

**Challenges to the Independence of Inspectors General in Robust Congressional Oversight**

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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.”*<sup>1</sup>

The Department of Transportation (“DOT”) Office of Inspector General (“OIG”) website lists enforcement priorities in order of importance.<sup>2</sup> “[E]nhanc[ing] DOT’s transportation safety goals by investigating crimes where death or serious bodily injury has or is likely to occur”<sup>3</sup> 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.”<sup>4</sup>

There is no doubt that DOT OIG’s activities are important. But there is also no reason they should be undertaken by an Inspector General (“IG”) rather than the agency itself or the Department of Justice on its own. The core mission of the Inspector General is to assist Congress in its constitutional oversight role. Additional activities, even worthwhile ones, even necessary ones, raise serious questions about IG independence and interfere with the core purpose of these important institutions. At the end of the day, being “agents of positive change striving for continuous improvement in our agencies’ management and program operations”<sup>5</sup> comes at a price. For IGs to do their work effectively and as Congress intended, they have to retain their independence. Regulatory enforcement activities can threaten that independence.

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<sup>1</sup> 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)).

<sup>2</sup> <https://www.oig.dot.gov/investigations/oig-investigative-priorities> (last visited August 28, 2020).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* Additional examples of “parallel enforcement” are described in more detail *infra*. Sec. II.B.

<sup>5</sup> 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); *see also* Memorandum from Alice Rivlin, Deputy Dir., Exec. Off. of the President, Inspector General Vision Statement, (Apr. 11, 1994); *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) (statement of Sen. John Glenn) (“ Agents of ‘Positive Change’ in a Brave New World.”).

## **Introduction**

Congressional oversight is not in the text of the Constitution, but it is among the chief responsibilities of the legislative branch.<sup>6</sup> Congress has a range of tools available to oversee the government. Inspectors General (“IGs”) are among the most important of these tools because they are “hard wired” into the Executive branch itself. IGs are the “eyes and ears” 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.

There is no single lens for studying IGs, which are a unique institution within the Executive Branch. They are not featured in Administrative Law casebooks,<sup>7</sup> and research into their work tends to focus on their history<sup>8</sup> or management role<sup>9</sup> rather than their unique function as an arm of Congressional oversight,<sup>10</sup> with all the attendant complexities that ensue. This article furthers a project of scholarship on IGs as institutions of oversight and accountability,<sup>11</sup> analyzing the statutory framework within which they operate<sup>12</sup> and the conflicting imperatives<sup>13</sup> that affect their work. At issue here is the theoretical “duality” of the IG role, furthering Congressional interest in independent and accurate information about the working 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,<sup>14</sup> nomination,<sup>15</sup> tenure,<sup>16</sup> and the

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<sup>6</sup> *Trump v. Mazars*, 140 S.Ct. 2019, 2031 (July 9, 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.*

<sup>7</sup> [cite]

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<sup>10</sup> [cite] 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 critical” to Congress, “independence” is important but hard to define, “independent decisionmaking is the IG’s responsibility”).

<sup>11</sup> [cite]

<sup>12</sup> [cite]

<sup>13</sup> [cite]

<sup>14</sup> [cite]

<sup>15</sup> [cite]

<sup>16</sup> [cite]

question of “who watches the watchers?”<sup>17</sup> 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. They provide quick access to relevant information about how things are working. They are responsible for preventing billions of dollars in waste, fraud and abuse. And they conduct investigations and audits that protect the lives of the American public. For these reasons, there is overwhelming, bipartisan support for IGs among members of Congress.<sup>18</sup>

IGs must retain their independence to do their work effectively and as Congress intended.<sup>19</sup> But “independence” is not a statutorily defined term. It depends on how individual IGs operationalize 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.<sup>20</sup> That sort of “operational”<sup>21</sup> independence expands the scope of influence of the IG within the agency. But it can also compromise the office’s ability to do its work.<sup>22</sup> If an “independent” IG pursues activities that overlap substantially with those of the agency it is required to 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 in the delivery of information and recommendations to Congress. Without independence, IGs have or might develop conflicts of interest with the agencies they are supposed to oversee. 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.<sup>23</sup>

Independence is critical to the value IGs provide Congress because without it, they are just another part of the agencies they oversee. For these reasons, the Inspector General Act of 1978,

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<sup>17</sup> [cite]

<sup>18</sup> [cite] *See infra* at \_\_\_\_.

<sup>19</sup> [cite] *See infra* at \_\_\_\_.

<sup>20</sup> [cite] *See infra* at \_\_\_\_.

<sup>21</sup> [cite] *See infra* at \_\_\_\_.

<sup>22</sup> [cite] *See infra* at \_\_\_\_.

<sup>23</sup> PROJECT ON GOVERNMENT OVERSIGHT, INSPECTORS GENERAL: MANY LACK ESSENTIAL TOOLS FOR INDEPENDENCE 8 (2008), (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)).

as amended, promotes and facilitates IG independence.<sup>24</sup> IGs have their own staff, counsel, budgets, and autonomy.<sup>25</sup> IGs report to Congress, not just to their agency head.<sup>26</sup>

Despite the importance of independence, IGs have the discretion -- and sometimes decide -- to work together with their agencies (and other agencies) to undertake programmatic responsibilities and even enforce laws against members of the public, a practice to which this article refers as “parallel enforcement.”<sup>27</sup> Parallel enforcement creates a conflict of interest that is inconsistent with the spirit and purpose of the IG Act. Parallel enforcement undermines IG independence. When IG independence is undermined, Congressional oversight is compromised. 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 potentially confuses the agency 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 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

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<sup>24</sup> Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (1978) (codified as amended at 5 U.S.C. app. §§ 1-13). Hereinafter “IG Act” or “1978 Act.”

<sup>25</sup> [cite]

<sup>26</sup> 5 U.S.C. app. §§ 2, 4-5. “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). One former IG famously called this “straddling a barbed wire fence.” PROJECT ON GOVERNMENT OVERSIGHT, INSPECTORS GENERAL: MANY LACK ESSENTIAL TOOLS FOR INDEPENDENCE 10 (2008) (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); PAUL C. LIGHT, MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY 69 (1993); see also CHARLES A. JOHNSON & KATHRYN E. NEWCOMER, U.S. INSPECTORS GENERAL: TRUTH TELLERS IN TURBULENT TIMES 140 (2020) (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.” *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 82 (1998) (testimony of Sherman M. Funk, Inspector Gen., U.S. Dep’t of Com. and U.S. Dep’t of State).

<sup>27</sup> The term refers to any activity undertaken cooperatively by the Office of Inspector General (“OIG”) with the host agency with a common target. The principal focus is regulatory enforcement or investigations focusing outside the host agency or its direct spending, but can also encompass cooperative efforts to improve agency performance or other policy objectives.

Integrity and Efficiency (“CIGIE”), which convenes IGs and other oversight professionals across the federal government, if it were granted rulemaking authority for this purpose.<sup>28</sup> 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 the 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. After explaining the Inspector General Act of 1978 and describing the offices’ core functions, the Section explains why IG independence is essential for the offices to perform as intended. 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 is blurry and frequently requires judgment calls that are easily made in favor of expanding the scope of activity. This Section provides a taxonomy of parallel enforcement and then explains why it poses a problem. Parallel enforcement violates the letter and spirit of the IG Act by entangling IGs with the agencies they oversee on behalf of Congress. Entanglement of this nature creates the potential for confusion (operational, public, and potentially to whistleblowers). Overall, these are challenges to the IG’s independence and ability to oversee their agency. Finally, Section III provides potential solutions to address the challenge to IG independence and 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 why they must be independent *from their agencies* in order to perform as intended. It begins with background on the creation of Inspectors General.<sup>29</sup> It proceeds to describe the sort of work performed by IGs and then explains why independence *from* agency operations is so essential to IGs performing their intended role for Congress.

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<sup>28</sup> 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. 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).

<sup>29</sup> 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).

Congressional “oversight of administration” is not in the text of the Constitution, but that doesn’t make it less real (or important). Courts<sup>30</sup> and scholars<sup>31</sup> have pointed to a number of constitutional provisions that imply congressional authority to oversee the Executive Branch, including the appropriations power,<sup>32</sup> the organization power,<sup>33</sup> the power to “make all laws for carrying into execution”,<sup>34</sup> and the “necessary and proper” clause<sup>35</sup> -- as well as the confirmation<sup>36</sup> and impeachment<sup>37</sup> powers.

The Supreme Court has rejected retroactive, unicameral oversight of agency actions<sup>38</sup> and interference by Congress in the removal of federal officers.<sup>39</sup> Congress can “hardwire” control

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<sup>30</sup> See *Trump v. Mazars*, 140 S.Ct. 2019, 2031 (July 9, 2020) (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*, (D.C. Cir. Aug. 7, 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 . . .”).

<sup>31</sup> 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, 1-2 (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).

<sup>32</sup> U.S. CONST., art. I, § 9, cl. 7.

<sup>33</sup> U.S. CONST., art. I, § 9; U.S. CONST. art. II, § 2, cl. 2.

<sup>34</sup> U.S. CONST., art. I, § 8.

<sup>35</sup> U.S. CONST., art. I, § 8, cl. 18.

<sup>36</sup> U.S. CONST., art. II, § 2, cl. 2.

<sup>37</sup> U.S. CONST., art. II, § 4.

<sup>38</sup> *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). And “informal” legislative vetoes occur where an executive official pledges not to proceed with an activity until Congress or certain committees agree to it. *Id.*

<sup>39</sup> See *Seila Law LLC v. Consumer Fin. Prot. Bureau*, No. 19-7 2020, WL 3492641, at \*2-3 (U.S. June 20, 2020). Ironically, the president’s power to remove Executive branch officials without congressional interference was inferred by Chief Justice (and former president) William Taft

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.<sup>40</sup> And it can exercise control through the appropriations process.<sup>41</sup> But these are very blunt tools. In order to exercise them, and ensure the 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.<sup>42</sup>

For instance, Congress has established a range of reporting requirements on agencies to meet its oversight responsibilities. Though reporting mandates are usually specific to a particular agency or department, a few apply more generally. The Government Performance and Review Act (GPRA) requires the head of each agency to provide Congress with a yearly “strategic plan”

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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 than claiming he had the power to do so. [cite]

<sup>40</sup> U.S. CONST., art. I, § 9 and Art. II, § 2, cl. 2. *See also Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838) (holding that Congress has the right to prescribe duties to subordinate officers of the Executive branch).

<sup>41</sup> U.S. Constitution, art. I, § 9, cl. 7. Congress arguably relies on appropriations acts as a form of legislative veto. *See* CONG. RESEARCH SERV., *Congressional Oversight Manual*, RL30240, 68-69 (2020).

<sup>42</sup> 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); Whistleblowers 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); Section 714 of the Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 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); Section 716 of the Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034 (2010) (prohibits the expenditure of any appropriated funds for use in implementing or enforcing non-disclosure agreements). *See Comm. on the Judiciary, U.S. House of Representatives v. McGahn*, (D.C. Cir. Aug. 7, 2020) (en banc) (“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 v Daugherty*, 273 U.S. 135, 174 (1927) (“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*, in 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).

containing a mission statement and the agency’s “general goals and objectives.”<sup>43</sup> Similarly, another reporting mandate is the Congressional Review Act, which Congress employs to challenge federal rules.<sup>44</sup> Before a rule can take effect, an agency must submit a report to each chamber.<sup>45</sup> However, agencies could potentially frustrate this oversight mechanism, as the CRA bars judicial review.<sup>46</sup> 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 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.<sup>47</sup>

The Government Accountability Office (GAO) is another channel through which Congress conducts oversight and obtains information. The GAO was established in 1921 through the Budget and Accounting Act as an auditor of government activities and agencies.<sup>48</sup> 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”<sup>49</sup> at Congress’ request and in order to assist Congress in its oversight role. The GAO was created to be “independent of the executive departments” but given audit and review powers over the departments.<sup>50</sup>

Perhaps most important of all, the Inspector General Act of 1978 provides a mechanism for Congress to obtain information and oversight analysis from *inside* the government on a regular basis, while at the same time enhancing the Executive’s ability to monitor and improve

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<sup>43</sup> 5 U.S.C. § 306.

<sup>44</sup> CONG. RESEARCH SERV., R43992, THE CONGRESSIONAL REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS, 1-2 (2020).

<sup>45</sup> CONG. RESEARCH SERV., R43992, THE CONGRESSIONAL REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS, 2-3 (2020).

<sup>46</sup> CONG. RESEARCH SERV., R43992, THE CONGRESSIONAL REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS, 12 (2020).

<sup>47</sup> CONG. RESEARCH SERV., R43992, THE CONGRESSIONAL REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS, 12 (2020). Congress rarely disapproves a rule, and even less frequently through the GAO disapproval process. *Id.*

<sup>48</sup> 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*, <https://www.gao.gov/pdfs/about/GAO%20Past%20and%20Present,%201921%20through%20the%201990s.pdf> (last visited July 20, 2020).

<sup>49</sup> 31 U.S.C. §717(b). *See also* U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-767G, GAO’S CONGRESSIONAL PROTOCOLS 3-4 (2017).

<sup>50</sup> Frederick M. Kaiser, CONG. RESEARCH SERV., RL3034, GAO: GOVERNMENT ACCOUNTABILITY OFFICE AND GENERAL ACCOUNTING OFFICE 1-2 (2008).



government performance.<sup>51</sup> The “IG scheme” 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.”<sup>52</sup>

**A. Statutory creation and relation to Congress**

The first years of the Carter administration were an exceedingly productive time for advocates of government reform.<sup>53</sup> Among the accomplishments of that period are legislative reorganization,<sup>54</sup> a stronger Government Accountability Office,<sup>55</sup> the War Powers Resolution,<sup>56</sup> the Freedom of Information Act<sup>57</sup> and other important legislation. The modern Inspector General “concept” of consolidating auditing and investigative responsibilities under a single, high-level official began in 1962 at the impetus of Secretary Orville Freeman in the Department of Agriculture.<sup>58</sup> That was followed later by establishment of the statutory Inspector General for the

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<sup>51</sup> Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (1978) (codified as amended at 5 U.S.C. app. §§ 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. RESEARCH SERV., R43814, FEDERAL INSPECTORS GENERAL: HISTORY, CHARACTERISTICS, AND RECENT CONGRESSIONAL ACTIONS (2016); WENDY GINSBERG, CONG. RESEARCH SERV., R43722, OFFICES OF INSPECTORS GENERAL AND LAW ENFORCEMENT AUTHORITY (2014); COUNCIL OF THE INSPECTORS GENERAL ON INTEGRITY AND EFFICIENCY, PRESIDENTIAL TRANSITION HANDBOOK: THE ROLE OF INSPECTORS GENERAL AND THE TRANSITION TO A NEW ADMINISTRATION (2016).

<sup>52</sup> MORTON ROSENBERG, WHEN CONGRESS COMES CALLING: A STUDY ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY 103 (2017). The question remains whether, 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, 2322-2323 (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.

