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Challenges to the Independence of Inspectors General in Robust Congressional Oversight

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Challenges to the Independence of Inspectors General in Robust Congressional Oversight

FERNANDO R. LAGUARDA*

ABSTRACT

Congressional oversight of the Executive is among the chief responsibilities of the legislative branch. Inspectors General (“IGs”) are among the most important tools available to Congress because they are “hard-wired” into the Executive itself. The value of IGs to Congress depends on their expertise in the workings of their host agencies and their “independence” from those agencies. But “independence” is not a statutorily defined term. As the agencies, and sometimes Congress itself, expand the role of IGs to engage in activities that parallel the regulatory programs of their host agencies, IG independence is compromised and the value IGs provide to Congress can be undermined. This article seeks to further a project of scholarship on IGs focusing on the statutory framework within which they operate and the conflicting imperatives that affect their work.

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“Are you my Inspector General? When I was Governor of Pennsylvania, I had an Inspector General, but he wasn’t out there like you, constantly criticizing and embarrassing us.”¹

The Department of Transportation (“DOT”) Office of Inspector General (“OIG”) website lists enforcement priorities in order of importance.² “[E]nhanc[ing] DOT’s transportation safety goals by investigating crimes where death or serious bodily injury has or is likely to occur”³ is at the top of the list. According to the website, OIG’s investigations of rule violations—and the prosecutions that result—“complement the regulatory enforcement programs of DOT’s Operating Administrations.”⁴

There is no doubt that the DOT OIG’s activities “complement[ing DOT’s] enforcement programs” are important. But there is also no reason they should be undertaken by an Inspector General (“IG”), rather than by the agency itself or by

1. CHARLES A. JOHNSON ET AL., IBM CENTER FOR BUS. & GOV’T, BALANCING INDEPENDENCE AND POSITIVE ENGAGEMENT: HOW INSPECTORS GENERAL WORK WITH AGENCIES AND CONGRESS 26 (2015) (quoting CLARK KENT ERVIN, OPEN TARGET: WHERE AMERICA IS VULNERABLE TO ATTACK 39 (2006)) [hereinafter HOW INSPECTORS GENERAL WORK].

2. U.S. DEP’T OF TRANSP.: OFF. OF INSPECTOR GEN., OIG INVESTIGATIVE PRIORITIES, <https://www.oig.dot.gov/investigations/oig-investigative-priorities> [<https://perma.cc/JL55-PH2B>].

3. *Id.*

4. *Id.* Additional examples of “parallel enforcement” are described in more detail *infra*. note 211 *et seq.* Sec. II.B.

the Department of Justice. The core mission of the IG is to assist Congress with its constitutional oversight role.⁵ Additional activities, even worthwhile and necessary ones, raise serious questions about IG independence and interfere with this important institution's core purpose. For an OIG to do its work effectively and as Congress intended, it must retain its independence—which is threatened by “regulatory enforcement” activities.

INTRODUCTION

The Constitution is silent about Congressional oversight, but it is among the chief responsibilities of the legislative branch.⁶ Inspectors General are among Congress' most important tools for overseeing government because IGs are hard-wired into the Executive Branch.⁷ They are the “eyes and ears”⁸ of the public inside federal agencies. After more than forty years, they have deep relationships (or the capacity to form deep relationships) with their congressional committees of jurisdiction and deep expertise in the workings of their host agencies.

IGs are a unique institution within the Executive Branch, so there is no single lens through which to study them. IGs are not featured in Administrative Law casebooks,⁹ and research into their work tends to focus on their history or management role,¹⁰ rather than on their unique function as an arm of Congressional oversight with all the attendant complexities.¹¹ This article furthers a project of

5. See *infra* Sec. I.

6. See *Trump v. Mazars*, 140 S.Ct. 2019, 2031 (2020) (“Congress has no enumerated constitutional power to conduct investigations . . . but we have held that each House has power ‘to secure needed information’ in order to legislate.”) (internal citations omitted). The “power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.” *Id.* Without information, “Congress would be shooting in the dark, unable to legislate ‘wisely or effectively.’” *Id.*

7. See 166 CONG. REC. S3,88–89 (daily ed. June 18, 2020) (prepared remarks of Sen. Grassley) (Congress “cannot perform [its] constitutional mandate of oversight without [IGs]”) [hereinafter statement of Sen. Grassley].

8. 161 CONG. REC. 20,168 (2015) (statement of Sen. Johnson, Chairman, S. Comm. on Homeland Sec. & Governmental Aff.) [hereinafter Sen. Johnson statement].

9. See generally MICHAEL ASIMOW & RONALD M. LEVIN, *STATE AND FEDERAL ADMINISTRATIVE LAW* (5th ed. 2020) (no references to IGs in table of contents or index); STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES* (8th ed. 2017) (no references to IGs in table of contents); RONALD A. CASS ET AL., *ADMINISTRATIVE LAW: CASES AND MATERIALS* (8th ed. 2020) (no references to IGs in teacher's manual); JERRY L. MASHAW ET AL., *ADMINISTRATIVE LAW, THE AMERICAN PUBLIC LAW SYSTEM, CASES AND MATERIALS* (8th ed. 2020) (no references to IGs in table of contents; briefly discussed at pp.140–41); ANDREW F. POPPER ET AL., *ADMINISTRATIVE LAW: A CONTEMPORARY APPROACH* (3d ed. 2016) (no references to IGs in table of contents or index); JOHN M. ROGERS ET AL., *ADMINISTRATIVE LAW* (4th ed. 2020) (no references to IGs in table of contents or teacher's manual); BERNARD SCHWARTZ ET AL., *ADMINISTRATIVE LAW: A CASEBOOK* (9th ed. 2018) (no references to IGs in teacher's manual).

10. See *infra* note 21. Earlier literature on Inspectors General is cited in William Fields, *The Enigma of Bureaucratic Accountability*, 43 Cath. U. L. Rev. 505 (1994) (reviewing Paul C. Light, *MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY* (1993) [hereinafter *MONITORING GOVERNMENT*]).

11. One exception is “The Role of Inspectors General in Congressional Oversight,” conference sponsored by the Levin Center at Wayne Law (June 13, 2018), available at <https://law.wayne.edu/levin-center/conferences#definition-76226> (last visited August 28, 2020) (Inspectors General are “absolutely

scholarship on IGs as institutions of oversight and accountability by analyzing the statutory framework within which they operate and the conflicting imperatives that affect their work. The theoretical “duality” of the IG role is the issue here: furthering Congressional interest in independent and accurate information about the workings of the Executive Branch, while simultaneously providing additional enforcement capacity and management expertise to their host agencies. Additional scholarship focusing on the unique issues raised by these institutions—including their appointment, nomination, tenure, and the question of “who watches the watchers?”¹²—is touched upon here but merits more detailed consideration.

IGs do their job in two ways: (1) retroactively auditing; ensuring compliance; and surfacing waste, fraud, and abuse in the government and (2) prospectively recommending best practices to their agencies. IGs enjoy overwhelming bipartisan support in Congress because they provide quick access to relevant information about how the government is doing its job; prevent billions of dollars in waste, fraud and abuse; and conduct investigations and audits that protect the lives of the American public.¹³ IGs must retain their independence to do their work effectively and as Congress intended,¹⁴ but because “independence” is not a statutorily defined term, it ends up meaning whatever individual IGs intend it to mean in the process of operationalizing their responsibilities. In a sense, “independence” is in the eye of the beholder. Some reformers believe that IGs should have independence to conduct activities as they see fit, help their agencies perform better, and cooperate extensively in doing so.¹⁵ This sort of “operational” independence expands the IGs’ scope of influence within the agency, but it can also compromise the office’s ability to do its work.¹⁶ If an “independent” IG pursues activities that overlap substantially with those of the agency it is required to

critical” to Congress, “independence” is important but hard to define, “independent decision-making is the IG’s responsibility”).

12. See *infra* notes 137–138 and accompanying text. See also PROJECT ON GOV’T OVERSIGHT, INSPECTORS GENERAL: MANY LACK ESSENTIAL TOOLS FOR INDEPENDENCE 5–6 (discussing “the issue of accountability of federal Inspectors General”) (2008) [hereinafter LACK ESSENTIAL TOOLS]. See also Wendy J. Gordon, *Norms of Communication and Commodification*, 144 Penn. L. Rev. 2321, 2323 (1996) (discussing how “legal intermediaries have power and privileges that largely immunize them from scrutiny.”); and 2324 (asking “who watches the watchers”).

13. See *infra* notes 82, 112, 117, 136, 168, 200 and accompanying text.

14. See *infra* notes 18, 20, 133, 177 and accompanying text.

15. See Alice N. Rivlin, *Inspector General Vision Statement; Inspectors General Vision and Strategies to Apply to Our Reinvention Principles*, 43 THE GOV’T ACCT. J. 9 (1994) (IGs are “agents of positive change striving for continuous improvement in our agencies’ management and program operations.”); see also Memorandum from Alice Rivlin, Deputy Dir., Exec. Off. of the President, Inspector General Vision Statement, to Program Associate Directors, Deputy Associate Directors, and OMB Branch Chiefs (Apr. 11, 1994) (on file with author); *The Inspector General Act of 1978: Twenty Years After Passage, are the Inspectors General Fulfilling Their Mission? Hearing Before the Subcomm. on Govt. Mgmt., Info., & Tech. of the H. Comm. on Govt. Reform & Oversight*, 105th Congress 17 (1998) [hereinafter “Twenty Years After the Act”] (statement of Sen. John Glenn) (“Agents of ‘Positive Change’ in a Brave New World.”).

16. See discussion *infra* Sec. II.C.

oversee, it may be doing so “independently”—but it is no longer, in fact, independent from the agency.

Ultimately, independence is critical to oversight efficacy because it ensures objectivity and credibility in delivering information and recommendations to Congress. According to former Defense Department IG Eleanor Hill: “Military IGs [constantly] recognized that in investigations of very senior officials or in audits of programs dear to the agency head, the statutorily protected independence of the Departmental IG was critical to both the integrity of the inquiry and to the credibility of the findings.”¹⁷ Moreover, without independence, IGs have—or might develop—conflicts of interest with the agencies they are supposed to oversee. Without independence, IGs are just another part of the agencies they oversee. For these reasons, the Inspector General Act of 1978 (“IG Act”), as amended, promotes and facilitates IG independence.¹⁸ IGs have their own staff, counsel, budgets, and autonomy.¹⁹ IGs report to Congress, not just to their agency head.²⁰

Despite the importance of independence, IGs have the discretion—and sometimes decide—to work together with their host and other agencies to undertake programmatic responsibilities and sometimes, to enforce laws against members of the public, a practice this article calls “parallel enforcement.”²¹ Parallel enforcement creates a conflict of interest that is inconsistent with the spirit and purpose of the IG Act, undermining IG independence and potentially compromising Congressional oversight. Parallel enforcement also potentially creates operational confusion and the appearance of due process concerns for members of the public, who must respond to separate investigators for the same operative facts. Moreover, parallel enforcement may confuse agency

17. LACK ESSENTIAL TOOLS 8 (citing *Strengthening the Unique Role of the Nation’s Inspectors General: Hearing Before the S. Comm. on Homeland Sec. & Governmental Aff.*, 110th Cong. 19–20 (2007) (statement of Eleanor Hill, Inspector Gen., U.S. Dep’t of Defense)).

18. Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (1978) (codified as amended at 5 U.S.C. app. §§ 113). [Hereinafter “IG Act” or “1978 Act.”]

19. See *infra* note 76 and accompanying text.

20. 5 U.S.C. app. §§ 2, 45. “For IGs, the two primary stakeholders with legal authority over them, and to whom they officially report, are Congress and the leadership in their home agency.” CHARLES A. JOHNSON & KATHRYN E. NEWCOMER, U.S. INSPECTORS GENERAL: TRUTH TELLERS IN TURBULENT TIMES 114 (2020) [hereinafter TRUTH TELLERS]. One former IG famously called this “straddling a barbed wire fence.” LACK ESSENTIAL TOOLS, *supra* note 17 at 10 (quoting *Serious Management Problems in the U.S. Government: Hearings Before the S. Comm. on Governmental Aff.* 101 Cong. 55 (1989) (statement of Sherman Funk, Inspector General, U.S. Dep’t of State); MONITORING GOVERNMENT *supra* note 10 at 69; see also TRUTH TELLERS, *supra* at 140 (OIG interviewees “offered other metaphors—dancing on a tight rope, walking the line, and walking through a mine field—which convey the crosscutting pressures of reporting to an agency head and to Congress.”). “[The Hill] tend[s] to regard IGs as patsies who sell out regularly to agency management, [and] agency managers tend to regard IGs as finks who leak to Congress on a daily basis.” *Twenty Years After the Act*, *supra* note 15, (testimony of Sherman M. Funk, Inspector Gen., U.S. Dep’t of Com. and U.S. Dep’t of State).

21. The term refers to any activity undertaken cooperatively by the Office of Inspector General (“OIG”) and the host agency focusing on a common target. The principal focuses are regulatory enforcement and investigations focusing outside the host agency or its direct spending, but can also encompass cooperative efforts to improve agency performance or other policy objectives. See *infra* Sec. II.

employees and the public when it comes to operational integrity and potential whistleblower reporting.

For these reasons, agencies and their IGs should maintain operational independence in enforcement matters as a matter of policy and practice. IGs should develop guidelines and principles for determining whether to engage in activities that programmatically align them with agencies they oversee. IGs could develop those guidelines on their own or through the Council of Inspectors General for Integrity and Efficiency (“CIGIE”)—which convenes IGs and other oversight professionals across the federal government—if it were granted rulemaking authority for this purpose.²² If necessary, Congress should amend the IG Act to scale back extraneous obligations imposed on IGs and clarify that IGs should not ordinarily cooperate in investigations or activities alongside agencies they oversee (or other agencies).

This article proceeds in three sections. Section I outlines the role of Inspectors General, focusing on their unique value to Congressional oversight. The Section explains why IG independence is essential for the offices to perform as intended after explaining the Inspector General Act of 1978 and describing the offices’ core functions. Section II describes “parallel enforcement” or the practice of IGs expanding beyond audits and investigations of the agencies they oversee (whether authorized by law or through individual IG discretion to interpret their roles more expansively). Although IGs are generally forbidden from engaging in programmatic activities, the line between core functions and agency enforcement can be blurry and require judgment calls that are easily made in favor of expanding the scope of activity. This Section provides case studies of parallel enforcement and then explains why the practice violates the letter and spirit of the IG Act by entangling IGs with the agencies they oversee on behalf of Congress. This kind of entanglement creates the potential for operational, public, and, potentially, whistleblower confusion, challenging the IG’s independence and ability to oversee their agency. Finally, Section III provides potential solutions to address the challenge to IG independence and to robust Congressional oversight posed by parallel enforcement.

I. THE INSPECTOR GENERAL AS AN ARM OF CONGRESSIONAL OVERSIGHT

This Section explains the origin of Inspectors General, their core functions, and the reasons IGs must be independent from their host agencies in order to perform as Congress intended. It begins with background on the creation of

22. CIGIE was created by the Inspector General Reform Act of 2008, Pub. L. No. 110–409, §7(a), 122 Stat. 4306 (2008) (codified at 5 U.S.C. app. §11) [hereinafter IG Reform Act]. CIGIE “is an independent entity established within the executive branch to address integrity, economy and effectiveness issues that transcend individual Government agencies and aid in the establishment of a professional, well-trained and highly skilled workforce in the Offices of Inspectors General.” <https://ignet.gov/> (last visited Sept. 4, 2020).

Inspectors General.²³ It proceeds to describe the sort of work IGs perform and then explains why independence from agency operations is so essential to IGs performing the role Congress intended.

Congressional “oversight of administration” is not in the text of the Constitution, but such an omission does not make the role any less real or important. Courts²⁴ and scholars²⁵ have pointed to a number of constitutional provisions that imply congressional authority to oversee the Executive Branch—including the Appropriations Power,²⁶ the Organization Power,²⁷ the power to “make all laws for carrying into execution,”²⁸ the Necessary and Proper clause,²⁹ and the Confirmation³⁰ and Impeachment³¹ powers.

The Supreme Court has rejected retroactive, unicameral oversight of agency actions³² and interference by Congress in the removal of federal officers.³³ So,

23. There are two types of IGs under the IG Act. “Establishment” IGs are appointed by the President with Senate confirmation. “Designated Federal Entity” IGs are appointed by the agency head, which may be an individual, a board, or a commission. *See* COUNCIL OF INSPECTORS GENERAL ON INTEGRITY AND EFFICIENCY, *THE INSPECTORS GENERAL* 2 (2014). This article does not differentiate between the two types because the problem discussed is equally manifested in both.

24. *See* *Trump v. Mazars*, 140 S.Ct. 2019, 2031 (The congressional power to obtain information is “broad” and “indispensable.” (citing *Watkins v. United States*, 354 U.S. 178, 187, 215 (1957))). It encompasses inquiries into the administration of existing laws, studies of proposed laws, and “surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them.” *Id.* *See also* *Comm. on the Judiciary, U.S. House of Representatives v. McGahn*, 968 F.3d 755, 760 (D.C. Cir. 2020) (en banc) (“The Constitution charges Congress with certain responsibilities, including . . . to conduct oversight of the federal government . . .”); *McGrain v. Daugherty*, 273 U.S. 135, 153 (1927) (“The power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function”).

25. Woodrow Wilson wrote in his classic treatise on Congress, “Quite as important as lawmaking is vigilant oversight of administration.” WOODROW WILSON, *CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS* 297 (1885). *See also* Carl Levin & Elise J. Bean, *Defining Congressional Oversight and Measuring Its Effectiveness*, 64 *Wayne L. Rev.* 1, 12 (2018) (“The power to investigate plays an essential role in every aspect of the legislative function”). Importantly, “because oversight interactions between Congress and the Executive almost universally occur without any judicial involvement, as a functional matter, the likelihood of judicial involvement is remote.” Andrew McCanse Wright, *Constitutional Conflict and Congressional Oversight*, 98 *Marq. L. Rev.* 881, 893 (2014).

26. U.S. CONST. art. I, § 9, cl. 7.

27. U.S. CONST. art. I, § 9; U.S. CONST. art. II, § 2, cl. 2.

28. U.S. CONST. art. I, § 8, cl. 18.

29. U.S. CONST. art. I, § 8, cl. 18.

30. U.S. CONST. art. II, § 2, cl. 2.

31. U.S. CONST. art. II, § 4.

32. *See* *INS v. Chadha*, 462 U.S. 919, 952–54 (1983) (finding that that all exercises of legislative power that affect the rights, duties, and relations of persons outside the legislative branch must satisfy the constitutional requirements of bicameralism and presentment of a bill or resolution to the President for his signature or veto). “[I]nformal” legislative vetoes occur when an executive official pledges not to proceed with an activity absent congressional or committee approval. *Id.*

33. *See* *Seila Law LLC v. Consumer Fin. Prot. Bureau*, No. 19-7 2020, WL 3492641, at *23 (U.S. 2020). Ironically, the president’s power to remove Executive branch officials without congressional interference was inferred by Chief Justice (and former president) William Taft based on the “take care” clause without any other textual basis. *Myers v. United States*, 272 U.S. 52, 163–64 (1926). The Constitution sets forth requirements for appointment, Art II, § 2, but is silent on removal. This has created all sorts of difficulties with respect to IG independence, most notably when President Trump removed or demoted several IGs without explanation other

Congress exercises oversight through the appropriations process³⁴ and by “hard-wiring” control over agencies through the authorization process to shape the agency’s scope of work, duties, and procedures, which is an exercise of its power to organize the government.³⁵ In order to exercise these tools and ensure agencies do what they are supposed to do, Congress is left with a range of indirect tools, all of which rely on obtaining accurate and timely information.³⁶

For instance, Congress has enacted a range of reporting requirements for federal agencies. Though these requirements are usually specific to a particular agency, a few apply more generally. The Government Performance and Review Act requires the head of each agency to provide Congress with a periodic “strategic plan” containing a mission statement and the agency’s “general goals and objectives.”³⁷ Similarly, the Congressional Review Act requires that an agency submit a report to each chamber of Congress before a proposed rule can take effect.³⁸

than claiming he had the power to do so. See Laura Spector, *Spring Cleaning or Spring Purge?*, <https://oversightproject.org/2020/06/12/spring-cleaning-or-spring-purge-independent-inspectors-general-need-congressional-protection/> (last visited Nov. 22, 2020). See also Letter from Pat A. Cippollone, Counsel to the President, to Sen. Charles Grassley (R-IA), dated May 26, 2020, available at <https://www.grassley.senate.gov/sites/default/files/2020-05-26%20White%20House%20Counsel%20to%20CEG%20%28IC%20IG%20and%20State%20IG%29.pdf> (last visited Nov. 22, 2020) (“When the President loses confidence in an inspector general, he will exercise his constitutional right and duty to remove that officer . . .”).

34. U.S. CONST., art. I, § 9, cl. 7. Congress arguably relies on appropriations acts as a form of legislative veto. See CONG. RSCH. SERV., CONGRESSIONAL OVERSIGHT MANUAL, RL30240, 68–69 (2020).

35. U.S. CONST., art. I, § 9; U.S. CONST., art. II, § 2, cl. 2. See also *Kendall v. United States ex rel. Stokes*, 37 U.S. 524 (1838) (holding that Congress has the right to prescribe duties to subordinate officers of the Executive branch).

