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## Inspectors General Reform

### *Considering Proposals for Greater Independence, Effectiveness, and Accountability*

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Formally sitting within the executive branch yet functionally situated between the executive and legislative branches, inspectors general (IGs) play a vital role in upholding governmental integrity. Statutorily created by the Inspector General Act of 1978 (IG Act), IGs exist to “prevent and detect fraud, waste, abuse, and mismanagement in federal agencies’ programs and operations; conduct and supervise audits and investigations; and recommend policies to promote economy, efficiency, and effectiveness.”<sup>1</sup> Though they work within federal agencies, IGs work independently of such agencies and conduct audits and investigations to ensure “accountability and transparency over government programs and operations.”<sup>2</sup>

A foundational principle engrained in the IG Act is the preservation of IG independence during the auditing or investigative process.<sup>3</sup> Though formally located within the executive branch, IGs

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<sup>1</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-20-639R, [INSPECTORS GENERAL: INDEPENDENCE PRINCIPLES AND CONSIDERATIONS FOR REFORM 1](#) (2020). The IG Act, together with the Inspector General Act Amendments of 1988, covers both the inspectors general appointed by the President and with the consent of the Senate (PAS) and the inspectors general who work within designated federal entities (DFEs) and are appointed and removed by their respective agency heads. While most inspectors general were created by the promulgation of the IG Act, there are also a handful of civilian and military IGs established beyond the IG Act. The civilian statutory IGs are comprised of the “IGs for the Intelligence Community and the Central Intelligence Agency; three special inspectors general who are authorized to oversee nonpermanent federal activities and whose offices will terminate when the conditions in their authorizing statutes are met; and five IGs established within agencies in the legislative branch, including GAO.” Meanwhile, the military statutory IGs are created and located within offices of the Department of Defense. The authorizing statutes for this separate group of IGs mirror several of the IG Act provisions. *Id.* at 2.

<sup>2</sup> *Id.* at 1. A recent example of the IG’s role within governmental oversight involved the Justice Department’s inspector general releasing a 119-page report that investigated and criticized the shortcomings of the senior FBI officials in handling the sexual abuse case involving Lawrence Nassar and former U.S.A. gymnasts and Michigan State athletes. Juliet Macur & Michael Levenson, [Inspector General Says F.B.I. Botched Nassar Abuse Investigation](#), N.Y. TIMES (July 14, 2021). The report detailed the “numerous and fundamental errors” made by the Indianapolis field office’s special agent, who lied to the inspector general and violated F.B.I. policy when seeking job opportunities at U.S.A. Gymnastics during the duration of his investigation. *Id.*

<sup>3</sup> U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 1, at 2.

are statutorily committed to assisting Congress with oversight measures.<sup>4</sup> Given the proximity with which IGs function within their auditing agencies, their independence is vulnerable to a multitude of threats—such as undue influence from others and their own implicit biases.<sup>5</sup> Oftentimes such threats to IG independence result from an IG’s fear of removal by the executive branch or an IG’s existing conflict of interest arising out of either a relationship with members of the auditing agency or an acting IG’s dual-hatted role as an agency official.<sup>6</sup> As potential risks undermining independence go unchecked, IGs increasingly find themselves wedged between two often-disputing branches of government with few means to protect the fundamental role of their office.

Despite legislative intentions to maintain separation between the IGs and their respective agencies, recent events, including presidential removals of IGs, have highlighted shortcomings in the IG Act and spurred calls for reform. Most notably, in 2020 President Trump took widespread, unprecedented aim at government watchdogs, firing or replacing four IGs in a six-week span. Included in that IG purge was the intelligence community IG, Michael Atkinson, whom President Trump abruptly removed roughly seven months after Atkinson reported to Congress a whistleblower complaint that ultimately resulted in the first impeachment of the then-President.<sup>7</sup>

Within the following six weeks, Trump removed State Department IG Steven Linick, who was investigating both Secretary of State Mike Pompeo for allegedly misusing department staff and President Trump’s \$8.1 billion arm sale to Saudi Arabia and the United Arab Emirates.<sup>8</sup> Prior to Linick’s firing, Trump similarly fired the senior deputy IG for the Department of Health and Human Services who reported on the COVID-19 testing shortages in U.S. hospitals, as well as the acting IG of the Defense Department.<sup>9</sup>