<sup>53</sup> *See generally* PAUL C. LIGHT, MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY (1993).

<sup>54</sup> [cite]

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<sup>58</sup> *Legislation to Establish Offices of Inspector General: Hearing on H.R. 8588 Before Subcomm. on Governmental Efficiency & the D.C. of the S. Comm. on Governmental Aff.*, 95th Cong. 5 (1978) (statement of Rep. Lawrence H. Fountain). The necessity of the legislation was occasioned by a scandal at the Department of Agriculture that had been difficult to end because

Department of Health, Education and Welfare in 1976<sup>59</sup> and for the Department of Energy in 1977.<sup>60</sup> The Inspector General Act of 1978, which passed the House with only six opposing votes and passed the Senate unanimously,<sup>61</sup> sought to further reorganize audit functions inside the government and provide a mechanism for “keeping the agency head *and the Congress* informed about serious problems and deficiencies and... recommending necessary corrective action.”<sup>62</sup> The lead Senate sponsor referred to the Inspector General “concept” as “the

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investigations were uncoordinated and poorly managed and which reported to officials directly responsible for the program being reviewed. *See 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 25 (1998) (statement of James R. Naughton, counsel, Intergovernmental Relations & Human 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. *See* PAUL C. LIGHT, *MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY* 28 (1993) (“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.’”).

<sup>59</sup> *Legislation to Establish Offices of Inspector General: Hearing on H.R. 8588 Before Subcomm. on Governmental Efficiency & the D.C. of the S. Comm. on Governmental Aff.*, 95th Cong. 5 (1978) (statement of Rep. Lawrence H. Fountain). *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).

<sup>60</sup> *See* Department of Energy Organization Act, Pub. L. No. 95-91 § 208, 91 Stat. 565, 575 (Aug. 4, 1977) (codified as amended at 42 U.S.C. § 7138) (establishing Office of Inspector General with the new Department of Energy).

<sup>61</sup> *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 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.” *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 24 (1998) (statement of James R. Naughton, counsel, Intergovernmental Relations & Human Res. Subcomm., H. Comm. on Gov’t Operations).

<sup>62</sup> 124 CONG. REC. 10,400 (1978) (statement of Rep. Fountain). 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).

consolidation of auditing and investigative responsibilities under a single high-level official reporting directly to the head of the establishment.”<sup>63</sup>

In operation, the IG Act of 1978 consolidated existing audit and investigative units inside various federal agencies, divested them of “program operating responsibilities”<sup>64</sup> and placed them into newly established Offices of Inspectors General inside each agency.<sup>65</sup> The purpose of the offices would be to conduct and supervise audits and investigations relating to programs and operations of the agencies, provide leadership and coordination and recommend policies to promote economy and efficiency, and prevent and detect fraud and abuse.<sup>66</sup> Importantly, the IG was expected to “provide a means for keeping agency heads *and the Congress fully and currently informed*” about problems and deficiencies.<sup>67</sup> Congress was especially concerned about interference from the Executive in the provision of such information, and thus required reports and information to be submitted “without further clearance or approval.”<sup>68</sup> Chairman Fountain

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<sup>63</sup> 124 CONG. REC. 30,952 (1978) (statement of Sen. Eagleton). Importantly, both offices were expressly not authorized to undertake “program operating responsibilities.” CONG. RESEARCH SERV., R45450, STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER 2 (2019). The term “program operating responsibilities” is not defined in the statute or elsewhere in the legislative history, but refers to the fundamental operations performed by the host agency. *See infra* n. \_\_\_ 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 GENERAL: ADEQUACY OF TVA’S INSPECTOR GENERAL 9 (1989).

<sup>64</sup> 5 U.S.C. app. §§ 8G(b), 9(a)(2).

<sup>65</sup> 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).

<sup>66</sup> H.R. Rep. No. 95-584, at 2 (1977). *See also Legislation to Establish Offices of Inspector General: Hearing on H.R. 8588 Before Subcomm. on Governmental Efficiency & the D.C. of the S. Comm. on Governmental Aff.*, 95th Cong. 63 (1978) (statement of Thomas D. Morris, Inspector General, Dep’t of Health, Education, 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 supplied).

<sup>67</sup> H.R. Rep. No. 95-584, at 2 (1977). Keeping Congress “currently informed,” as the IG statute requires, is a challenge for OIGs regarding when to share information and what information to share. CHARLES A. JOHNSON ET AL., IBM CENTER FOR BUS. & GOV’T, BALANCING INDEPENDENCE AND POSITIVE ENGAGEMENT: HOW INSPECTORS GENERAL WORK WITH AGENCIES AND CONGRESS 20 (2015).

<sup>68</sup> H.R. Rep. No. 95-584, at 3 (1977).

acknowledged that “Presidents... don’t want Congress seeking out or getting information statutorily....”<sup>69</sup>

Testifying on H.R. 2819, which eventually become the IG Act of 1978, Department of Labor Comptroller Al Zuck objected to the reporting requirement on the basis that it would impose a *separate* reporting channel *parallel* to that established through the General Accounting Office (GAO, the predecessor to the modern General Accountability Office).<sup>70</sup> He argued that Congressional need for information could be met through GAO exclusively on the basis of its “complete access to all [agency] accounts” and its ability “presently... to inform Congress regarding any facet of our program.”<sup>71</sup> The new IG would “serve two masters” and “disrupt[] smooth-working management....”<sup>72</sup> Instead, “Congress [could] be provided needed information without” a direct line to an independent IG, claimed Mr. Zuck.<sup>73</sup> Congress obviously disagreed.

The Senate Report makes this point even more clearly.<sup>74</sup> Recognizing the Inspector General’s “*unique function*” as only “in part” that of “an executive official,” the drafters made clear that they were conferring upon the Inspector General a “*unique status* within the executive branch.”<sup>75</sup> While the head of a department or agency ordinarily has the right to screen communications before transmittal to Congress, the drafters sought to hardwire the responsibility to inform Congress into the definition of the Inspector General’s job description as “the foundation of the Inspector[] General’s independence.”<sup>76</sup> Margaret Gates and Marjorie Fine Knowles argue that this made Inspectors General “the *only*... Presidential appointee who speaks

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<sup>69</sup> *Establishment of Offices of Inspector General: Hearings on H.R. 2819 Before the Subcomm. on Intergovernmental Relations & Human Res. of the H. Comm. on Gov’t Operations* 95th Cong. 165 (1977).

<sup>70</sup> *Establishment of Offices of Inspector General: Hearings on H.R. 2819 Before the Subcomm. on Intergovernmental Relations & Human Res. of the H. Comm. on Gov’t Operations* 95th Cong. 164 (1977).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> S. Rep. No. 95-1071 at 30-31 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 2676, 2705-06.

<sup>75</sup> S. Rep. No. 95-1071 at 30-31 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 2676, 2706. (emphasis supplied).

<sup>76</sup> S. Rep. No. 95-1071 at 30-31 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 2676, 2706.

“The offices of an IG differ from most federal offices in several ways: (a) IGs report to an executive office and to Congress; (b) IGs perform a watchdog role while residing in the agency they oversee; (c) IGs are expected to be independent of managerial pressures or political influences from the agency, Congress, or other outside forces; (d) IGs have independent administrative resources and legal authority to pursue auditing, law enforcement, and evaluation responsibilities; and (e) IGs have open-ended appointments, and their dismissal requires notice be given to Congress by the president or agency head.” CHARLES A. JOHNSON & KATHRYN E. NEWCOMER, *U.S. INSPECTORS GENERAL: TRUTH TELLERS IN TURBULENT TIMES* 147 (2020).

directly to Congress without clearance [and this] ability to speak directly to Congress provides a potential source of substantial clout....”<sup>77</sup>

One of the earliest proponents for IGs argued that existing auditing offices inside federal agencies “lacked independence because they reported to and were hired and fired by officials directly responsible for the programs being investigated.”<sup>78</sup> Working with officials responsible for agency programs was believed to undermine the independence of audit and investigative personnel.<sup>79</sup> Reflecting these reasons, the Inspector General Act of 1978 begins by highlighting the establishment of “independent and objective units.”<sup>80</sup> Carl Levin and Elise Bean’s seminal article on congressional oversight refers to IGs being “explicitly charged with assisting *Congress* in its oversight responsibilities,” which sets them apart from any other arm of the Executive.<sup>81</sup>

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<sup>77</sup> 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). 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).

<sup>78</sup> *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 & Human Res. of the H. Comm. on Gov’t Operations* 94th Cong. 1-2 (1976) (statement of Rep. Lawrence H. Fountain); see also *Legislation to Establish Offices of Inspector General: Hearing on H.R. 8588 Before Subcomm. on Governmental Efficiency & the D.C. of the S. Comm. on Governmental Aff.*, 95th Cong. 17 (1978) (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 supplied). 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; *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 25 (1998) (statement of James R. Naughton, counsel, Intergovernmental Relations & Human Res. Subcomm., H. Comm. on Gov’t Operations).

<sup>79</sup> *The Inspector General Act of 1978: Twenty Years after Passage, are the Inspectors General Fulfilling Their Mission? Before the Subcomm. on Govt. Mgmt., Info., & Tech. of the H. Comm. on Gov’t. Reform & Oversight*, 105th Congress 25 (1998) (statement of James R. Naughton, counsel, Intergovernmental Relations & Human Res. Subcomm., H. Comm. on Gov’t Operations).

<sup>80</sup> [cite]

<sup>81</sup> Carl Levin & Elise J. Bean, *Defining Congressional Oversight and Measuring Its Effectiveness*, 64 WAYNE L. REV. 1, 14 (2018) (emphasis supplied).

Since passage of the 1978 Act, Congress has continually and on a bipartisan basis strengthened the role of independent Inspectors General.<sup>82</sup> The Homeland Security Act of 2002 vested certain Inspectors General with law enforcement authorities, including the power to (1) carry a firearm; (2) make arrests without a warrant; and (3) seek and execute warrants for arrest, search of premises, or seizure of evidence.<sup>83</sup> The Inspector General Reform Act of 2008 further demonstrated Congressional support for strong and independent IGs by (a) establishing the Council of the Inspectors General on Integrity and Efficiency (“CIGIE”), which addresses issues transcending individual IGs; (b) authorizing IGs to obtain legal advice from their own counsel (or to obtain counsel from another IG’s office or from CIGIE); and (c) requiring the President’s budget submission to the Congress to have the IGs’ requested budget amounts identified separately within their respective agency budgets, along with any comments provided by the IGs on the sufficiency of their budgets.<sup>84</sup> Perhaps most significantly, the Inspector General

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<sup>82</sup> 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. 2515–2529 (1988) (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. 2415 (1998) ; Inspector General Reform Act of 2008 Pub. L. No. 110–409, §§ 2–4(a)(1), 5, 6(a), (b), 7(a), (d)(1), 8, 9, 11–13(a), 14, 122 Stat. 4302, 4305, 4313–4316 (2008) (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 (2016) (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 PAUL C. LIGHT, MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY 17 (1993) (“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 at the front end of the process, instead of inspecting it at the back end. [Q]uality comes not from inspection but from improvement of the process.”).

<sup>83</sup> Pub. L. No. 107–296 §812 (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 General: Causes, Concerns, and Cautions*, 15 Police Studies Int’l Review of 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.* Under these different approaches, law enforcement authority was extended over time to a number of personnel throughout the IG community. *Id.*

<sup>84</sup> Inspector General Reform Act of 2008, Pub. L. 110–409, §§2–4(a)(1), 5, 6(a), (b), 7(a), (d)(1), 8, 9, 11–13(a), 14, Oct. 14, 2008, 122 Stat. 4302, 4305, 4313–4316. The Dodd-Frank Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010), (requiring GAO to report on IG implementation of these

Empowerment Act of 2016 highlights congressional response to Executive challenge. After the FBI raised objections to providing the Department of Justice IG with access to grand jury, Title III electronic wiretap, and Fair Credit Reporting Act information, forty seven inspectors general wrote to Congress indicating their view that meaningful oversight depends on “complete and timely access to all agency materials.”<sup>85</sup> Congress responded with appropriations language forbidding the Justice Department to deny its Inspector General access to information.<sup>86</sup> When the Department nevertheless continued to refuse access, Congress reacted by amending the IG Act to require agencies to provide IGs with “timely access to *all records* of the agency.”<sup>87</sup>

There is no question that Congress values the role that Inspectors General play in overseeing the federal government. “We cannot perform our constitutional mandate of oversight without [inspectors general],” according to one longtime Senator who has been their determined defender.<sup>88</sup> Their “work makes government more transparent, and more accountable, and that strengthens the public’s trust in our republic.... In this way, these watchdogs serve an indispensable function in our system of checks and balances.”<sup>89</sup> According to one former House Oversight and Reform Committee Chair, “If [IGs] can’t do their job, Congress can’t do its job.”<sup>90</sup> According to the current Chairman of the Senate Committee on Homeland Security and Governmental Affairs, IGs are Congress’s “best partner in rooting out waste, fraud and abuse.”<sup>91</sup>

The frequency and quality of interactions between Congress and an inspector general are critical to the success of the IG. “[I]nformation is the coin of the realm” for Congress, and IGs provide “someone who give[s] regular input... and irregular access” outside the channels of

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provisions). See U.S. GOV’T ACCOUNTABILITY OFF., GAO-1-770, INSPECTORS GENERAL: REPORTING ON INDEPENDENCE, EFFECTIVENESS, AND EXPERTISE (2011).

<sup>85</sup> MORTON ROSENBERG, WHEN CONGRESS COMES CALLING: A STUDY ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY 109 (2017) (emphasis supplied).

<sup>86</sup> MORTON ROSENBERG, WHEN CONGRESS COMES CALLING: A STUDY ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY 109 (2017).

<sup>87</sup> MORTON ROSENBERG, WHEN CONGRESS COMES CALLING: A STUDY ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY 112 (2017) (emphasis supplied). “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).

<sup>88</sup> 166 CONG. REC. S3,088-89 (daily ed. June 18, 2020) (prepared remarks of Sen. Grassley).

<sup>89</sup> 166 CONG. REC. S3,088 (daily ed. June 18, 2020) (prepared remarks of Sen. Grassley).

<sup>90</sup> *Inspectors General: Independence, Access and Authority: Hearing Before the H. Comm. on Oversight & Gov’t Reform* 114 Cong. 2 (2015) (opening statement of Rep. Chaffetz).

