of the House of

Representatives). During that time, I testified and submitted briefs to court a very large number of times on questions like the one before us. Since then, I have been a professor at the University of Baltimore Law School. I have continued to study these subjects, testifying from time to time, and, publishing at length, on these subjects. Charles Tiefer, *The Specially Investigated President*," 5 Univ. of Chicago Roundtable 143-204 (1998).

I was Chairman Issa's (R-Cal.) lead witness at his hearing on the demand for Justice Department materials about the "Fast and Furious" scandal that became the House's contempt case against Attorney General Holder when the President invoked executive privilege.[1] I gave full-length written (and oral) testimony in 2002 about a similar issue during the Bush Administration involving an FBI informant program.[2] Ultimately a claim of executive privilege by the President himself was overcome by that investigation.

This Committee Has "Penetrating and Far-Reaching" Power to Obtain Oversight Materials from Agencies, Including Inspectors General

The Supreme Court described the Congressional oversight power as "penetrating and far-reaching" in Barenblatt v. United States, 360 U.S. 109, 111 (1959):

> The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate; it has similarly been utilized in determining what to appropriate from the national purse, or whether to appropriate. The

[1] "Congressional Committee Conducting Oversight of ATF Program to Sell Weapons to Smugglers, Notwithstanding Pending Cases," in Hearing on Justice Department Response to Congressional Subpoenas: Hearing Before the House Committee on Government Oversight. June 13, 2011.

[2] "Overcoming Executive Privilege at the Justice Department," in The History of Congressional Access to Deliberative Justice Department Documents: Hearings Before the House Committee on Government Reform, 107th Cong., 2d Sess. (Feb. 6, 2002).

scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.

Congress enacted the Inspector General Act of 1978 to create investigative machinery for more than one purpose. Of course, one purpose was for law enforcement. But, another purpose was to keep Congressional oversight about agency problems, which involves cooperating with Congressional committees' own efforts to oversee the same. The House General Counsel's office, when I served there, wrote what became the authoritative opinion in the House about that inspectors general must provide committees with oversight material. (The opinion has been separately furnished to this committee. It was about a Justice Department memo known as the "Kmiec Memo".)

Let us lay out the argument made unsuccessfully then, and made again now by the VA OIG. Specifically, section 4(a)(5 of the Inspector General Act plainly and explicitly requires each IG "'to keep . . . the Congress fully and currently informed, by means of the reports required by section 5 and otherwise, concerning fraud and other serious problems, abuses, and deficiencies relating to the administration of programs, abuses, and deficiencies relating to the administration of programs and operations . . . ."

The response now by the OIG is that "The only specific means identified or mandated in Section 5 . . . for meeting this requirement are the Semiannual Reports to Congress and the 'seven day' letter described in Section 5(d)." In other words, the OIG would shrink down the duty and obligation of the OIG to keep Congress "fully and currently informed" to the published reports. It is as if the statute said "the OIG shall withhold from Congress anything to keep it 'fully and currently informed' except what the whole world is told too." The Inspector General statute would become the opposite of what Congress intended. It would create an entire layer of shielding and withholding to surround what

Congress pointed to as the "fraud and other serious problems, abuses, and deficiencies" of agencies like the VA. From living contemporary experience at the time, and from the legal materials sources, we know the Inspector General Act of 1978 was part of a wave of post-Watergate legislation intending to restore Congressional oversight. But, the OIG argument would make it the opposite, a statute meant to shut the windows and bar the doors for Congress peeking in at the failings of agencies like the VA.

But, taking the OIG's argument and looking at the Inspector General Act's words, if the OIG was to withhold and deny needed documents for Congressional oversight, and just to make the reports, then there would be no purpose to the statute's key words saying the OIG was to keep Congress "fully and currently informed, by . . . reports . . . and otherwise." The statute would have stopped with "by . . . reports" if all that the OIG was obliged to provide were reports. Rather, the OIG claim that the Inspector General need not go beyond giving Congress access to public record material like his reports, is refuted by the highly significant "and otherwise" language.