Following then-President Trump’s unparalleled and hasty removal of the IGs, good governance advocates promoted several reform proposals designed to address IG vacancies, independence, removal, and appointment. The individual proposals vary in their scope and raise unique political, policy, and legal questions. However, there are certain common themes and approaches that recent bills and proposed solutions share:

- Reforming, at a structural level, the Offices of Inspectors General (OIGs) and ensuring their independence,

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<sup>4</sup> Andrew Wright, *Executive Privilege and Inspectors General*, 97 TEX. L. REV. 1295, 1298 (2019), (citing WENDY GINSBERG & MICHAEL GREENE, CONG. RSCH. SERV., R43814, [FEDERAL INSPECTORS GENERAL: HISTORY, CHARACTERISTICS AND RECENT CONGRESSIONAL ACTIONS](#) 1 (2016)).

<sup>5</sup> U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 1.

<sup>6</sup> *Id.*

<sup>7</sup> Kyle Cheney, *Atkinson: Trump Fired Me Because I Handled Whistleblower Complaint Properly*, POLITICO (Apr. 5, 2020).

<sup>8</sup> John Walcott, *Trump’s Firing of State Department Inspector General is Just the Latest in a Rolling Purge*, TIME (May 18, 2020).

<sup>9</sup> *Id.*

- Amending the means of filling IG vacancies,
- Expanding the investigative authority of IGs,
- Preserving vital IG resources

This Issue Brief analyzes key issues that advocates have highlighted as needing reform, as well as the corresponding proposals put forth both by independent watchdogs and elected officials with the aim of securing robust, independent IGs.

## I. OIG Structural Reforms

A crucial principle that underscores the role of the IG is their ability to conduct audits and investigations in an independent manner without the threat of political pressure and without fear of political retribution. Under the current statute, the president maintains wide discretion to remove IGs and may do so at will. In hope of deterring politically motivated removals, Congress, in drafting the IG Act, required the president to report to Congress within 30 days in the event of a removal. Beyond that notification requirement, which requires specifying the reasons for an IG's removal, the Act places no tangible limits on the president's removal authority.<sup>10</sup> Previous presidents, aware of the lack of limitations, inevitably removed IGs without providing much explanation beyond a general lack of confidence in the IG's ability.<sup>11</sup> For example, President Barack Obama removed an IG in 2009, citing to Congress his lack of confidence in the IG's ability. Similarly, and most recently, President Donald Trump in an unprecedented move replaced four IGs under an explanation of no confidence.<sup>12</sup>

Several independent watchdogs and elected officials have proposed reforms relating to removal, written notice, and set terms as a means of mitigating political influence. For example, Stephen Street, Jr., the national president of the Association of Inspectors General, has urged Congress to allow for IG removal only for cause and to require that such cause is communicated to Congress.<sup>13</sup> In today's "hyper-partisan environment," requiring just cause for removal, Street has argued, would allow IGs to effectively fulfill their oversight duties while staying "above the fray...of the political arena."<sup>14</sup> In a June 2020 report, the U.S. Government Accountability Office (GAO) similarly recommended that Congress consider requiring a for-cause justification for IG removal. The GAO also proposed that the written notice requirement extend to actions beyond transfer or removal, such as placing an IG on administrative leave.<sup>15</sup>

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<sup>10</sup> The present removal process is found in Section 3(b) of the IG Act, which simply states that "[a]n Inspector General may be removed from office by the President." The only formal requirement imposed on the president is that he or she must notify Congress no later than 30 days prior to removal. BEN WILHELM, CONG. RES. SERV., IF11698 [LEGISLATIVE PROPOSALS RELATED TO THE REMOVAL OF INSPECTORS GENERAL IN THE 116TH CONGRESS 1](#) (2020). There is also an active debate among legal scholars about whether the constitutional law would permit limitations on the president's removal power with respect to an inspector general.

<sup>11</sup> Liz Hempowicz, *Strengthening Government Watchdogs*, PROJECT ON GOV'T OVERSIGHT (Apr. 20, 2021).

<sup>12</sup> *Id.*

<sup>13</sup> Stephen B. Street, Jr., *President's Message*, ASS'N OF INSPECTORS GEN., (last visited June 17, 2021).

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

<sup>15</sup> U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 1, at 8.