<sup>91</sup> 161 CONG. REC. 20,168 (2015) (statement of Sen. Johnson, Chairman, S. Comm. on Homeland Sec. & Governmental Aff.)

agency leadership.<sup>92</sup> While IGs are not the only source of information Congress has as to what is going on inside the government, they lower the “cost” of oversight substantially.<sup>93</sup>

For this reason, the IG Act of 1978 as amended, requires Inspectors General to provide Congress with semiannual reports about their activities, findings, and recommendations.<sup>94</sup> While these reports are first submitted to the agency head, the agency head must submit the report to Congress within thirty days.<sup>95</sup> The agency head must submit the IG’s report without alterations.<sup>96</sup> They also must promptly report “particularly serious or flagrant problems, abuses, or deficiencies” to the agency head.<sup>97</sup> In turn, the agency head is required to submit this report to Congress within seven days.<sup>98</sup> For example, in 2019 the EPA OIG wrote one of these “seven day letters” in response to the agency’s Chief of Staff’s refusal to fully cooperate with an OIG’s investigation.<sup>99</sup> This reporting structure is critical to the effective processing by IGs of whistleblower complaints. This is particularly evident in the intelligence community, as a whistleblower is required to go through the IG to report an urgent matter to Congress.<sup>100</sup> Intelligence Community IG Michael Atkinson followed this procedure in reporting the whistleblower complaint that resulted in the impeachment of President Donald Trump.<sup>101</sup> And the IG is required to report to Congress on management challenges facing the agency and the agency’s progress in meeting those challenges.<sup>102</sup>

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<sup>92</sup> Paul C. Light, *MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY* 56 (1993).

<sup>93</sup> *See* Paul C. Light, *MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY* 56 (1993) (“[IGs] cut down on some of the spade work we would have to do, and let us go directly to more detailed investigations.”).

<sup>94</sup> Inspector General Act of 1978, 5 U.S.C. app § 5 (a) - (b) (2020); *See also* CONG. RESEARCH SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 76 (2020).

<sup>95</sup> 5 U.S.C. app § 5(c); *See also* CONG. RESEARCH SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 76 (2020).

<sup>96</sup> CONG. RESEARCH SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 76 (2020).

<sup>97</sup> 5 U.S.C. app § 5(d).

<sup>98</sup> 5 U.S.C. app § 5(d).

<sup>99</sup> Letter from Charles J. Sheenan, Acting Inspector Gen., to Andrew R. Wheeler, EPA Adm’r (Oct. 29, 2019).

<sup>100</sup> 5 U.S.C. app. 8H; 50 U.S.C. §3033; *See also* MICHAEL E. DEVINE, CONG. RESEARCH SERV., R45345, INTELLIGENCE COMMUNITY WHISTLEBLOWER PROTECTIONS (2019).

<sup>101</sup> *See* Letter from Michael K. Atkinson, Inspector Gen. of the Intelligence Community, to Chairman Richard Burr, S. Select Comm. on Intelligence and Chairman Adam Schiff, H.R. Permanent Select Comm. On Intelligence (Aug. 12, 2019).

<sup>102</sup> 31 USC. § 3516(d); COUNCIL OF THE INSPECTORS GENERAL ON INTEGRITY AND EFFICIENCY, QUALITY STANDARDS FOR FEDERAL OFFICES OF INSPECTORS GENERAL 36 (2012).



Congressional committees and subcommittees hold frequent hearings to examine IG-related issues, often inviting IGs to testify or submit written statements.<sup>103</sup> Some of these hearings examine the operations of a specific agency. For example, State Department IG Steve Linick testified before the House of Representatives' Committee on Appropriations, Subcommittee on State, Foreign Operations, and Related Programs regarding management challenges facing the Department and its Agency for International Development Programs.<sup>104</sup> Other times, Congress examines broad questions affecting multiple agencies.<sup>105</sup> In 2014, several IGs voiced displeasure at constraints placed upon their access to agency records.<sup>106</sup> In response to these complaints, the Judiciary Committee of the House of Representatives held a hearing and invited some of these IGs to testify.<sup>107</sup> Congress similarly invites IGs to testify when considering IG-related legislation and appropriations bills.<sup>108</sup>

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 regarding whistleblower protections at the DOT.<sup>109</sup> Members may also reach out to request the IG to open new inquiries. In February 2020, Senator Elizabeth Warren wrote to the Housing and Urban Development's IG, requesting that the Office add an inquiry into whether delays in release of emergency funds to Puerto Rico violated Federal law into its

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<sup>103</sup> WENDY GINSBURG & MICHAEL GREENE, CONG. RESEARCH SERV., R43814, FEDERAL INSPECTORS GENERAL: HISTORY, CHARACTERISTICS, AND RECENT CONGRESSIONAL ACTIONS.

<sup>104</sup> 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).

<sup>105</sup> *Where are all the WatchDogs? Addressing Inspector General Vacancies: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 112th Cong. (2012) (examining how IG vacancies affect the independence and Integrity of OIGs).

<sup>106</sup> *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. (2014).

<sup>107</sup> *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. (2014).

<sup>108</sup> 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. (2007) (regarding proposed reforms in the Inspector General Reform Act of 2008); *Budget Hearing: USDA Office of the Inspector General*, 116th Cong. (2020) (statement of Phyllis K. Fong, Inspector General, U.S. Dep't of Agric.).

<sup>109</sup> See Letter from Calvin L. Scovel III, Inspector Gen., U.S. Dep't of Transp., to Sen. Bill Nelson Chairman Richard Burr (Feb. 6, 2017).

ongoing investigation of HUD’s use of funds appropriated for disaster relief.<sup>110</sup> And IGs may inform Congress “using other appropriate means” in instances of fraud and other serious problems relating to the agency’s programs or operations.<sup>111</sup> For instance, Inspectors General have requested briefings with Congress or congressional staff. Often these briefings are related to IG reports or to update a committee on pressing matters in the course of an investigation or audit. For example, in 2019, DOS IG Linick requested a briefing with the House of Representatives Permanent Select Committee on Intelligence in light of the Ukraine scandal and to provide the committee with documents relevant to the investigation.<sup>112</sup> IGs have also written to Congress to express concerns. In 2014, 47 of (then) 72 statutory inspectors general signed a letter to Congress protesting their restricted access to agency materials.<sup>113</sup>

## **B. Core functions and relevance to Congress**

To carry out their mandate, Inspectors General are given broad authority to conduct audits and investigations and issue such reports as they believe appropriate;<sup>114</sup> access all records and information of their host agency<sup>115</sup>; request assistance from other federal, state, and local government agencies<sup>116</sup>; subpoena information and documents<sup>117</sup>; administer oaths when taking testimony<sup>118</sup>; hire staff and manage their own resources<sup>119</sup>; receive and respond to complaints from agency employees, whose confidentiality is to be protected;<sup>120</sup> and implement any cash incentive award program in their agencies for employee disclosures of waste, fraud, and abuse.<sup>121</sup>

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<sup>110</sup> Letter from Sen. Elizabeth Warren to Rae Oliver Davis, Inspector Gen., U.S. Dep’t of Hous. & Urban Dev. (Feb. 7, 2020).

<sup>111</sup> 5 U.S.C. app. 3 § 4(a)(5); COUNCIL OF THE INSPECTORS GENERAL ON INTEGRITY AND EFFICIENCY, QUALITY STANDARDS FOR FEDERAL OFFICES OF INSPECTORS GENERAL 37 (2012).

<sup>112</sup> Linick briefs congressional staff. <https://www.cnn.com/2019/10/01/politics/deposition-delayed-impeachment-investigation/index.html>

<sup>113</sup> *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).

<sup>114</sup> 5 U.S.C. app. §§ 2, 4.

<sup>115</sup> 5 U.S.C. app. § 6(a)(1).

<sup>116</sup> 5 U.S.C. app. § 6(a)(3).

<sup>117</sup> 5 U.S.C. app. § 6(a)(4).

<sup>118</sup> 5 U.S.C. app. § 6(a)(5).

<sup>119</sup> 5 U.S.C. app. § 6(a)(7), (8), and (9).

<sup>120</sup> 5 U.S.C. § 2302(b)(8)(B).

<sup>121</sup> 5 U.S.C. 4511.

Originally, the work of Inspectors General was focused “almost solely on investigations [and] audits -- detection of wrongdoing.”<sup>122</sup> Later, IGs started to work on prevention objectives and by 2017 virtually all IGs were conducting “other work focused on improving program management, in addition to financial audits and investigations.”<sup>123</sup> Still, much IG work ultimately is reactive to crises.<sup>124</sup>

While discerning the “roots of the IG Act is like making an geological dig,” beneath the traditional explanations “is the burgeoning congressional demand for information.”<sup>125</sup> The IGs’ principal responsibilities can be divided into two buckets: (1) retrospective activities, such as conducting audits, inspections and investigations relating to agency programs and operations as well as 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; (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).<sup>126</sup> As Paul Light points out, IGs have one fundamental tool, which is monitoring, and one significant power, which is “complete access to information.”<sup>127</sup> Through it all, they are to keep Congress informed.<sup>128</sup> Within this broad mandate, the IG is given full discretion to undertake those investigations that are, in the judgment of the IG, “necessary or desirable” [IG Act, § 6(a)(2)].

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<sup>122</sup> CHARLES A. JOHNSON & KATHRYN E. NEWCOMER, U.S. INSPECTORS GENERAL: TRUTH TELLERS IN TURBULENT TIMES 95 (2020).

<sup>123</sup> CHARLES A. JOHNSON & KATHRYN E. NEWCOMER, U.S. INSPECTORS GENERAL: TRUTH TELLERS IN TURBULENT TIMES 95 (2020).

<sup>124</sup> CHARLES A. JOHNSON & KATHRYN E. NEWCOMER, U.S. INSPECTORS GENERAL: TRUTH TELLERS IN TURBULENT TIMES 96 (2020).

<sup>125</sup> Paul C. Light, MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY 39 (1993).

<sup>126</sup> FREDERICK M. KAISER, CONG. RESEARCH SERV., 98-379, STATUTORY OFFICES OF INSPECTOR GENERAL: PAST AND PRESENT 1 (2008); *see also* CONG. RESEARCH SERV., R45450, STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER 7 (2019) (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). In addition, OIGs work with the U.S. Office of Special Counsel (OSC) to investigate alleged reprisals against whistleblowers. *See* MORTON ROSENBERG, WHEN CONGRESS COMES CALLING: A STUDY ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY 104 (2017).

<sup>127</sup> Paul C. Light, MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY 16 (1993) (“They are to look, not act; recommend, not implement.”).

<sup>128</sup> *See infra*.

Generally, “an audit, inspection or evaluation is conducted to examine organizational program performance and operations or financial management matters, typically of a systemic nature.”<sup>129</sup> The Inspector General Act’s legislative history suggests that such audits are to have 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.<sup>130</sup>

Inspector General audits are conducted in accordance with Government Auditing Standards established by the Comptroller General.<sup>131</sup> In addition, IGs coordinate with the Comptroller General to avoid duplication in Federal audits [IG Act, § 4(c)]. IGs are charged with not only investigating or auditing fraud, waste, and abuse after they have occurred, but also identifying vulnerabilities and recommending programmatic changes that would, when enacted or implemented, strengthen controls or mitigate risk. IGs establish criteria for using non-Federal

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<sup>129</sup> MORTON ROSENBERG, *WHEN CONGRESS COMES CALLING: A STUDY ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY* 104 (2017). 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.” *The Inspector General Act of 1978: Twenty Years after Passage, are the Inspectors General Fulfilling Their Mission? Before the Subcomm. on Govt. Mgmt., Info., & Tech. of the H. Comm. on Govt. Reform & Oversight*, 105th Congress 84 (1998) (testimony of Sherman M. Funk, Inspector Gen., U.S. Dep’t of Com. and U.S. Dep’t of State).

<sup>130</sup> S. Rep. No. 95–1071 at 30 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 2676, 2703-04; *see also* CONG. RESEARCH SERV., R45450, *STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER* 9 (2019) (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).

<sup>131</sup> 5 U.S.C. app. § 4(b)(1)(A). “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.” CHARLES A. JOHNSON & KATHRYN E. NEWCOMER, *U.S. INSPECTORS GENERAL: TRUTH TELLERS IN TURBULENT TIMES* 101 (2020).

auditors (typically, Certified Public Accountant firms) and ensure that such auditors comply with 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.”<sup>132</sup> 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.”<sup>133</sup> These IG investigations typically include “nonprogrammatic analysis and instead focus primarily on alleged misuse or mismanagement of an agency’s programs, operations, or resources by an individual government employee, contractor, or grantee.”<sup>134</sup> The reports typically produce recommendations to improve the programs and operations reviewed.

Importantly, IGs are not to perform the work of their agencies.<sup>135</sup> While the first IG in the State Department had been given the authority to by Congress suspend all or part of any project or operation “with respect to which he has conducted or is conducting an inspection,” that power was never used and *never again granted* to any future IG.<sup>136</sup> Since then, IGs have all specifically been prohibited from taking corrective action themselves.<sup>137</sup> The IG Act also prohibits the transfer of “program operating responsibilities” to an IG.<sup>138</sup> 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.”<sup>139</sup> “[E]xtensive background efforts and deliberations are typically undertaken by IG offices to prioritize their work, collect relevant data, develop actionable

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<sup>132</sup> MORTON ROSENBERG, WHEN CONGRESS COMES CALLING: A STUDY ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY 104 (2017).

<sup>133</sup> MORTON ROSENBERG, WHEN CONGRESS COMES CALLING: A STUDY ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY 104 (2017).

<sup>134</sup> CONG. RESEARCH SERV., R45450, STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER 9 (2019). 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).” *Id.*

<sup>135</sup> [cite]

<sup>136</sup> Paul C. Light, MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY 29-30 (1993).

<sup>137</sup> [cite] *See also* Paul C. Light, MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY 16-17 (1993) (“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.”).

<sup>138</sup> 5 U.S.C. app. §§8G(b), 9(a)(2).

<sup>139</sup> *See* FREDERICK M. KAISER, CONG. RESEARCH SERV., 98-379, STATUTORY OFFICES OF INSPECTOR GENERAL: PAST AND PRESENT 2 (2008).

recommendations, and then support actions made by agency staff to make [any] recommended changes.”<sup>140</sup>

### **C. Inspector General Independence**

Ensuring independent oversight through IGs was critical to the drafters of the IG Act. The text of the Act expressly provides that Congress intended IGs to be “independent and objective.”<sup>141</sup> 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... have a non-political role.”<sup>142</sup> Yet there is no “standard definition” for what constitutes IG independence.<sup>143</sup> One Inspector General put it this way:

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.<sup>144</sup>

Even if not expressly defined, Inspector General “independence” is plainly manifested in the structure of the IG Act. First, the Inspector General position was established with protections that differentiate it from other Executive appointees. The statute requires appointment “without

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<sup>140</sup> CHARLES A. JOHNSON & KATHRYN E. NEWCOMER, U.S. INSPECTORS GENERAL: TRUTH TELLERS IN TURBULENT TIMES 94 (2020).

<sup>141</sup> 5 U.S.C. app. §2(1).

<sup>142</sup> CHARLES A. JOHNSON ET AL., IBM CENTER FOR BUS. & GOV’T, BALANCING INDEPENDENCE AND POSITIVE ENGAGEMENT: HOW INSPECTORS GENERAL WORK WITH AGENCIES AND CONGRESS 19 (2015); *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.”).