Moreover, as the House Counsel memo responded back at that time to the unsuccessful Kmiec Memo, the legislative history of the act shows the contrary to the OIG's position. Chairman Jack Brooks (R-Tex) was House floor manager of the Inspector General Act of 1978. A bipartisan chair who worked closely with his ranking minority member Frank Horton (R-NY), he was a strong exponent of Congressional oversight. Not surprisingly, his legislative history spells out the exact opposite of the OIG position. In a discussion on the House floor. Representative Bauman (R-Md) agreed with Chairman Brooks -- that "It would just seem to me to be pointless to pass this legislation unless, as part of each committee's oversight function, the committee had complete access to all records of

the investigations of these Inspectors General. Otherwise, the bill is unnecessary." (Underlining added) Chairman Brooks agreed and explained: "If the gentleman will yield further, Mr. Speaker, we will have complete access to the records if we request them. It just will not be part of the routine [of IG reports]. I would say to my distinguished friend, the gentleman from Maryland (Mr. Bauman), that there is no prohibition with respect to filing all the information which Congress wants. We will be able to get it. There is no problem about it. It is just that it will not be routinely printed in the semiannual reports." 124 Cong. Rec. 32032 (1978).

Committees Have Vast Oversight Powers That Go Far Beyond What the 435 Individual Members Doing Casework Can Obtain

Another OIG argument reduces the authority of the VA Committee to that of one of the 435 individual Members who do casework. The OIG justifies not providing records to the VA Committee because they are covered by the Privacy Act. If the Privacy Act barred providing information to oversight committees, it is hard to see how they could function, as a substantial fraction of the waste, fraud, and abuses of agencies affect individuals. Now, even the OIG does not dispute that Congress carefully provided in section 552a(b)(9) for disclosure "to either House of Congress, or, to the extent of a matter within its jurisdiction, any committee or subcommittee thereof . . . ."

The provision furthering oversight is not surprising, for the Privacy Act, like the Inspector General Act, was a product of the post-Watergate era when Congress restored the oversight power of its committees. See, e.g., Murphy v. Department of the Army, 612 F.2d 1151 (D.C. Cir. 1979) (noting in that case "the obvious purpose of the Congress to carve out for itself a special right of access to privileged information not shared by others").

But, even more, there is a further nuance of that statutory language. Congress did not provide equivalent treatment for committees like the VA Committee, and for the 435 individual Members doing casework. It referred to "any committee or subcommittee," while it did not refer to individual Members.

Yet the OIG asserts the power to reduce this committee to the level of a caseworker. The OIG argument now continues:

> OMB Guidelines specifically state that this exception does not authorize the disclosure of information protected under the Privacy Act to an individual Member of Congress acting on his or her behalf or on behalf of a constituent. OMB Guidelines, 40 Fed. Reg. 28,948 - 28,955. (July 9,1975).

Having conflated committee oversight requests, with individual casework, OIG then says:

> The decision by the agency to disclose Privacy Act protected information to an oversight body is at the discretion of the agency and requires a written request. Neither the Privacy Act nor any other statute mandates that an agency release Privacy Act protected information to either House of Congress when requested.

This same argument runs through the rest of the OIG and VA positions -- that the VA Committee has no more authority than an individual Member doing casework, to overcome VA and OIG withholding.

No one with any understanding of the Congressional investigatory power would ever mistake the vast authority of committees (including, when pertinent, subcommittees) to conduct oversight, with the work of the 435 individual Members on casework. Congress delegates vast oversight authority to committees for agencies and matters within their committee jurisdiction. It is constitutional authority, upheld in literally dozens of decisions in the Supreme Court and the other federal courts. In citing *Barenblatt v. United States* above, what was cited for "penetrating and far-reaching" authority was a House Committee's oversight power, fully respected, honored, and accepted by the Supreme Court. The Supreme Court was not talking about casework.

Normally, this point is so well-understood, so fundamental, so undisputed, that no further discussion would be necessary. But, the testimony of the agency witness, again and again, conflates the ability of an agency to be unhelpful, if it chooses, with individual Members doing casework, with the contrasting full authority of House Committees, like the Veteran's Affairs Committee (and its oversight subcommittee) to perform committee oversight on agencies, like the VA, within the committee's jurisdiction.