Legislators responded to this mounting pressure with the introduction of a variety of bills in 2020. On the IG removal process, a handful of bills provide for just cause removal. For example, the Inspector General Independence Act would allow for removal only for “permanent incapacity, neglect of duty, malfeasance, conviction of a felony or conduct of moral turpitude, knowing violation of a law or regulation, gross mismanagement, gross waste of funds, abuse of authority, and inefficiency.”<sup>16</sup>

Along with proposing for-cause removal, several of the introduced bills would also bolster the written notice requirement to Congress that presently exists. Notably, the Securing Inspector General Independence Act of 2020 amends the current 30-day notice requirement to add the obligation that presidents or heads of designated federal entities (DFEs) include in writing a “substantive rationale, including detailed and case-specific reasons” to justify the removal, as well as any information related to open or completed inquiries associated with the removal.<sup>17</sup> Similarly, the Inspector General Independence Act would require the president or DFE head to include in their written notice explicit documentation associated with the cause for removal.<sup>18</sup>

Adding a temporal limitation to the IG position, several of the introduced bills would create seven-year renewable terms for IGs.<sup>19</sup> Proponents of this limitation believe that by establishing a set term, IGs will be further insulated from political pressure, as their tenure would potentially span across more than one presidential administration.<sup>20</sup>

Despite the seemingly wide consensus across these bills on the implementation of term limits, others do not view such limits as beneficial to oversight. In her testimony to the Subcommittee on Government Oversight, Kathy Buller, the Peace Corps IG, opined that the natural turnover within the OIGs negates the general benefits associated with term limits. Buller highlighted the traditional tendency for numerous vacancies to exist at any given time throughout the IG community and added that the inconsistency with which IGs stay in their roles—some staying

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<sup>16</sup> WILHELM, *supra* note 10. The Inspectors General Independence Act of 2020, Coronavirus Oversight and Recovery and Ethics (CORE) Act of 2020, Heroes Act and Protecting Our Democracy Act include similar variations of the for-cause removal provision found in the Inspector General Independence Act. *Id.* For a more robust and comprehensive comparison of the nine bills addressing inspectors general reform during the 116th Congress, see the tables found in the Appendix.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Unlike the FBI director, who serves a single 10-year term and may only be reappointed if Congress acts to allow a second appointment, the IG could serve multiple terms under a number of the proposed legislative reforms. *See* WILHELM, *supra* note 10; VIVIAN S. CHU & HENRY B. HOGUE, CONG. RES. SERV., R41850, [FBI DIRECTOR: APPOINTMENT AND TENURE 1](#) (2014).

<sup>20</sup> *Restoring Independence: Rebuilding the Federal Offices of Inspectors General Before the Subcomm. on Gov't Operations, of the H. Comm. on Oversight and Reform*, 117th Cong. 1-2 [hereinafter *Ervin Statement*] (statement of Clark Ervin, Inspector General, Peace Corps). *See also* *Five Ways Congress Can Strengthen The Independence of Inspectors General*, P'SHIP FOR PUB. SERV. (Apr. 28, 2020) (suggesting that Congress alter the term length from indefinite to a renewable term that spans across administrations).

for a few years and others staying for decades – would limit the benefits that set terms would confer to oversight.<sup>21</sup>

## II. Reforms Related to the Appointment and Functioning of Acting Inspectors General

The lack of limitations placed on the president or DFE heads' removal power can, as demonstrated by recent administrations, result in numerous vacancies across offices. With the public's reliance on IGs' ability to effectively and efficiently perform their statutory responsibilities, the process of choosing acting IGs has risen to the forefront of reform advocates' concerns.

At present, the Federal Vacancies Reform Act (FVRA) lays out the president's authority to select temporary acting IGs.<sup>22</sup> Under the FVRA, a president can select an individual to serve as a temporary acting IG so long as the individual is either: (1) the "first assistant" to the OIG; (2) a high-level official already working in the same agency; or (3) a Senate-confirmed official from any agency. Importantly, a temporary acting IG does not need to pass any conflict of interest requirements.<sup>23</sup>

Allison Lerner, Chair of the Council of the Inspectors General on Integrity and Efficiency (CIGIE), has argued that the president's largely unfettered authority to select political appointees or agency officials to serve as temporary acting IGs allows dual-hatted and potentially under-qualified individuals to fill the shoes of the nation's top oversight leadership.<sup>24</sup> For example, the current law does not prohibit the president from appointing individuals, such as agency officials, who have conflicts of interest with the mission of the OIG. In fact, President Trump, after firing several IGs, selected two acting IGs to serve within the State and Transportation departments who simultaneously held political appointments in offices within their respective agencies – offices that the IG could be called on to investigate.<sup>25</sup> When compounded together, the increasing vacancies and the president's ability to fill vacancies with potentially conflicted acting IGs could severely undermine the independence of the OIG community.