<sup>143</sup> CONG. RESEARCH SERV., R45450, STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER 21 (2019).

<sup>144</sup> *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, Insepector Gen., Dep’t of Homeland Sec.).

regard to political affiliation.”<sup>145</sup> There are no term limits.<sup>146</sup> And the statute requires notice to Congress of the reasons for removal of an Inspector General.<sup>147</sup> These are unprecedented and unparalleled protections intended to insulate the position from Executive influence and ensure independence. The extraordinary procedural requirements imposed on the removal of an IG are particular testimony to the importance of IG independence.<sup>148</sup> Current 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.<sup>149</sup>

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 “report on the progress made in implementing such corrective action.”<sup>150</sup> And, whenever an Inspector General issues a recommendation for corrective action to the agency, it must simultaneously be submitted to Congress.<sup>151</sup> As if to emphasize the distinction with other arms of the government, the statute expressly imposes dual

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<sup>145</sup> 5 U.S.C. app. §3(a).

<sup>146</sup> CONG. RESEARCH SERV., R45450, STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER 13 (2019).

<sup>147</sup> 5 U.S.C. app. §3(b).

<sup>148</sup> COUNCIL OF THE INSPECTORS GENERAL ON INTEGRITY AND EFFICIENCY, THE INSPECTORS GENERAL 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* CONG. RESEARCH SERV., R45450, STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER 12 (2019) (outlining removal provisions).

<sup>149</sup> Inspectors General Independence Act of 2020, S.3664, 116<sup>th</sup> 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. *Legislation to Establish Offices of Inspector General: Hearing on H.R. 8588 Before Subcomm. on Governmental Efficiency & the D.C. of the S. Comm. on Governmental Aff.*, 95th Cong. 15 (1978) (Statement of Rep. Lawrence H. Fountain).

<sup>150</sup> 5 U.S.C. app. §4(a)(5). *See also* CIGIE, “Quality Standards for Federal Offices of Inspectors General,” August 2012, pp. 35-39 <https://www.ignet.gov/sites/default/files/files/Silver%20Book%20Revision%20-%208-20-12r.pdf> (quality standards for communicating results of OIG activities).

<sup>151</sup> 5 U.S.C. app. §4(e).

loyalties on the Inspector General encompassing both the Executive and Congress.<sup>152</sup> Inspectors General are required by law to “keep the head [of their agency] *and the Congress*” fully and currently informed.<sup>153</sup> When the legislation was first considered, the Department of Justice pointed out arguable separation of powers concerns with this mandate to the extent that it might amount to “continuing supervision” by the IG of agency or department activities.<sup>154</sup> The clear thrust of these provisions was therefore to ensure the flow of information to Congress (viz., “keep... fully and currently informed”, “recommend” and “report”).<sup>155</sup> After all, the most important asset Congress has in conducting effective oversight is access to quality, timely, unbiased information as to how federal agencies are performing.<sup>156</sup>

In the leadup to the Inspector General Empowerment Act of 2016,<sup>157</sup> the notion of “independence” was pointedly framed in terms of IG access to agency information.<sup>158</sup> From the Congressional perspective, independent Inspectors General require “access to key materials” and “timely information.”<sup>159</sup> “We certainly want to make sure that the Offices of Inspector General

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<sup>152</sup> 5 U.S.C. app. §§2(3) (purpose and establishment of OIGs), 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.”

<sup>153</sup> 5 U.S.C. app. §4(a)(5). 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) and 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).

<sup>154</sup> Memorandum from John M. Harmon, Acting Assistant Att’y Gen., 77-8 O.L.C. 16, 17 (1977) (expressing concern about an IG’s potential “assumption of the Executive’s role in administering or executing the laws.”).

<sup>155</sup> MORTON ROSENBERG, *WHEN CONGRESS COMES CALLING: A STUDY ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY* 107 (2017) (“Transparency is a key attribute of the IG scheme.”).

<sup>156</sup> *See* David & Sharyn O’Halloran, *A Theory of Strategic Oversight: Congress, Lobbyists, and the Bureaucracy*, 11 J. OF LAW, 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.”).

<sup>157</sup> Pub. L. No. 114–317, §§ 2, 3, 4(c)–6, 7(b)(1), (c), (d)(2)–(3), 130 Stat. 1595–1606 (2016).

<sup>158</sup> *See supra* nn. [60-62 \_\_\_\_] and accompanying text (controversy regarding access to Department of Justice documents and other information withheld from other Inspectors General).

<sup>159</sup> *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*



remain independent, [and] that you have full access to the information that is required....”, said Homeland Security Committee Chair Ron Johnson.<sup>160</sup> “Delaying access [to agency information] imperils an IGs independence . . . .”, testified Department of Justice Inspector General Michael Horowitz.”<sup>161</sup>

Other provisions of the IG Act further reinforce the independence of the office from the Executive Branch.<sup>162</sup> The statute requires operational independence with respect to IG audits and investigations.<sup>163</sup> IG independence is reinforced through protection of their budgets (in the larger establishments),<sup>164</sup> separate appropriations accounts (for establishment IGs),<sup>165</sup> prohibitions on

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*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. 5 (2014) (testimony 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 deciding which documents it needs access to, not the leadership of the agency that is being overseen.”).

<sup>160</sup> *Improving the Efficiency, Effectiveness, and Independence of Inspectors General, Hearing Before the S. Comm. on Homeland Sec. and Governmental Aff.*, 114th Cong. 2 (2015) (statement of Sen. Johnson, Chairman, S. Comm. on Homeland Sec. and Governmental Aff.).

<sup>161</sup> *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....”).

<sup>162</sup> *See generally* 5 U.S.C. app. §§ 6(a)(7), 3(b), (g); *see also* FREDERICK M. KAISER, CONG. RESEARCH SERV., 98-379, STATUTORY OFFICES OF INSPECTOR GENERAL: PAST AND PRESENT 2 (2008); MORTON ROSENBERG, WHEN CONGRESS COMES CALLING: A STUDY ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY 106 (2017) (detailing “elements of OIG independence”).

<sup>163</sup> [cite] Although the IG reports to the agency head, even that official may not compromise the initiation or conduct of an OIG audit or investigation. 5 U.S.C. app. §§ 3, 8G(d).

<sup>164</sup> CONG. RESEARCH SERV., R45450, STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER 13 (2019) (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.”).

<sup>165</sup> *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* CONG. RESEARCH SERV., R45450, STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER 14 (2019) (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.”).

interference with their activities and operations (with a few exceptions),<sup>166</sup> and fixing the priorities and projects for their offices without outside direction (unless a review is ordered in statute or, at their own discretion, requested by the President, agency heads, other IGs, or congressional offices).<sup>167</sup>

Crucially, Congress affirmed its intention that OIGs maintain independence in the performance of their duties by placing distinct boundaries on the scope of IG activity. 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.<sup>168</sup> Inspectors General were created to be “independent and have no program responsibilities to divide allegiances.”<sup>169</sup> In describing the IG’s mandate, the lead Senate sponsor of the legislation said

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<sup>166</sup> [cite] The IG is given full discretion to undertake those investigations that are, in the judgment of the IG, “necessary or desirable”. 5 U.S.C. app. §6(a)(2).

<sup>167</sup> 5 U.S.C. app. § 6(a)(2).

<sup>168</sup> H.R. Rep. No. 95-584 at 12-13 (1977). IG independence is fostered by their “lack of conflicting policy responsibility.” Inspector General 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 supplied).

<sup>169</sup> 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 IG’s are to be totally independent and free from political pressure.”). *See also* CHARLES A. JOHNSON & KATHRYN E. NEWCOMER, U.S. INSPECTORS GENERAL: TRUTH TELLERS IN TURBULENT TIMES 121 (2020) (“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 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”), 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

that “independence” was considered “most important”, exemplified by a “special reporting relationship to the Congress.”<sup>170</sup>

The legislative history of the IG Act of 1978 is short on explanation as to what constitutes “program operating responsibilities,” but the testimony of Comptroller of the Department of Labor Al Zuck is informative.<sup>171</sup> Mr. Zuck objected to the establishment of 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 itself to perform its work well.<sup>172</sup> 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.<sup>173</sup> Mr. Zuck argued that an independent IG would interfere with the Secretary’s “flexibility” to determine the best manner to reduce fraud and abuse.<sup>174</sup> He specifically argued that “current arrangements provide[d] independence”<sup>175</sup> and that the “accountability” function (audits and investigations) should be considered *integral to* “program operating responsibility” not separate from it so as to properly incentivize agency staff to detect and deter waste, fraud and abuse.<sup>176</sup> Chairman Fountain responded that, of course, Congress expected agencies to “do a responsible job” with taxpayer funds (even if they worked with IGs as an additional safeguard).<sup>177</sup> But, he asked the witness: how would it be possible to have “maximum independence and objectivity when auditors or investigators report to the persons

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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”).

<sup>170</sup> 124 CONG. REC. 30,952 (1978) (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, which “blur[s] the necessary independence.” *Legislation to Establish Offices of Inspector General: Hearing on H.R. 8588 Before Subcomm. on Governmental Efficiency & the D.C. of the S. Comm. on Governmental Aff.*, 95th Cong. 8 (1978) (Statement of Rep. Elliott H. Levitas). *See also id.* at 15 (Statement of Sen. Thomas Eagleton) (“It is crucial to insure... independence” from the agency.).

<sup>171</sup> *See Establishment of Offices of Inspector General: Hearings on H.R. 2819 Before the Subcomm. on Intergovernmental Relations & Human Res. of the H. Comm. on Gov’t Operations* 95th Cong. 162 (1977). Chairman Fountain indicated that he “found the same theme running throughout all the agencies” testifying on the legislation. *Id.* at 165; *see also* U.S. GOV’T ACCOUNTABILITY OFF., GAO/AFMD-89-68, INSPECTORS GENERAL: ADEQUACY OF TVA’S INSPECTOR GENERAL 9 (1989).

<sup>172</sup> *See Establishment of Offices of Inspector General: Hearings on H.R. 2819 Before the Subcomm. on Intergovernmental Relations & Human Res. of the H. Comm. on Gov’t Operations* 95th Cong. 162 (1977).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 163.

<sup>175</sup> *Id.* at 164.

<sup>176</sup> *Id.* at 167.

<sup>177</sup> *Id.* at 167.

who are also responsible for running the programs being audited or investigated?”<sup>178</sup> Indeed, GAO has recently reinforced this point by expressing concern about the “independence implications” of scenarios where an acting IG holds a position as a “senior employee or PAS official” at the host agency (or even another agency).<sup>179</sup>

Lack of independence, or even a perceived lack of independence, is antithetical to the congressional intent in the drafting of the IG Act. Dependence on or collaboration with the agency threatens an IG’s credibility and its relationship with Congress. “IGs have been publicly criticized and forced to resign when collaborative engagement appears to have compromised their independence.”<sup>180</sup> CIGIE’s quality standards reinforce the importance of IG independence.<sup>181</sup> They provide that IGs and their staffs have a responsibility to maintain independence “both in fact and appearance.”<sup>182</sup> That independence is protected by a “legislative

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<sup>178</sup> *Id.* at 166; *see also 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 & Human Res. of the H. Comm. on Gov’t Operations* 94th Cong. 44 (1976) (testimony 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....*”) (emphasis supplied); 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.”). Further support for this interpretation is found in the House Report to the 1988 amendments to the IG Act of 1978 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.” H.R. REP. NO. 100-771 (1988) (emphasis added); Inspector General Authority to Conduct Regulatory Investigations, 13 O.L.C. 54, 65 (1989). This statement is followed almost immediately by the statement that these newly-created “inspectors general would have the same authorities and responsibilities as those provided in the 1978 act.” *Id.* 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.” Inspector General Authority to Conduct Regulatory Investigations, 13 O.L.C. 54, 65 (1989).

<sup>179</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO 20-639R, INSPECTORS GENERAL: INDEPENDENCE PRINCIPLES AND CONSIDERATIONS FOR REFORM 5 (2020).

<sup>180</sup> CHARLES A. JOHNSON & KATHRYN E. NEWCOMER, U.S. INSPECTORS GENERAL: TRUTH TELLERS IN TURBULENT TIMES 124 (2020).

<sup>181</sup> COUNCIL OF THE INSPECTORS GENERAL ON INTEGRITY AND EFFICIENCY, QUALITY STANDARDS FOR FEDERAL OFFICES OF INSPECTORS GENERAL 12-13 (2012).

<sup>182</sup> COUNCIL OF THE INSPECTORS GENERAL ON INTEGRITY AND EFFICIENCY, QUALITY STANDARDS FOR FEDERAL OFFICES OF INSPECTORS GENERAL 10 (2012).

safety net,” viz. their unique reporting relationship to Congress.<sup>183</sup> 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.<sup>184</sup> Threats include excessive familiarity with agency management or personnel or and taking on or performing agency management functions.<sup>185</sup>

## **II. Parallel Enforcement**

This section describes “parallel enforcement,” defined below as the practice of IGs expanding beyond audits and investigations *of the agencies* they oversee (whether authorized by Act of Congress or merely as a result of expansive interpretation of their statutory roles) to activities that entangle them *with the agencies* they oversee. Although IGs are forbidden from engaging in “program operating responsibilities,”<sup>186</sup> the line between that prohibited activity and otherwise acceptable enforcement activities is blurry and frequently requires IG judgment calls that may end up putting OIG staff into what should be exclusively the host agency’s lane. Many times, it is Congress that has authorized or permitted IG expansion into activities that overlap substantially with the function of the host agency. This article argues that parallel enforcement violates the letter and spirit of the IG Act by improperly entangling IGs with the agencies they oversee. Entanglement compromises independence and creates the potential for confusion (operationally within the agency, externally among members of the press and public -- and potentially with whistleblowers). Entanglement compromises independence and thereby impinges upon the IG’s ability to serve as an instrument of Congressional oversight.<sup>187</sup>

### **A. Defining Parallel Enforcement**

Congress did not originally intend Inspectors General to undertake activities performed by their host agencies. That much is clear in the language of the 1978 Act, which prohibits the transfer of “program operating responsibilities” to an IG.<sup>188</sup> With this provision, “Congress intended to insulate IGs from responsibility for running the very programs that they might review.”<sup>189</sup> In 1989, the Department of Justice Office of Legal Counsel concluded as much in addressing a challenge to the Department of Labor Inspector General’s desire to conduct certain

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<sup>183</sup> COUNCIL OF THE INSPECTORS GENERAL ON INTEGRITY AND EFFICIENCY, QUALITY STANDARDS FOR FEDERAL OFFICES OF INSPECTORS GENERAL 12 (2012).

<sup>184</sup> COUNCIL OF THE INSPECTORS GENERAL ON INTEGRITY AND EFFICIENCY, QUALITY STANDARDS FOR FEDERAL OFFICES OF INSPECTORS GENERAL 12 (2012).

<sup>185</sup> COUNCIL OF THE INSPECTORS GENERAL ON INTEGRITY AND EFFICIENCY, QUALITY STANDARDS FOR FEDERAL OFFICES OF INSPECTORS GENERAL 13-15 (2012).