36. Lloyd–La Follette Act of 1912 (Anti-Gag Legislation), 37 Stat. 555 (1912) (codified at 5 U.S.C. § 7211 (2006)) (ensures availability of information); Whistleblower Protection Act of 1978, 5 U.S.C. § 2302 (b)(8) (ensures availability of information); Intelligence Community Whistleblower Protection Act, Pub. L. No. 105-272 (ensures availability of information); Consolidated Appropriations Act 2010, Pub. L. No. 111-117, § 714, 123 Stat. 3034 (2010) (prohibits the payment of the salary of any officer or employee of the Federal Government who prohibits or prevents or attempts or threatens to prohibit or prevent, any other Federal officer or employee from having direct oral or written communication with Congress); *Id.* at § 716 (2010) (prohibits the expenditure of any appropriated funds for use in implementing or enforcing non-disclosure agreements). See McGahn, 968 F.3d at 760 (“Possession of relevant information is an essential precondition to the effective discharge of all [the] duties” with which “[t]he Constitution charges Congress . . .”) (emphasis supplied); McGrain, 273 U.S. at 174 (“the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.”). See also Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, CONGRESS, STRUCTURE AND POLICY 426, 427-30 (Matthew D. McCubbins & Terry Sullivan eds., 1987) (highlighting congressional reliance on outside information to conduct oversight); Patricia M. Wald & Jonathan R. Siegel, *The D.C. Circuit and the Struggle for Control of Presidential Information*, 90 GEO. L.J. 737, 739 (2002) (emphasizing Congress’ need for information to conduct oversight).

37. 5 U.S.C. § 306 (2020).

38. CONG. RSCH. SERV., R43992, THE CONGRESSIONAL REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS, 1 (2020). Agencies could potentially frustrate this oversight mechanism, as the CRA bars judicial review. *Id.* at 12. If the agency does not designate the action as a rule, it can circumvent the requirement for Congressional submission. In such cases, Congress can ask for the Government Accountability Office (GAO) to review the action and determine whether it constitutes a rule as defined

The Government Accountability Office (GAO) is another channel through which Congress conducts oversight and obtains information. Congress established the GAO as an auditor of government activities and agencies in the Budget and Accounting Act of 1921.³⁹ The Legislative Reorganization Act of 1970 further authorized the GAO to “evaluate the results of a program or activity the Government carries out under existing law”⁴⁰ at Congress’s request. The GAO was created to be “independent of the executive departments” and was given audit and review powers over the departments.⁴¹

The Inspector General Act of 1978 is the most important mechanism for Congress to obtain information and oversight analysis from *inside* the government on a regular basis. The Act enhances Congress’s ability to monitor government performance.⁴² The structure reflects Congress’s understanding of “oversight committees’ limited ability to effectively monitor and assess agency programs and enforcement responsibilities in a timely, on the spot manner.”⁴³

A. Statutory Creation and Relation to Congress

The early 1970s produced a number of important government reforms.⁴⁴ During this period, Congress enacted legislative reorganization⁴⁵ and reforms to

by the CRA. A determination by the GAO that the action constitutes a rule allows Congress to move forward with its review of the rule, without a formal submission by the agency. *Id.* Congress rarely disapproves a rule, and even less frequently through the GAO disapproval process. *Id.*

39. Budget and Accounting Act of 1921, Pub. L. No. 67-13, 42 Stat. 20 ch. 18 (1921); *see also* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO PAST AND PRESENT 1921 THROUGH THE 1990S 1.

40. 31 U.S.C. § 717(b). *See also* U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-767G, GAO’S CONGRESSIONAL PROTOCOLS 34 (2017).

41. FREDERICK M. KAISER, CONG. RSCH. SERV., RL3034, GAO: GOVERNMENT ACCOUNTABILITY OFFICE AND GEN. ACCOUNTING OFFICE 12 (2008).

42. 1978 Act §§ 1–13. *See also* Carl Levin & Elise J. Bean, *Defining Congressional Oversight and Measuring Its Effectiveness*, 64 WAYNE L. REV. 1, 13 (2018) (“IGs can provide inside information about the agencies they review. . . .”); WENDY GINSBERG & MICHAEL GREEN, CONG. RSCH. SERV., R43814, FEDERAL INSPECTORS GEN.: HISTORY, CHARACTERISTICS, AND RECENT CONGRESSIONAL ACTIONS (2016); WENDY GINSBERG, CONG. RSCH. SERV., R43722, OFFICES OF INSPECTORS GEN. AND LAW ENFORCEMENT AUTHORITY (2014); COUNCIL OF THE INSPECTORS GEN. ON INTEGRITY AND EFFICIENCY, PRESIDENTIAL TRANSITION HANDBOOK: THE ROLE OF INSPECTORS GEN. AND THE TRANSITION TO A NEW ADMINISTRATION (2016).

43. MORTON ROSENBERG, WHEN CONGRESS COMES CALLING: A STUDY ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY 103 (2017). Perhaps, by assigning oversight responsibilities to Inspectors General, Congress enabled the President—rather than the IGs—to substitute Executive decision for that of the statutorily designated officials. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2322–23 (2001) (concluding it likely that “Congress may limit the President’s capacity to direct administrative officials in the exercise of their substantive discretion.”). The question remains whether robust oversight through Inspectors General represents needed expertise or unduly impinges on presidential administration. “The history of the American administrative state is the history of competition among different entities for control of its policies.” *Id.* at 2246. The same might be said about the history of *oversight* of the American administrative state.

44. *See generally* MONITORING GOVERNMENT, *supra* note 10.

45. Legislative Reorganization Act of 1970, Pub. L. 91-510, 84 Stat. 1140, codified at scattered sections of 2 U.S.C. *et seq.* (providing greater transparency for the operation of the legislative branch).

both the Government Accountability Office⁴⁶ and to the War Powers Resolution.⁴⁷ Although there were some predecessors,⁴⁸ the modern inspector general was a product of this period as well, first at the Department of Health, Education and Welfare⁴⁹ and later, at the Department of Energy.⁵⁰ The Inspector General Act of 1978—which passed the House with only six opposing votes and passed the Senate unanimously⁵¹—sought to further reorganize audit functions inside the government. It provided a mechanism for “keeping the agency head *and the Congress* informed about serious problems and deficiencies and . . . recommending necessary corrective action.”⁵² The lead Senate sponsor of the Act referred to the concept of an inspector general as “the consolidation of auditing and investigative responsibilities under a single high-level official reporting directly to the head of the establishment.”⁵³

46. *Id.*, 84 Stat. 1170 (authorizing GAO to conduct program evaluations and analyses of a broad range of federal activities). See *supra* note 40 and accompanying text.

47. War Powers Resolution, Pub. L. 93-148, 87 Stat. 555, codified at 50 U.S.C. §§ 1541–48.

48. The “modern” inspector general authorized by Congress traces back to the 1962 Department of Agriculture. *Legislation to Establish Offices of Inspector Gen.: Hearing on H.R. 8588 Before the Subcomm. on Governmental Efficiency & the D.C. of the S. Comm. on Governmental Aff.*, 95th Cong. 5 (1978) (statement of Rep. Lawrence H. Fountain) [hereinafter *Hearing on H.R. 8558*]. The necessity for legislation was occasioned by a scandal at the Department of Agriculture that had been difficult to end because investigations were uncoordinated and poorly managed and reported to officials directly responsible for the program being reviewed. See *Twenty Years After the Act*, *supra* note 615, (1998) (statement of James R. Naughton, counsel, Intergovernmental Relations & Hum. Res. Subcomm., H. Comm. on Gov’t Operations) Res. Subcomm., H. Comm. on Gov’t Operations). Congress had previously established a Department of State “Inspector General and Comptroller” in 1959. Mutual Security Act of 1959, Pub. L. 86-108, 73 Stat. 246, 253. See MONITORING GOVERNMENT, *supra* note 10, (“Created under the 1959 amendments to the Mutual Security Act, the IG was appointed by the secretary of state and held the title ‘inspector general and comptroller.’”).

49. *Hearing on H.R. 8558*, *supra* note 48; See Act of Oct. 15, 1976, Pub. L. No. 94-505, § 201, 90 Stat. 2429, 2429 (establishing the Office of Inspector General for the Department of Health, Education, and Welfare).

50. See Department of Energy Organization Act, Pub. L. No. 95-91, § 208, 91 Stat. 565, 575 (1977) (codified as amended at 42 U.S.C. § 7138) (establishing Office of Inspector General within the new Department of Energy).

51. *Twenty Years After the Act*, *supra* note 15, 105th Congress 81 (1998) (testimony of Sherman M. Funk, Inspector Gen., U.S. Dep’t of Com. & U.S. Dep’t of State). IG legislation had “strong bipartisan support from the very beginning.” *Twenty Years After the Act*, *supra* note 15, 105th Congress 24 (1998) (statement of James R. Naughton, counsel, Intergovernmental Relations & Hum. Res. Subcomm., H. Comm. on Gov’t Operations).

52. 124 CONG. REC. 10,400 (1978) (statement of Rep. Fountain) (emphasis supplied). Viewing Congressional “oversight” broadly, it includes “efforts to gather information about what agencies are doing and to dictate or signal to agencies regarding the preferred behavior or policy.” CHRISTOPHER H. FOREMAN, SIGNALS FROM THE HILL: CONGRESSIONAL OVERSIGHT AND THE CHALLENGE OF SOCIAL REGULATION 13 (1988).

53. 124 CONG. REC. 30,952 (1978) [hereinafter statement of Sen. Eagleton] Importantly, both offices were expressly not authorized to undertake “program operating responsibilities.” CONG. RSCH. SERV., R45450, STATUTORY INSPECTORS GEN. IN THE FEDERAL GOVERNMENT: A PRIMER 1–2 (2019) [hereinafter STATUTORY INSPECTORS GENERAL]. The term “program operating responsibilities” is not defined in the statute or elsewhere in the legislative history, but it refers to the fundamental operations performed by the host agency. See *infra* n.127 and accompanying text. “The Inspector General Act, as amended, prohibits statutory inspectors general from performing program operating responsibilities but does not define those responsibilities.” U.S. GOV’T ACCOUNTABILITY OFF., GAO/AFMD-89-68, INSPECTORS GEN.: ADEQUACY OF TVA’S INSPECTOR GEN. 9 (1989).

The Inspector General Act of 1978 consolidated existing audit and investigative units inside various federal agencies, divested them of “program operating responsibilities,”⁵⁴ and established them as new offices of inspectors general inside each agency.⁵⁵ The purpose of OIGs to conduct audits and investigations of the agencies’ programs and operations, provide leadership and coordination, and recommend policies that promote efficiency and prevent fraud and abuse.⁵⁶ Inspectors general were expected to “provide a means for keeping agency heads *and the Congress fully and currently informed*”⁵⁷ about problems and deficiencies. Congress was especially concerned about interference from the Executive Branch, so it required that reports and information be submitted “without further clearance or approval.”⁵⁸ Then-Chairman of the House Committee on Government Operations L.H. Fountain (D-NC) acknowledged that “Presidents . . . don’t want Congress seeking out or getting information statutorily. . . .”⁵⁹

At the time of its enactment, the Executive Branch expressed concern about the proposed new offices. In testimony before the House Committee on Government Operations, Department of Labor Comptroller Al Zuck objected to the proposed reporting requirement on the basis that it would impose a *separate* reporting channel that was *parallel* to the existing channel for the General Accounting Office (the predecessor to the modern GAO).⁶⁰ He argued that the GAO could sufficiently meet Congress’s need for information because of its “complete access to all [agency] accounts” and its ability “presently . . . to inform Congress regarding any facet of our program.”⁶¹ He argued that the new offices

54. 5 U.S.C. app. §§ 8G(b), 9(a)(2).

55. H.R. Rep. No. 95-584, at 2 (1977). The House Report accompanying the Act states:

“While Inspectors General would have direct responsibility for conducting audits and investigations relating to the efficiency and economy of program operations and the prevention and detection of fraud and abuse in such programs, *they would not have such responsibility for audits and investigations constituting an integral part of the programs involved.*”

Id. at 12–13 (emphasis added).

56. H.R. Rep. No. 95-584, at 2. *See also* *Hearing on H.R. 8558, supra* note 48 (statement of Thomas D. Morris, Inspector General, Dep’t of Health, Educ., and Welfare) (“The purposes are . . . to conduct objective factfinding and to make meaningful recommendations, *not to make program or policy decisions which are the responsibility of line management.*”) (emphasis added).

57. H.R. Rep. No. 95-584, at 2. Keeping Congress “currently informed,” as the IG statute requires, is a challenge for OIGs regarding when to share information and what information to share. *HOW INSPECTORS GENERAL WORK, supra* note 1, at 20.

58. *See* H.R. Rep. No. 95-584, at 3.

59. *Establishment of Offices of Inspector General: Hearings on H.R. 2819 Before the Subcomm. on Intergovernmental Relations & Hum. Res. of the H. Comm. on Gov’t Operations*, 95th Cong. 165 (1977) [hereinafter *Hearings on H.R. 2819*]. Congressman Fountain was one of the leading proponents of independent Inspectors General, arguing that existing government auditing offices were “too scattered and understaffed to be effective and that they lacked independence because they reported to and were hired and fired by officials directly responsible for the programs being investigated.” *HOW INSPECTORS GENERAL WORK, supra* note 1, at 9.

60. *Hearings on H.R. 2819, supra* note 59.

61. *Id.*

of inspectors general would “serve two masters” and could “lead to a disruption of a smooth-working management team . . .”⁶² Instead, “Congress [could] be provided needed information without” these drawbacks to a direct line to an independent inspector general⁶³. Congress’s intent.

Congress disagreed The Senate Report accompanying the Inspector General Act of 1978 demonstrates Congress’s contrary intent.⁶⁴ Recognizing an inspector general’s “*unique function*” as only “in part” that of “an executive official,” Congress conferred upon the office a “*unique status* within the Executive Branch.”⁶⁵ While the heads of agencies ordinarily have the right to review communications of their agencies before transmittal to Congress, the Inspector General Act of 1978 made inspectors general “the *only* . . . Executive Branch . . . Presidential appointee who speaks directly to Congress without clearance. . . .”⁶⁶

This direct responsibility to Congress resolved a criticism of previous auditing offices. One of the earliest proponents for the creation of the offices of inspectors general argued that existing auditing offices within federal agencies “lacked independence because they reported to and were hired and fired by officials directly responsible for the programs being investigated.”⁶⁷ According to this line of criticism, working with officials responsible for agency programs undermined the independence of audit and investigative personnel.⁶⁸ Reflecting this concern, the Inspector General Act of 1978 emphasized the establishment of “independent and objective units.”⁶⁹ Carl Levin and Elise Bean’s seminal article on congressional oversight refers to inspectors general being “explicitly charged with

62. *Id.*

63. *Id.*

64. See S. Rep. No. 95-1071, at 30–31 (1978), reprinted in 1978 U.S.C.A.N. 2676, 2705–06.

65. *Id.* (emphasis added).

66. Margaret Gates & Marjorie Fine Knowles, *The Inspector General Act in the Federal Government: A New Approach to Accountability*, 36 Ala. L. Rev. 473, 475 (1985) (emphasis in original). Ultimately, the independence and influence of Inspectors General depends significantly on conventions, not law. Inspectors General enjoy independence “because norms have evolved that protect them beyond statutory provisions.” Shirin Sinnar, *Internal Oversight and the Tenuous Protection of Norms*, 93 N.Y.U. L. Rev. 61, 63 (2018); see also Adrian Vermeule, *Conventions of Agency Independence*, 113 Colum. L. Rev. 1163 (2013) (focusing on regulatory agencies and their protection by “conventions” that provide some measure of independence from Executive intervention).

67. *Establishment of an Office of Inspector General in the Department of Health, Education, and Welfare: Hearing on H.R. 5302 et. al. Before the Subcomm. on Intergovernmental Relations & Hum. Res. of the H. Comm. on Gov’t Operations*, 94th Cong. 1-2 (1976) (statement of Rep. Lawrence H. Fountain); see also *Hearing on H.R. 8558, supra* note 48 (testimony of Rep. Lawrence H. Fountain) (Senator Eagleton: “[W]e want the Inspector General to inquire into matters of efficiency and economy and potential illegality and fraud [but not] to intrude . . . into policymaking.” Rep. Fountain: “*Or program operations.*”) (emphasis added). One of the congressional investigations leading to the creation of the first Inspector General at the Department of Health, Education and Welfare had in fact unearthed disturbing reports of interference with factfinding by the Secretary or Under Secretary. See *Twenty Years After the Act, supra* note 15 (statement of James R. Naughton, counsel, Intergovernmental Relations & Hum. Res. Subcomm., H. Comm. on Gov’t Operations).

68. *Twenty Years After the Act, supra* note 15 (statement of James R. Naughton, counsel, Intergovernmental Relations & Hum. Res. Subcomm., H. Comm. on Gov’t Operations).

69. 1978 Act at Sec. 2.

assisting *Congress* in its oversight responsibilities,” which sets them apart from any other arm of the Executive Branch.⁷⁰

Since passage of the Inspector General Act of 1978, Congress has continuously on a bipartisan basis augmented the role of independent inspectors general.⁷¹ The Homeland Security Act of 2002 vested certain inspectors general with law enforcement authority, including the power to carry a firearm; to make arrests without a warrant; and to seek and execute warrants for arrest, search of premises, or seizure of evidence.⁷² The Inspector General Reform Act of 2008 further demonstrated congressional support for strong and independent inspectors general. The Act established the Council of the Inspectors General on Integrity and Efficiency (CIGIE), authorized inspectors general to obtain legal advice from their own counsel, and required that the President’s annual budget request to Congress identify the requested budget amounts of the inspectors general separately within their respective agency budgets.⁷³ Perhaps most significantly, the Inspector General Empowerment Act of 2016 highlights a congressional response

70. Carl Levin & Elise J. Bean, *Defining Congressional Oversight and Measuring Its Effectiveness*, 64 WAYNE L. REV. 1, 14 (2018) (emphasis added).

71. See generally Inspector General Act Amendments of 1988, Pub. L. No. 100-504, title I, §§102(a)–(d), (f), (g), 104(a), 105–107, 109, 110, 102 Stat. 2515, 2515–29 (expanding total number of statutory IGs, creating a new category for IGs for “designated federal entities,” setting uniform salary rates and separate appropriations); Intelligence Community Whistleblower Act, Pub. L. No. 105-272, title VII, §702(b), 112 Stat. 2396, 2415 (1998); IG Reform Act, *supra* note 22, §§ 2–4(a)(1), 5, 6(a), (b), 7(a), (d)(1), 8, 9, 11–13(a), 14, 122 Stat. 4302, 4305, 4313–16 (establishing CIGIE, increasing salaries, providing budget protection, access to independent legal counsel, and requiring advanced congressional notification for the removal or transfer of IGs); Inspector General Empowerment Act of 2016, Pub. L. No. 114-317, §§ 2, 3, 4(c)–6, 7(b)(1), (c), (d)(2), (3), 130 Stat. 1595–1606 (enhancing IG access to and use of agency records and requiring IGs to submit any documents containing recommendations for corrective action to agency heads and congressional committees of jurisdiction, as well as any Members of Congress, upon request); Whistleblower Protection Coordination Act, Pub. L. No. 115-192, § 2(a)–(c), 132 Stat. 1502, 1503 (2018). See also MONITORING GOVERNMENT, *supra* note 10 (“At the same time Congress and the president increased the regulation of the federal government’s employees, the private sector began to embrace the management philosophy of W. Edwards Deming, which focused on designing quality into a product at the front end of the process, instead of inspecting it at the back end As biographer Mary Walton explained . . . “[q]uality comes not from inspection but from improvement of the process.”).

72. Pub. L. No. 107-296, § 812, 116 Stat. 2135, 2222–23 (codified at 5 U.S.C. app. § 6(f)). Some Offices of Inspector General possessed law enforcement powers from the time they were established through a transfer of functions and units that had already held them. Frederick M. Kaiser, *Full Law Enforcement Authority for Offices of Inspector Gen.: Causes, Concerns, and Cautions*, 15 POLICE STUD. INT’L REV. POLICE DEV. 75, 75 (1992). Other OIG investigators have acquired relevant authorities later, through a specific statutory assignment. *Id.* Still other OIGs received law enforcement authorities temporarily and indirectly; these have come from an outside (non-IG) source, either through a delegation by the establishment head or through special deputation, as a Deputy United States Marshal. *Id.* at 76. Under these different approaches, law enforcement authority was extended over time to a number of personnel throughout the IG community. *Id.*

73. IG Reform Act, *supra* note 22 at §§2–4(a)(1), 5, 6(a), (b), 7(a), (d)(1), 8, 9, 11–13(a), 14, 122 Stat. 4302, 4302, 4305, 4313–16. The Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (requiring GAO to report on IG implementation of these provisions). See U.S. GOV’T ACCOUNTABILITY OFF., GAO-1-770, INSPECTORS GEN.: REPORTING ON INDEPENDENCE, EFFECTIVENESS, AND EXPERTISE (2011).

to challenges to the independence of inspectors general arising from the Executive Branch. After the FBI raised objections to providing the Inspector General for the Department of Justice with access to statutorily protected information, forty-seven inspectors general wrote to Congress indicating their view that meaningful oversight depends on “complete and timely access to *all* agency materials.”⁷⁴ Congress responded with appropriations language prohibiting the Justice Department from denying its Inspector General access to information.⁷⁵ When the Department nevertheless continued to refuse access, Congress reacted by amending the Inspector General Act of 1978 to require agencies to provide inspectors general with “timely access to *all records* of the agency.”⁷⁶

Recent congressional committee chairmen attest to the role that inspectors general play in its Congress’s oversight function today. The former Chairman of the Senate Committee on the Judiciary has argued that Congress “cannot perform [its] constitutional mandate of oversight without [inspectors general]. . . .”⁷⁷ The former Chairman of the House Committee on Oversight and Reform has argued that “[i]f [inspectors general] can’t do their job, [Congress] can’t do [its] job.”⁷⁸ The former Chairman of the Senate Committee on Homeland Security and Governmental Affairs has argued that inspectors general are Congress’s “best partner[s] in rooting out waste, fraud, and abuse.”⁷⁹

The frequency and quality of interactions between Congress and inspectors general are critical to their success. “[I]nformation . . . is the coin of the realm” for Congress, and inspectors general provide “someone who give[s] regular input . . . and irregular access” outside the channels of agency leadership.⁸⁰ Although IGs are not Congress’s only source of information concerning the operations of the government, they lower the “cost” of oversight substantially.⁸¹

For this reason, the Inspector General Act of 1978, as amended, requires inspectors general to provide Congress with semiannual reports about their activities, findings, and recommendations.⁸² These reports are first submitted to the

74. ROSENBERG, *supra* note 43, at 109 (emphasis added). See Access of Department of Justice Inspector General to Certain Information Protected from Disclosure by Statute, 39 O.L.C. 12 (1985) (referring to IG requests for information protected by grand jury secrecy, the Federal Wiretap Act, and the Fair Credit Reporting Act).