A related, yet distinct, concern regarding the use of acting IGs is the extensive time that they often serve in their temporary capacity. For example, IG positions in the Department of Defense, the CIA, the Office of Personnel Management, and the Export-Import Bank have

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<sup>21</sup> *Id.*

<sup>22</sup> 5 U.S.C. § 3345 (2020).

<sup>23</sup> *Id.*

<sup>24</sup> Restoring Independence: Rebuilding the Federal Offices of Inspectors General Before the Subcomm. on Gov't Operations, of the H. Comm. on Oversight and Reform, 117th Cong. 1-2 [hereinafter Lerner Statement] (statement of Allison C. Lerner, Inspector General, National Science Foundation).

<sup>25</sup> Eric Tucker & Matthew Daly, *White House Letter Doesn't Explain Why Trump Fired Watchdogs*, AP NEWS (May 26, 2020).



remained vacant since the Obama administration.<sup>26</sup> As noted by a coalition of nonpartisan organizations in a letter to Congress, consistently relying on temporary oversight leadership undermines the independence and accountability of the offices and “unconstitutionally circumvents the Senate’s Advice and Consent.”<sup>27</sup> Not only may acting IGs shy away from investigating an administration that decides whether they eventually will assume the permanent role, but they also may not necessarily be acting with or cognizant of the long-term decisions of the OIG beyond their temporary stint.

Hoping to preserve the independence of IGs, several pieces of proposed legislation call for the revision of the acting IG selection process. More specifically, the Accountability for Acting Officials Act provides that, in the event of an IG vacancy, the “first assistant” in that specific office will become acting IG.<sup>28</sup> If there is no such assistant, the president may appoint an acting IG, but only from “among individuals serving in an office of any Inspector General who occupy a position at the Senior Executive Service level or higher.”<sup>29</sup> Similar bills create this tiered appointment method with a preference toward selecting, if possible, the first assistant as acting IG and allowing the president to appoint a temporary IG from a list of qualified officials.<sup>30</sup>

Most recently, the House of Representatives approved the Inspector General Protection Act that would require the president to notify Congress prior to altering an IG’s status—including placing an IG on administrative leave.<sup>31</sup> Additionally, the bill would require the president to provide Congress an explanation in the event of an extended vacancy.<sup>32</sup> Characterizing the bill as a “bipartisan example of strengthening our government’s system of checks and balances,” the nonprofit organization Protect Democracy stated that such changes would “help ensure that

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<sup>26</sup>*Lerner Statement, supra* note 23 at 2.

<sup>27</sup>*Cross-ideological Coalition Applauds Federal Vacancies Reform Bill, Urges Next Steps*, PROTECT DEMOCRACY (May 3, 2021). The coalition included nonpartisan organizations such as American Oversight, Brennan Center for Justice, Citizens for Responsibility and Ethics in Washington, Demand Progress, Democracy Fund Voice, Government Accountability Project, National Taxpayers Union, Niskanen Center, Open the Government, Project on Government Oversight, Protect Democracy, Public Citizen, Public Employees for Environmental Responsibility, and Stand Up America. The group wrote a letter to Representative Katie Porter in support of her proposed Accountability for Acting Officials Act.

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

<sup>29</sup> Accountability for Acting Officials Act, H.R. 6689, 116th Cong. § 2(d) (2020).

<sup>30</sup> WILHELM, *supra* note 10. Though they maintain a relatively similar structure regarding selection of the acting IG, the bills vary on who and when the president can designate an individual as acting inspector general. For example, the Securing Inspector General Independence Act of 2020 allows either for a specified first assistant or a presidentially designated individual to serve as acting IG and does not appear to place a preference as to either selection method. The CORE Act of 2020, on the other hand, mandates that the first assistant would become acting IG and, in the event that there is no first assistant, the president may appoint from a select group of employees already working in an IG office. However, if the vacancy remained for 210 days or more, the CORE Act states that three inspectors general named by the CIGIE chair would appoint a temporary IG until a presidentially appointed individual is confirmed by the senate. *Id.* Despite the variations, these bills largely establish increased qualifications that individuals need to meet in order to serve the role as acting IG. *Id.*

<sup>31</sup>*Inspector General Protection Act Is Early Example of Bipartisan ‘Democracy Reform’ This Congress*, PROTECT DEMOCRACY (Jan. 5, 2021).