<sup>186</sup> 5 U.S.C. app. §§ 8G(b), 9(a)(2).

<sup>187</sup> See *infra*. Sec. II.B (outlining OIG parallel enforcement activities).

<sup>188</sup> 5 U.S.C. app. §§8G(b), 9(a)(2).

<sup>189</sup> COUNCIL OF THE INSPECTORS GENERAL ON INTEGRITY AND EFFICIENCY, THE INSPECTORS GENERAL 11 (2014).

investigations.<sup>190</sup> OLC reasoned 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.”<sup>191</sup> The drafters of the 1978 IG Act expressly disclaimed IG responsibility to enforce agency statutes.<sup>192</sup> The “investigatory portion” of an agency’s “regulatory policy”, they concluded, belongs with officials “designated by statute or by the Secretary” -- not in an official “separate from the regulatory division” of the agency or department.<sup>193</sup> OLC concluded that Congress did not intend by creating IGs to change the fundamental regulatory structure of the federal government.

By not performing the program 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.”<sup>194</sup> But there is no definition in the statute or legislative history of what “program operating responsibilities” means. 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....”<sup>195</sup> Courts have also been relatively permissive in construing the boundaries of Inspector General activity.<sup>196</sup> In

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<sup>190</sup> See Inspector General Authority to Conduct Regulatory Investigations, 13 O.L.C. 54 (1989). A controversy had arisen as to whether the original Inspector General Act of 1978 authorized IGs to conduct investigations pursuant to statutes that grant their host agencies regulatory authority outside the agency. OLC concluded 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.

<sup>191</sup> *Id.* at 58.

<sup>192</sup> *Id.* at 59-60 (quoting Rep. Levitas) (stating that IGs should not be “a new layer of bureaucracy to plague the public.”).

<sup>193</sup> *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.”).

<sup>194</sup> COUNCIL OF THE INSPECTORS GENERAL ON INTEGRITY AND EFFICIENCY, THE INSPECTORS GENERAL 11 (2014).

<sup>195</sup> *Id.*; see also FREDERICK M. KAISER, CONG. RESEARCH SERV., 98-379, STATUTORY OFFICES OF INSPECTOR GENERAL: ESTABLISHMENT AND EVOLUTION 2 (2003).

<sup>196</sup> See, e.g., *Univ. of Med. & Dentistry of New Jersey v. Corrigan*, 347 F.3d 57, 66 (3d Cir. 2003) (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) (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. Dept. 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

addition to what Congress or their host agency assigns 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.

For the most part, Inspectors General 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).<sup>197</sup> IG’s operationalize this balance primarily by separating the audit function from other functions inside their offices.<sup>198</sup> Independence is a “challenge” because distance from the agency makes it harder to obtain needed information.<sup>199</sup> Staff engaged in auditing and engaged in evaluation and inspection still report to the same ultimate official.<sup>200</sup> Second, IGs may avoid becoming part of agency policymaking, whether that means staying away from agency leadership meetings, not participating in policy discussions, and eschewing a public identity of interest with agency management.<sup>201</sup>

Clearly, IGs are not supposed to deliver or manage the delivery of services, benefits and programs by 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 evolved

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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.”); *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). *But see Univ. of Med. & Dentistry of New Jersey 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 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).

<sup>197</sup> CHARLES A. JOHNSON & KATHRYN E. NEWCOMER, U.S. INSPECTORS GENERAL: TRUTH TELLERS IN TURBULENT TIMES 122-23 (2020).

<sup>198</sup> [cite]

<sup>199</sup> CHARLES A. JOHNSON & KATHRYN E. NEWCOMER, U.S. INSPECTORS GENERAL: TRUTH TELLERS IN TURBULENT TIMES 128 (2020); *see also id.* at 129 (cooperation is “key to the IG’s work”).

<sup>200</sup> [cite]

<sup>201</sup> CHARLES A. JOHNSON & KATHRYN E. NEWCOMER, U.S. INSPECTORS GENERAL: TRUTH TELLERS IN TURBULENT TIMES 141 (2020).

that is “dedicated to improving management,”<sup>202</sup> they have received more resources and flexibility to undertake more activities cooperatively with their host agencies.<sup>203</sup> As IGs inherited new responsibilities and missions, they began to be an integral part of solving management problems. They tackled problems as much as sounding the alarm, “both watchdog and junkyard dog” in the words of former Senator John Glenn.<sup>204</sup> They obtained law enforcement authority to assist in carrying out their duties.<sup>205</sup> 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

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<sup>202</sup> Statement of Sen. John Glenn, “The Inspector General Act of 1978: Twenty Years after Passage, are the Inspectors General Fulfilling Their Mission?”, Hearing before the Subcommittee on Government Management, Information, and Technology of the Committee on Government Reform and Oversight, 105th Congress, 2d Sess. April 21, 1998, Ser. No. 105-176, GPO 51-176 (1999), at p.16.

<sup>203</sup> 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., Testimony of Former Department of Commerce and State Department Inspector General Sherman M. Funk, “The Inspector General Act of 1978: Twenty Years after Passage, are the Inspectors General Fulfilling Their Mission?”, Hearing before the Subcommittee on Government Management, Information, and Technology of the Committee on Government Reform and Oversight, 105th Congress, 2d Sess. April 21, 1998, Ser. No. 105-176, GPO 51-176 (1999), at p.85 (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 General, “The Inspectors General,” July 14, 2014, [https://www.ignet.gov/sites/default/files/files/IG\\_Authorities\\_Paper\\_-\\_Final\\_6-11-14.pdf](https://www.ignet.gov/sites/default/files/files/IG_Authorities_Paper_-_Final_6-11-14.pdf), at p.10. 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. Council of Inspectors General, “The Inspectors General,” July 14, 2014, [https://www.ignet.gov/sites/default/files/files/IG\\_Authorities\\_Paper\\_-\\_Final\\_6-11-14.pdf](https://www.ignet.gov/sites/default/files/files/IG_Authorities_Paper_-_Final_6-11-14.pdf), at p.10. 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 Appendix 3, p.16 (listing OIGs with law enforcement authorities).

<sup>204</sup> *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) (statement of Sen. John Glenn).

<sup>205</sup> Pub. L. No. 107-296, § 812, codified at 5 U.S.C. app. § 6(f).



cooperation at the agency, or other factors.<sup>206</sup> Over time, IG independence and discretion are eroded as their responsibilities are expanded.<sup>207</sup> As a result, the careful balance needed to ensure Congress receives the benefit of independent information is compromised.

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.”<sup>208</sup> The goal, of course, is for the IG to “remain objective if he or she later reviews those issues and matters.”<sup>209</sup> When Department of Justice Inspector General Michael Horowitz objected in 2014 to “compromising” his independence by

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<sup>206</sup> 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 General 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).

<sup>207</sup> *See* 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 (1993) (e.g., 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). *Id.*

<sup>208</sup> COUNCIL OF THE INSPECTORS GENERAL ON INTEGRITY AND EFFICIENCY, THE INSPECTORS GENERAL 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.”).

<sup>209</sup> COUNCIL OF THE INSPECTORS GENERAL ON INTEGRITY AND EFFICIENCY, THE INSPECTORS GENERAL 11 (2014).

“hav[ing] to go to the people I oversee for approval to get records,”<sup>210</sup> that is the same “compromise” he makes if and when the agency he oversees relies on his team to make policy or implement agency programs or operations.

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.”<sup>211</sup> And “if you’ve seen one IG, you’ve seen one IG.”<sup>212</sup> 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.<sup>213</sup> 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.<sup>214</sup> These standards require structural separation of the audit organization and the application of an independence “framework” in assessing threats to independence, but ultimately rely on the judgment of the Inspector General.<sup>215</sup> The threats to independence that are outlined in GAGAS are compounded by IG entanglement with agency activities.<sup>216</sup> At the same time, there are incentives to loosely interpret the ban on programmatic responsibilities, beginning with the trend

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<sup>210</sup> *Obstructing Oversight: Concerns From Inspectors General, Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 113th Cong. 41 (2014) (testimony of Michael Horowitz, Inspector Gen. Dep’t of Justice).

<sup>211</sup> CONG. RESEARCH SERV., R45450, STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER 10 (2019).

<sup>212</sup> Remarks of Peter Tyler, Project on Government Oversight, at “The Role of Inspectors General in Congressional Oversight,” conference sponsored by the Levin Center at Wayne Law (June 13, 2018), available at [https://archive.org/details/CSPAN3\\_20180614\\_015200\\_Role\\_of\\_Inspectors\\_General\\_\\_Effectiveness/start/2457.3/end/2468.4](https://archive.org/details/CSPAN3_20180614_015200_Role_of_Inspectors_General__Effectiveness/start/2457.3/end/2468.4) (last visited August 28, 2020).

<sup>213</sup> COUNCIL OF THE INSPECTORS GENERAL ON INTEGRITY AND EFFICIENCY, QUALITY STANDARDS FOR FEDERAL OFFICES OF INSPECTORS GENERAL 13-15 (2012).

<sup>214</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO 20-639R, INSPECTORS GENERAL: INDEPENDENCE PRINCIPLES AND CONSIDERATIONS FOR REFORM (2020). The GAO issues a publication containing the GAGAS, which is accessible at <https://www.gao.gov/yellowbook/overview>; 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).

<sup>215</sup> See U.S. GOV’T ACCOUNTABILITY OFF., GAO 20-639R, INSPECTORS GENERAL: INDEPENDENCE PRINCIPLES AND CONSIDERATIONS FOR REFORM 3 (2020) (“evaluative framework”).

<sup>216</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO 20-639R, INSPECTORS GENERAL: INDEPENDENCE PRINCIPLES AND CONSIDERATIONS FOR REFORM 6 (2020) (undue influence threat, management participation threat).

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.<sup>217</sup> 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.”<sup>218</sup> 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 from* 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 activity 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,”<sup>219</sup> the term itself is undefined and the blurry 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 are to compromise 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.

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<sup>217</sup> See PROJECT ON GOVERNMENT OVERSIGHT, INSPECTORS GENERAL: MANY LACK ESSENTIAL TOOLS FOR INDEPENDENCE 11 (2008), (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).

<sup>218</sup> PROJECT ON GOVERNMENT OVERSIGHT, INSPECTORS GENERAL: MANY LACK ESSENTIAL TOOLS FOR INDEPENDENCE 11 (2008) (“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.”).

<sup>219</sup> 5 U.S.C. app. §§ 8G(b), 9(a)(2).

## **1. Health & Human Services**

The Department of Health and Human Services (HHS) was created as the Department of Health, Education, and Welfare (HEW).<sup>220</sup> The department's mission is to provide effective health and human services to "enhance the health and well-being of all Americans."<sup>221</sup> The HEW OIG was the first modern statutory IG Office.<sup>222</sup> 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.<sup>223</sup>

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.<sup>224</sup> 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.<sup>225</sup> The HHS Secretary "*acting through the Department's Inspector General (HHS/OIG)*" directs HCFAC alongside the Attorney General of the DOJ.<sup>226</sup> In practice, the HHS-OIG is responsible for conducting and coordinating investigations of suspected fraud in

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<sup>220</sup> See 5 U.S.C. app. In 1979 The Department of Education Organization Act created a separate Department of Education. The Department of Health, Education, and Welfare became the Department of Health and Human Services in 1980. See <https://www.hhs.gov/about/historical-highlights/index.html>. See <https://www.hhs.gov/about/historical-highlights/index.html>.

<sup>221</sup> U.S. DEP'T OF HEALTH & HUMAN SERVS., *About HHS*, <https://www.performance.gov/health-and-human-services/> (last visited July 20, 2020).

<sup>222</sup> Pub. L. No. 94-505, §401(h); see also CONG. RESEARCH SERV., R45450, STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER 1 (2019).

<sup>223</sup> See U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-660T, MEDICARE: ACTIONS NEEDED TO BETTER MANAGE FRAUD RISKS 1-3 2018).

<sup>224</sup> 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. Pub. L. No. 104-191, tit. II, § 201, 110 Stat. 19376, 1937 (1996) (codified at 42 U.S.C. §§ 1320a-7c, 1395i(k)); 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).

<sup>225</sup> 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).

<sup>226</sup> 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).

HCFAC programs.<sup>227</sup> The CMS, for example, usually refers suspected fraud to the HHS-OIG.<sup>228</sup> Due to its vital role in HCFAC, Congress appropriates a large portion of HCFAC funds directly to the HHS-OIG.<sup>229</sup>

As part of HCFAC, OIG investigators participate in inter-agency programs<sup>230</sup> designed to weed out such cases of fraud and abuse. For instance, Medicare Fraud Strike Force Teams unite the efforts and resources of multiple agencies under the common goal of identifying health care fraud and swiftly bringing prosecutions.<sup>231</sup> HHS-OIG, CMS, and DOJ agents use data analytics to identify, investigate, and prosecute fraud.<sup>232</sup> The GAO designates Medicare as a “High-Risk” issue “because its complexity and susceptibility to improper payments, in addition to its size....”<sup>233</sup> 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

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<sup>227</sup> 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).

<sup>228</sup> 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).

<sup>229</sup> 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); 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).

<sup>230</sup> 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 (codified in scattered sections of 5 U.S.C., 31 U.S.C.); see also S. REP. 111-372, at 3 (2010). CHARLES A. JOHNSON ET AL., IBM CENTER FOR BUS. & GOV’T, BALANCING INDEPENDENCE AND POSITIVE ENGAGEMENT: HOW INSPECTORS GENERAL WORK WITH AGENCIES AND CONGRESS 8 (2015).

<sup>231</sup> U.S. DEP’T OF HEALTH & HUM. SERV. OFF. OF INSPECTOR GEN., SEMIANNUAL REPORT TO CONGRESS: OCTOBER 1, 2019–March 31, 2020 43 (2020).

<sup>232</sup> 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).

<sup>233</sup> 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).

healthcare fraud scheme ever charged by the Department of Justice in 2019, leading to the defendant's twenty-year sentence.<sup>234</sup>

In October 2018, the DOJ announced the creation of a similar initiative to combat the opioid epidemic.<sup>235</sup> 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.<sup>236</sup> 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.<sup>237</sup> 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 60 individuals for their alleged participation and involved over 350,000 prescriptions.<sup>238</sup>

The HHS-OIG also plays a role in sanctioning those who have committed HHS program fraud.<sup>239</sup> Under the exclusion authority granted by Social Security Act, the OIG has the statutory authority to exclude practitioners from participation in Medicare, Medicaid, and other federal

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<sup>234</sup> Press Release, U.S. Dep't of Just., 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-healt-0>.

<sup>235</sup> U.S. Dep't of Health & Hum. Serv. Off. of Inspector Gen., Semiannual Report to Congress: October 1, 2019–March 31, 2020 43 (2020).

<sup>236</sup> U.S. Dep't of Health & Hum. Serv. Off. of Inspector Gen., Semiannual Report to Congress: October 1, 2019–March 31, 2020 43 (2020).