What is the difference?

For House Committees:

-- Rules of the House of Representative confer jurisdiction, including oversight jurisdiction, and authority, on House committees. Moreover, they create a structure with committee rules, including witness rights, all to further evolve the committee oversight authority.

--Rules of the House, and firmly established precedent, confer authority for hearings and subpoenas, the main formal tools of inquiry, on House committees.

--Criminal statutes, and firmly established precedent, confer the classic investigative sanctions on those who impede committees by committing contempt, perjury, and obstruction. This contrasts with the 435 individual House Members doing casework, at the level down to which the VA puts this Committee.[3]

This is just the superstructure. Under this rubric, House Committees -- not the 435 individual Members -- conduct a vast quantity of oversight on the agencies within their jurisdiction and authority, like the VA for the VA Committee. Committees publish many

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[3] For individual Member casework:

--House Rules do not establish such jurisdiction and authority for casework, and do not create a structure with specific rules including witness rights;

--House Rules do not confer authority for hearings and subpoenas

--Criminal statutes do not establish contempt, perjury and obstruction for creating obstacles to casework by the 435 individual Members.

hundreds of hearings and reports every Congress. Committees are the eyes and ears of the Congress and the nation for oversight like this committee's of the VA.[4]

To put it bluntly: the VA has lost touch with legal reality, and is having a flight of fantasy, to withhold documents from the VA Committee by equating the Committee with doing casework.[5] Section 552(b)(9) has not been in the past, is not now, and never will be, authority to withhold material from Congressional oversight committees.

For the VA to Block Committee Inquiries Into Health Care Matters Lacks Support in Congressional Investigatory Law

The VA invokes statutory provisions that keep medical records of individual beneficiaries nonpublic. It conjures this issue in the abstract, as though the committee were about to throw open the doors to VA medical facilities and flinging all the records outside to be public, and for no reason at that. The OIG argument strikes at the heart of Congressional oversight by rejecting Congressional committees' right to anything but public records.

For several reasons, the OIG argument lacks support. First, the VA argument treats oversight as invalid because it must not be allowed to view nonpublic records. That is contrary to how oversight is conducted -- namely, with the understanding and full acceptance that House Committees must obtain some nonpublic records. The House has a rule about closed or executive sessions, and nonpublic records may be deemed to be received that way. The examples of this are legion. Virtually every Senate committee

[4] That has been true since the administration of George Washington, when a House Committee inquired into an Indian war. Indeed this was true in state and colonial legislatures and the British Parliament, as the precedents for the Framers writing Article I of the Constitution. Nothing could be firmer as a matter of constitutional principle.

[5] A different question is posed when an individual Member seeks, not the sword of formal authority to inquire, but the shield of Speech or Debate Clause privilege for informal self-informing. Different considerations apply. That question is not posed here.

receives confidential FBI inquiries on nominees, which starts nonpublic and is kept nonpublic.[6]

The Armed Services Committees receive defense information from a wide variety of nonpublic arrangements, treated likewise. As House Counsel, I dealt with any number of oversight committees, from the House Banking Committee to the House Government Reform and Oversight Committee, with material from inquiries that was nonpublic. To put it differently, it would hobble the House oversight power to restrict it only to public information.[7] Taken as a whole, if House committees could obtain nothing more than is publicly posted, their hearing rooms would be stale, boring, and completely empty, and their reports would go completely unread.

Second, when Congress passes statutes that would preclude, selectively or wholesale, the constitutional processes of Congressional oversight, it says so expressly.[8] There is no possible equating of the statutes cited by OIG, which do not mention precluding oversight, and these other statutes, which do. There is no comparison between the statutes that expressly constrain being obtained by Congress, and those that simply say, like these VA-related statutes do, that the information is nonpublic. Such statutes do not bar oversight,

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[6] The House and Senate Intelligence Committees receive information at the highest levels of classification, which starts nonpublic and is kept nonpublic. The Joint Committee on Taxation receives taxpayer information of an extremely private rigidly undisclosed nature, which starts nonpublic and is kept nonpublic.