75. ROSENBERG, *supra* note 43, at 109.

76. *Id.* at 110 (emphasis added). “The overall important legal outcome of the passage of the Empowerment Act is that it is now certain that IGs can get all the information they need to do their jobs and that committees and individual members are entitled to get every bit of information that IGs have.” *Id.* at 112. See Inspector General Empowerment Act of 2016 Pub. L. No. 114-317, §§2, 3, 4(c)–6, 7(b) (1), (c), (d)(2), (3), 130 Stat. 1595–1606 (2016).

77. See *supra* note 7, statement of Sen. Grassley.

78. *Inspectors Gen.: Independence, Access and Authority: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 114 Cong. 2 (2015) (opening statement of Rep. Chaffetz).

79. See *supra* note 8, statement of Sen. Johnson.

80. MONITORING GOVERNMENT, *supra* note 10, 56.

81. See *id.* (“[The IG Act] cut down on some of the spade work we would have to do, and let us go directly to more detailed investigations.”).

82. Inspector Gen. Act of 1978, 5 U.S.C. app. § 5 (a)–(b) (2020); See also CONG. RSCH. SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 76 (2020).

agency head, who must then submit the report, without alterations,⁸³ to Congress within thirty days.⁸⁴ The IGs must also promptly report “particularly serious or flagrant problems, abuses, or deficiencies” to the agency head.⁸⁵ In turn, the agency head is required to submit this report to Congress within seven days.⁸⁶ For example, in 2019 the EPA Office of Inspector General wrote one such “seven day letter” in response to the agency Chief of Staff’s refusal to fully cooperate with an OIG investigation.⁸⁷ This reporting structure is critical to the IG’s effective processing of whistleblower complaints, especially in the intelligence community. There, a whistleblower is required to go through the IG to report an urgent matter to Congress.⁸⁸ Intelligence Community IG Michael Atkinson followed this procedure in reporting the whistleblower complaint that resulted in the impeachment of President Donald Trump.⁸⁹ In addition, the IG is required to report to Congress on management challenges facing the agency and on the agency’s progress in meeting those challenges.⁹⁰

Congressional committees and subcommittees hold frequent hearings to examine IG-related issues, often inviting IGs to testify or submit written statements.⁹¹ Some of these hearings examine the operations of a specific agency.⁹² On other occasions, Congress examines broad questions affecting multiple agencies.⁹³ In 2014, several IGs voiced displeasure with constraints placed upon their access to agency records.⁹⁴ In response to these complaints, the House of Representatives

83. *Id.*

84. 5 U.S.C. app. § 5(c) (2020); *see also* CONG. RSCH. SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 76 (2020).

85. 5 U.S.C. app. § 5(d) (2020).

86. *Id.*

87. Letter from Charles J. Sheenan, Acting Inspector Gen., to Andrew R. Wheeler, EPA Adm’r, U.S. Envtl. Prot. Agency (Oct. 29, 2019).

88. 5 U.S.C. app. 8H; (2020); 50 U.S.C. § 3033 (2012); *see also* MICHAEL E. DeVINE, CONG. RSCH. SERV., R45345, INTELLIGENCE COMMUNITY WHISTLEBLOWER PROTECTIONS 2 (2019).

89. *See* Letter from Michael K. Atkinson, Inspector Gen. of the Intelligence Cmty., to Chairman Richard Burr, S. Select Comm. on Intelligence, and Chairman Adam Schiff, H.R. Permanent Select Comm. on Intelligence (Aug. 12, 2019).

90. 31 U.S.C. § 3516(d) (2012); COUNCIL OF THE INSPECTORS GENERAL ON INTEGRITY AND EFFICIENCY, QUALITY STANDARDS FOR FEDERAL OFFICES OF INSPECTORS GENERAL 36 (2012) [hereinafter QUALITY STANDARDS].

91. WENDY GINSBURG & MICHAEL GREENE, CONG. RSCH. SERV., R43814, FEDERAL INSPECTORS GENERAL: HISTORY, CHARACTERISTICS, AND RECENT CONGRESSIONAL ACTIONS (2016).

92. *See Management Challenges and Oversight of Department of State and United States Agency for International Development Programs: Hearing Before the Subcomm. on State, Foreign Operations, & Related Programs*, 116th Cong. 3–5 (2019) (statement of Steve A. Linick, Inspector General, U.S. Dep’t of State).

93. *Where Are All the Watchdogs? Addressing Inspector General Vacancies: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 112th Cong., 2d Sess., 1–2 (2012) (examining how IG vacancies affect the independence and integrity of OIGs).

94. *Access to Justice: Does DOJ’s Office of Inspector General Have Access to Information Needed to Conduct Proper Oversight?: Hearing Before the H. Comm. on the Judiciary*, 113th Cong., 2d Sess., 1 (2014) (“Restricting or delaying an inspector general’s access to key materials in turn deprives Congress and the American people of timely information with which to evaluate an agency’s performance.”) (Statement of Rep. Goodlatte).

Judiciary Committee held a hearing and invited some of these IGs to testify.⁹⁵ Congress similarly invites IGs to testify when considering IG-related legislation and appropriations bills.⁹⁶

Members of Congress also reach out to IGs for information regarding agency and OIG operations. For instance, in 2017, the DOT IG issued a letter in response to Senator Bill Nelson's request for information on whistleblower protections at the DOT.⁹⁷ Members may also reach out to request that the IG open new inquiries. In February 2020, Senator Elizabeth Warren wrote to the Housing and Urban Development ("HUD") IG requesting that the Office add an inquiry—whether delays in the release of emergency funds to Puerto Rico violated federal law—into its ongoing investigation of HUD's use of funds appropriated for disaster relief.⁹⁸ In addition, IGs may inform Congress "using other appropriate means" in instances of fraud and other serious problems relating to the agency's programs or operations.⁹⁹ For example, IGs have requested briefings with Congress or congressional staff. Often these briefings are related to IG reports or involve updating a committee on pressing matters in the course of an investigation or audit. In light of the 2019 Ukraine scandal, for instance, the Department of State IG requested a briefing with the House of Representatives Permanent Select Committee on Intelligence to provide the committee with documents relevant to the investigation.¹⁰⁰ IGs have also written to Congress to express concerns. In 2014, 47 of the then-72 statutory IGs signed a letter to Congress protesting the administration's policy of restricting IG access to agency materials.¹⁰¹

B. Core Functions and Relevance to Congress

To carry out their mandate, IGs have broad authority to: conduct audits and investigations; issue such reports as they believe appropriate;¹⁰² access all records and information of their host agency;¹⁰³ request assistance from other federal, state, and local government agencies;¹⁰⁴ subpoena information and documents;¹⁰⁵

95. *Id.*

96. See, e.g., *Inspectors General: Independence and Integrity: Hearing Before the Subcomm. on Gov't Mgmt., Org., & Procurement of the H. Comm. on Oversight & Gov't Reform*, 110th Cong., 1st Sess. (2007) (regarding proposed reforms in the Inspector General Reform Act of 2008).

97. See Letter from Calvin L. Scovel III, Inspector Gen., U.S. Dep't of Transp., to Sen. Bill Nelson (Feb. 6, 2017).

98. Letter from Sen. Elizabeth Warren to Rae Oliver Davis, Inspector Gen., U.S. Dep't of Housing & Urb. Dev. (Feb. 7, 2020).

99. 5 U.S.C. app. 3 § 4(a)(5) (2020); QUALITY STANDARDS, *supra* note 9090 at 37.

100. Manu Raju et al., *State Department inspector general requests urgent briefing on Ukraine with congressional staff*, <https://www.cnn.com/2019/10/01/politics/deposition-delayed-impeachment-investigation/index.html> [<https://perma.cc/77FA-LPJJ>] (Oct. 2, 2019).

101. *Access to Justice: Does DOJ's Office of Inspector General Have Access to Information Needed to Conduct Proper Oversight?: Hearing Before the H. Comm. on the Judiciary* 113th Cong. 1 (2014).

102. 5 U.S.C. app. §§ 2, 4. (2020).

103. 5 U.S.C. app. § 6(a)(1) (2020).

104. 5 U.S.C. app. § 6(a)(3) (2020).

105. 5 U.S.C. app. § 6(a)(4) (2020).

administer oaths when taking testimony;¹⁰⁶ hire staff and manage their own resources;¹⁰⁷ receive and respond to complaints from agency employees, whose confidentiality is to be protected;¹⁰⁸ and implement an intra-agency cash incentive award program for employee disclosures of waste, fraud, and abuse.¹⁰⁹

Originally, IGs' work focused "almost solely on investigations [and] audits," viz., "detection of wrongdoing."¹¹⁰ Later, IGs started to work on prevention objectives. By 2017 virtually all IGs were conducting "other work focused on improving program management, in addition to financial audits and investigations."¹¹¹ Still, much IG work is ultimately reactive to crises.¹¹²

While discerning the "roots of the IG Act is like making a geological dig," beneath the traditional explanations "is the burgeoning congressional demand for information."¹¹³ The IGs' principal responsibilities can be divided into two categories: (1) retrospective activities, such as conducting audits, inspections, and investigations relating to agency programs, agency operations, and instances of past misconduct or mismanagement; and (2) prospective activities, such as (a) providing leadership and coordination and recommending policies to promote the economy, efficiency, and effectiveness of these principles; (b) preventing waste, fraud, and abuse; and (c) keeping the agency head and Congress fully and currently informed about problems (and recommending corrective action where needed).¹¹⁴ As Paul Light points out, IGs have one fundamental tool—monitoring—and one significant power, which is "complete access to information."¹¹⁵ In exercising their multiple responsibilities, IGs are to keep Congress informed.¹¹⁶ Within this broad mandate, the IG is given full discretion to undertake those investigations that are, in the IG's judgment, "necessary or desirable."¹¹⁷

Generally, "an audit, inspection, or evaluation is conducted to examine organizational program performance and operations or financial management matters,

106. 5 U.S.C. app. § 6(a)(5) (2020).

107. 5 U.S.C. app. § 6(a)(7), (8), and (9) (2020).

108. 5 U.S.C. § 2302(b)(8)(B) (2018).

109. 5 U.S.C. § 4511. (2018).

110. TRUTH TELLERS, *supra* note 20 at 95.

111. *Id.*

112. *Id.* at 96.

113. MONITORING GOVERNMENT, *supra* note 10.

114. FREDERICK M. KAISER, CONG. RSCH SERV., 98–379, STATUTORY OFFICES OF INSPECTOR GENERAL: PAST AND PRESENT 1 (2008); *see also* STATUTORY INSPECTORS GENERAL, *supra* note 53 at 7 (categorizing IG reviews by type of analysis: (a) performance audits, inspections or evaluations for programmatic compliance and prospective analysis and (b) investigations for individual misconduct). Each OIG has a broad statutory mandate to "conduct . . . audits and investigations relating to the programs and operations" of the agency and to "conduct . . . other activities . . . for the purpose of promoting economy and efficiency in the administration of . . ." the agency. 5 U.S.C. app. § 4(a)(1), (a)(3) (2020). In addition, OIGs work with the U.S. Office of Special Counsel (OSC) to investigate alleged reprisals against whistleblowers. *See* ROSENBERG, *supra* note 43, 104.

115. MONITORING GOVERNMENT, *supra* note 10, 16 ("They are to look, not act; recommend, not implement.").

116. 5 U.S.C. App. 3 § 2(3).

117. 5 U.S.C. App. 3 § 6(a)(2).

typically of a systemic nature.”¹¹⁸ The IG Act’s legislative history suggests that such audits require three basic areas of inquiry:

(1) examinations of financial transactions, accounts, and reports and reviews of compliance with applicable laws and regulations, (2) reviews of efficiency and economy to determine whether the audited entity is giving due consideration to economical and efficient management, utilization, and conservation of its resources and to minimum expenditure of effort, and (3) reviews of program results to determine whether programs or activities meet the objectives established by Congress or the establishment.¹¹⁹

IG audits are conducted in accordance with the Government Auditing Standards established by the Comptroller General.¹²⁰ In addition, IGs coordinate with the Comptroller General to avoid duplication in federal audits.¹²¹ IGs are charged not only with investigating or auditing fraud, waste, and abuse after they have occurred, but also with identifying vulnerabilities and recommending programmatic changes that would, when enacted or implemented, strengthen controls or mitigate risk. IGs establish criteria for using non-federal auditors (typically, Certified Public Accountant firms) and ensure that such auditors comply with the Government Auditing Standards.

One subset of an IG’s assigned work is “to address and resolve specific allegations, complaints or information concerning possible violations of law, regulation or policy.”¹²² Investigations “may involve a variety of matters, including allegations of fraud with respect to grants and contracts, improprieties in the administration of programs and operations, and serious allegations of employee misconduct.”¹²³ These IG investigations typically include “nonprogrammatic analysis and instead

118. ROSENBERG, *supra* note 43, 104. Some OIGs, but not all, have separate offices devoted to conducting program inspections and evaluations. Others fulfill this responsibility through their audit and investigative offices. Where an OIG does conduct program evaluations and inspections, the IG is charged with tracking and reporting these recommendations in its semiannual report to the Congress, just as it reports its audit findings and recommendations. Former State Department IG Sherman Funk once referred to “an inspection as an inch deep and a mile wide, compared to an audit, which is an inch wide and a mile deep.” *Twenty Years After the Act*, *supra* note 15 (testimony of Sherman M. Funk, Inspector Gen., U.S. Dep’t of Com. and U.S. Dep’t of State).

119. S. Rep. No. 95–1071, at 30 (1978), as reprinted in 1978 U.S.C.C.A.N. 2676, 2703–04; see also STATUTORY INSPECTORS GENERAL, *supra* note 53 at 9 (audits, inspections, or evaluations include “programmatic analysis, which may involve analyses related to the compliance, internal control, or efficiency and effectiveness of agency programs and operations,” as well as recommendations to improve programs and operations).

120. 5 U.S.C. app. § 4(b)(1)(A) (2020). “For every finding that an IG office offers as a result of their work, they must describe four things: (1) the condition they studied—typically because there was reason to believe that the condition was undesirable; (2) the criteria they applied to assess how deviant the condition was from the desired state, for example, as per a law or regulation; (3) the effect or potential effect of the existing condition, such as undesirable outcomes; and (4) the cause, or the reason or factor responsible for the difference between the current condition and the desired state.” TRUTH TELLERS, *supra* note 20 at 101.

121. 5 U.S.C. App. 3 § 4(c).

122. ROSENBERG, *supra* note 43, 104.

123. *Id.*

focus primarily on alleged misuse or mismanagement of an agency's programs, operations, or resources by an individual government employee, contractor, or grantee."¹²⁴ The reports typically produce recommendations for improving the programs and operations under review.

Importantly, IGs are not to perform the work of their agencies. Congress gave the first State Department IG the authority to suspend all or part of any project or operation "with respect to which he has conducted or is conducting an inspection," but that power was never used and *never again granted* to any future IG.¹²⁵ In fact, since then, Congress has *specifically prohibited* IGs from taking corrective action themselves.¹²⁶ The IG Act also prohibits the transfer of "program operating responsibilities" to an IG.¹²⁷ The rationale for these restrictions is that "it would be difficult, if not impossible, for IGs to audit or investigate programs and operations impartially and objectively if they were directly involved in making changes in them or carrying them out."¹²⁸ A certain amount of professional detachment is inherent in the work of IGs, as "extensive background efforts and deliberations are typically undertaken by [their] offices to prioritize [] work, collect relevant data, develop actionable recommendations, and then support actions [undertaken] by agency staff to [implement any] recommended changes."¹²⁹

C. Inspector General Independence

Ensuring independent oversight by IGs was critical to the drafters of the IG Act. The text of the Act makes clear that Congress intended IGs to be "independent and objective."¹³⁰ One survey of presidentially appointed and Senate-confirmed IGs reported that in their initial interactions with Congress, they were asked to remain "independent of the agency and . . . [to] have a non-political role."¹³¹ Yet, there is no "standard definition" for what constitutes IG independence.¹³² One IG put it this way:

124. STATUTORY INSPECTORS GENERAL, *supra* note 53 at 9 ("Unlike audits and inspections or evaluations, IG investigations can directly result in disciplinary actions that are criminal (e.g., convictions and indictments) or administrative (e.g., monetary payments, suspension/debarment, or termination of employment).").

125. MONITORING GOVERNMENT, *supra* note 10, 29–30.

126. MONITORING GOVERNMENT, *supra* note 10 at 16–17 ("The IGs were neither created as line, or operating, officers of their departments and agencies nor given any powers to suspend, or otherwise interfere with, program activities.").

127. 5 U.S.C. app. §§ 8G(b), 9(a)(2) (2020).

128. FREDERICK M. KAISER, CONG. RSCH. SERV., 98-379, STATUTORY OFFICES OF INSPECTOR GENERAL: PAST AND PRESENT 2 (2008).

129. TRUTH TELLERS, *supra* note 20 at 94.

130. 5 U.S.C. app. § 2(1).

131. HOW INSPECTORS GENERAL WORK, *supra* note 1 at 19; *see also id.* at p.20 ("[C]ongressional staff interviewees expressly indicated that their (and presumably Congress) major concern involved instances in which IGs are not sufficiently independent or aggressive, in which agencies ignore requests for information, or in which agencies consistently do not implement OIG recommendations. Accordingly, relations are positive for OIGs who are viewed as strongly independent of their host agencies, keep their congressional contacts informed, and are responsive to congressional requests.").

132. STATUTORY INSPECTORS GENERAL, *supra* note 53 at 21.

For an IG, independence is the coin of the realm. The GAO's yellow book describes it as the State of mind that allows an individual to act with integrity and exercise objectivity and professional skepticism. Professional skepticism is an attitude that includes a questioning mind and a critical assessment of evidence, and in a nutshell, that is my job. I am a professional skeptic. I act as an agent of positive change within the Department by having the freedom to be independent and objective. I am here to ask the difficult questions, to challenge the Department I work for to be better, to be more efficient, to ensure rigor in Departmental operations, and to look for and eliminate waste.¹³³

Even if not expressly defined, IG “independence” is plainly manifested in the structure of the IG Act. First, Congress established the role of IG with protections that distinguish it from other Executive appointees. The statute requires appointment “without regard to political affiliation,”¹³⁴ does not establish term limits,¹³⁵ and requires notice to Congress of the reasons for removal of an Inspector General.¹³⁶ These are unprecedented and unparalleled protections intended to insulate the position from Executive influence. The extraordinary procedural requirements imposed on the removal of an IG speak to the importance of IG independence.¹³⁷ Recent efforts in Congress to ensure the president provides specific reasons for removing an IG further underscore the extent to which the independence of this particular role is held in unique regard.¹³⁸

Second, IGs are obligated to keep Congress “fully and currently informed” of “fraud and other serious problems, abuses, and deficiencies relating to the administration of programs and operations,” “recommend corrective action,” and

133. *Improving the Efficiency, Effectiveness, and Independence of Inspectors General*, Hearing Before the S. Comm. on Homeland Sec. and Governmental Aff., 114th Cong. 8 (2015) (testimony of John Roth, Inspector Gen., Dep't of Homeland Sec.).

134. 5 U.S.C. app. § 3(a).

135. STATUTORY INSPECTORS GENERAL, *supra* note 53 at 13.

136. 5 U.S.C. app. § 3(b).

137. COUNCIL OF THE INSPECTORS GEN. ON INTEGRITY AND EFFICIENCY, THE INSPECTORS GEN. 3 (2014). (“An establishment IG may be removed from office or transferred to another position within the agency by the President; however, the President must communicate the reasons for the action in writing to both Houses of Congress at least 30 days before the removal or transfer.” “[A] DFE IG may be removed from office or transferred to another position within the agency by the entity head; however, the entity head must communicate the reasons for the action in writing to both Houses of Congress at least 30 days before the removal or transfer. In a DFE agency with a board or commission, removal or transfer of a DFE IG requires the written concurrence of two-thirds of the members of the board or commission.”); *see also* STATUTORY INSPECTORS GENERAL, *supra* note 53 at 12 (outlining removal provisions).

138. Inspectors General Independence Act of 2020, S.3664, 116th Cong. (2020). Interestingly, the bill that became the Inspector General Act did not require presidential notice of reasons for removal of any IG but did require the Comptroller General to “promptly investigate and report to each House of Congress on the circumstances of any such removal.” H.R. Rep. No. 95-584, at 2 (1977). Another provision considered, but dropped, would have given Inspectors General fixed terms. *Hearing on H.R. 8558*, *supra* note 48.