<sup>237</sup> U.S. Dep't of Health & Hum. Serv. Off. of Inspector Gen., Semiannual Report to Congress: October 1, 2019–March 31, 2020 43 (2020).

<sup>238</sup> Press Release, U.S. Dep't of Just., 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>.

<sup>239</sup> 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).

health programs.<sup>240</sup> The IG can also pursue civil monetary penalties (CMP) against such actors.<sup>241</sup> The OIG may work alongside CMS in taking these enforcement actions.<sup>242</sup>

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 HCFAC and outside HCFAC).<sup>243</sup> 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.<sup>244</sup> 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.<sup>245</sup>

## **2. Social Security Administration**

The modern Social Security Administration (SSA) was established through the Social Security Independence and Program Improvements Act of 1994.<sup>246</sup> The mandate of the agency is to “administer the old-age, survivors, and disability insurance program . . . and the

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<sup>240</sup> Kevin Barry et. al, *Office of Inspector General's Special Advisory Bulletin on the Effect of Exclusion from Participation in Federal Health Care Programs*, 12 HEALTH L. 21, 21 (2000).

<sup>241</sup> Kevin Barry et. al, *Office of Inspector General's Special Advisory Bulletin on the Effect of Exclusion from Participation in Federal Health Care Programs*, 12 HEALTH L. 21, 21 (2000). In the six month period from October, 2019 to March, 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).

<sup>242</sup> 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).

<sup>243</sup> For example, HIPAA investigations are outside HCFAC.

<sup>244</sup> 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).

<sup>245</sup> 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 11, 23 (2013).

<sup>246</sup> 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>. (last visited July 22, 2020).

supplemental security income program....”<sup>247</sup> The SSA-OIG was also established in 1994.<sup>248</sup> 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 to prevent and detect fraud, waste, abuse, and mismanagement in such programs and operations.”<sup>249</sup> To meet their mandate, the OIG leads audits, evaluations, and investigations relating to Social Security programs.<sup>250</sup>

In addition to its oversight function, the OIG often engages in regulatory enforcement against those organizations and individuals allegedly defrauding social security programs. The OIG coordinates with law enforcement agencies on individual cases of suspected social security fraud.<sup>251</sup> The OIG also works to protect vulnerable social security recipients through investigations and audits. For instance, the OIG receives allegations of representative payee<sup>252</sup> fraud and misuse from the SSA and law enforcement agencies.<sup>253</sup> In 2011, the SSA OIG participated in an investigation involving a representative payee who had held four mentally disabled social security recipients captive.<sup>254</sup> The SSA OIG’s role in the investigation involved gathering evidence analyzing SSA documents, and interviewing sources.<sup>255</sup>

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<sup>247</sup> 42 U.S.C. § 901.

<sup>248</sup> CONG. RESEARCH SERV., R45450, STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER 27 (2019)

<sup>249</sup> OFFICE OF INSPECTOR GEN., SOC. SEC. ADMIN., SEMIANNUAL REPORT TO CONGRESS: OCTOBER 1, 2019-MARCH 31, 2020 41 (2020).

<sup>250</sup> SOC. SEC. ADMIN. OFFICE OF INSPECTOR GEN., *About Our Organization*, <https://oig.ssa.gov/sites/default/files/About.pdf> (last visited July 22, 2020).

<sup>251</sup> *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 (June 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>.

<sup>252</sup> 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).

<sup>253</sup> *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.).

<sup>254</sup> *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. 20-21 (2017) (prepared statement of Gale Stallworth Stone, Acting Inspector Gen., Soc. Sec. Admin.).

<sup>255</sup> *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. 21 (2017) (prepared statement of Gale Stallworth Stone, Acting Inspector Gen., Soc. Sec. Admin.).



The SSA has been praised for its active participation in joint task forces.<sup>256</sup> The SSA OIG’s Cooperative Disability Investigations Program (CDI) is a joint effort between the SSA, SSA OIG, State Disability Determination services, as well as state and local law enforcement.<sup>257</sup> The goal of this effort is to “investigate and deter Social Security disability fraud.”<sup>258</sup> 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.<sup>259</sup> 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. 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, which she applied for and received under a second identity.<sup>260</sup> Similar task forces have been formed to combat other categories of Social Security fraud.<sup>261</sup>

### **3. Department of Transportation**

The Department of Transportation was established in 1966 through the enactment of the Department of Transportation Act in order to assure the “. . . e]ffective administration of the transportation systems of the Federal Government . . . .”<sup>262</sup> The DOT OIG was established by the 1978 IG Act.<sup>263</sup> 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.”<sup>264</sup> In

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<sup>256</sup> [cite]

<sup>257</sup> OFFICE OF INSPECTOR GEN., SOC. SEC. ADMIN., SEMIANNUAL REPORT TO CONGRESS: OCTOBER 1, 2019-MARCH 31, 2020 6 (2020).

<sup>258</sup> OFFICE OF INSPECTOR GEN., SOC. SEC. ADMIN., SEMIANNUAL REPORT TO CONGRESS: OCTOBER 1, 2019-MARCH 31, 2020 6 (2020).

<sup>259</sup> OFFICE OF INSPECTOR GEN., SOC. SEC. ADMIN., SEMIANNUAL REPORT TO CONGRESS: OCTOBER 1, 2019-MARCH 31, 2020 6 (2020).

<sup>260</sup> 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>.

<sup>261</sup> 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>.

<sup>262</sup> Department of Transportation Act, Pub. L. No. 89-670 § 2(b)(1), 80 Stat. 931 (1966).

<sup>263</sup> Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (1978) (codified as amended at 5 U.S.C. app. §§ 1-13).

<sup>264</sup> U.S. DEP’T OF TRANSP. OFFICE OF INSPECTOR GEN., *About OIG*, <https://www.oig.dot.gov/about-oig> (last visited July 22, 2020).

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, the Transportation Safety Investigation program investigates crimes where death or serious injury has or is likely to occur in order to “enhance DOT’s transportation safety goals.”<sup>265</sup> The OIG stresses that their investigations are separate from, but “complement” DOT’s operating administrations’ regulatory enforcement programs.<sup>266</sup>

In 2019, the DOT OIG was involved in the investigation leading to the first Federal prosecution involving the unlawful operation of an unmanned aircraft system (UAS).<sup>267</sup> The investigation arose when an unlicensed Georgia man used an unregistered UAS to attempt to deliver contraband to a State prison.<sup>268</sup> The FAA assisted the DOT OIG in this investigation.<sup>269</sup> The same transportation safety program also investigated the president of multiple commercial passenger bus companies in a multi-state fraud case.<sup>270</sup> The investigation uncovered that the company routinely falsified FMCSA reports related to bus safety and driver qualifications.<sup>271</sup> The FMCSA assisted the DOT OIG in this investigation.<sup>272</sup>

DOT OIG also investigates the illegal shipment of hazardous materials. For instance, in 2019 the subject of one such investigation plead guilty to the reckless transport of over 100,000 pounds of hazardous materials.<sup>273</sup> The California trucking company received over \$3 million in

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<sup>265</sup> 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).

<sup>266</sup> 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).

<sup>267</sup> 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>.

<sup>268</sup> 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>.

<sup>269</sup> 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>.

<sup>270</sup> 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>.

<sup>271</sup> 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>.

<sup>272</sup> 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>.

<sup>273</sup> 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>.

penalties.<sup>274</sup> DOT OIG special agents also often partner with other law enforcement agencies to conduct joint investigations.<sup>275</sup> 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.<sup>276</sup> The oilfield service company was sentenced for an OSHA violation in the maintenance of its tanker, which led to the death of a welder.<sup>277</sup>

#### **4. Department of Agriculture**

The Department of Agriculture (“USDA”) was established in 1862 under the Department of Agriculture Act.<sup>278</sup> This department was tasked with acquiring and disseminating “useful information on subjects connected with agriculture... and to procure, propagate, and distribute... valuable seeds and plants.”<sup>279</sup> The Agriculture and Food Act grants the United States Department of Agriculture 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.<sup>280</sup>

The USDA-OIG was administratively created in 1962<sup>281</sup> and legislatively established pursuant to the 1978 IG Act.<sup>282</sup> The OIG works “with the Department’s 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....”<sup>283</sup>

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<sup>274</sup> 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>.

<sup>275</sup> 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).

<sup>276</sup> 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>.

<sup>277</sup> 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>.

<sup>278</sup> Department of Agriculture Act, ch. 72, 12 Stat. 387 (1862).

<sup>279</sup> *Id.* § 1.

<sup>280</sup> See Information on OIG's Investigation Authority, and Criminal Investigations Involving Threats of Violence and Safety Risks <https://www.usda.gov/oig/webdocs/FirearmsMemo.pdf>

<sup>281</sup> CONG. RESEARCH SERV., R45450, STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER 1 (2019).

<sup>282</sup> CONG. RESEARCH SERV., R45450, STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER 27 (2019).

<sup>283</sup> U.S. DEP’T OF AGRIC. OFFICE OF INSPECTOR GEN., *About OIG* <https://www.usda.gov/oig/about.htm> (last visited July 20, 2020).

This Department's broad mandate allows USDA OIG to participate in a wide range of investigative activities in conjunction with various federal agencies for the purposes of ensuring the safety and security of public health and agriculture. In 2019, the Office of Inspector General participated in an investigation of a large-scale illegal dogfighting and drug trafficking operation 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.<sup>284</sup> The investigation culminated in fifty-one counts of federal dogfighting offenses.<sup>285</sup>

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 conjunction with the Internal Revenue Service (IRS) and the USDA's Risk Management Agency. The effort uncovered that the participant stole more than \$5 million in the scheme and resulted in the defendant's incarceration.<sup>286</sup>

## **5. Department of Veteran's Affairs**

The Department of Veteran's Affairs (VA) was established in 1930 as the Veterans' Administration, following the passage of the Consolidation of Veterans Activities act.<sup>287</sup> The statute elevated the previous Veterans Bureau to a Federal agency and allowed the president to "consolidate and coordinate governmental activities affecting war veterans."<sup>288</sup> 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."<sup>289</sup> The Department of Veteran's Affairs OIG was established through the IG

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<sup>284</sup> 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>.

<sup>285</sup> 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>.

<sup>286</sup> 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>.

<sup>287</sup> Consolidation of Veteran's Activities, Pub. L. No. 71-536, 46 Stat. 1016 (1930).

<sup>288</sup> Consolidation of Veteran's Activities, Pub. L. No. 71-536 § 1(a), 46 Stat. 1016 (1930).

<sup>289</sup> U.S. DEP'T OF VETERAN'S AFFAIRS, *About VA*, [https://www.va.gov/landing2\\_about.htm#:~:text=Mission%20Statement,women%20who%20are%20America's%20veterans](https://www.va.gov/landing2_about.htm#:~:text=Mission%20Statement,women%20who%20are%20America's%20veterans) (last visited July 20, 2020).

Act of 1978<sup>290</sup> and conducts oversight of Veteran's Affairs operations as well as its programs.<sup>291</sup> The VA OIG was charged with the authority to oversee the quality of VA healthcare under the Benefits and Services Act of 1988.<sup>292</sup>

OIG enforcement efforts often involve allegations of VA health care fraud. 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.<sup>293</sup> The investigation revealed this individuals led a nationwide conspiracy to bribe medical practitioners to unnecessarily prescribe their fentanyl-based narcotic drug.<sup>294</sup> 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 agencies' offices of inspectors general.<sup>295</sup>

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.<sup>296</sup> A medical device manufacturer plead guilty to distributing an adulterated device as well as the marketing of such device for unproven and unsafe uses.<sup>297</sup>

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

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<sup>290</sup> Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (1978) (codified as amended at 5 U.S.C. app. §§ 1-13); *see also* CONG. RESEARCH SERV., R45450, STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER 27 (2019).

<sup>291</sup> U.S. DEP'T OF VETERAN'S 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).

<sup>292</sup> 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).

<sup>293</sup> OFFICE OF INSPECTOR GEN., U.S. DEP'T OF VETERAN'S AFFAIRS, SEMIANNUAL REPORT TO CONGRESS: ISSUE 83 OCTOBER 1, 2019- MARCH 31, 2020 35 (2020).

<sup>294</sup> 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>.

<sup>295</sup> 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>.

<sup>296</sup> 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).

<sup>297</sup> 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).

collect and spend her father's VA benefits following his death.<sup>298</sup> 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 as well as other OIGs.<sup>299</sup>

## **6. Environmental Protection Agency**

The Environmental Protection Agency (EPA) was established through the congressional approval of President Nixon's presidential directive.<sup>300</sup> The 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, conduct environmental research, provide assistance to others combatting environmental pollution, and to recommend new policies for environmental protection.<sup>301</sup> The EPA's Office of the Inspector General was created pursuant to the Inspector General Act of 1978.<sup>302</sup> The OIG's role is to detect and prevent fraud, waste, and abuse in order to assist the Environmental Protection Agency efficiently and effectively protect human health and the environment.<sup>303</sup>

The OIG states that one of its goals is to contribute to EPA's programs and operations.<sup>304</sup> 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.<sup>305</sup> Although the investigation uncovered

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<sup>298</sup> OFFICE OF INSPECTOR GEN., U.S. DEP'T OF VETERAN'S AFFAIRS, SEMIANNUAL REPORT TO CONGRESS: ISSUE 83 OCTOBER 1, 2019- MARCH 31, 2020 28 (2020).

<sup>299</sup> OFFICE OF INSPECTOR GEN., U.S. DEP'T OF VETERAN'S AFFAIRS, SEMIANNUAL REPORT TO CONGRESS: ISSUE 83 OCTOBER 1, 2019- MARCH 31, 2020 32 (2020).

<sup>300</sup> See Jack Lewis, The Birth of EPA, 11 EPA J., 6, 8 (1985) (discussing the creation and early years of the EPA).

<sup>301</sup> Jack Lewis, The Birth of EPA, 11 EPA J., 6-8 (1985) (discussing the creation and early years of the EPA).

<sup>302</sup> Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (1978) (codified as amended at 5 U.S.C. app. §§ 1-13); see also CONG. RESEARCH SERV., R45450, STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER 27 (2019).

<sup>303</sup> OFFICE OF INSPECTOR GEN., ENVTL. PROT. AGENCY, SEMIANNUAL REPORT TO CONGRESS: OCTOBER 1, 2019-MARCH 31, 2020 1 (2020).

<sup>304</sup> OFFICE OF INSPECTOR GEN., ENVTL. PROT. AGENCY, SEMIANNUAL REPORT TO CONGRESS: OCTOBER 1, 2019-MARCH 31, 2020 1 (2020).

<sup>305</sup> 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>.

significant misconduct,<sup>306</sup> the EPA directly involved itself in an investigation outside the scope of the IG Act.