[7] If the Armed Services Committee could only see the documents about our defenses what we post on open websites for viewing by everyone, it would know little about our military and its judgments for the defense authorization bill would be unsupported. If Chairman Issa's inquiry about "Fast and Furious" only knew about what the posts on websites for viewing by everyone, it would have learned little and its judgments would be unsupported.

[8] For example, tax legislation meant to keep individual tax return information inviolate expressly precludes committees (other than the tax committees) from obtaining the information. 26 U.S.C. 6103(f). House Rules expressly precludes classified information in the hands of the Intelligence Committee from being released (except either by negotiated declassification or similar special processes). The wiretap statute expressly constrains the occasions when Congressional committees obtain wiretap records. I worked with these types of provisions when I was detailed from House Counsel to being Special Deputy Chief Counsel for the Iran-Contra Committee.

they put Congress on notice that the agency has held these in a nonpublic status, and the committees understand this and proceed consciously and appropriately.

Third, as to statutory provisions about individual medical record privacy in particular, as committee counsel has pointed out, a HIPAA section related to the one cited by the VA says "A covered entity may disclose protected health information to a health oversight agency for oversight activities[.]" 45 CFR sec. 164.512(d). And, official VA practices ("Notice of Privacy Practices", Sept. 23, 2013) state that "VHA May Disclose Your Health Information" to "Law Enforcement Health Care Oversight (e.g., giving information to the Office of. Inspector General or Congressional Committees."[9] The pertinent statutes and regulations should be interpreted together to authorize committee oversight.

Fourth, the above points make clear how a legitimate House Veterans Affairs Committee investigations into, say, certain specific causes of death for specific beneficiaries who did not get appointments, differs from throwing open the doors at VA facilities and tossing out to the public all the records. The Committee may have a specific oversight inquiry, such as the extent to which delays in making appointments were a cause of certain specific deaths. It may have a different focus or standard than, say, the Inspector General.[10] The Committee has a different responsibility. It must do its oversight work, even though this means reviewing nonpublic documents.

[9] http://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=3048

[10] For a hypothetical, the Inspector General for his office's specific purposes may decide only pursue the matter when there is strong evidence that the delays were the main or probable cause. The Committee for their broader legislative purposes might still be interested if there was suggestive evidence the delays were a contributing or possible cause. I am speaking for myself. I have not discussed with the Committee whether this illustration fits or does not fit any of their inquiries.

Fifth, it is said to be a concern of the VA that it might be liable for providing the records to Congress in the face of these statutes. This is no reason to block oversight. I have heard this kind of argument since I started as a Congressional counsel in 1979. I do not know of one single occasion during that time when agencies have provided something for Congressional oversight and suffered damages from a lawsuit. It is a red herring. It is what general counsels raise up as a reason not to act, rather than a live probable problem to mitigate on the way to actually assisting the oversight.

In light of the statutes and regulations just recited, an agency would say it was legally justified in providing the records. But, perhaps the VA actually needs reassurance -- say, it has some example of something that actually happened that gives it legal worries. Then it should approach the Committee very differently. Rather than using its concerns as an excuse to preclude oversight, it should use its concerns as a reason to provide the records under some kind of an arrangement that provides such safety. It should have said to the Committee "we are ready to provide the records, but we wish to show we are acting under legal obligation. Can you provide us with a legal memorandum that we are under such an obligation?"

I researched and issued such memos as House Counsel. It was one of various ways to mitigate the agency's concerns and to confirm to the agency that providing information was the right thing.[11] The agency was expressing its concerns, and yet, its positive attitude, and its embracing a solution under which it provides the material, makes all the difference.

[11] Purely as an example, there were some times when an agency asked for a committee subpoena -- not as part of a desire to actually oppose the investigation, but rather to address their unusual need to show compulsion. For example, a state agency with records implicating privacy might say it needed a subpoena because that "translated" into an expression of compulsion that was clear between federal and state levels. I do not see in this case a need for a subpoena.