<sup>32</sup> *Id.*

the executive branch includes qualified watchdogs to hold agencies accountable and provide transparency to the American people.”<sup>33</sup>

In addition to endorsing legislative proposals such as the Accountability for Acting Officials Act and the Securing Inspector General Independence Act, independent watchdogs have proposed means of ensuring that qualified individuals serve in the role of acting IG. The Project on Government Oversight (POGO) has suggested two solutions: 1) designating federal judges to select an acting IG from a list of candidates generated by the CIGIE, or 2) designating an executive body of sitting IGs to appoint an acting IG in the absence of a presidentially-appointed IG.<sup>34</sup> Such appointment mechanisms, POGO argues, would not only increase IG independence, but would also incentivize the president to appoint permanent, rather than temporary, IGs in the event of a vacancy.<sup>35</sup>

The GAO also has submitted suggestions pertaining to the independence of acting IGs and the filling of IG vacancies. Nearly mirroring the provisions of the Accountability for Acting Officials Act, the GAO’s proposals call for Congress to amend the FVRA to require that the first assistant fill the vacant IG position and, in the event that there is no first assistant, “an acting IG should be selected from OIG staff at the Senior Executive Service level (or equivalent) or higher in accordance with the OIG’s succession planning.”<sup>36</sup> More explicitly, the GAO has recommended that Congress require IGs to “maintain clear documentation of their first assistants” for purposes of the amended Vacancies Act and consider using CIGIE personnel to report to Congress on IG vacancies.<sup>37</sup>

Finally, the temporary appointment of officers from the auditing agency to serve as the auditing official raises concerns about the potential chilling effect on whistleblower complaints.<sup>38</sup> In response, the GAO has suggested that Congress consider requiring an acting IG who simultaneously serves as an official in agency management to “provide and document assurances to OIG staff, agency employees, and Congress that the confidentiality of whistleblower disclosures will be maintained” and that whistleblowers’ identities will not be shared with agency management.<sup>39</sup> Similarly, to prevent dual-hatted officials from undermining whistleblower safeguards, the CIGIE has suggested that the first assistant to the IG assume the acting inspector general position once a vacancy occurs.<sup>40</sup>

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<sup>33</sup> *Id.*

<sup>34</sup> Hempowicz, *supra* note 11. See the discussion, below, addressing constitutional concerns raised by such provisions.

<sup>35</sup> *Id.*

<sup>36</sup> U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 1, at 9.

<sup>37</sup> *Id.*

<sup>38</sup> Hempowicz, *supra* note 11.

<sup>39</sup> U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 1, at 9.

<sup>40</sup> *Buller Statement*, *supra* note 21, at 3-4.

### III. Expand the Investigative Authority of IGs

#### A. Grant IGs Subpoena Power

Critical to IGs' ability to conduct meaningful governmental oversight and serve as watchdogs of the executive branch is their ability to fully access and examine executive branch documents and personnel. Though IGs generally enjoy comprehensive access to necessary resources, they lack access to a key means of oversight: departed agency officials. Presently, most IGs are unable to compel former officials to comply with pending IG investigations. Liz Hempowicz, Director of Public Policy at POGO, has voiced concern that such a gap allows nefarious agency officials to avoid accountability and hinder an IG's ability to perform his or her duties by simply resigning the second that an IG opens an investigation.

CIGIE and other advocates have urged Congress to grant all IGs testimonial and documentary subpoena power, which would allow IGs to compel relevant testimony from "former agency officials, agency contractors, or grantees."<sup>41</sup> Testimonial subpoena power currently extends to the Department of Defense IG, the Pandemic Response Accountability Committee, and the special IG for pandemic recovery.<sup>42</sup> In March 2021, Representative Gerry Connolly, Chairman of the House Subcommittee on Government Oversight, cosponsored and introduced the IG Subpoena Authority Act, which would extend testimonial subpoena power to all IGs.<sup>43</sup>