Additionally, the EPA OIG works directly in conjunction 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.<sup>307</sup> 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.<sup>308</sup> Though it is undeniable that the agencies produced commendable results, the OIG is impermissibly operating in an enforcement role against the public, rather than in an oversight capacity as the “eyes and ears” of Congress.<sup>309</sup>

## **7. United States Postal Service**

The Postal Reorganization Act established the United States Postal Service (“USPS”) as an independent agency of the executive branch.<sup>310</sup> Its congressional mandate is to “provide prompt, reliable, and efficient services to patrons in all areas and... render postal services to all communities.”<sup>311</sup> The USPS Office of the Inspector General was created pursuant to the IG Act Amendments of 1988.<sup>312</sup> The OIG’s ultimate mission is to “help maintain confidence in the

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<sup>306</sup> 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>.

<sup>307</sup> 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>.

<sup>308</sup> 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>.

<sup>309</sup> [cite]

<sup>310</sup> See Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719 (1970), (codified as amended at 39 U.S.C. § 201). See U.S. POSTAL SERV., *The United States Postal Service: An American History* 64-65 (2020).

<sup>311</sup> 39 U.S.C. § 101(a).

<sup>312</sup> Inspector General Act Amendments of 1988, Pub. L. No. 100-504, 100 S. 908; see also CONG. RESEARCH SERV., R45450, *STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER* 29 (2019). The USPS OIG is distinct from other OIGs in various crucial ways. The Inspector General of the USPS is appointed by the nine presidentially-appointed Governors of the U.S. Postal Service. 39 U.S.C. § 202. The USPS IG is also the only statutory IG with a term limit. CONG. RESEARCH SERV., R45450, *STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER* 33 (2019). The IG can only be removed for cause by at least seven of the nine Governors. 39 U.S.C. § 202(e).

postal system and improve the Postal Service's bottom line through independent audits and investigations."<sup>313</sup> Until 1988, the USPS Inspector General also held the position of Chief Postal Inspector of the Postal Inspection Service.<sup>314</sup> These positions were split in 1996.<sup>315</sup> 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.<sup>316</sup>

Despite the separation of the USPS OIG and the Chief Postal Inspector roles and functions, the USPS OIG continues to play an active role in enforcement efforts against the public. A significant portion of cases are healthcare-related investigations.<sup>317</sup> For instance, the USPS IG was involved in an investigation of a pharmaceutical company for antitrust and related False Claims Act violations.<sup>318</sup> In a statement, the special agent in charge emphasized the millions the Postal Service spends yearly on healthcare associated costs.<sup>319</sup>

Special agents of the OIG investigate frauds against the Postal Service to help safeguard the Agency's resources and deter postal crimes,<sup>320</sup> sometimes alongside the branches of the Postal Service. For example, the OIG investigates allegations of drug mail distribution

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<sup>313</sup> U.S. POSTAL SERV. OFFICE OF INSPECTOR GEN., *About the OIG*, <https://www.uspsoig.gov/about-us/about-oig> (last visited July 20, 2020).

<sup>314</sup> 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).

<sup>315</sup> Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-379 (1996). The Act also granted the USPS OIG law enforcement authority. *Id.* § 207; see also CONG. RESEARCH SERV., R43722, OFFICES OF INSPECTORS GENERAL AND LAW ENFORCEMENT AUTHORITY: IN BRIEF 5 (2014).

<sup>316</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO 07-138, INSPECTORS GENERAL: ACTIVITIES OF THE DEPARTMENT OF STATE OFFICE OF INSPECTOR GENERAL 26 (2007).

<sup>317</sup> U.S. POSTAL SERV. OFFICE OF INSPECTOR GEN., HEALTH CARE PROVIDER FRAUD, <https://www.uspsoig.gov/investigations/provider-fraud> (last visited July 20, 2020).

<sup>318</sup> 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>.

<sup>319</sup> 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>.

<sup>320</sup> U.S. POSTAL SERV. OFFICE OF INSPECTOR GEN., OFFICE OF INVESTIGATIONS: INTRODUCTION, <https://www.uspsoig.gov/investigations> (last visited July 20, 2020).



schemes.<sup>321</sup> In 2019, the OIG investigated a scheme to mail marijuana through the Postal System in coordination with the United States Postal Inspection Service and other Federal agencies.<sup>322</sup>

## **8. Federal Communications Commission**

The Communications Act of 1934 established the Federal Communication Commission (FCC) for the purposes of regulating interstate and international communications.<sup>323</sup> The Commission is responsible for implementing and enforcing communications law and regulations.<sup>324</sup> The FCC Office of Inspector General was established pursuant to the IG Amendments Act of 1988<sup>325</sup> and aids the Commission in its efforts to improve “operational and program effectiveness and efficiency.”<sup>326</sup>

Even though the FCC has a distinct enforcement bureau,<sup>327</sup> the OIG often investigates allegations of criminal misconduct and civil fraud relating to FCC programs.<sup>328</sup> 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

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<sup>321</sup> 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://www.uspsoig.gov/sites/default/files/document-library-files/2019/DOJ_News_2019_11_19.pdf).

<sup>322</sup> 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://www.uspsoig.gov/sites/default/files/document-library-files/2019/DOJ_News_2019_11_19.pdf).

<sup>323</sup> Communications Act of 1934, Pub. L. No. 73-416 § 1, 48 Stat. 1064 ch. 652 (codified as amended at 47 U.S.C. 151); *see also* CONG. RESEARCH SERV., R45699, The Federal Communications Commission: Current Structure and Its Role in the Changing Telecommunications Landscape 1 (2020).

<sup>324</sup> *See* CONG. RESEARCH SERV., R45699, THE FEDERAL COMMUNICATIONS COMMISSION: CURRENT STRUCTURE AND ITS ROLE IN THE CHANGING TELECOMMUNICATIONS LANDSCAPE 1 (2020).

<sup>325</sup> CONG. RESEARCH SERV., R45450, STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER 28 (2019). 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.*

<sup>326</sup> OFFICE OF INSPECTOR GEN., FED. COMM’NS COMM’N., SEMIANNUAL REPORT TO CONGRESS: OCTOBER 1, 2019-MARCH 31, 2020 41 (2020).

<sup>327</sup> 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).

<sup>328</sup> FED. COMM’NS COMM’N OFFICE OF THE INSPECTOR GEN., SEMIANNUAL REPORT TO CONGRESS OCTOBER 1, 2019-MARCH 31, 2020 7 (2020).

children.<sup>329</sup> 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.<sup>330</sup>

The OIG has also worked in cooperation with other FCC bureaus and offices in its investigations. In 2013, the FCC OIG and OGC 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.<sup>331</sup> More recently, the OIG and the Enforcement Bureau investigated an allegations that a broadcasting company had violated the False Claims Act in its contract with the FCC.<sup>332</sup>

## **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.”<sup>333</sup> The Department’s mandate is to lead the United States’ foreign policy through “. . . diplomacy, advocacy, and assistance by advancing the interests of the American people, their safety and economic prosperity.”<sup>334</sup> The Department of State Office of Inspector General, as currently organized, was established through amendments to the IG Act in 1985<sup>335</sup> and 1986.<sup>336</sup> In addition to the traditional functions of an Inspector General’s Office as

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<sup>329</sup> 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>.

<sup>330</sup> FED. COMMUNIC’NS COMM’N OFFICE OF THE INSPECTOR GEN., SEMIANNUAL REPORT TO CONGRESS OCTOBER 1, 2019-MARCH 31, 2020 13-14 (2020).

<sup>331</sup> 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](https://transition.fcc.gov/oig/DOJ_Press_Release_13-civ-1191.pdf).

<sup>332</sup> 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-y76ui ihbv 910700-federal-communications-commission>.

<sup>333</sup> Department of Foreign Affairs Act, 1 Stat. 28 ch. 4 (codified at 22 U.S. Code § 2651).

<sup>334</sup> U.S. DEP’T OF STATE, *About the U.S. Department of State*, <https://www.state.gov/about/about-the-u-s-department-of-state/> (last visited July 22, 2020).

<sup>335</sup> Foreign Relations Authorization Act, Pub. L. No. 99-93, § 150, 99 Stat. 405, 427 (1985).

<sup>336</sup> Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 853: *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* CONG.

delineated in the IG Act, the DOS OIG is required by statute to undergo inspections of the Department's bureaus and posts worldwide.<sup>337</sup>

The OIG investigates allegations of fraud, waste, and mismanagement that may be either criminal or in violation of Agency regulations.<sup>338</sup> For instance, the OIG investigates allegations of fraud in the State Department's grant programs.<sup>339</sup> The OIG's Spring 2020 semiannual report states that roughly 14% of investigations for that reporting period involved allegations of grant fraud.<sup>340</sup> In January 2020, a Department grantee falsified documents related to a grant intended to support youth centers in marginalized areas of the Middle East.<sup>341</sup> Another grantee and five companies were debarred for their roles in a bid rigging conspiracy to steer contracts for kickbacks, affecting a program to provide learning opportunities for refugee children.<sup>342</sup>

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.<sup>343</sup> In 2010, the two entities entered into a memorandum of understanding delineating the responsibilities of each, including areas of overlap.<sup>344</sup> The IG Office continues to investigate cases of visa and passport fraud. In 2017, a joint OIG and Department of Homeland Security

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RESEARCH SERV., R45450, STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER 28 (2019).

<sup>337</sup> See Foreign Service Act of 1980, Pub. L. No. 96-465, tit. I, ch. 2, § 209, 94 Stat. 2071, 2080 (codified as amended 22 U.S.C. § 3929). Congress often waives this periodic inspection, applying a risk-based approach 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).

<sup>338</sup> U.S. DEP'T OF STATE OFFICE OF INSPECTOR GEN., *About OIG*, <https://www.stateoig.gov/about> (last visited July 22, 2020).

<sup>339</sup> 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).

<sup>340</sup> OFFICE OF INSPECTOR GEN, U.S. DEP'T OF STATE, SEMIANNUAL REPORT TO THE CONGRESS OCTOBER 1, 2019, TO MARCH 31, 2020 25 (2020).

<sup>341</sup> OFFICE OF INSPECTOR GEN, U.S. DEP'T OF STATE, SEMIANNUAL REPORT TO THE CONGRESS OCTOBER 1, 2019, TO MARCH 31, 2020 28 (2020).

<sup>342</sup> OFFICE OF INSPECTOR GEN, U.S. DEP'T OF STATE, SEMIANNUAL REPORT TO THE CONGRESS OCTOBER 1, 2019, TO MARCH 31, 2020 28 (2020).

<sup>343</sup> 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).

<sup>344</sup> 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 U.S. GOV'T ACCOUNTABILITY OFF., GAO 11-382T, STATE DEPARTMENT INSPECTOR GENERAL: ACTIONS TO ADDRESS INDEPENDENCE AND EFFECTIVENESS CONCERNS ARE UNDER WAY 11 (2011).

investigation revealed a nationwide fraud scheme designed to profit unlawfully from Department exchange visitor programs.<sup>345</sup> 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.<sup>346</sup>

## **10. Internal Revenue Service**

The Internal Revenue Service 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.<sup>347</sup> The modern IRS was created pursuant to the Internal Revenue Service Restructuring and Reform Act of 1998.<sup>348</sup>

The Department of the Treasury has two IGs, the Department of the Treasury IG and the Treasury Inspector General for Tax Administration (TIGTA).<sup>349</sup> TIGTA serves as the IRS' OIG.<sup>350</sup> TIGTA was established under the Internal Revenue Service Restructuring and Reform Act of 1998.<sup>351</sup> TIGTA encourages the "... economy, efficiency, effectiveness in the administration of the internal revenue laws. It is also committed to the prevention and detection of fraud, waste, and abuse within the IRS and related entities."<sup>352</sup>

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."<sup>353</sup> For example, TIGTA investigates external crimes including fraudulently filed IRS documents.<sup>354</sup>

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<sup>345</sup> OFFICE OF INSPECTOR GEN, U.S. DEP'T OF STATE, SEMIANNUAL REPORT TO THE CONGRESS OCTOBER 1, 2017, TO MARCH 31, 2018 27 (2018).

<sup>346</sup> OFFICE OF INSPECTOR GEN, U.S. DEP'T OF STATE, SEMIANNUAL REPORT TO THE CONGRESS OCTOBER 1, 2017, TO MARCH 31, 2018 27 (2018).

<sup>347</sup> Internal Revenue Act of 1862, 12 Stat. 432 ch. 119.

<sup>348</sup> Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685.

<sup>349</sup> CONG. RESEARCH SERV., R45450, STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER 5-6 (2019).

<sup>350</sup> CONG. RESEARCH SERV., R45450, STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER 5-6 (2019).

<sup>351</sup> Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206 § 1103, 112 Stat. 685, 705.

<sup>352</sup> TREASURY INSPECTOR GEN. FOR TAX ADMIN., *About TIGTA*, <https://www.treasury.gov/tigta/> (last visited July 22, 2020).

<sup>353</sup> TREASURY INSPECTOR GEN. FOR TAX ADMIN., *Office of Investigations*, <https://www.treasury.gov/tigta/> (last visited July 22, 2020).

<sup>354</sup> See e.g. TREASURY INSPECTOR GEN. FOR TAX ADMIN, SEMIANNUAL REPORT TO CONGRESS: OCTOBER 1, 2019-MARCH 31, 2020 23-24 (2020) (man found guilty of wire fraud and aggravated

In 2018, TIGTA was involved in an investigation of two individuals who attempted to fraudulently obtain President Trump’s Tax returns.<sup>355</sup> TIGTA also investigates instances where scammers impersonate IRS employees in order to obtain personal information or steal money from taxpayers.<sup>356</sup> 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.<sup>357</sup> Other external issues TIGTA investigates include false 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.<sup>358</sup>

### **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, 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.<sup>359</sup> Cabinet secretaries, agency commissioners and other heads of department are charged with administering these statutes, which may include enforcement and investigative authority.<sup>360</sup> 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.”<sup>361</sup> In examining the language and intent of the IG Act, the court affirmed a lower court decision and held that IGs lacked statutory authority to conduct “regulatory compliance investigations or audits,” meaning those “most

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identity theft for filing fraudulent Federal income tax returns using the names and SSNs of others and claiming tax refunds he was not entitled to).

<sup>355</sup> TREASURY INSPECTOR GEN. FOR TAX ADMIN, SEMIANNUAL REPORT TO CONGRESS: OCTOBER 1, 2019-MARCH 31, 2020 25 (2020).

<sup>356</sup> TREASURY INSPECTOR GEN. FOR TAX ADMIN, SEMIANNUAL REPORT TO CONGRESS: OCTOBER 1, 2019-MARCH 31, 2020 26 (2020).

<sup>357</sup> TREASURY INSPECTOR GEN. FOR TAX ADMIN, SEMIANNUAL REPORT TO CONGRESS: OCTOBER 1, 2019-MARCH 31, 2020 23 (2020).

<sup>358</sup> TREASURY INSPECTOR GEN. FOR TAX ADMIN, SEMIANNUAL REPORT TO CONGRESS: OCTOBER 1, 2019-MARCH 31, 2020 23 (2020).