Arguments from 18 U.S.C. 1905 and from Pre-Decisional Privilege Are Without Merit

VA and OIG have made a number of arguments to the Committee which are not at the heart of their testimony today. These warrant only brief comment.

They have mentioned the statute at 18 U.S.C. 1905, the Trade Secrets Act, which provides for criminal sanctions for an agency official who discloses trade secrets "unless authorized by law." As discuss above, the Congressional investigatory power is well recognized as authority to obtain agency documents, and satisfies the statute. Opinion of the Attorney General 221 (1955). The invocation of this statute purports to justify withholding, as proprietary, of records of procurement. This claim could not have merit without putting out of the oversight business a large part of the activity of House committee inquiries doing exactly what the House as a whole, and the public, want them to do.[12]

There has also been impugning by the VA of the inquiring communications of Congressional committee counsel, also known as the VA seeking to impose the requirement of a specific letter from the Chairman himself even for limited requests. This is not persuasive. Committees must delegate. The VA is enormous.[13] The VA is not going to have the Secretary do everything himself.[14] It should reserve its arguments in this regard for

[12] Virtually every committee of the House looks into procurement as to the agency under its jurisdiction. And, from experience with procurement protests at the GAO, it is clear that in an instance of procurement dispute over contract award, a claim of proprietary will sweep up a great deal. Conversely, few subjects deserve oversight as much as procurement.

[13] It outclasses in size almost any agencies other than Defense and HHS. The VA has hundreds of thousands of employees, and has large numbers of facilities scattered around the country. Does the VA Counsel claim the power to dictate that the Chair himself must visit them all in person, eschewing staff (and still handle his gigantic flow of work in Washington)? The VA has hundreds of matters warranting oversight, involving all together, directly and indirectly, perhaps millions of documents and perhaps gigabytes of data. The VA can hardly insist that the Chair read and analyze them all in person, and still handle also the duties of legislating, communicating, voting, and so on.

[14] For that matter, oversight inquiries from various sources flow into the VA. Is the VA Counsel going to make the Secretary of the VA himself show up in person, meet in person, join visitations in person, take calls in person, fill out questionnaires in person, answer inquiries in person, and scrutinize himself millions of documents and gigabytes of data in person, and, in short, do everything for the whole vast department as to inquiries in person -- and not delegate to his staff?

when it has a focused, supportable issue that it wants to raise up to the level of the Chairman, not for all requests.[15]

The VA has also tried to make a claim of deliberative process privilege. However, it has done little of what it must do to make such a claim. It has not focused the claim on some specific narrow agency decision or category of documents. Nor has it provided an index for the documents. And, this is a claim that ultimately evaporates unless backed up by an invocation of executive privilege by the President himself. (Currently, the "Fast and Furious" litigation is about this issue, and the President himself invoked executive privilege.)

Even with all those steps taken, the claim would be weak, because none of the deliberative process involves communications with the President. *In re Sealed Case (Espy)*, 121 F.3d 729 (D.C. Cir.). There is no particular sign that the President would support a privilege claim in this matter.[16] Without some documentation from the VA that the White House stands ready to invoke executive privilege, it should be regarded as not specifically invoked in this matter.

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[15] There always has to be delegation from Chairs -- and Secretaries -- for others to handle the large extent of matters under their jurisdiction. And, each side must tolerate a degree of delegation on the other side. A wholesale refusal by the VA to respond to delegated inquiries makes as much sense as a wholesale insistence by the VA Committee that the Secretary in the VA respond in person. The VA should not use this point as a basis for blanket refusal to answer inquiries. Rather than that, the VA should step back from a refusal, recognize the need for delegation on both sides, stop treating committee counsel as nullities, figure out some far more finely-tuned approach that would meet its real needs and proceed from there.

[16] The VA had a large scandal in recent years, and Congress conducted oversight, without contest from the White House. Congress passed a remedial statute, and the Secretary of VA left office and was replaced, without argument from the White House.