“report on the progress made in implementing such corrective action.”¹³⁹ IGs do not supervise or direct their host agencies; they report.¹⁴⁰ Moreover, whenever an IG issues a recommendation for corrective action to the agency, it must simultaneously submit the recommendation to Congress.¹⁴¹

As if to emphasize how different IGs are compared to other agencies or arms of the government, the statute expressly imposes dual loyalties upon them.¹⁴² Inspectors General are required by law to “keep the head [of their agency] *and the Congress*” fully and currently informed.¹⁴³ The thrust of the dual reporting provisions was to ensure the flow of information to Congress (viz., “keep . . . fully and currently informed”, “recommend” and “report”).¹⁴⁴ After all, the most important asset Congress has in conducting effective oversight is access to quality, timely, and unbiased information as to how federal agencies are performing.¹⁴⁵ In the lead-up to the Inspector General Empowerment Act of 2016,¹⁴⁶ the notion of “independence” was pointedly framed in terms of IG access to agency information.¹⁴⁷ Congress believed that the independence of the IG hinged on the IG’s “access to key materials” and “timely information.”¹⁴⁸

139. 5 U.S.C. app. §4(a)(5). *See also* QUALITY STANDARDS, *supra* note 90 at 35–39 (quality standards for communicating results of OIG activities).

140. Indeed, when the IG Act was introduced, the Department of Justice raised concerns that the statute would threaten separation of powers principles by effectively allowing the IG to “continu[ously] supervis[e]” agency or departmental action. OFFICE OF LEGAL COUNSEL, Opinion Letter on Inspector General Legislation, 77-8 O.L.C. 17 (1977) (expressing concern about an IG’s potential “assumption of the Executive’s role of administering or executing the laws”).

141. 5 U.S.C. app. § 4(e).

142. *See* 5 U.S.C. app. § 2(3) (purpose and establishment of OIGs); *id.* § 4(a)(5) (duties and responsibilities of OIGs). Both require the Inspector General to “keep the head of [the agency] *and the Congress* fully and currently informed.” *Id.* (emphasis added).

143. 5 U.S.C. app. § 4(a)(5) (emphasis supplied). The IG Act requires IGs to issue semiannual reports that summarize the activities of their offices. *Id.* at § 5(a)(10). The report must be submitted by the agency head unaltered to Congress within 30 days. *Id.* at § 5(b). IGs are required to immediately report to their agency heads any “particularly serious or flagrant problems,” and the head must transmit the report unaltered to Congress within 7 days. *Id.* at §§ 5(d), 8G(g)(1) (establishment and DFE IGs); 50 U.S.C. § 3033(k)(2) (IG IC); and 50 U.S.C. § 3517(d)(2) (CIA IG). Authorizing statutes for the AOC, LOC, and GPO IGs incorporate portions of Section 5 of the IG Act pertaining to the seven-day letter. *See* 2 U.S.C. § 1808(d)(1) (AOC IG); 2 U.S.C. § 185(d)(1) (LOC IG); and 44 U.S.C. § 3903(a) (GPO IG).

144. ROSENBERG, *supra* note 43, 107 (“Transparency is a key attribute of the IG scheme.”).

145. *See* David Epstein & Sharyn O’Halloran, *A Theory of Strategic Oversight: Congress, Lobbyists, and the Bureaucracy*, 11 J. OF L., ECON., & ORG. 227, 246–47 (1995) (“Congress delegates authority to avail itself of bureaucratic expertise. But legislators worry that agencies will use their informational advantage strategically, enacting policies different from those that Congress would prefer were it fully informed.”).

146. Pub. L. No. 114–317, §§ 2, 3, 4(c)–6, 7(b)(1), (c), (d)(2)–(3), 130 Stat. 1595–1606 (2016).

147. *See supra* note 48 and accompanying text (controversy regarding access to Department of Justice documents and other information withheld from other Inspectors General).

148. *Access to Justice?: Does DOJ’s Office of Inspector General Have Access to Information Needed to Conduct Proper Oversight? Hearing Before the H. Comm. on the Judiciary* 113th Cong. 1-2 (2014) (statement of Rep. Goodlatte, Chairman, H. Comm. on the Judiciary); *see also supra* note 61 (statement of Michael Horowitz, Inspector Gen., Dep’t of Justice) (“[R]equiring the OIG to obtain permission from department leadership seriously compromises our independence. The OIG should be

The independence of the IG office from the Executive Branch is reinforced in several other provisions of the IG Act.¹⁴⁹ For example, the statute requires operational independence with respect to IG audits and investigations.¹⁵⁰ In the larger establishments, IG independence is reinforced through protection of their budgets¹⁵¹ and separate appropriations accounts.¹⁵² With limited exceptions, host agencies are forbidden from interfering with IG activities and operations.¹⁵³ OIGs have discretion to set their priorities without outside direction, unless a review is ordered by Congress.¹⁵⁴

The strict statutory boundaries and limits on the scope of IG activity also reflect Congress's intent that the IG maintain independence in the performance of her duties. The House Report accompanying the original legislation made clear that IGs would not have responsibility *for* agency programs and operations but focus instead on oversight *of* them.¹⁵⁵ Inspectors General were created to be "independent and have no program responsibilities to divide allegiances."¹⁵⁶ In describing

deciding which documents it needs access to, not the leadership of the agency that is being overseen.""). "We certainly want to make sure that the Offices of Inspector General remain independent, [and] that you have full access to the information that is required . . ." said Homeland Security Committee Chair Ron Johnson. *Improving the Efficiency, Effectiveness, and Independence of Inspectors General*, *supra* note 133, at 2 (statement of Sen. Johnson, Chairman, S. Comm. on Homeland Sec. and Governmental Aff.). "Delaying access [to agency information] imperils an IG's independence . . ." testified Department of Justice Inspector General Michael Horowitz. "Commerce, Justice, Science, and Related Agencies Appropriations for 2016: Hearings Before a Subcomm. of the H. Comm. on Appropriations, 114th Cong. 62 (2015) (testimony of Michael Horowitz, Inspector Gen., Dep't of Justice); see also *Improving the Efficiency, Effectiveness, and Independence of Inspectors General*, *Hearing Before the S. Comm. on Homeland Sec. and Governmental Aff.*, 114th Cong. 4 (2015) (testimony of Michael Horowitz, Inspector Gen., Dep't of Justice) ("Delaying or denying access imperils an IG's independence, impedes our ability to provide effective and independent oversight. . .").

149. See generally 5 U.S.C. app. §§ 6(a)(7), 3(b), (g); see also FREDERICK M. KAISER, CONG. RSCH SERV., 98-379, STATUTORY OFFICES OF INSPECTOR GENERAL: PAST AND PRESENT 2 (2008); ROSENBERG, *supra* note 43, 106 (detailing "elements of OIG independence").

150. 5 U.S.C. app. §§ 3, 8G(d). Although the IG reports to the agency head, even that official may not compromise the initiation or conduct of an OIG audit or investigation.

151. See STATUTORY INSPECTORS GENERAL, *supra* note 53, at 13 (The process "arguably provides a level of budgetary independence . . . by enabling Congress to perceive differences between the budgetary perspectives of IGs and affiliated agencies or the President.").

152. See 31 U.S.C. § 1105(a)(25); 50 U.S.C. § 3517(f)(1) (CIA IG); 50 U.S.C. § 3033(m) (IC IG); see also STATUTORY INSPECTORS GENERAL, *supra* note 53, at 14.

153. 5 U.S.C. app. § 6(a)(2) (IG given full discretion to undertake those investigations that are, in the judgment of the IG, "necessary or desirable.")

154. *Id.*

155. H.R. REP. NO. 95-584 at 12-13 (1977). IG independence is fostered by their "lack of conflicting policy responsibility." Inspector Gen. Authority to Conduct Regulatory Investigations, 13 O.L.C. 54, 59 (1989). See also S. Rep. No. 95-1071 at 27 (1978), as reprinted in 1978 U.S.C.C.A.N. 2676, 2702 ("The Inspector . . . General's focus is the way in which Federal tax dollars are *spent by the agency*. . .") (emphasis added).

156. 124 CONG. REC. 10,405 (1978) (statement of Rep. Levitas); see also 124 Cong. Record 10,404 (1978) (statement of Rep. Horton) ("[T]his new Office of Inspector General will have absolutely no policy responsibility. The new IGs are to be totally independent and free from political pressure."); TRUTH TELLERS, *supra* note 20, at 121 ("Unique among federal executive officials, on a daily basis IGs face the challenge of maintaining independence and being accountable, both while being constructive, collaborative, or even cooperative to advance their home agency's mission and to fulfill expectations of

the IG's mandate, the lead Senate sponsor of the legislation said that "independence" was "most important," exemplified by a "special reporting relationship to the Congress."¹⁵⁷

The legislative history of the IG Act of 1978 does not provide much guidance for discerning what constitutes "program operating responsibilities." However, the testimony of the Comptroller of the Department of Labor, Al Zuck, is instructive.¹⁵⁸ Mr. Zuck objected to establishing an Office of Inspector General inside agencies themselves on the basis that an "independent" entity tasked with oversight would *diminish* the incentive of the agency to perform its work well.¹⁵⁹ At that time, audit activities were centralized in the Department of Labor's "Directorate of Audit and Investigations," separate from those performing the work but inside the agency and reporting up to the Secretary.¹⁶⁰ Mr. Zuck argued that an independent IG would interfere with the Secretary's "flexibility" to determine the best manner to reduce fraud and abuse.¹⁶¹ He specifically argued that "current arrangements provide[d] independence"¹⁶² and that the "accountability" function, such as audits and investigations, are *integral to* "program operating

the relevant congressional committees."). This followed the model Congress established for the Inspector General for the Department of Health, Education and Welfare. *See* H.R. REP. NO. 94-1573, at 1 (1976) (H.R. 15390 established the new office of Inspector General inside the Department of Health, Education and Welfare "with no program responsibilities" to conduct and supervise audits and investigations "relating to programs and operations of the Department."); *id.* at 2 (the office would "provide a means for keeping the Secretary and the Congress "fully and currently informed"); *id.* at 3 ("no program operating responsibilities" would be transferred); *id.* at 3 ("HEW administers around 300 separate programs"); *id.* ("fraud and abuse [occurs] in HEW programs"); *id.* at 4 (independence is jeopardized when officials "report to and [are] hired and fired by officials directly responsible for . . . programs"); *id.* at 5 (Inspector General should have "no program responsibilities"); *id.* at 6 (to "promote objectivity and prevent possible conflicts of interest, no program operating responsibilities [would] be assigned" to the new Inspector General); *id.* at 10 (transfer of "program operating responsibilities" prohibited); *see also* S. REP. NO. 94-1324, at 3 (the new HEW Inspector General "would have no program responsibilities"); *id.* at 5 (audit and investigation assets would be transferred to the new IG but "no program operating responsibilities [would] be . . . transferred."); *id.* at 8 (to "insure that the independence and objectivity of the [IG] is not compromised, transfer of program operating responsibilities [is] prohibited."); *id.* at 13-14 (prohibition on transfer of "program operating responsibilities").

157. *supra* note 53, statement of Sen. Eagleton. The drafters of the IG Act were concerned about IGs "working side by side" with the programmatic agencies that they have responsibility for inspecting because it "blur[s] the necessary independence." *Hearing on H.R. 8558, supra* note 48 (statement of Rep. Elliott H. Levitas); *see also id.* at 15 (statement of Sen. Eagleton) ("[I]t is crucial to insure . . . independence" from the agency.).

158. *See Hearings on H.R. 2819, supra* note 59 (statement of Al Zuck, Comptroller, Dep't of Labor). Chairman Fountain indicated that he "found the same theme running throughout all . . . the agencies" while testifying on the legislation. *Id. Hearings on H.R. 2819, supra* note 59 at 165 (statement of Rep. L. H. Fountain, Chairman, Subcomm. on Intergovernmental Relations & Human Res. of the H. Comm. on Gov't Operations); *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO/AFMD-89-68, INSPECTORS GENERAL: ADEQUACY OF TVA'S INSPECTOR GENERAL 9 (1989).

159. *See Hearings on H.R. 2819, supra* note 59 (statement of Al Zuck, Comptroller, Dep't of Labor).

160. *Id. Id. Id. See Hearings on H.R. 2819, supra* note 59 (statement of Al Zuck, Comptroller, Dep't of Labor).

161. *Id.* at 163.

162. *Id.* at 164.

responsibility,” not separate from it. They also, he argued, effectively incentivize agency staff to detect and deter waste, fraud, and abuse.¹⁶³ Chairman Fountain responded that Congress expected agencies to act responsibly with taxpayer funds, even if the IG served as an additional safeguard.¹⁶⁴ Chairman Fountain also questioned whether it would be possible to have “maximum independence and objectivity when auditors or investigators report to the persons who are also responsible for running the programs being audited or investigated.”¹⁶⁵ Indeed, GAO recently reiterated this point by expressing concern about the “independence implications” where an acting IG holds a position as a “senior employee” or presidentially appointed and Senate-confirmed official at the host agency or even another agency.¹⁶⁶

Lack of independence, whether perceived or actual, is antithetical to the factors that motivated and informed the IG Act. Dependence on or collaboration with the agency threatens an IG’s credibility and its relationship with Congress. On at least one occasion, apparent lack of independence has led to public condemnation of an IG by CIGIE.¹⁶⁷ CIGIE’s quality standards reinforce the importance of IG independence.¹⁶⁸ They provide that IGs and their staffs have a responsibility to maintain independence “both in fact and appearance.”¹⁶⁹ That independence is protected by a “legislative safety net,” viz. their unique reporting relationship to

163. *Id.* at 167.

164. *Id.* at 167; see *supra* note 59 and accompanying text.

165. *Hearings on H.R. 2819 at 166; see also Establishment of an Office of Inspector Gen. in the Dep’t of Health, Educ. & Welfare: Hearing on H.R. 5302 et. al. Before the Subcomm. on Intergovernmental Relations & Human Res. of the H. Comm. on Gov’t Operations*, 94th Cong. 44 (1976) (statement of Tom Morris, Inspector Gen., Dep’t of Health, Educ., & Welfare) (“[W]hat is the proper relationship of the Inspector General to program and policy issues? [The bill] prescribe[s] that *we will not be involved*. . . .”); H.R. REP. NO. 94-1573 at 13 (1976) (“Personnel [auditing and investigating fraud at HEW] lack independence . . . because they report to officials who are directly responsible for managing the programs the unit is investigating.”); see generally H.R. REP. NO. 100-771 (1988) (supporting this interpretation through describing the provisions of the proposed bill (to be codified as section 8E of the Act), which extended the Inspector General concept to 33 other federal entities, as requiring “that multiple audit and investigative units in an agency (*except for units carrying out audits or investigations as an integral part of the program of the agency*) be consolidated into a single Office of Inspector General . . . who would report directly to the agency head and to the Congress.”); Inspector Gen. Auth. to Conduct Regulatory Investigations, 13 O.L.C. 54, 65 (1989) (stating that these newly-created “inspectors general would have the same authorities and responsibilities as those provided in the 1978 act”); H.R. REP. NO. 94-1573 at 15. It is also significant that a provision in the Senate bill that would have transferred to the newly-created Office of the Inspector General at the Nuclear Regulatory Commission the office that conducted the Commission’s regulatory investigations was dropped after objections were raised by several Senators.

166. U.S. GOV’T ACCOUNTABILITY OFF., GAO 20-639R, INSPECTORS GEN.: INDEP. PRINCIPLES AND CONSIDERATIONS FOR REFORM 5 (2020) [hereinafter PRINCIPLES AND CONSIDERATIONS].

167. Letter from James H. Burrus, Chair, CIGIE Integrity Committee, to Clay Johnson, CIGIE Chair, dated Jan. 22, 2007 at 4, available at <https://www.govexec.com/pdfs/PCIEReportonNASAIG.pdf> (reporting that the NASA Inspector General “sought to develop and maintain a close relationship with [the] former NASA Administrator [which] contributed to an appearance that his independence was being compromised.”).

168. QUALITY STANDARDS, *supra* note 90, at 12–13.

169. *Id.* at 10.

Congress.¹⁷⁰ In outlining their approach to preserving independence, the CIGIE standards specify the importance of identifying threats, evaluating their significance, and applying safeguards to eliminate or reduce threats to an acceptable level.¹⁷¹ Threats include excessive familiarity with agency management or personnel and taking on or performing agency management functions.¹⁷²

II. PARALLEL ENFORCEMENT

Parallel enforcement violates the letter and spirit of the IG Act by improperly entangling IGs with the agencies they oversee. “Parallel enforcement” is the expansion of the IG’s role and duties *beyond audits and investigations of the agencies they oversee*—whether authorized by Act of Congress or merely as a result of expansive interpretation by IGs of their statutory roles—to activities that entangle the IG with the agencies they oversee. Although IGs are forbidden from engaging in “program operating responsibilities,”¹⁷³ the line between prohibited activity and otherwise acceptable enforcement activity is blurry. To draw the line, IGs must frequently make judgment calls that may end up putting OIG staff into what should exclusively be the host agency’s lane. Often, Congress itself has authorized or permitted IG expansion into activities that overlap substantially with the function of the host agency. This further undermines IG independence.

Entanglement between IGs and the agencies they oversee compromises independence and creates the potential for confusion within the agency, among members of the press and public, and potentially among whistleblowers. Such entanglement thereby impinges upon the IG’s ability to serve as an instrument of Congressional oversight.¹⁷⁴

A. Defining Parallel Enforcement

Congress did not originally intend Inspectors General to undertake the activities that their host agencies perform. That much is clear in the language of the 1978 Act, which prohibits the transfer of “program operating responsibilities” to the newly established OIGs.¹⁷⁵ With this provision, “Congress intended to insulate IGs from responsibility for running the very programs that they might review.”¹⁷⁶ In 1989, the Department of Justice Office of Legal Counsel (OLC) concluded as much in addressing a challenge to the Department of Labor Inspector General’s desire to conduct certain investigations.¹⁷⁷ OLC reasoned

170. *Id.* at 12. *Id.* at 12. *Id.* at 12. QUALITY STANDARDS, *supra* note 90, at 12.

171. *Id.* at 12. *Id.* at 12. *Id.* at 12. QUALITY STANDARDS, *supra* note 90, at 12.

172. QUALITY STANDARDS, *supra* note 90, at 13–15.

173. 5 U.S.C. app. §§ 8G(b), 9(a)(2).

174. *See infra*. Sec. IIB (outlining OIG parallel enforcement activities).

175. 5 U.S.C. app. §§ 8G(b), 9(a)(2).

176. COUNCIL OF THE INSPECTORS GEN. ON INTEGRITY AND EFFICIENCY, THE INSPECTORS GEN. 11 (2014).

177. *See* Inspector Gen. Authority to Conduct Regulatory Investigations, 13 O.L.C. 54 (1989) (concluding that the IG Act) did not generally vest authority in IGs to conduct investigations pursuant to regulatory statutes administered by their host agencies or permit their subsequent transfer to IGs).

that the agency is “charged with administering” its enabling statute, which includes grants of enforcement and investigative authority, but IGs do not have authority to conduct investigations “relating to” agency programs based on “the structure and legislative history of the Act.”¹⁷⁸ The drafters of the 1978 Act expressly disclaimed IG responsibility to enforce agency statutes.¹⁷⁹ The “investigatory portion” of an agency’s “regulatory policy,” they concluded, belongs with officials “designated by statute or by the Secretary”—not with an official “separate from the regulatory division” of the agency or department.¹⁸⁰ OLC concluded that Congress did not intend to change the fundamental regulatory structure of the federal government by creating IGs.

By not partaking in the functions and responsibilities of their agencies, IGs are supposed to abjure any “vested interest in agency policies or particular programs and can remain unbiased in their review of those programs.”¹⁸¹ But there is no definition in the statute or legislative history of “program operating responsibilities.”¹⁸² Inspectors General—at their discretion—may interpret the provision to mean that Congress “intended to insulate IGs from responsibility for running the very programs that they might review [and therefore avoid] vested interest in agency policies or particular programs [so as to] remain unbiased. . . .”¹⁸³ Courts have also been relatively permissive in construing the boundaries of Inspector General activity.¹⁸⁴ In addition to what Congress or their host agency assigns

178. *Id.* at 58.

179. *Id.* at 59–60 (statement of Rep. Levitas) (asserting that IGs should not be “a new layer of bureaucracy to plague the public.”).

180. *Id.* at 60; *see also id.* at 61 (“One of the Inspector General’s functions is to criticize regulatory investigative policy, a function he cannot perform if it is his responsibility to set and implement that policy.”).

181. COUNCIL OF THE INSPECTORS GEN. ON INTEGRITY AND EFFICIENCY, THE INSPECTORS GEN. 11 (2014).

182. *See supra* note 156 and accompanying text (strict statutory boundaries and limits on the scope of IG activity reflect Congress’s intention that the IG maintain independence in the performance of its duties); *see also infra* note 184 and accompanying text (courts have been relatively permissive in construing the boundaries of IG activity).

183. *Id.*; *see also* FREDERICK M. KAISER, CONG. RSCH. SERV., 98-379, STATUTORY OFFICES OF INSPECTOR GEN.: ESTABLISHMENT AND EVOLUTION 2 (2003).