<sup>359</sup> [cite]

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<sup>361</sup> *Burlington N. R.R. Co. v. Office of Inspector Gen., R.R. Retirement Bd.*, 983 F.2d 631, 638 (5th Cir. 1993).

appropriately viewed as being within the authority of the agency itself.”<sup>362</sup> 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.”<sup>363</sup> Indeed, for that reason, the House drafters of the IG Act had 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.<sup>364</sup> The court ruled that the goal for IGs should be exercising oversight of “the internal operations of the departments and agencies.”<sup>365</sup>

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 and agency wide issues.”<sup>366</sup> The IG Act, the court found, “specifically prohibits” IGs from assuming “program operating responsibilities.”<sup>367</sup> While the court understood “honest cooperation” between an IG and its host agency, that would not authorize the IG to “enforc[e] motor carrier safety regulations -- *a role which is central to the basic operations of the agency.*”<sup>368</sup> 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.<sup>369</sup>

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<sup>362</sup> *Burlington N. R.R. Co. v. Office of Inspector Gen., R.R. Retirement Bd.*, 983 F.2d 631, 642 (5th Cir. 1993).

<sup>363</sup> *Burlington N. R.R. Co. v. Office of Inspector Gen., R.R. Retirement Bd.*, 983 F.2d 631, 642 (5th Cir. 1993) (emphasis supplied).

<sup>364</sup> *Burlington N. R.R. Co. v. Office of Inspector Gen., R.R. Retirement Bd.*, 983 F.2d 631, 642 (5th Cir. 1993).

<sup>365</sup> *Burlington N. R.R. Co. v. Office of Inspector Gen., R.R. Retirement Bd.*, 983 F.2d 631, 642 (5th Cir. 1993). (citing 124 Cong. Rec. 10,405 (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 O.L.C. 54 (1989)).

<sup>366</sup> *Truckers United for Safety v. Mead*, 251 F.3d 183, 186 (D.C. Cir. 2001).

<sup>367</sup> *Truckers United for Safety v. Mead*, 251 F.3d 183, 186 (D.C. Cir. 2001).

<sup>368</sup> *Truckers United for Safety v. Mead*, 251 F.3d 183, 186 (D.C. Cir. 2001). Congress subsequently amended the power of the IG to investigate persons subject to the agency’s jurisdiction. *Id.* at 189. *Compare 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).

<sup>369</sup> *Truckers United for Safety v. Mead*, 251 F.3d 183, 190 (D.C. Cir. 2001).

Congress may have a host of reasons to expand 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 relating to the programs and operations” of the covered departments<sup>370</sup> “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.”<sup>371</sup> 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” or problems.<sup>372</sup> This is a difficult role, and Members of Congress are not always receptive to receiving complex or nuanced information.<sup>373</sup>

Maintaining independence is difficult. “Expectations of independence and collaborative engagement can produce conflicting pressures for [IGs] when independence might be compromised by collaborative engagement.”<sup>374</sup> The same problem Chairman Fountain identified to Department of Labor Comptroller Zuck<sup>375</sup> exists today when IG offices -- even separate

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<sup>370</sup> 5 U.S.C. app. § 2(1).

<sup>371</sup> 5 U.S.C. app. § 2(2).

<sup>372</sup> 5 U.S.C. app. § 4(a).

<sup>373</sup> See PETER H. SCHUCK, WHY GOVERNMENT FAILS SO OFTEN: AND HOW IT CAN DO BETTER 167-68 (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.”).

<sup>374</sup> CHARLES A. JOHNSON & KATHRYN E. NEWCOMER, U.S. INSPECTORS GENERAL: TRUTH TELLERS IN TURBULENT TIMES 123 (2020).

<sup>375</sup> See *supra* n \_\_\_\_ and accompanying text. *Establishment of Offices of Inspector General: Hearings on H.R. 2819 Before the Subcomm. on Intergovernmental Relations & Human Res. of the H. Comm. on Gov’t Operations* 95th Cong. 166 (1977).

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 themselves compromised through entanglement in the operations of their host agencies, they are less independent and therefore less useful and reliable to Congress for this important purpose.<sup>376</sup> To the extent IGs devote more time to the performance of those congressionally mandated activities outside the scope of the IG Act, that comes at the expense of the duties generally assigned to them by the 1978 Inspector General Act. Entanglement also compromises IGs’ ability independently to set their office priorities. 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.<sup>377</sup> As former Department of Homeland Security Inspector General John Roth testified:

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<sup>376</sup> 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).

<sup>377</sup> “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 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.” 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, 109-110 (1993). 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.” Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. Rev. 1260, 1285 (2006) (internal citations and quotations omitted). *See also* Steven P. Croley, *Regulation and Public Interests: The Possibility of Good Regulatory Government*, 14-25. Princeton: Princeton University Press, 2008 (outlining “the cynical view” of public choice theory).



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.<sup>378</sup>

Good policy and management practice require that IGs not become entangled with their agencies.<sup>379</sup> The result at best is operational confusion, confusing the public, and confusing staff. The relationship between Congress and the Executive already entails a great deal of complicated negotiation and accommodation.<sup>380</sup> Blurring the lines between agency and IG further complicates this process. Congress depends on Inspectors General to provide independent, timely and actionable information on the operations of the federal government.<sup>381</sup>

Regulators are captured “when [they] are in a constant state of being persuaded based on the persuader’s *identity* rather than an argument on the merits.”<sup>382</sup> Two of the warning signs of capture are (a) issue framing by the regulated entity<sup>383</sup> and (b) substitution of the regulated entity’s welfare for (or conflation with) the public good.<sup>384</sup> The text and history of the IG Act indisputably requires that IGs regulate their host agencies and report to Congress, not perform program operations or otherwise regulate the public.<sup>385</sup> But these commands are broad and convey discretion to the “regulator.” Those regulators are statutorily “identified” with their host agencies. They examine many issues as they arise within the agency. They see their role in part as contributing to the good of their host agency. To the extent that IGs “balance” those host

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<sup>378</sup> *Improving the Efficiency, Effectiveness, and Independence of Inspectors General*, 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.).

<sup>379</sup> 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, 109-110 (1993) (“[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.”).

<sup>380</sup> CHRISTOPHER H FOREMAN, SIGNALS FROM THE HILL: CONGRESSIONAL OVERSIGHT AND THE CHALLENGE OF SOCIAL REGULATION 12 (1988) (“A wealth of informal monitoring and bargaining constantly fleshes out the structural bones of both the congressional division of labor and the legislative-executive relationship.”).

<sup>381</sup> “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 INDEPENDENCE AND POSITIVE ENGAGEMENT: HOW INSPECTORS GENERAL WORK WITH AGENCIES AND CONGRESS 21 (2015).

<sup>382</sup> Scott Hempling, “Regulatory Capture: Sources and Solutions,” 1 EMORY CORPORATE GOVERNANCE AND ACCOUNTABILITY REVIEW 23, 25 (2014) (emphasis supplied).

<sup>383</sup> *Id.* at 26.

<sup>384</sup> *Id.* at 28.

<sup>385</sup> *See supra* \_\_\_\_.

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, yet the phrase “independence” itself has no concrete meaning.<sup>386</sup> Generally Accepted Government Auditing Standards (“GAGAS”) provide that auditors must be “independent” but the requirements relate to the appearance of objectivity.<sup>387</sup> Even framing auditors’ professional obligations in terms of their duty to their “client” necessarily blurs the obligation they owe to the rules themselves.<sup>388</sup> One cannot “stand separate and apart from the client’s business and at the same time be an agent beholden to the shareholder interest.”<sup>389</sup> Just as “enmesh[ing]” auditors in an agency relationship with shareholders “*subject[s] [them] to the principal’s control*,”<sup>390</sup> 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 OIGs perform more independent or objective.

At this point, one may be tempted to respond that fidelity to the statutory mandate alone is insufficient grounds for concern about IGs becoming overly enmeshed in the programs and operations of their host agencies. If there are efficiencies in combining human resources, if there are performance improvements to be obtained in joint operations, if there are cost savings in consolidating teams, then 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 perfectable and that problems arise solely as a result of undue outside (“political”) interference from Congress or lack of support inside the Executive branch. Yet 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

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<sup>386</sup> 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* AICPA Plain English Guide to Independence (August 2017) at 8 (“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.”), available at <https://www.aicpa.org/interestareas/professionalethics/resources/tools/downloadabledocuments/plain%20english%20guide.pdf> (last visited August 28, 2020) (emphasis supplied).

<sup>387</sup> Government Accountability Office, “Government Auditing Standards, 2018 Revision” (GAO-18-568G), July 2018 at 28-30.

<sup>388</sup> *See* William W. Bratton, “Shareholder Value and Auditor Independence,” 53 DUKE L. J. 439 (2003).

<sup>389</sup> *Id.* at 444 (internal quotations omitted).

<sup>390</sup> *Id.* (emphasis supplied).

the regulated industry.<sup>391</sup> 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.”<sup>392</sup> In this context, Inspectors General relying solely on their judgment and discretion -- rather than clear standards or guidelines -- risk becoming entangled in the same web of incentives that agencies have to work hard to avoid. Moreover, there is no mechanism for preventing or correcting potential entanglement, as the only process established to address problems with IGs is to report misconduct to CIGIE.<sup>393</sup>

Worse, from the perspective of the interest in sound oversight, such entanglement potentially confuses whistleblowers and compromises IG independence and ability to oversee the agency as Congress intended. As the Office of Legal Counsel put it, 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....”<sup>394</sup> 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.”<sup>395</sup> Potential whistleblowers may be scared off if they believe the Office of

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<sup>391</sup> 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. OF 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.”).

<sup>392</sup> PAUL C. LIGHT, MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY 57 (1993).

<sup>393</sup> 5 U.S.C. app. § 11(d)(1). CIGIE’s Special Integrity Committee receives, reviews, and refers for investigation allegations of wrongdoing.

<sup>394</sup> Inspector General Authority to Conduct Regulatory Investigations, 13 O.L.C. 54, 61 (1989).

<sup>395</sup> PROJECT ON GOVERNMENT OVERSIGHT, INSPECTORS GENERAL: MANY LACK ESSENTIAL TOOLS FOR INDEPENDENCE 9 (2008).

Inspector General -- not just the IG -- is “susceptible to pressures” from agency management.<sup>396</sup> “Scaring off would-be whistleblowers” can happen when the IG creates the impression that the office is (a) too busy or (b) too connected to the agency.<sup>397</sup>

Notions of due process<sup>398</sup> and fundamental fairness to investigatory targets also counsel against IGs becoming entangled with their agencies and their operations.<sup>399</sup> Requiring targets of investigations to deal with multiple offices inside the same agency, including the part of the agency charged with receiving complaints about investigators or auditing and evaluating the efficacy of investigations, likewise raises a host of concerns.

#### **D. What IGs Might Say**

Inspectors General and their offices are overwhelmingly trying to do a very difficult and important job, and do it as Congress intended. They may understandably respond that separation of audit and investigative functions and personnel are sufficient for them to avoid the practical problems, threats to independence, and compromise of value to Congress outlined above. IGs

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<sup>396</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO 20-639R, INSPECTORS GENERAL: INDEPENDENCE PRINCIPLES AND CONSIDERATIONS FOR REFORM 7 (2020).

<sup>397</sup> PROJECT ON GOVERNMENT OVERSIGHT, INSPECTORS GENERAL: MANY LACK ESSENTIAL TOOLS FOR INDEPENDENCE 12 (2008).

<sup>398</sup> 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).

<sup>399</sup> Agencies are accorded “extreme breadth” in conducting regulatory investigations. *See Linde Thompson 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).

might also contend that investigations of wrongdoers outside their host agencies are sufficiently different in nature from the oversight work they do that they do not compromise independence or the oversight function. Of course, whether they do remains in the eye of the beholder, and the only opinion that matters will be that of the IG.

IGs and their staffs are “highly attuned to requests from Congress.”<sup>400</sup> Yet, IGs can report discomfort with “serving in an agent-like role that advances the political interests of individual legislators.”<sup>401</sup> 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 IG independence compromise the ability of Congress to rely on IGs to conduct oversight of the Executive. Even if it may be fair to say in the overwhelming majority of cases that IGs are better able to support their agencies when they become closer to them operationally and programmatically, the closer they are the harder it is for Congress to rely on IGs providing critical information in the manner clearly anticipated in the statute.

### **III. Potential Solutions**

The problem identified here is one that could be mitigated in a variety of ways. At the very least, agencies and their IGs should maintain operational independence in enforcement matters as a matter of policy and practice. If IG personnel report only to their own supervisors, for example, the risks of agency capture and the dangers inherent in reviewing one’s own work could be reduced, if not entirely eliminated. In the alternative, IGs could 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 it were granted rulemaking authority for this purpose.

Another alternative might be for Congress to spend more time on initiatives that promote congressional cooperation with Inspectors General, thereby strengthening IG independence, including by scheduling more time for briefings, communicating more, working with IGs to shape mandates, and dedicating (or detailing) staff to work between offices.<sup>402</sup> Congress could

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<sup>400</sup> CHARLES A. JOHNSON ET AL., IBM CENTER FOR BUS. & GOV’T, BALANCING INDEPENDENCE AND POSITIVE ENGAGEMENT: HOW INSPECTORS GENERAL WORK WITH AGENCIES AND CONGRESS 19 (2015).

<sup>401</sup> CHARLES A. JOHNSON ET AL., IBM CENTER FOR BUS. & GOV’T, BALANCING INDEPENDENCE AND POSITIVE ENGAGEMENT: HOW INSPECTORS GENERAL WORK WITH AGENCIES AND CONGRESS 19 (2015).

<sup>402</sup> CHARLES A. JOHNSON & KATHRYN E. NEWCOMER, U.S. INSPECTORS GENERAL: TRUTH TELLERS IN TURBULENT TIMES 138-39 (2020).

also invest more time following up on IG reports or unimplemented recommendations and maintaining more regular contact with IG offices.<sup>403</sup>

Congress could also consider grandfathering specific reporting and auditing requirements imposed on IGs and curtailing the practice of assigning more duties to IGs beyond those in the 1978 IG Act.<sup>404</sup> Hearings could be conducted to review the manner in which 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 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 just define the term “program operating responsibilities.” In doing so, it would finally provide OIGs with clear guidance regarding which activities are prohibited by the IG Act, and clarify 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 as to 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.<sup>405</sup>

## **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 do their work effectively and as Congress intended, they have to 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

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<sup>403</sup> CHARLES A. JOHNSON & KATHRYN E. NEWCOMER, U.S. INSPECTORS GENERAL: TRUTH TELLERS IN TURBULENT TIMES 138-139 (2020).

<sup>404</sup> 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.

<sup>405</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO 20-639R, INSPECTORS GENERAL: INDEPENDENCE PRINCIPLES AND CONSIDERATIONS FOR REFORM 7 (2020).

undermined, Congressional oversight is weakened. Safeguarding against this practice so as to maximize IG independence will benefit Congress in its conduct of oversight activities.