Addressing documentary access, the Partnership for Public Service (PPS), a nonpartisan organization aimed at increasing government efficacy, called on Congress to withhold appropriations from agencies that restrict IG access to requested records.<sup>44</sup> Noting that Congress holds the power of the purse, the PPS argued that lawmakers can aid IGs in successfully fulfilling their investigative duties by using the threat of losing funding to compel agency cooperation with pending IG audits.<sup>45</sup>

#### B. Extend IG Jurisdiction to DOJ Attorneys

Under current law, the Justice Department IG acts under the authority and control of the Attorney General with respect to conducting audits and investigations and issuing subpoenas. The IG may initiate and conduct investigations as he or she finds appropriate and may additionally investigate allegations of criminal wrongdoing of a Justice Department employee.<sup>46</sup> However, the IG is prohibited from investigating the misconduct of Justice Department lawyers "where the allegations relate to the exercise of the authority of an attorney to investigate,

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<sup>41</sup> Hempowicz, *supra* note 11.

<sup>42</sup> *Id.*

<sup>43</sup> *Top Oversight Committee Members Introduce IG Subpoena Authority Act*, HOUSE COMM. ON OVERSIGHT REFORM (Mar. 19, 2021). The IG Subpoena Authority Act reintroduced legislation that unanimously passed the House in 2018 but failed to become law. *Id.*

<sup>44</sup> *Five Ways Congress Can Strengthen the Independence of Inspectors General*, P'SHIP FOR PUB. SERV. (Apr. 28, 2020).

<sup>45</sup> *Id.*

<sup>46</sup> 5 U.S.C app. § 8E(a).



litigate, or provide legal advice.”<sup>47</sup> Unlike most federal agencies, the role of holding Justice Department lawyers accountable sits within the department’s Office of Professional Responsibility rather than an OIG, which, as Hempowicz argues, has proven ineffective in ameliorating misconduct.<sup>48</sup>

Concern surrounding the present oversight practice in the Justice Department stems from the notion that oversight conducted by agency officials rather than independent IGs inherently lends itself to incomplete and, oftentimes, shallow oversight with no disclosure of the offending individuals. For example, the Center for American Progress criticized the Justice Department and, more specifically, the Office of the Inspector General for failure to robustly investigate then-Attorney General Jeff Sessions’ initial refusal to recuse himself from the Mueller investigation.<sup>49</sup> However, the OIG largely attributed its inability to investigate to the Justice Department’s Office of Professional Responsibility’s jurisdiction over professional misconduct.<sup>50</sup>

To promote more thorough accountability throughout the Justice Department and bring it into alignment with the rest of the federal government, Congress could retract the carve-out exception in the IG Act that bars IG investigation of Justice Department attorneys for allegations related to professional misconduct. Doing so, Hempowicz and others argue, would also improve both real and perceived accountability among federal agents and, more specifically, among federal prosecutors.<sup>51</sup>

#### IV. Mitigate Resource Constraints and Bureaucratic Obstacles

Under current law, IGs must produce and submit semiannual reports to Congress detailing the office’s operations during the previous six-month period. Concerned with the resources expended in creating these voluminous—yet oftentimes unread—reports, Clark Ervin, former Inspector General of the Departments of State and Homeland Security, noted that many of the existing requirements are “quantitative in nature rather than qualitative.”<sup>52</sup> . Moreover, Ervin expressed his concern that, by committing extensive resources to fulfilling the reporting requirements, IGs would neglect to prioritize more consequential projects such as sensitive audits or investigations.<sup>53</sup> Considering the redundancy of the reporting requirements, coupled with limited resources, Ervin suggested that Congress consider reducing the reporting requirements to minimize the superfluous use of resources.<sup>54</sup>

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<sup>47</sup> 5 U.S.C app. § 8E(b)(3).

<sup>48</sup> Hempowicz, *supra* note 11.

<sup>49</sup> Maggie Jo Buchanan & Will Ragland, *The Lack of Oversight in Trump’s Justice Department*, CTR. FOR AM. PROGRESS (Dec. 6, 2019).

<sup>50</sup> *Id.*

<sup>51</sup> Hempowicz, *supra* note 11.

<sup>52</sup> *Ervin Statement, supra* note 20, at 1-2. Hempowicz similarly noted that much of the information required from IGs is already published by IG in their own capacity on individual websites or through the CIGIE’s official website. Hempowicz, *supra* note 11.