184. *See, e.g., Univ. of Med. & Dentistry of N.J. v. Corrigan*, 347 F.3d 57, 66 (3d Cir. 2003) (holding that the inspector general’s mandate to prevent and detect fraud and abuse is not limited by HHS’s—or its agents’—own efforts to prevent and detect fraud and abuse.”); *United States v. Chevron U.S.A., Inc.*, 186 F.3d 644, 648 (5th Cir. 1999) (finding that subpoenas that did not “displace any agency responsibilities” permissible because no agency functions had been “transferred to the IG.”); *Inspector Gen. of the U.S. Dep’t of Agric. v. Glenn*, 122 F.3d 1007, 1011 (11th Cir. 1997) (“While we agree that the [Inspector General Act]’s main function is to detect abuse within agencies themselves, the [Act]’s legislative history indicates that Inspectors General are permitted and expected to investigate public involvement with the programs in certain situations.”); *Winters Ranch P’ship v. Viadero*, 123 F.3d 327, 334 (5th Cir. 1997) (“No transfer of operating responsibility occurs and the IG’s independence and objectivity is not compromised when the IG mimics or adapts agency investigatory methods or functions in the course of an independent audit or investigation.”); *id.* at 327 (upholding IG’s subpoena because it was part of an investigation to test the effectiveness of the agency’s conduct of a program and not part of program operating responsibilities). *But see Univ. of Med. & Dentistry of N.J. v. Corrigan*, 347 F.3d 57, 66 (3d Cir. 2003) (“If the department fails to perform a function that is within its responsibilities, and the

them, IGs are basically free to render whatever assistance to their host agencies they see fit—within the bounds of their judgment and the constraints of Congressional supervision.

Inspectors General may – but do not always – implement the prohibition on undertaking “program operating responsibilities” in two ways. First, the “culture” of IGs emphasizes the need for “balance.” Foremost is the need for IGs to balance independence in the form of accountability to Congress and collaborative engagement with their host agency.¹⁸⁵ IGs operationalize this balance primarily by separating the audit function from other functions inside their offices.¹⁸⁶ Independence is a challenge because distance from the agency makes it harder to obtain needed information.¹⁸⁷ Staff engaged in auditing and in evaluation and inspection nevertheless report to the same ultimate official, *viz.* the IG. Second, IGs may avoid becoming part of agency policymaking, whether that means avoiding agency leadership meetings and policy discussions or eschewing a public identity of interest with agency management.¹⁸⁸

Clearly, IGs are not supposed to deliver or manage the services, benefits, and programs of their host agencies. Their core responsibilities are auditing agency activities, investigating allegations of fraud and abuse by the agency, and keeping Congress informed. But over time, as they have proven their value to Congress and as the political culture has become more “dedicated to improving management,”¹⁸⁹ they have received more resources and flexibility to undertake more activities cooperatively with their host agencies.¹⁹⁰ As IGs inherited new

inspector general takes on those responsibilities, then it may be correct to speak of “transfer” of program operating responsibilities.”); *Burlington N. R.R. Co. v. Office of Inspector Gen., R.R. Retirement Bd.*, 983 F.2d 631 (5th Cir. 1993) (finding impermissible transfer of authority where the inspector general audited railroad employers for tax compliance when the board had declined to do so).

185. TRUTH TELLERS, *supra* note 20 at 122–23.

186. See Government Accountability Office, GOVERNMENT AUDITING STANDARDS 2018 at 29 (GAO-18-568G) (“In all matters relating to the GAGAS engagement, auditors and audit organizations must be independent from an audited entity.”)

187. TRUTH TELLERS, *supra* note 20, at 128; see also *id.* at 129 (stating that cooperation is “key to the IG’s work”).

188. TRUTH TELLERS, *supra* note 20, at 141.

189. *Twenty Years After the Act*, *supra* note 15, (statement of Sen. John Glenn).

190. Law enforcement authority was not included in the 1978 Act. Over time, the argument was made that IGs could not perform their jobs without such authorities. See, e.g., *Twenty Years After the Act*, *supra* note 15 (statement of Former Department of Commerce and State Department Inspector General Sherman M. Funk) (arguing for “gun and badge” authority). The Homeland Security Act of 2002 extended law enforcement powers to criminal investigators in offices headed by presidential appointees. See Pub. L. 107-296, § 812, (codified at 5 U.S.C. app § 6(f)). The IG Act as amended now authorizes criminal investigators in the offices of Presidentially-appointed IGs to exercise law enforcement powers while conducting official duties. IG Act, § 6 (e). See Council of Inspectors Gen., “The Inspectors Gen.,” (July 14, 2014) https://www.ignet.gov/sites/default/files/files/IG_Authorities_Paper_-_Final_6-11-14.pdf, [<https://perma.cc/8W8S-C9S9>]. These law enforcement powers include the authority to (1) carry a firearm while engaged in official duties; (2) make an arrest without a warrant for any Federal offense committed in the presence of the agent, or when the agent has reasonable grounds to believe that the person to be arrested has committed or is committing a Federal felony; and (3) seek and execute Federal warrants for arrest, search of premises, or seizure of evidence under the authority of the United States. *Id.* The Act also provides a mechanism whereby the Attorney General may, after an initial determination of need, confer law enforcement powers on investigative personnel of other OIGs, including those in DFE OIGs. *Id.* See also *id.* at 16 (Appendix 3) (listing OIGs with law enforcement authorities).

responsibilities and missions, they gradually became an integral part of solving management problems. They tackled problems as frequently as they sounded the alarm, functioning as “both watchdog and junkyard dog,” in the words of former Senator John Glenn.¹⁹¹ They obtained law enforcement authority to assist them in carrying out their duties.¹⁹² While the Inspector General Act and its prohibition on the assumption of “program operating responsibilities” has remained in force and effect, the reality is that IGs do many things that, to the outside world, might appear to cross the line from cooperation to policy implementation. The reasons for such activity may include congressional authorization, policy determinations by the IG, patterns and practice of cooperation at the agency, or other factors.¹⁹³ Over time, IG independence has eroded as their responsibilities have expanded.¹⁹⁴ As a result, Congress is less likely to receive the benefit of independent information.

According to CIGIE, the statutory prohibition on the IGs having program operating responsibilities “does not preclude the IG from assisting the agency and its committees and project teams, when the IG determines that such assistance will help the entity reduce fraud, waste, and abuse and such assistance by the IG would not compromise its independence in subsequent reviews of the subject matter.”¹⁹⁵ The goal, of course, is for the IG to “remain objective if he or she later

191. *Twenty Years After the Act*, *supra* note 15 (statement of Sen. John Glenn).

192. Pub. L. No. 107-296, § 812 (codified at 5 U.S.C. app. § 6(f)).

193. The Eleventh Circuit’s reasoning about the expansion of IG operations is illustrative:

While we agree that IGA’s main function is to detect abuse within agencies themselves, the [Inspector General Act’s] legislative history indicates that Inspectors General are permitted and expected to investigate public involvement with the programs in certain situations. Congressman Levitas, a co-sponsor of the IGA, stated that the Inspector General’s “public contact would only be for the beneficial and needed purpose of receiving complaints about problems with agency administration and in the investigation of fraud and abuse by those persons who are misusing or stealing taxpayer dollars.” 124 Cong. Rec. 10,405 (1978). From this statement, we conclude that the Inspector General’s public contact in this case was appropriate because it occurred during the course of an investigation into alleged misuse of taxpayer dollars.

Inspector Gen. of U.S. Dep’t of Agric. v. Glenn, 122 F.3d 1007, 1011 (11th Cir. 1997) (concluding that subpoenas issued by the Agriculture Department Inspector General to members of the public did not exceed the statutory authority granted under the Inspector General Act); *see also* William S. Fields & Thomas E. Robinson, *Legal and Functional Influences on the Objectivity of the Inspector Gen. Audit Process*, 2 Geo. Mason Indep. L. Rev. 97, 109–10 (1993) (arguing that the 1978 IG Act’s consolidation of existing audit and investigative units, along with their “functions, powers or duties,” into the Offices of Inspector General compromised IG independence and objectivity from the start).

194. *See* William S. Fields & Thomas E. Robinson, *Legal and Functional Influences on the Objectivity of the Inspector Gen. Audit Process*, 2 GEO. MASON INDEP. L. REV. 97, 110 (1993) (citing a series of examples, including annual appropriations containing directives to audit specific programs, requirements that an agency’s IG perform an audit, and laws such as the Single Audit Act and the Chief Financial Officers Act).

195. COUNCIL OF THE INSPECTORS GEN. ON INTEGRITY AND EFFICIENCY, THE INSPECTORS GEN. 11 (2014) (“For example, an IG may decline to serve as a voting member on a policy-making board or committee within the agency; however, the IG could opt to attend those meetings and provide technical assistance with respect to fraud, waste, and abuse issues or matters of economy, efficiency, or effectiveness.”).

reviews those issues and matters.”¹⁹⁶ But this leads to difficult line drawing. Department of Justice Inspector General Michael Horowitz objected in 2014 to “compromising” his independence by “hav[ing] to go to the people I oversee for approval to get records.”¹⁹⁷ Sharing enforcement duties with the “people [an IG] oversee[s]” to make policy or implement agency programs or operations is arguably even more “compromising.”

In the end, any entanglement is subject to the IG’s discretion. “[T]he manner in which each IG interprets and implements [their] authorities and responsibilities can vary widely, thus potentially resulting in substantially different structures, operations, and activities across IGs.”¹⁹⁸ As the saying goes, “if you’ve seen one IG, you’ve seen one IG.”¹⁹⁹ There are no standards and certainly no reference to the important principle of independence constraining IG discretion. CIGIE’s standards for quality warn against excessive familiarity with management or personnel or performing management functions.²⁰⁰ But these are not binding or enforceable. GAO has urged greater attention to independence in IG reform efforts, building on CIGIE’s standards that IGs comply with Generally Accepted Government Auditing Standards for their audits.²⁰¹ These standards require structural separation of the audit organization and the application of an independence “framework” in assessing threats to independence, but they ultimately rely on the judgment of the Inspector General.²⁰² The threats to independence outlined in GAGAS are compounded by IG entanglement with agency activities.²⁰³ At the same time, there are incentives to interpret the ban on programmatic responsibilities loosely, beginning with the trend towards more operational flexibility on the part of IGs, the grant of enforcement authority, and the reliance on IG staff for management and performance evaluation. This creates a problem.

There is a strong imperative for IGs to work collaboratively with their agencies, which is to be commended for the sake of efficiency and effectiveness.²⁰⁴

196. COUNCIL OF THE INSPECTORS GEN. ON INTEGRITY AND EFFICIENCY, THE INSPECTORS GEN. 11 (2014).

197. *Obstructing Oversight: Concerns From Inspectors Gen.*, Hearing Before the H. Comm. on Oversight and Gov’t Reform, 113th Cong. 41 (2014) (statement of Michael Horowitz, Inspector Gen. Dep’t of Justice).

198. CONG. RSCH SERV., R45450, STATUTORY INSPECTORS GENERAL *supra* note 53.

199. Peter Tyler, Remarks at Wayne State University Law School Conference (June 13, 2018), https://archive.org/details/CSPAN3_20180614_015200_Role_of_Inspectors_General_Effectiveness/start/2457.3/end/2468.4, archived at <https://perma.cc/PUP3-X5UC>.

200. QUALITY STANDARDS, *supra* note 90 at 13–15.

201. PRINCIPLES AND CONSIDERATIONS, *supra* note 166 (referencing the GAO), <https://www.gao.gov/yellowbook/overview> [<https://perma.cc/A722-RG4F>]; see also Pub. L. No. 115–91, div. A, title XV, §1521(e), 131 Stat. 1714, (2017) (providing that the Special Inspector General for Afghanistan Reconstruction comply with GAGAS in all its reporting).

202. PRINCIPLES AND CONSIDERATIONS, *supra* note 166 at 3 (“citing the evaluative framework”).

203. *Id.* at 6 (citing the types of threats to consider in including the undue influence threat and management participation threat).

204. See LACK ESSENTIAL TOOLS, *supra* note 17 at 11 (citing Memorandum from Alice Rivlin, Deputy Dir., Exec. Off. of the President, Inspector General Vision Statement, (Apr. 11, 1994) (encouraging IGs to work collaboratively with their agencies)).

But as longtime observers point out, “[w]hile a relationship between agency and IG of pure antagonism surely is not desirable, there are dangers associated with IGs being too closely identified with agency success.”²⁰⁵ Most importantly, it risks involving the IG in programmatic responsibilities of the agency. Even when an OIG engages in its own program operating activity independently *from* the agency, by working as an enforcement arm against the public, the OIG is in practice no longer independent *of* the agency.

B. Parallel Enforcement by Inspectors General Is Pervasive across the Federal Government

IGs do many things that might appear to cross the line from cooperation to policy implementation. The reasons for such activities may include congressional authorization, policy determinations by the IG, patterns and practice of cooperation at the agency, or other factors. Although IGs are forbidden from engaging in “program operating responsibilities,”²⁰⁶ the term itself is undefined, and the blurred line between oversight; fighting waste, fraud and abuse; and improving program management frequently requires IGs to make judgment calls. Some IGs have had their roles expanded by Congress, while others have voluntarily taken on activities cooperatively with their host agencies. Participating in—and sometimes, spearheading—enforcement actions against the public is not a function that serves Congressional oversight of the Executive Branch. The consequences of this entanglement include compromising the independence and the benefit IGs were intended to provide. This section offers ten examples of IGs carrying out enforcement activities that extend beyond oversight responsibilities. These “parallel enforcement” initiatives can and frequently do contribute to host agency objectives. But serving as a host agency “cop” does not further the Congressional interest in independent oversight. The following section analyzes the problems that flow from these types of activities.

1. Health & Human Services

The Department of Health and Human Services (HHS) was created as the Department of Health, Education, and Welfare (HEW).²⁰⁷ The department’s mission is to provide effective health and human services to “enhance the health and

205. LACK ESSENTIAL TOOLS, *supra* note 17 at 11 (“Agency leaders should . . . be careful not to over-emphasize that IGs are part of an agency’s success, because this attitude could be construed as tipping the balance from independence to subordination.”).

206. 5 U.S.C. app. §§ 8G(b), 9(a)(2).

207. See 5 U.S.C. app. The Department of Education Act of 1979 created a separate Department of Education. See The Department of Education Organization Act, 20 U.S.C. § 3411 (1979). The Department of Health, Education, and Welfare became the Department of Health and Human Services in 1980. See U.S. DEP’T OF HEALTH & HUMAN SERVS., *HHS Historical Highlights*, <https://www.hhs.gov/about/historical-highlights/index.html>, archived at <https://perma.cc/UMZ5-K774> (last visited November 5, 2020).

well-being of all Americans.”²⁰⁸ The HEW OIG was the first modern statutory IG Office.²⁰⁹ The IG expends especially significant effort investigating fraud by recipients of government funds, as these programs are particularly susceptible to fraud due to their size and complexity.²¹⁰

The HHS-OIG manages investigations into suspected wrongdoing related to the Health Care Fraud and Abuse Control Program (HCFAC) and is authorized to penalize wrongdoers.²¹¹ HCFAC addresses fraud committed against all health plans and expends funds to the Centers for Medicare & Medicaid Services (CMS), the Children’s Health Insurance Program (CHIP), and HHS OIG.²¹² The HHS Secretary “*acting through the Department’s Inspector General (HHS/OIG)*” directs HCFAC alongside the Attorney General of the DOJ.²¹³ In practice, the HHS-OIG is responsible for conducting and coordinating investigations of suspected fraud in HCFAC programs.²¹⁴ The CMS, for example, usually refers suspected fraud to the HHS-OIG.²¹⁵ Due to its vital role in HCFAC, Congress appropriates a large portion of HCFAC funds directly to the HHS-OIG.²¹⁶

As part of HCFAC, OIG investigators participate in inter-agency programs²¹⁷ designed to weed out cases of fraud and abuse. For instance, the Medicare Fraud

208. U.S. DEP’T OF HEALTH & HUMAN SERVS., *About HHS*, HHS.GOV, <https://www.performance.gov/health-and-human-services/>, archived at <https://perma.cc/E3NJ-4KN6> (last visited July 20, 2020).

209. Utah Shriners’ Hospital for Crippled Children Land Conveyance and Department of Health, Education and Welfare Office of Inspector General Establishment, Pub. L. No. 94-505, §401 201(3) (1976401(h)); *see also* STATUTORY INSPECTORS GENERAL, *supra* note 53 at 1.

210. *See* U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-660T, MEDICARE: ACTIONS NEEDED TO BETTER MANAGE FRAUD RISKS 1-3 (2018).

211. U.S. GOV’T ACCOUNTABILITY OFF., GAO-12-820, HEALTH CARE FRAUD: TYPES OF PROVIDERS INVOLVED IN MEDICARE, MEDICAID, AND THE CHILDREN’S HEALTH INSURANCE PROGRAM CASES 6-12 (2012). The Health Insurance Portability and Accountability Act of 1996 (HIPAA) established HCFAC. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, tit. II, § 201, 110 Stat. 1936, 1937 (1996) (codified at 42 U.S.C. §§ 1320a-7c, (2011), 1395i(k) (2010)); *see also* U.S. GOV’T ACCOUNTABILITY OFF., GAO-13-746, HEALTH CARE FRAUD AND ABUSE PROGRAM: INDICATORS PROVIDE INFORMATION ON PROGRAM ACCOMPLISHMENTS, BUT ASSESSING PROGRAM EFFECTIVENESS IS DIFFICULT 1-2 (2013).

212. U.S. GOV’T ACCOUNTABILITY OFF., GAO-13-746, HEALTH CARE FRAUD AND ABUSE PROGRAM: INDICATORS PROVIDE INFORMATION ON PROGRAM ACCOMPLISHMENTS, BUT ASSESSING PROGRAM EFFECTIVENESS IS DIFFICULT 1-2 (2013).

213. U.S. DEP’T OF HEALTH & HUMAN SERV. & U.S. DEP’T OF JUSTICE, HEALTH CARE FRAUD AND ABUSE CONTROL PROGRAM ANNUAL REPORT FOR FISCAL YEAR 2019 1 (2020).

214. *See* U.S. GOV’T ACCOUNTABILITY OFF., GAO-12-820, HEALTH CARE FRAUD: TYPES OF PROVIDERS INVOLVED IN MEDICARE, MEDICAID, AND THE CHILDREN’S HEALTH INSURANCE PROGRAM CASES 7-8 (2012).

215. *Id.* at 8 (2012).

216. *Id.* *see* U.S. GOV’T ACCOUNTABILITY OFF., GAO-13-746, HEALTH CARE FRAUD AND ABUSE PROGRAM: INDICATORS PROVIDE INFORMATION ON PROGRAM ACCOMPLISHMENTS, BUT ASSESSING PROGRAM EFFECTIVENESS IS DIFFICULT 10-12 (2013) (explaining the various activities conducted by the HHS-OIG and the DOJ under the HCFAC program).

217. Congress encourages coordination between agencies and departments through legislation such as the Government Performance and Results Act Modernization Act (GPRAMA) and its predecessor, the Government Performance and Results Act (GPRA). Congress hoped that these legislative efforts would enable agencies to address cross-cutting issues efficiently and effectively. *See* GPRA Modernization Act, Pub. L. No. 111-352, 124 Stat. 3866 (2011) (codified at 5 U.S.C. §§ 306, 5105; 31

Strike Force Teams unite the efforts and resources of multiple agencies under the common goal of identifying health care fraud and swiftly bringing prosecutions.²¹⁸ HHS-OIG, CMS, and DOJ agents use data analytics to identify, investigate, and prosecute fraud.²¹⁹ The GAO designates Medicare as a “High-Risk” issue “because [of] its complexity and susceptibility to improper payments, in addition to its size. . . .”²²⁰ Efforts such as the Medicare Fraud Strike Force Teams have proven to be efficient in combating fraud. One such strike force team was involved in the investigation of the largest healthcare fraud scheme ever charged by the Department of Justice in 2019, leading to the defendant’s twenty-year sentence.²²¹

In October 2018, the DOJ announced the creation of a similar initiative to combat the opioid epidemic.²²² The Appalachian Regional Prescription Opioid (ARPO) Strike Force focuses specifically on investigating cases involving physicians and pharmacies that are responsible for medically unnecessary opioid prescriptions paid for by Medicare and Medicaid.²²³ The HHS OIG’s Office of Investigation works closely with law enforcement partners in the DEA, FBI, Medicaid Fraud Control Units, and other agencies in these efforts.²²⁴ In April 2019, the ARPO Strike Force participated in the largest ever prescription opioid law enforcement operation, the Appalachian Regional Prescription Opioid Surge Takedown. This takedown resulted in charges against sixty individuals for their alleged participation and involved over 350,000 prescriptions.²²⁵

The HHS-OIG also plays a role in sanctioning those who have committed HHS program fraud.²²⁶ Under the exclusive authority granted by the Social

U.S.C 1101, 1105, 1115, 1116, 1120-1125); *see also* S. REP. NO. 111-372, at 3 (2010). HOW INSPECTORS GENERAL WORK, *supra* note 1 at 8.

218. U.S. DEP’T OF HEALTH & HUM. SERV., OFF. OF INSPECTOR GEN., SEMIANNUAL REPORT TO CONGRESS: OCT. 1, 2019–MAR. 31, 2020 43 (2020).

219. *See* U.S. GOV’T ACCOUNTABILITY OFF., GAO-12-820, HEALTH CARE FRAUD: TYPES OF PROVIDERS INVOLVED IN MEDICARE, MEDICAID, AND THE CHILDREN’S HEALTH INSURANCE PROGRAM CASES 6-9 (2012).

220. U.S. GOV’T ACCOUNTABILITY OFF., GAO-13-746, HEALTH CARE FRAUD AND ABUSE PROGRAM: INDICATORS PROVIDE INFORMATION ON PROGRAM ACCOMPLISHMENTS, BUT ASSESSING PROGRAM EFFECTIVENESS IS DIFFICULT 1 (2013).

221. Press Release, U.S. Dep’t of Justice, South Florida Health Care Facility Owner Sentenced To 20 Years in Prison for Role in Largest Health Care Fraud Scheme Ever Charged by the Department of Justice (Sept. 13, 2019), <https://www.justice.gov/usao-sdfl/pr/south-florida-health-care-facility-owner-sentenced-20-years-prison-role-largest-health-0>, *archived at* <https://perma.cc/9XE4-WK57> (last visited Dec. 2, 2020).

222. U.S. DEP’T OF HEALTH & HUM. SERV., OFF. OF INSPECTOR GEN., SEMIANNUAL REPORT TO CONGRESS: OCT. 1, 2019–MAR. 31, 2020 43 (2020).

223. *Id.*

224. *Id.*

225. Press Release, U.S. Dep’t of Justice, Appalachian Regional Prescription Opioid (ARPO) Strike Force Takedown Results in Charges Against 60 Individuals, Including 53 Medical Professionals (Apr. 17, 2019), <https://www.justice.gov/opa/pr/appalachian-regional-prescription-opioid-arpo-strike-force-takedown-results-charges-against>, *archived at* <https://perma.cc/8N3Y-LYQP> (last visited Dec. 2, 2020).

226. U.S. GOV’T ACCOUNTABILITY OFF., GAO-12-820, HEALTH CARE FRAUD: TYPES OF PROVIDERS INVOLVED IN MEDICARE, MEDICAID, AND THE CHILDREN’S HEALTH INSURANCE PROGRAM CASES 8 (2012).

Security Act, the OIG has the statutory authority to exclude practitioners from participation in Medicare, Medicaid, and other federal health programs.²²⁷ The IG can also pursue civil monetary penalties (CMP) against such actors.²²⁸ The OIG may work alongside CMS in taking these enforcement actions.²²⁹

The HHS-OIG has been given the authority to manage a sizeable percentage of HHS Fraud cases at both the investigative and enforcement stages, while the department focuses on other programs (both within and outside HCFAC).²³⁰ Within HCFAC, the department identifies and investigates the Administration for Community Living's (ACL) Senior Medicare Patrol programs, as well as HCFAC-related work conducted by the HHS-OGC, CMS, and FDA.²³¹ Though the HHS-OIG has proven valuable to the Department, it requires the IG to manage programs and objectively monitor the operation of these programs at the same time it is charged with agency oversight responsibilities. Although the department is required to annually report to Congress on the efficacy of HCFAC programs, the HHS Secretary has chosen to delegate that task to the HHS-OIG, which means the IG is assessing its own work rather than that of the agency.²³²

2. Social Security Administration

The modern Social Security Administration (SSA) was established through the Social Security Independence and Program Improvements Act of 1994.²³³ The mandate of the agency is to "administer the old-age, survivors, and disability insurance program . . . and the supplemental security income program."²³⁴ The SSA OIG was also established in 1994.²³⁵ The OIG is directly responsible for meeting the statutory mission of promoting economy, efficiency, and effectiveness in the administration of SSA programs and operations and for "the prevention of fraud, waste, abuse," and mismanagement in such programs and

227. *Office of Inspector General's Special Advisory Bulletin on the Effect of Exclusion from Participation in Federal Health Care Programs*, OFFICE OF THE INSPECTOR GENERAL, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (Sept. 1999), https://oig.hhs.gov/exclusions/effects_of_exclusion.asp, archived at <https://perma.cc/V6SP-9J6J>. (last visited Dec. 2, 2020).

228. *Id.* In the six month period from Oct. 2019 to Mar. 2020, the HHS-OIG reported 903 exclusions. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUMAN SERVS., SEMIANNUAL REP. TO CONG.: OCT. 1, 2019–MAR. 31, 2020 48 (2020).

229. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-88, MEDICARE AND MEDICAID: CMS NEEDS TO FULLY ALIGN ITS ANTIFRAUD EFFORTS WITH THE FRAUD RISK FRAMEWORK (2018).

230. For example, HIPAA investigations are outside HCFAC.

231. U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-746, HEALTH CARE FRAUD AND ABUSE PROGRAM: INDICATORS PROVIDE INFORMATION ON PROGRAM ACCOMPLISHMENTS, BUT ASSESSING PROGRAM EFFECTIVENESS IS DIFFICULT 10-12 (2013).

232. *Id.* at 11, 23 (2013).

233. See generally Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, 108 Stat. 1464. The SSA originated as the Social Security Board, in 1935. See SOC. SEC. ADMIN., *Organizational History*, <https://www.ssa.gov/history/orghist.html>, archived at <https://perma.cc/3L66-L8JG> (last visited July 22, 2020).

234. 42 U.S.C. § 901 (1994).

235. STATUTORY INSPECTORS GENERAL, *supra* note 53 at 27.

operations.²³⁶ To meet its mandate, the OIG leads audits, evaluations, and investigations relating to Social Security programs.²³⁷

In addition to its oversight function, the OIG often engages in regulatory enforcement against organizations and individuals allegedly defrauding social security programs. The OIG coordinates with law enforcement agencies on individual cases of suspected social security fraud.²³⁸ The OIG also works to protect vulnerable social security recipients through investigations and audits. For instance, the OIG receives allegations of representative payee²³⁹ fraud and misuse from the SSA and law enforcement agencies.²⁴⁰ In 2011, the SSA OIG participated in an investigation involving a representative payee who had held four mentally disabled social security recipients captive.²⁴¹ The SSA OIG's role in the investigation involved gathering evidence, analyzing SSA documents, and interviewing sources.²⁴²

The SSA OIG actively participates in joint task forces. One of these is the SSA OIG's Cooperative Disability Investigations Program (CDI), a joint effort between the SSA, SSA OIG, State Disability Determination services, and state and local law enforcement.²⁴³ The goal of this effort is to "investigate and deter Social Security disability fraud."²⁴⁴ The SSA OIG assigns a CDI team leader, while the SSA funds the program and assigns a program specialist to provide technical support and expertise on SSA claims.²⁴⁵ SSA OIG's Spring 2020 Semiannual Report to Congress projects that CDI investigations in the reporting period contributed to \$62,442,733 in projected savings for SSA programs.²⁴⁶ In 2019, the New York Field Division arrested a recipient for filing a false claim to receive more than \$101,000 in Social Security retirement and disabilities benefits,

236. OFFICE OF INSPECTOR GEN., SOC. SEC. ADMIN., SEMIANNUAL REPORT TO CONGRESS: OCT. 1, 2019–MAR. 31, 2020 41 (2020).

237. SOC. SEC. ADMIN. OFFICE OF INSPECTOR GEN., *About Our Organization*, <https://oig.ssa.gov/sites/default/files/About.pdf> <https://perma.cc/9K98-8FFX> (last visited July 22, 2020).

238. See e.g. Press Release, U.S. Dep't of Just., Plaquemine Man Sentenced to 12 Months in Federal Prison for Stealing Over \$450,000 In a Fraudulent Social Security Benefits Scheme (Jun. 17, 2020) (investigating a social security recipient for stealing over \$450,000 alongside the U.S. Attorney's Office), <https://oig.ssa.gov/audits-and-investigations/investigations/june17-la-fraudulent-social-security-benefit-scheme>, archived at <https://perma.cc/T2Y8-Q7G6>.

239. U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-688, SOCIAL SECURITY BENEFITS: SSA NEEDS TO IMPROVE OVERSIGHT OF ORGANIZATIONS THAT MANAGE MONEY FOR VULNERABLE BENEFICIARIES 1 (2019).

240. *Social Security's Representative Payee Program: Hearing Before Subcomm. on Oversight and Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means*, 115th Cong. 17 (2017) (statement of Gale Stallworth Stone, Acting Inspector Gen., Soc. Sec. Admin.).

241. *Id.* at 21.

242. *Id.*

243. OFFICE OF INSPECTOR GEN., SOC. SEC. ADMIN., SEMIANNUAL REPORT TO CONGRESS: OCT. 1, 2019–MAR. 31, 2020 6 (2020).

244. *Id.*

245. *Id.*

246. Social Security Administration, Office of the Inspector General, Semiannual Report to Congress, May 29, 2020, at p.6 (available at <https://oig.ssa.gov/sites/default/files/semiannual/SAR-Spring-2020.pdf>).

which she applied for and received under a second identity.²⁴⁷ The SSA OIG has formed other similar task forces to combat other categories of Social Security fraud.²⁴⁸

3. Department of Transportation

The Department of Transportation Act established the Department of Transportation (“DOT”) in 1966 to assure the “. . . [e]ffective administration of the transportation systems of the Federal Government. . . .”²⁴⁹ The DOT OIG was established by the 1978 IG Act.²⁵⁰ The DOT OIG is charged with “improv[ing] the performance and integrity of DOT’s programs to ensure a safe, efficient, and effective national transportation system.”²⁵¹ In addition to conducting agency audits and reviews, the DOT OIG investigates fraud, waste, abuse, and other violations of law by regulated entities through its investigation programs. For instance, in order to “enhance DOT’s transportation goals,” the Transportation Safety Investigation program investigates crimes where death or serious injury has or is likely to occur.²⁵² The OIG emphasizes that their investigations are separate from but complementary to DOT’s operating administrations’ regulatory enforcement programs.²⁵³

In 2019, the DOT OIG was involved in the investigation leading to the first federal prosecution concerning the unlawful operation of an unmanned aircraft system (UAS).²⁵⁴ The investigation arose when an unlicensed Georgia man used an unregistered UAS to attempt to deliver contraband to a State prison.²⁵⁵ The FAA assisted the DOT OIG in this investigation.²⁵⁶ The same transportation safety program also investigated the president of multiple commercial passenger bus

247. Press Release, Office of the Inspector Gen., Soc. Sec. Admin., New York Widow with Dual Identity Arrested for Disability Fraud (Oct. 31, 2019), <https://oig.ssa.gov/newsroom/news-releases/new-york-widow-dual-identity-arrested-disability-fraud> [<https://perma.cc/T4L8-QKMU>].

248. For instance, The Western Pennsylvania U.S. Attorney announced the formation of a COVID-19 Fraud Task Force, which will include representatives from the U.S. Attorney’s Office, FBI, Secret Service, ICE/Homeland Security, the Department of Education OIG, and the SSA OIG. Press Release, U.S. Dep’t of Just., U.S. Attorney Scott Brady and Pennsylvania Attorney General Josh Shapiro Announce Formation of Joint Western Pennsylvania COVID-19 Task Force (Mar. 19, 2020), <https://www.justice.gov/usao-wdpa/pr/us-attorney-scott-brady-and-pennsylvania-attorney-general-josh-shapiro-announce> [<https://perma.cc/QP8C-6C3W>].

249. Department of Transportation Act, Pub. L. No. 89-670, § 2(b)(1), 80 Stat. 931 (1966).

250. 1978 Act.

251. U.S. DEP’T OF TRANSP. OFFICE OF INSPECTOR GEN., *About OIG*, <https://www.oig.dot.gov/about-oig> (last visited July 22, 2020) [<https://perma.cc/NFR7-DBWC>].

252. U.S. DEP’T OF TRANSP. OFFICE OF INSPECTOR GEN., *OIG Investigative Priorities*, <https://www.oig.dot.gov/investigations/oig-investigative-priorities> (last visited July 20, 2020) [<https://perma.cc/H5YS-MS2C>].

253. *Id.*

254. Press Release, U.S. Dep’t of Transp. Office of Inspector Gen., Georgia Man Sentenced to Prison for Using Unregistered UAS To Deliver a Controlled Substance (Oct. 31, 2019), <https://www.oig.dot.gov/library-item/37583> [<https://perma.cc/4ARS-LQHL>].

255. *Id.*

256. *Id.*

companies in a multi-state fraud case.²⁵⁷ The investigation revealed that the company routinely falsified FMCSA reports related to bus safety and driver qualifications.²⁵⁸ The FMCSA assisted the DOT OIG in this investigation.²⁵⁹

DOT OIG also investigates the illegal shipment of hazardous materials. For instance, in 2019, the subject of one such investigation, a California trucking company, pled guilty to the reckless transport of over 100,000 pounds of hazardous materials.²⁶⁰ The company received over \$3 million in penalties.²⁶¹ DOT OIG special agents also often partner with other law enforcement agencies to conduct joint investigations.²⁶² For example, in 2019, the Office conducted an investigation into a Texas Oil Well Services Company in conjunction with OSHA, the Department of Labor, the DOJ, and the EPA.²⁶³ This investigation resulted in the oilfield service company's conviction for an OSHA violation in the maintenance of its tanker, which led to the death of a welder.²⁶⁴

4. Department of Agriculture

In 1862, the Department of Agriculture Act established the Department of Agriculture ("USDA").²⁶⁵ Congress tasked this department with acquiring and disseminating "useful information on subjects connected with agriculture . . . and to procure, propagate, and distribute . . . valuable seeds and plants."²⁶⁶ In addition, the Agriculture and Food Act grants USDA a broad mandate to investigate violations of laws relating to USDA programs, as well as those alleged to have committed fraud while participating in those programs.²⁶⁷

Though its administrative creation occurred in 1962,²⁶⁸ the 1978 IG Act legislatively established the USDA OIG.²⁶⁹ The OIG works "with the Department's

257. Press Release, U.S. Dep't of Transp. Office of Inspector Gen., Pennsylvania Bus Company Operator Sentenced (Nov. 19, 2019), <https://www.oig.dot.gov/library-item/37602> [https://perma.cc/PTZ8-QBMD].

258. *Id.*

259. *Id.*

260. Press Release, U.S. Dep't of Transp. Office of Inspector Gen., California Trucking Company Pleads Guilty to Illegal Transportation of Hazardous Material (Feb. 25, 2019), <https://www.oig.dot.gov/library-item/37043> [https://perma.cc/N5TC-LT7N].

261. *Id.*

262. U.S. DEP'T OF TRANSP. OFFICE OF INSPECTOR GEN., *OIG Law Enforcement Authority*, <https://www.oig.dot.gov/oig-law-enforcement-authority> (last visited July 20, 2020) [https://perma.cc/87P2-PTLZ].

263. Press Release, U.S. Dep't of Transp. Office of Inspector Gen., Texas Oil Well Services Company Sentenced for Fatal Safety Violations (Aug. 28, 2019), <https://www.oig.dot.gov/library-item/37409> [https://perma.cc/L9KU-6XBU].

264. *Id.*

265. Department of Agriculture Act, ch. 72, 12 Stat. 387 (1862).

266. *Id.* § 1.

267. See U.S. DEP'T OF AGRIC. OFFICE OF INSPECTOR GEN., Information on OIG's Investigation Authority, and Criminal Investigations Involving Threats of Violence and Safety Risks, <https://www.usda.gov/sites/default/files/documents/FirearmsMemo.pdf> [https://perma.cc/9AL5-PS8J].

268. STATUTORY INSPECTORS GENERAL, *supra* note 53 at 1.

269. STATUTORY INSPECTORS GENERAL, *supra* note 53 at 27.

management team in activities that promote economy, efficiency, and effectiveness or that prevent and detect fraud and abuse in programs and operations, both within USDA and in non-Federal entities that receive USDA assistance.”²⁷⁰

This Department’s broad mandate allows USDA OIG to participate in a wide range of investigative activities, in conjunction with various federal agencies, to ensure the safety and security of public health and agriculture. In 2019, the OIG participated alongside the DEA, DOJ OIG, Homeland Security Investigations, Bureau of Alcohol, Tobacco, Firearms and Explosives, the United States Marshals Service, U.S. Customs and Border Protection, and the FBI in an investigation of a large-scale illegal dogfighting and drug trafficking operation.²⁷¹ The investigation culminated in fifty-one counts of federal dogfighting offenses.²⁷²

The USDA OIG also works in conjunction with other branches of the USDA. For instance, in 2018, the OIG participated in a fraud investigation of participants of a federal crop insurance program in partnership with the Internal Revenue Service (“IRS”) and the USDA’s Risk Management Agency. The effort uncovered that the participant had stolen more than \$5 million in the scheme and resulted in his incarceration.²⁷³

5. Department of Veterans Affairs

The Consolidation of Veterans Activities Act established the Department of Veterans Affairs (“VA”) as the Veterans’ Administration in 1990.²⁷⁴ This statute elevated the previous Veterans Bureau to a federal agency and allowed the president to “consolidate and coordinate governmental activities affecting war veterans.”²⁷⁵ The VA’s mission is “to fulfill President Lincoln’s promise ‘to care for him who shall have borne the battle, and for his widow, and his orphan’ by serving and honoring the men and women who are America’s veterans.”²⁷⁶ The IG Act of 1978 established the VA OIG,²⁷⁷ which oversees Veterans Affairs operations as well as its programs.²⁷⁸ Congress charged the VA OIG with the authority

270. U.S. DEP’T OF AGRIC. OFFICE OF INSPECTOR GEN., *About OIG*, <https://www.usda.gov/oig/about.htm> (last visited July 20, 2020) [<https://perma.cc/874X-LBGD>].

271. Press Release, U.S. Dep’t of Just., 51-Count Superseding Indictment for Dogfighting Conspiracy (Dec. 10, 2019), <https://www.justice.gov/usao-ndfl/pr/51-count-superseding-indictment-dogfighting-conspiracy> [<https://perma.cc/R7ZV-HFV9>].

272. *Id.*

273. Press Release, U.S. Dep’t of Just., LaGrange Farmer Sentenced for Crop Insurance Fraud, Fraudulent Federal Crop Disaster Claims, Aggravated Identity Theft and Conspiracy to Commit Money Laundering (May 30, 2018), <https://www.justice.gov/usao-ednc/pr/lagrange-farmer-sentenced-crop-insurance-fraud-fraudulent-federal-crop-disaster-claim-0> [<https://perma.cc/BU8V-TP9U>].

274. Consolidation of Veterans’ Activities, Pub. L. No. 71-536, 46 Stat. 1016 (1930).

275. *Id.* § 1(a).

276. U.S. DEP’T OF VETERANS AFFAIRS, *About VA*, https://www.va.gov/landing2_about.htm#:~:text=Mission%20Statement,women%20who%20are%20America’s%20veterans (last visited July 20, 2020) [<https://perma.cc/NPJ7-4KAC>].

277. 1978 Act; STATUTORY INSPECTORS GENERAL, *supra* note 53 at 27.

278. U.S. DEP’T OF VETERANS AFFAIRS Office of Inspector Gen., *VA OIG Mission, Vision, and Values*, <https://www.va.gov/oig/pubs/VA-OIG-Mission-Vision-Values.pdf> (last visited July 20, 2020) [<https://perma.cc/75LF-C4ZE>].

to oversee the quality of VA healthcare under the Benefits and Services Act of 1988.²⁷⁹

OIG enforcement efforts often involve allegations of VA health care fraud. For example, in 2019, eight high-level executives of a pharmaceutical company were sentenced for their participation in a Racketeer Influence and Corrupt Organizations (“RICO”) Act conspiracy.²⁸⁰ This investigation revealed that these individuals led a nationwide conspiracy to bribe medical practitioners to unnecessarily prescribe their fentanyl-based narcotic drug.²⁸¹ These individuals also conspired to defraud health insurance providers, including the VA’s Civilian Health and Medical Program (“CHAMPVA”), which paid approximately \$3.3 million for the drug. This investigation was conducted in conjunction with a series of agencies and agency OIGs.²⁸²

The OIG has also investigated violations of laws designed to set standards for the health and safety of medical devices and medications. In 2018, the VA OIG investigated a violation of the Food, Drug, and Cosmetic Act in cooperation with the HHS OIG, FDA, and other agencies.²⁸³ A medical device manufacturer pled guilty to distributing an adulterated device, as well as to marketing said device for unproven and unsafe uses.²⁸⁴

The VA OIG also investigates reports of alleged false claims related to VA beneficiaries. For instance, an investigation revealed the daughter of a deceased VA beneficiary continued to collect and spend her father’s VA benefits following his death.²⁸⁵ The Office similarly investigates medical professionals and administrators alleged to be involved in submitting false claims on behalf of the VA, often collaborating with agencies such as IRS and other OIGs.²⁸⁶

6. Environmental Protection Agency

President Nixon’s presidential directive established the Environmental Protection Agency (“EPA”).²⁸⁷ Nixon’s plan consolidated the piecemeal environmental protection functions of various federal agencies under one federal agency with the mandate to establish and enforce environmental protection standards, to conduct environmental research, to provide assistance to others combatting

279. OFFICE OF INSPECTOR GEN., U.S. DEP’T OF VETERAN’S AFFAIRS, SEMIANNUAL REPORT TO CONGRESS: ISSUE 83 OCTOBER 1, 2019- MARCH 31, 2020 IV (2020).

280. *Id.* at 35.

281. Press Release, U.S. Dep’t of Just., Founder and Owner of Pharmaceutical Company Insys Arrested and Charged with Racketeering (Oct. 26, 2017), <https://www.justice.gov/usao-ma/pr/founder-and-owner-pharmaceutical-company-insys-arrested-and-charged-racketeering> [https://perma.cc/L8A3-H787].

282. *Id.*

283. OFFICE OF INSPECTOR GEN., U.S. DEP’T OF VETERAN’S AFFAIRS, SEMIANNUAL REPORT TO CONGRESS: ISSUE 83 OCTOBER 1, 2019- MARCH 31, 2020 30 (2020).

284. *Id.*

285. *Id.* at 28.

286. *Id.* at 32.

287. See Jack Lewis, *The Birth of EPA*, 11 EPA J., 6, 8 (1985) (discussing the creation and early years of the EPA).

environmental pollution, and to recommend new policies for environmental protection.²⁸⁸ The EPA's OIG was created pursuant to the Inspector General Act of 1978.²⁸⁹ The OIG's role is to detect and prevent fraud, waste, and abuse in order to assist the EPA to efficiently and effectively protect human health and the environment.²⁹⁰

The OIG states that one of its goals is to contribute to EPA's programs and operations.²⁹¹ For instance, the EPA OIG assisted in an investigation to resolve allegations that Duke University violated the False Claims Act by submitting applications and reports containing falsified research in order to receive funding for grants.²⁹² Although the investigation uncovered significant misconduct,²⁹³ this was a case of the EPA directly involving itself in an investigation outside the scope of the IG Act.

Additionally, the EPA OIG works directly with the Agency in investigations. In 2014, a joint investigation by the EPA OIG and the EPA CID resulted in the sentencing of two corporations and four individuals.²⁹⁴ The investigation revealed that these entities and individuals were involved in a scheme to unlawfully sell unregistered pesticides shown to be harmful to the environment.²⁹⁵ Though it is undeniable that the agencies produced commendable results, this is an example of the OIG impermissibly operating in an enforcement role against the public, rather than in an oversight capacity as the "eyes and ears" of Congress.

7. United States Postal Service

The Postal Reorganization Act established the United States Postal Service ("USPS") as an independent agency of the Executive Branch.²⁹⁶ Its congressional mandate is to "provide prompt, reliable, and efficient services to patrons in all areas and . . . render postal services to all communities."²⁹⁷ The USPS Office of the Inspector General was created pursuant to the IG Act Amendments of

288. *Id.* (discussing the creation and early years of the EPA).]

289. 1978 Act; *see also* STATUTORY INSPECTORS GENERAL, *supra* note 53 at 27.

290. OFFICE OF INSPECTOR GEN., ENVTL. PROT. AGENCY, SEMIANNUAL REPORT TO CONGRESS: OCTOBER 1, 2019-MARCH 31, 2020 1 (2020).

291. *Id.*

292. Press Release, U.S. Dep't of Justice, Duke University Agrees to Pay U.S. \$112.5 Million to Settle False Claims Act Allegations Related to Scientific Research Misconduct (Mar. 25, 2019), <https://www.justice.gov/opa/pr/duke-university-agrees-pay-us-1125-million-settle-false-claims-act-allegations-related> [<https://perma.cc/SH7Q-S56C>].

293. *Id.*

294. Press Release, U.S. Dep't of Justice, Two Tampa Corporations and Four Tampa Residents Sentenced in Connection with Scheme to Unlawfully Sell an Unregistered Pesticide and Obstruct Justice (Dec. 5, 2014), <https://www.justice.gov/usao-sdfl/pr/two-tampa-corporations-and-four-tampa-residents-sentenced-connection-scheme-unlawfully> [<https://perma.cc/LE4R-GSWF>].

295. *Id.*

296. *See* Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719 (1970), (codified as amended at 39 U.S.C. § 201 (2018)); *see also* U.S. POSTAL SERV., The United States Postal Service: An American History 64–65 (2020).

297. 39 U.S.C. § 101(a) (2018).

1988.²⁹⁸ The OIG's ultimate mission is to "help maintain confidence in the postal system and improve the Postal Service's bottom line through independent audits and investigations."²⁹⁹ Until 1988, the USPS Inspector General also held the position of Chief Postal Inspector of the Postal Inspection Service.³⁰⁰ These positions were split in 1996.³⁰¹ In 2006, the Chairman of the Board of Governors signed a memorandum announcing that the Postal Inspection Service would have full responsibility for the investigation of external crimes.³⁰²

Despite the separation of the USPS Inspector General and Chief Postal Inspector roles and functions, the USPS OIG plays an active role in enforcement efforts against the public. A significant portion of cases are healthcare-related investigations.³⁰³ For instance, the USPS OIG was involved in an investigation of a pharmaceutical company for antitrust and related False Claims Act violations.³⁰⁴ In a statement, the special agent in charge emphasized the millions the Postal Service spends yearly on healthcare-associated costs.³⁰⁵

Special agents of the OIG investigate frauds against the Postal Service to help safeguard the Agency's resources and deter postal crimes,³⁰⁶ sometimes alongside the branches of the Postal Service. For example, the OIG investigates allegations of schemes to illegally distribute drugs by mail.³⁰⁷ In 2019, the OIG investigated a scheme to mail marijuana through the postal system in

298. Inspector General Act Amendments of 1988, Pub. L. No. 100-504, 102 Stat. 2524; *see also infra* note 357, at 29. The USPS OIG is distinct from other OIGs in various crucial ways. The USPS IG is appointed by the nine presidentially-appointed governors of the U.S. Postal Service. 39 U.S.C. § 202 (2018). The USPS IG is also the only statutory IG with a term limit. *See infra* note 335, at 33. Finally, the USPS IG can only be removed for cause by at least seven of the nine governors. 39 U.S.C. § 202(e) (2018).

299. U.S. POSTAL SERV. OFFICE OF INSPECTOR GEN., ABOUT THE OIG, <https://www.uspsoig.gov/about-us/about-oig> (last visited July 20, 2020) [<https://perma.cc/PJE9-S9Z4>].

300. U.S. GOV'T ACCOUNTABILITY OFF., GAO/AIMD-96-150, INSPECTORS GENERAL: A COMPARISON OF CERTAIN ACTIVITIES OF THE POSTAL IG AND OTHER IGs 3 (1996).

301. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-379 (1996) (codified as amended at 39 U.S.C. app. §8G (2018)). The Act also granted the USPS OIG law enforcement authority. *Id.*; *see also* CONG. RSCH. SERV., R43722, OFFICES OF INSPECTORS GENERAL AND LAW ENFORCEMENT AUTHORITY: IN BRIEF 5 (2014).

302. U.S. GOV'T ACCOUNTABILITY OFF., GAO 07-138, INSPECTORS GENERAL: ACTIVITIES OF THE DEPARTMENT OF STATE OFFICE OF INSPECTOR GENERAL 26 (2007).

303. *See* U.S. POSTAL SERV. OFFICE OF INSPECTOR GEN., HEALTH CARE PROVIDER FRAUD, <https://www.uspsoig.gov/investigations/provider-fraud> (last visited July 20, 2020) [<https://perma.cc/XPY9-82W3>].

304. Press Release, U.S. Dep't of Justice, Pharmaceutical Company Admits to Price Fixing in Violation of Antitrust Law, Resolves Related False Claims Act Violations (May 31, 2019), <https://www.justice.gov/opa/pr/pharmaceutical-company-admits-price-fixing-violation-antitrust-law-resolves-related-false> [<https://perma.cc/B4CY-NDNQI>].

305. *Id.*

306. U.S. POSTAL SERV. OFFICE OF INSPECTOR GEN., OFFICE OF INVESTIGATIONS: INTRODUCTION, <https://www.uspsoig.gov/investigations> (last visited July 20, 2020) [<https://perma.cc/JE8B-A6A7>].

307. Press Release, U.S. Dep't of Justice, Two Men Sentenced in Marijuana Scheme Through U.S. Postal Service (Nov. 19, 2019), https://www.uspsoig.gov/sites/default/files/document-library-files/2019/DOJ_News_2019_11_19.pdf [<https://perma.cc/W62L-YKTUJ>].

coordination with the United States Postal Inspection Service and other federal agencies.³⁰⁸

8. Federal Communications Commission

The Communications Act of 1934 established the Federal Communication Commission (FCC) for the purpose of regulating interstate and international communications.³⁰⁹ The Commission is responsible for implementing and enforcing communications law and regulations.³¹⁰ The FCC Office of Inspector General (OIG) was established pursuant to the IG Amendments Act of 1988³¹¹ and aids the Commission in its efforts to improve “operational and program effectiveness and efficiency.”³¹²

Even though the FCC has a distinct enforcement bureau,³¹³ the OIG often investigates allegations of criminal misconduct and civil fraud relating to FCC programs.³¹⁴ For instance, the OIG investigates the FCC’s “E-Rate” program, which distributes funds for telecommunication services and internet access to schools and libraries serving economically disadvantaged children.³¹⁵ In 2020, the FCC OIG worked alongside the FBI to uncover a multimillion dollar scheme to defraud the E-Rate program, in which false claims were filed to enrich school officials and vendors at the expense of underprivileged children.³¹⁶

The OIG has also worked in cooperation with other FCC bureaus and offices in its investigations. In 2013, the FCC OIG and the Office of General Counsel worked together to investigate allegations that AT&T was knowingly overbilling an FCC program which compensates service providers for placing calls on behalf of the hearing or speech impaired.³¹⁷ More recently, the OIG and the

308. *Id.*

309. Communications Act of 1934, Pub. L. No. 73-416, § 1, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. 151) (2018); *see also infra* note 310.

310. See CONG. RESEARCH SERV., R45699, THE FEDERAL COMMUNICATIONS COMMISSION: CURRENT STRUCTURE AND ITS ROLE IN THE CHANGING TELECOMMUNICATIONS LANDSCAPE 1 (2020).

311. *See infra* note 335, at 28. The FCC OIG was originally established as a designated federal entity (DFE). *Id.* In 2018, the FCC IG became an establishment IG, pursuant to the Consolidated Appropriations Act of 2018. *Id.*

312. OFFICE OF INSPECTOR GEN., FED. COMM’NS COMM’N., SEMIANNUAL REPORT TO CONGRESS: OCTOBER 1, 2019-MARCH 31, 2020 41 (2020).

313. The Enforcement Bureau (EB) is the primary enforcement mechanism for the Communications Act of 1934 as amended, other FCC statutes, as well as FCC rules and orders. FED. COMM’NS COMM’N ENF’T BUREAU, ENFORCEMENT OVERVIEW 4 (2020).

314. *See supra* note 312, at 7.

315. Press Release, U.S. Dep’t of Justice, Seven Defendants Plead Guilty To Defrauding Federal Program That Provided Technology Funding For Rockland County Schools (Feb. 12, 2020), <https://www.justice.gov/usao-sdny/pr/seven-defendants-plead-guilty-defrauding-federal-program-provided-technology-funding>. [<https://perma.cc/4YDR-2FXH>].

316. *See supra* note 312, at FED. 13–14.

317. Press Release, U.S. Dep’t of Justice, AT&T Agrees to Settle Allegations Involving IP Relay Services Provided to Hearing-and-Speech-Impaired Persons (Nov. 7, 2013), https://transition.fcc.gov/oig/DOJ_Press_Release_13-civ-1191.pdf.

Enforcement Bureau investigated an allegation that a broadcasting company had violated the False Claims Act in its contract with the FCC.³¹⁸

9. State Department

The State Department was established in 1789 as the Department of Foreign Affairs, pursuant to an “act establishing an Executive Department, to be denominated the Department of Foreign Affairs.”³¹⁹ The Department’s mandate is to lead United States foreign policy through “diplomacy, advocacy, and assistance by advancing the interests of the American people, their safety and economic prosperity.”³²⁰ The Department of State Office of Inspector General (DOS OIG), as currently organized, was established through amendments to the IG Act in 1985³²¹ and 1986.³²² In addition to the traditional functions of an Inspector General’s Office as delineated in the IG Act, the DOS OIG is required by statute to undergo inspections of the Department’s bureaus and posts worldwide.³²³

The OIG investigates allegations of fraud, waste, and mismanagement that may be either criminal or in violation of Agency regulations.³²⁴ For instance, the OIG investigates allegations of fraud in the State Department’s grant programs.³²⁵ The OIG’s Spring 2020 semiannual report states that roughly 14% of investigations for that reporting period involved allegations of grant fraud.³²⁶ In January 2020, a Department grantee falsified documents related to a grant intended to support youth centers in marginalized areas of the Middle East.³²⁷ Another grantee and five companies were debarred for their roles in a bid rigging conspiracy to

318. Press Release, U.S. Dep’t of Justice, Florida-Based Broadcasting Company Ordered to Pay \$910,700 to Federal Communications Commission (Sept. 6, 2018), <https://www.justice.gov/usao-dc/pr/florida-based-broadcasting-company-ordered-pay-910700-federal-communications-commission> [https://perma.cc/87VZ-HQ7V].

319. Department of Foreign Affairs Act, 1 Stat. 28 (1789) (codified as amended at 22 U.S.C. § 2651 (2018)).

320. U.S. DEP’T OF STATE, ABOUT THE U.S. DEP’T OF STATE, <https://www.state.gov/about/about-the-u-s-department-of-state/> [https://perma.cc/SR2V-CKBA] (last visited July 22, 2020).

321. Foreign Relations Authorization Act, Pub. L. No. 99-93, § 150, 99 Stat. 405, 427 (1985).

322. Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 853 (1986); *see also* U.S. GOV’T ACCOUNTABILITY OFF., GAO 07-138, INSPECTORS GENERAL: ACTIVITIES OF THE DEPARTMENT OF STATE OFFICE OF INSPECTOR GENERAL 10–11 (2007). In 1998, the DOS OIG expanded to include the Broadcasting Board of Governors. *See infra* note 335, at 28.

323. *See* Foreign Service Act of 1980, Pub. L. No. 96-465, § 209, 94 Stat. 2071, 2080 (1980) (codified as amended 22 U.S.C. § 3929 (2018)). Congress often waives this periodic inspection, applying a risk-based approach instead. *See* U.S. GOV’T ACCOUNTABILITY OFF., GAO 11-382T, STATE DEPARTMENT INSPECTOR GENERAL: ACTIONS TO ADDRESS INDEPENDENCE AND EFFECTIVENESS CONCERNS ARE UNDER WAY 3 (2011).

324. U.S. DEP’T OF STATE OFFICE OF INSPECTOR GEN., ABOUT OIG, <https://www.stateoig.gov/about> [https://perma.cc/ZJ4B-FPJJC] (last visited July 22, 2020).

325. OFFICE OF INSPECTOR GEN, U.S. DEP’T OF STATE, SEMIANNUAL REPORT TO THE CONGRESS OCTOBER 1, 2019, TO MARCH 31, 2020 25–28 (2020).

326. *Id.* at 25.

327. *Id.* at 28.

steer contracts for kickbacks, affecting a program that provides learning opportunities for refugee children.³²⁸

In the past, GAO has expressed concerns over potential overlap of investigative functions between the OIG and the Bureau of Diplomatic Security (BDS) in cases of passport and visa fraud.³²⁹ In 2010, the two entities entered into a memorandum of understanding delineating the responsibilities of each, including areas of overlap.³³⁰ The OIG continues to investigate cases of visa and passport fraud. In 2017, a joint OIG and Department of Homeland Security investigation revealed a nationwide fraud scheme designed to profit unlawfully from Department exchange visitor programs.³³¹ The victims came to the United States believing they would be part of the Department's Intern and Training Program but instead, were exploited for their labor and paid only a fraction of what they earned.³³²

10. Internal Revenue Service

The Internal Revenue Service (IRS) is a bureau of the Department of the Treasury. The IRS originated with the Office of the Commissioner of Internal Revenue under the Internal Revenue Act of 1862.³³³ The modern IRS was created pursuant to the Internal Revenue Service Restructuring and Reform Act of 1998.³³⁴

The Department of the Treasury has two IGs, the Department of the Treasury IG and the Treasury Inspector General for Tax Administration (TIGTA).³³⁵ TIGTA serves as the IRS OIG.³³⁶ TIGTA was established under the Internal Revenue Service Restructuring and Reform Act of 1998.³³⁷ TIGTA encourages "... economy, efficiency, [and] effectiveness in the administration of the internal revenue laws."³³⁸ It also works to prevent and detect fraud, waste, and abuse within the IRS and related entities.³³⁹

328. *Id.*

329. See U.S. GOV'T ACCOUNTABILITY OFF., GAO 07-138, INSPECTORS GENERAL: ACTIVITIES OF THE DEPARTMENT OF STATE OFFICE OF INSPECTOR GENERAL 5, 25 (2007).

330. See OFFICE OF INSPECTOR GEN, U.S. DEP'T OF STATE BROAD. BD. OF GOVERNORS, INSPECTION OF THE BUREAU OF DIPLOMATIC SECURITY, OFFICE OF INVESTIGATIONS AND COUNTERINTELLIGENCE, DIVISIONS OF SPECIAL INVESTIGATIONS, CRIMINAL INVESTIGATIONS, AND COMPUTER INVESTIGATIONS AND FORENSICS 3 (2013); see also report cited *supra* note 323, at 11.

331. OFFICE OF INSPECTOR GEN, U.S. DEP'T OF STATE, SEMIANNUAL REPORT TO THE CONGRESS OCTOBER 1, 2017, TO MARCH 31, 2018 27 (2018).

332. *Id.*

333. Internal Revenue Act of 1862, 12 Stat. 432 (1862).

334. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (1998).

335. See STATUTORY INSPECTORS GENERAL, *supra* note 53 at 5-6.

336. *Id.*

337. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206 § 1103, 112 Stat. 685, 705 (1998).

338. <https://www.treasury.gov/tigta/>.

339. About TIGTA, TREASURY INSPECTOR GEN. FOR TAX ADMIN. (May 25, 2018), <https://www.treasury.gov/tigta/about.shtml>, archived at <https://perma.cc/F8SZ-UKXZ>.

In addition to internal audits and investigations, TIGTA also addresses threats of violence against the IRS and “external attempts to corruptly interfere with Federal tax administration.”³⁴⁰ For example, TIGTA investigates external crimes, including fraudulently filed IRS documents.³⁴¹ In 2018, TIGTA investigated two individuals who attempted to fraudulently obtain President Trump’s tax returns.³⁴² TIGTA also investigates instances where scammers impersonate IRS employees in order to obtain personal information or steal money from taxpayers.³⁴³ In addition, TIGTA investigates cybercrimes. For instance, TIGTA was involved in an investigation into high-profile attacks against the IRS web portal and the FAFSA website.³⁴⁴ Other external issues TIGTA investigates include falsely or frivolously filed documents against IRS employees, instances of fraud related to contracts awarded by the IRS, and misuse of the IRS seal and symbols.³⁴⁵

C. The Problem with Parallel Enforcement

The foregoing ten examples describe how some IGs are deeply involved in agency law enforcement activities. At the same time, the text, structure, and intent of the IG Act clearly provides that IGs should not become overly entangled with their agencies. Congress organizes the federal government and establishes departments, agencies, commissions and other instrumentalities to accomplish objectives pursuant to statutory directives.³⁴⁶ Cabinet secretaries, agency commissioners, and other heads of department are charged with administering these statutes, which may include enforcement and investigative authority.³⁴⁷ These are not the functions for which IGs were established.

This problem is examined in two appellate cases addressing IG investigatory powers. In *Burlington Northern Railroad Co. v. Office of Inspector General, Railroad Retirement Board*, 983 F.2d 631 (5th Cir. 1993), the court considered whether an IG could enforce a subpoena issued in aid of a regularly scheduled tax compliance audit, rather than the detection of fraud and abuse. The trial court had found that the audit “did not include any oversight element but . . . had as its goal the carrying out of program responsibilities.”³⁴⁸ In examining the language and intent of the IG Act, the court affirmed a lower court decision and held that IGs

340. *Office of Investigations*, TREASURY INSPECTOR GEN. FOR TAX ADMIN. (Nov. 19, 2018), <https://www.treasury.gov/tigta/oi.shtml>, archived at <https://perma.cc/J55Z-RK2Y>.

341. *See, e.g.*, TREASURY INSPECTOR GEN. FOR TAX ADMIN., SEMI-ANNUAL REP. TO CONGRESS: OCTOBER 1, 2019–MARCH 31, 2020 23-24 (2020) (man found guilty of wire fraud and aggravated identity theft for filing fraudulent Federal income tax returns using the names and SSNs of others and claiming tax refunds to which he was not entitled).

342. *Id.* at 25.

343. *Id.* at 26.

344. *Id.* at 23.

345. *Id.*

346. *See supra* n.35 and accompanying text.

347. *Id.*

348. *Burlington N. R.R. Co. v. Office of Inspector Gen., R.R. Ret. Bd.*, 983 F.2d 631, 638 (5th Cir. 1993).

lacked statutory authority to conduct “regulatory compliance investigations or audits,” meaning those “most appropriately viewed as being within the authority of the agency itself.”³⁴⁹ The force of the court’s reasoning, based on the language of the statute, applies regardless of whether Congress subsequently might choose to amend the law and expand the IG’s authority. Specifically, the court pointed out that, if an IG “assume[s] an agency’s regulatory compliance function, [the IG’s] independence and objectiveness—*qualities that Congress has expressly recognized are essential*. . . would, in our view, be compromised.”³⁵⁰ Indeed, for that reason, the House drafters of the IG Act expressly disclaimed the IG’s jurisdiction over “audits and investigations constituting an integral part of” any agency program that would potentially be audited or investigated by the IG.³⁵¹ The court ruled that the goal for IGs should be exercising oversight of “the internal operations of the departments and agencies.”³⁵²

In *Truckers United for Safety v. Mead*, 251 F.3d 183 (D.C. Cir. 2001), the court held that, without specific congressional authorization, the Department of Transportation IG could not conduct investigations of private party compliance with provisions of its host agency regulations. The court pointed out that the IG’s mandate “focuses on systemic agency-wide issues.”³⁵³ The IG Act, the court found, “specifically prohibits” IGs from assuming “program operating responsibilities.”³⁵⁴ While the court understood “honest cooperation” between an IG and its host agency, this would not authorize the IG to “enforc[e] motor carrier safety regulations—a role which is central to the basic operations of the agency.”³⁵⁵ The court determined that the joint project at issue, seeking to “combine the efforts of OIG and [agency] staffs” to review the operations of regulated entities, was not authorized by statute and was therefore unlawful.³⁵⁶ Congress may have a host of reasons for expanding IG authority to enhance the efficacy of the host agency, but the D.C. Circuit found that those reasons are not consistent with the IG’s fundamental oversight responsibilities and the need to protect IG independence.

The 1978 IG Act establishes IGs inside covered departments “to create independent and objective units” to “conduct and supervise audits and investigations

349. *Id.* at 642.

350. *Id.* (emphasis added).

351. *Id.* (emphasis omitted).

352. *Id.* (emphasis omitted) (citing 124 Cong. Rec. 10,405 (daily ed. Sept. 28, 1978) (statement of Rep. Levitas)). The court found support as well from the Department of Justice’s Office of Legal Counsel, which had previously prepared a memorandum addressing the question of IG authority to conduct investigations pursuant to statutes that provide the host agency with regulatory jurisdiction over private individuals and entities that do not receive federal funds. *Id.* at 642–43 (citing Inspector General Authority to Conduct Regulatory Investigations, 13 Op. O.L.C. 54 (1989)).

353. *Truckers United for Safety v. Mead*, 251 F.3d 183, 186 (D.C. Cir. 2001).

354. *Id.*

355. *Id.* at 189 (emphasis added). Congress subsequently amended the power of the IG to investigate persons subject to the agency’s jurisdiction. *Id.* Compare *id.* with *Winters Ranch P’ship v. Viadero*, 123 F.3d 327 (5th Cir. 1997) (upholding IG’s subpoena because it was part of an investigation to test the effectiveness of the agency’s conduct of a program and not part of program operating responsibilities).

356. *Truckers United for Safety*, 251 F.3d at 187, 190.

relating to the programs and operations” of the covered departments³⁵⁷ and “to provide leadership and coordination and recommend policies for activities designed (A) to promote economy, efficiency, and effectiveness in the administration of, and (B) to prevent and detect fraud and abuse in, such programs and operations.”³⁵⁸ The duties and responsibilities of IGs are far-ranging: providing policy direction to their agencies; reviewing legislation and regulation and making recommendations about the impact on economy and efficiency of their agencies and the detection of fraud and abuse; recommending and supervising the implementation of policies for promoting economy and efficiency and preventing fraud and abuse; taking the lead intergovernmental role in promoting economy and efficiency and preventing and detecting fraud and abuse; and keeping the agency head and Congress “fully and currently informed” of problems.³⁵⁹ This is a difficult role, and members of Congress are not always receptive to receiving complex or nuanced information.³⁶⁰

Maintaining independence is difficult. There are many seemingly good reasons for IGs to collaborate with their host agencies, but this “can produce conflicting pressures for [IGs] when independence might be compromised. . . .”³⁶¹ The same problem that Chairman Fountain identified to Department of Labor Comptroller Zuck³⁶² exists today when IG offices—even separate divisions, even separate teams—become involved in agency initiatives because they eventually report “to the person . . . also responsible” for “maximum independence and objectivity”, viz., the Inspector General. Whether Inspectors General are more auditors and internal investigators—authorized to investigate the operations of the government and the conduct of government employees and contractors and federal funds recipients—or functionally part of the mechanism by which the government accomplishes its programmatic mission, is answered in the text of the IG Act.

To the extent that IGs are compromised through entanglement in the operations of their host agencies, they are less independent and therefore, less useful and

357. 5 U.S.C. app. § 2(1).

358. *Id.* § 2(2).

359. *Id.* § 4(a).

360. See PETER H. SCHUCK, WHY GOVERNMENT FAILS SO OFTEN: AND HOW IT CAN DO BETTER 168 (2014) (“Members of Congress, at the summit of our system, receive a veritable tsunami of information, but much or most of it is highly biased and selective. Their main sources—lobbyists, party organs, and staff—are self-interested, partisan, pre-committed, and result-oriented, not objective problem-solvers. Members’ positions on many important issues are predetermined by their party affiliations and campaign pledges, and are usually not open to significant revision in light of new or better information. Preternaturally busy people, they typically spend most of their time on fund-raising, campaigning, subcommittee work, and constituency-tending. Consequently, they have little time to read or think deeply about issues, and in any event politicians are seldom drawn to such passive activities. Instead, they rely on cues, party and staff summaries, and various politics-specific heuristics and routines for processing information and voting.”).

361. TRUTH TELLERS, *supra* note 20 at 123.

362. See *supra* n.158 and accompanying text; *Establishment of Offices of Inspector General: Hearing on H.R. 2819 Before the Subcomm. on Intergovernmental Rel. & Hum. Res. of the H. Comm. on Gov’t Operations*, 95th Cong. 166 (1977).

reliable to Congress for this important purpose.³⁶³ To the extent IGs devote more time to the performance of those congressionally mandated activities outside the scope of the IG Act, this comes at the expense of the duties generally assigned to them by the 1978 Inspector General Act. Entanglement also compromises IGs' ability to set their office priorities independently. By assigning more duties to IGs that overlap with those of their host agencies, Congress helps to create a common identity of interest between the IG and their host agency. This raises the prospect of regulatory capture.³⁶⁴ As former Department of Homeland Security Inspector General John Roth testified:

Once you have lost that perception of independence, you are pretty much done, because . . . the only difference between me and the rest of the 225,000 people in the Department of Homeland Security is that I am, in fact, independent and am perceived to be that way. That is the value that we add, and once you lose that, you can never be effective again.³⁶⁵

Good policy and management practice require that IGs do not entangle themselves with their agencies.³⁶⁶ Entanglement will result at best in operational confusion, thus confusing both the public and the host agency staff. The relationship between Congress and the Executive already entails plenty of complicated negotiations and accommodations.³⁶⁷ Blurring the lines between agency and IG further

363. William S. Fields & Thomas E. Robinson, *Legal and Functional Influences on the Objectivity of the Inspector General Audit Process*, 2 Geo. Mason Indep. L. Rev. 97, 110–11 (1993).

364. "In its classic form, capture theory involves three actors: an agency, the congressional committee that oversees that agency, and a powerful interest group. In order to secure favorable regulations, the interest group (so the story goes) will aggressively lobby committee members and provide support, financial or otherwise, for the members' reelection efforts. Those committee members will then pressure the agencies to enact favorable regulations. Because the rest of Congress will be largely oblivious to the activities of that committee and the agency, this "iron triangle" will inevitably cater to the interest group's narrow desires to the detriment of the public interest." Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 Colum. L. Rev. 1260, 1284 (2006). See also George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 5 (1971) ("[E]very industry or occupation that has enough political power to utilize the state will seek to control entry."). IG efforts to "divest their offices of program operating responsibilities [often meet] with resistance from Congress." Fields & Robinson, *supra* note 363, at 110. This should be a warning sign, at least raising the question as to the benefits members of Congress obtain from compromising IG independence. "The political branches [are potentially] more attuned to the interests of those narrow interest groups than to the desires of the general public." Bagley & Revesz, *supra* note 364 at 1285 (internal citations and quotations omitted). See also Steven P. Croley, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 14–25 (2008) (outlining "the cynical view" of public choice theory).

365. *Improving the Efficiency, Effectiveness, and Indep. of Inspectors Gen.*, Hearing Before the S. Comm. on Homeland Sec. and Governmental Aff., 114th Cong. 13 (2015) (testimony of John Roth, Inspector Gen., Dep't of Homeland Sec.).

366. Fields & Robinson, *supra* note 363, at 109–10 ("[I]t is difficult for Inspector Generals to impartially evaluate and criticize their agencies' management practices and programs if they are themselves taking an active role in program management."). Again there is a *supra* to a later note.

367. CHRISTOPHER H. FOREMAN, SIGNALS FROM THE HILL: CONGRESSIONAL OVERSIGHT AND THE CHALLENGE OF SOCIAL REGULATION 12 (1988) ("A wealth of informal monitoring and bargaining

complicates this process. Congress depends on Inspectors General to provide independent, timely, and actionable information on the operations of the federal government.³⁶⁸

Regulators are captured “when [they] are in a constant state of ‘being persuaded’ . . . based on the persuader’s *identity* rather than an argument’s merits.”³⁶⁹ Two of the warning signs of capture are: (a) issue framing by the regulated entity³⁷⁰ and (b) substitution of the regulated entity’s welfare for (or conflation with) the public good.³⁷¹ The text and history of the IG Act indisputably require that IGs regulate their host agencies and report to Congress, not perform program operations or otherwise regulate the public.³⁷² But these commands are broad and convey discretion to the “regulator.” Those regulators are statutorily “identified” with their host agencies. Regulators examine many issues as they arise within the agency. These individuals see their role in part as contributing to the good of the host agency. To the extent that IGs “balance” those host agency interests with the interests of Congress, they risk undermining their independence and ability to keep Congress impartially informed.

One may further consider the problem from the perspective of corporate auditors. Auditors are required to be independent, but, the phrase “independence” itself does not possess a concrete definition.³⁷³ Generally Accepted Government Auditing Standards (“GAGAS”) provide that auditors must be “independent,” but the requirements contained in the standards relate to the appearance of objectivity.³⁷⁴ Even the professional paradigm of auditors’ and their “clients” necessarily blurs the obligation that auditors owe first and foremost to the rules under which they operate.³⁷⁵ One cannot “‘stand separate and apart’ from the client’s

constantly fleshes out the structural bones of both the congressional division of labor and the legislative-executive relationship.”).

368. “Congress is more concerned about independence involving OIG-agency relationships than about OIGs’ relationship with Congress.” CHARLES A. JOHNSON ET AL., IBM CENTER FOR BUS. & GOV’T, BALANCING INDEP. AND POSITIVE ENGAGEMENT: HOW INSPECTORS GEN. WORK WITH AGENCIES AND CONGRESS 21 (2015).

369. Scott Hempling, *Regulatory Capture: Sources and Solutions*, 1 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 23, 25 (2014) (emphasis added).

370. *Id.* at 26.

371. *Id.* at 28.

372. See *supra* n.156 *et seq.* and accompanying text.

373. American Institute of Certified Public Accountants (AICPA) and SEC “rules on auditor independence are lengthy and subject to constant reinterpretation, and both bodies have abandoned attempts to provide a concise definition.” Rick Antle, Auditor Independence, 22 J. ACCT’G RES. 1 (1984). See also Plain English Guide to Independence, ASSOCIATION OF INTERNATIONAL CERTIFIED PROFESSIONAL ACCOUNTANTS 1 (August 2017) (“Independence is the *state of mind* that permits [the auditor] to perform . . . without being affected by influences that compromise professional judgment . . . [and] exercise objectivity and professional skepticism.”) (emphasis added), <https://www.aicpa.org/interestareas/professionalethics/resources/tools/downloadabledocuments/plain%20english%20guide.pdf> (last visited August 28, 2020), [https://perma.cc/W7T7-LGJY].

374. U.S. GOV’T Accountability Office, GAO-18-568G, GOVERNMENT AUDITING STANDARDS, 2018 REVISION, 28–30 (2018).

375. See William W. Bratton, *Shareholder Value and Auditor Independence*, 53 DUKE L.J. 439, 440 (2003).

business and at the same time be an agent beholden to the [business itself].”³⁷⁶ Just as “[en]mesh[ing]” auditors in an agency relationship with shareholders “*subject[s] [them] to the principal’s control*,”³⁷⁷ IGs must be careful not to become “enmesh[ed]” in the regulatory or programmatic initiatives of their host agencies lest they compromise their independence. Separating audit functions from other functions may lend the appearance of objectivity to audits, but it does not help make other functions that OIGs perform more independent or objective.

At this point, one may be tempted to argue that fidelity to the statutory mandate alone is insufficient grounds for concern regarding IGs becoming overly enmeshed in the programs and operations of their host agencies. If there are efficiencies in combining human resources; if there are areas for performance improvements in joint operations; if there are possibilities to cut costs through consolidation; why should anyone care? Perhaps the lessons of regulatory theory might shed some light on the question. One might believe that the regulatory process, in general, is efficient and effective and that the existence of potential problems is attributed solely to the presence of undue outside (“political”) interference from Congress or a lack of support inside the Executive Branch. But there are sound theoretical reasons to believe that “inherent in the regulatory process is a persistent tendency to make socially undesirable policy”—even if the agency is motivated not to promote the regulated industry.³⁷⁸ Meanwhile, “Congress and the president . . . heap ever greater responsibilities on government, always comfortable in the belief that the . . . legion of auditors and investigators [will] make sure everything work[s] out.”³⁷⁹ In this context, IGs relying solely on their judgment and discretion—rather than clear standards or guidelines—risk entangling themselves in the same web of incentives that agencies diligently attempt to avoid. Moreover, there are no mechanisms for preventing or correcting

376. *Id.* at 444 (internal quotations omitted).

377. *Id.* (emphasis added).

378. ROGER NOLL, *REFORMING REGULATION: AN EVALUATION OF THE ASH COUNCIL PROPOSALS* 40 (1971). Regulated parties can make important contributions to the development of regulations. But in that process they may also gain undue influence over regulators. See Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 23 (2010); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1713–14 (1975). For detailed discussion of this phenomenon, see Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1565–70 (1992) (consider “the ability of an ostensibly regulated industry to influence government policy [as set forth by] the capture hypothesis. . .”). See generally PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT, (Daniel Carpenter & David Moss eds., 2013). Moreover, regulators depend on the regulated for observable success metrics, and the information asymmetries favor the regulated in most cases. ROGER NOLL, *REFORMING REGULATION: AN EVALUATION OF THE ASH COUNCIL PROPOSALS* 40–41 (1971). Agencies can embark on costly information-gathering and decision-making procedures, but these may have the side effect of raising the costs of entering a regulatory dispute. *Id.* See also Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 170 (1990) (“Postrevisionist theories demonstrate that modern democratic government allows many political actors to be free from oversight by the electorate or by those who do answer to the electorate.”).

379. *MONITORING GOVERNMENT*, *supra* notes 10, 57.

potential entanglement. The only established process to address these problems is for the IGs themselves to report misconduct to CIGIE.³⁸⁰

Worse, from the perspective of promoting the interest of sound governmental oversight, such entanglement potentially confuses whistleblowers and compromises the independence and ability of IGs to oversee the agency as Congress intended. As the Office of Legal Counsel previously stated, IGs cannot serve as a “check on the mistreatment or abuse of the general public by government employees” if they are “conducting and supervising regulatory investigations. . . .”³⁸¹ IGs should scrupulously avoid the possibility of “confus[ing] the press and public” or “creat[ing] pitfalls for potential whistleblowers [who] may believe [they are] approaching an independent arbiter and end up sadly mistaken.”³⁸² Potential whistleblowers may be scared off if they believe that the Office of Inspector General as a whole, not just the IG, is “susceptible to pressures” from agency management.³⁸³ “Scaring off would-be whistleblowers” occurs when the IG creates the impression that the office is either: (a) too busy or (b) too connected to the agency.³⁸⁴

Notions of due process³⁸⁵ and fundamental fairness to investigatory targets also caution against entanglement between IGs with their agencies and operations.³⁸⁶ Requiring the targets of investigations to engage with multiple offices inside the same agency, including both the enforcement officials and the IG office that is charged with receiving complaints about those same enforcement officials

380. 5 U.S.C. app. § 11(d)(1). CIGIE’s Special Integrity Committee receives, reviews, and refers for investigation allegations of wrongdoing.

381. Inspector General Authority to Conduct Regulatory Investigations, 13 Op. O.L.C. 54, 61 (1989).

382. LACK ESSENTIAL TOOLS, *supra* note 17 at 9.

383. PRINCIPLES AND CONSIDERATIONS, *supra* note 166 at 7.

384. LACK ESSENTIAL TOOLS, *supra* note 17 at 12.

385. In its ten-year review of the Inspector General Act of 1978, the House Government Operations Committee expressed concern that independent blanket law enforcement authority for IGs does not by itself “provide the due process requirements and protection of individual rights inherent in the grand jury process, used when the inspectors general conduct investigation in cooperation with the U.S. attorney, nor . . . the oversight inherent in the deputization process.” H.R. REP. NO. 100-1027 (1988). *See also* Frederick M. Kaiser, *Full Law Enforcement Authority for Offices of Inspector General: Causes, Concerns, and Cautions*, 15 POLICE STUDIES INT’L REVIEW OF POLICE DEV. 75, 76 (1992).

386. Agencies are accorded “extreme breadth” in conducting regulatory investigations. *See* Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp., 5 F.3d 1508, 1517 (D.C. Cir. 1993). Courts tend to grant considerable discretion to agencies when investigatory targets complain about compliance burdens. *Appeal of FTC Line of Business Report Litig.*, 595 F.2d 685, 703 (D.C. Cir.), *cert. denied*, 439 U.S. 958, 99 S.Ct. 362, 58 L.Ed.2d 351 (1978) (reasonableness of request is “presumed” absent showing of undue burden or disruption). Even the filing of a subsequent criminal or civil action has no effect upon the enforceability of an administrative subpoena issued by a body with significant investigative powers. *See Linde Thompson*, 5 F.3d at 1518 (“Nor does the statute authorizing RTC investigations contemplate the termination of investigative authority upon the commencement of civil proceedings.”); *Resolution Trust Corp. v. Frates*, 61 F.3d 962, 965 (D.C. Cir. 1995) (filing of civil case did not deprive agency of subpoena power since it could mean that agency “was still searching for further evidence of the extent of [subpoena recipient’s] wrongdoing or the value of the claims”); *Resolution Trust Corp. v. Walde*, 18 F.3d 943, 950 (D.C. Cir. 1994) (rejecting subpoena recipient’s argument that the administrative subpoena was moot due to the agency’s filing of a federal civil suit).

or with evaluating their performance, likewise raises a host of additional concerns.

D. What IGs Might Say

Inspectors General and their offices are overwhelmingly attempting to perform an extremely difficult and important job and, in doing so, act as Congress intended. IGs may understandably respond that the separation of audit and investigative functions and personnel are sufficient to avoid the practical problems, threats to independence, and the compromise of value to Congress as outlined above. IGs might also contend that the nature of investigations of wrongdoers outside their host agencies is sufficiently different from the oversight work that the IGs perform and that these investigations do not compromise their independence or oversight function. Of course, whether this is true remains in the eye of the beholder, and the only opinion that matters is that of the IG.

IGs and their staffs are “highly attuned to requests from Congress.”³⁸⁷ Yet, IGs can report discomfort with “serving in an agent-like role that advances the political interests of individual legislators.”³⁸⁸ Unfortunately, there is no response to the point that the entangling consequences of parallel enforcement are inconsistent with the ideal of independence as set forth in the structure of the IG Act. Threats to the independence of the IG compromise the ability of Congress to rely on IGs to conduct oversight of the Executive. Even if it is fair to say in most cases that IGs are better able to support their agencies when they work closer to them operationally and programmatically, the closer these two are, the harder it is for Congress to rely on IGs to provide critical information in the manner anticipated in the statute.

III. POTENTIAL SOLUTIONS

There are a variety of ways to mitigate the problem identified above. At the very least, agencies and their IGs should maintain operational independence in enforcement matters as a matter of policy and practice. For example, if IG personnel report only to their own supervisors, the risks of agency capture and the dangers inherent in reviewing one’s own work could be reduced, if not eliminated. In the alternative, IGs have the potential to develop better guidelines and principles for determining whether to engage in activities that align them programmatically with the agencies they oversee. This could be done through the Council of Inspectors General for Integrity and Efficiency (“CIGIE”) if they received rulemaking authority for this purpose.

Another alternative is that Congress could spend more time on initiatives that promote congressional cooperation with Inspectors General. This action will result in the strengthening IG independence by scheduling more time for briefings, communicating more, working with IGs to shape mandates, and dedicating

387. HOW INSPECTORS GENERAL WORK, *supra* note 1 at 19.

388. *Id.*

(or detailing) staff to work between offices.³⁸⁹ Congress could also invest more time following-up on IG reports or unimplemented recommendations and maintaining more regular contact with IG offices.³⁹⁰

Another possibility is that Congress could consider both grandfathering specific reporting and auditing requirements imposed on IGs and also curtailing the practice of assigning more duties to IGs beyond those in the 1978 IG Act.³⁹¹ Hearings could be conducted to review how agencies have delegated responsibilities to their IGs and the extent to which that compromises IG independence.

A more radical solution would be for Congress to amend the IG laws to prohibit investigations of wrongdoers outside an agency, strictly limiting IGs to their oversight work, and to re-categorize IG investigators doing law enforcement work as agency personnel. While those changes would initially cause disruption, they could also return IGs to their original role, strengthen their independence, and provide more value to Congress.

On the other hand, Congress could simply define the term “program operating responsibilities.” In clarifying and simplifying this meaning, OIGs will have clear guidance regarding which activities are prohibited by the IG Act and will better understand that IGs should not ordinarily cooperate in investigations or activities alongside the agencies they oversee (or other agencies). At the very least, Congress could require IGs to report on a regular basis their analysis regarding how the specific activities they undertake in cooperation with their host agencies do not threaten their independence and the objectivity of their reporting, consistent with the framework outlined in GAGAS and the GAO’s recommendations.³⁹²

CONCLUSION

Inspectors General have unique value as instruments of Congressional oversight. The line prohibiting IGs from engaging in programmatic activities is blurry and requires judgment calls that are easily made in favor of expanding the scope of activity. When IGs expand beyond audits and investigations of the agencies they oversee (whether authorized by law or through individual IG discretion to interpret their roles more expansively), they are compromising their independence and the value they provide to Congress.

For IGs to accomplish their work effectively and as Congress intended, these individuals must retain their independence. Parallel enforcement activities undermine IG independence and create a conflict of interest that is inconsistent with the purposes of the IG Act. When IG independence is undermined, Congressional oversight is weakened. Safeguarding against this practice to maximize IG independence will benefit Congress in its conduct of oversight activities.

389. TRUTH TELLERS, *supra* note 20 at 138-39.

390. *Id.*

391. P'SHIP FOR PUB. SERV., WALKING THE LINE, (2016). Congressional mandates are increasing and of increasing concern for IGs. Mandated activities make it difficult for IGs to foresee or respond to crises. “Mandated reports place a huge burden on . . . small and midsize OIGs.” *Id.* at 13.

392. PRINCIPLES AND CONSIDERATIONS, *supra* note 166 at 7.