<sup>53</sup> *Ervin Statement, supra* note 20, at 1-2.

<sup>54</sup> *Id.*

In contrast to Ervin, the GAO has found value in the semiannual reporting requirements and, in fact, suggested that Congress expand such requirements.<sup>55</sup> Discussing the reporting requirements as they related to Congress’s oversight role of the OIGs, the GAO opined that additional reporting requirements would aid Congress in providing more comprehensive oversight of the IG offices. Going further, the GAO suggested that Congress consider not only adding required topics for reporting, but also shortening the interval for reporting to Congress.<sup>56</sup>

## V. Constitutional Concerns Raised by Proposed IG Reforms

The proposed IG reforms discussed above — especially those seeking to limit presidential appointment and removal of IGs — give rise to constitutional concerns involving the allocation of powers between the legislative and executive branches. Much of the constitutional debate hinges on the IG’s classification as an inferior officer, principal officer, or employee of the United States. The Supreme Court has yet to definitively declare IGs as either officers or employees, leaving room for rigorous debate both within the courts and among legal and political actors.

Under the Supreme Court’s recent decision in *Seila Law v. CFPB*, a president’s ability to fire a principal officer cannot be limited by for-cause removal restrictions. As the Court explained, principal officers, those who are primarily supervised by the president, can only serve at the will of the president. That is contrasted with inferior officers, those who are directed and supervised by a higher official within their agency and who can be protected from termination. What category IGs fall into – and therefore what if any of the prior reform ideas are constitutional – is not entirely clear.

The IG Act creates OIGs as “independent offices” with structural safeguards to ensure independence, and the law states that IGs report to and are supervised by the agency head. Though these superior officials broadly supervise the IGs, their supervision may not impair the IG’s investigative or auditory functions or subpoena powers, meaning IGs are only subject to agency supervision when not acting in an investigative capacity.<sup>57</sup>

Whether this realm of unfettered authority sufficiently transforms IGs into principal officers is debatable. If, after weighing IGs’ independence-ensuring structure against agency heads’ supervisory roles, a court were to determine that IGs were principal officers with significant executive power, then the proposed congressional reforms limiting IG removal except for cause would likely generate separation-of-powers concerns, as *Seila Law* indicates that such officers cannot be insulated from at-will removal. However, if a court held that IGs act as inferior officers, then *Seila Law* holds that Congress may grant such officers for-cause removal

<sup>55</sup> U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 1, at 8.

<sup>56</sup> *Id.*

<sup>57</sup> 5 U.S.C. App. § 3(a).

protections so long as the IGs maintain narrowly defined duties without any administrative or policymaking authority.<sup>58</sup>

Relatedly, Congress' constitutional ability to influence presidential appointment of IGs depends on the classification of IGs as principal officers, inferior officers, or employees of the United States. Pursuant to the Appointments Clause, principal officers must be appointed by the president and confirmed by the Senate, whereas the appointment of inferior officers may be vested with either the president, courts, or department heads, without any input from Congress.<sup>59</sup> Employees, on the other end of the spectrum, are not subject to any constitutionally required method of appointment.<sup>60</sup>

An individual's designation for Appointment Clause purposes depends on their authority and the discretion they exert.<sup>61</sup> Typically, an official maintaining "significant authority" in a statutorily created position is considered an officer, rather than an employee, of the United States. Although case law defining "significant authority" remains unsettled, investigative or informational authority is generally not considered "significant authority".<sup>62</sup> Because IGs serve both an informational role (given their inability to administer statutes) and an enforcement role (through their power to arrest and execute warrants), colorable arguments can be made both in favor of finding that an IG is an officer or an employee, and the courts have yet to definitively decide.

## VI. Conclusion

Actions taken by the Trump administration to hastily remove or replace numerous IGs shined the political spotlight on the longstanding calls for IG reform, along with the multi-faceted complexities that involves. Wedged between two oftentimes conflicting branches of government while simultaneously fulfilling a mandate to independently and efficiently conduct governmental oversight, IGs find themselves at the core of legislative proposals and reform debates. They also find themselves caught in our current partisan divide, where IG reform programs have thus far failed to garner robust bipartisan support. As the push for credible government accountability and transparency continues to lend itself toward reform, the legislative vehicle through which Congress decides to amend the IG Act—if Congress ever

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<sup>58</sup> TODD GARVEY, CONG. RES. SERV., R46762, [CONGRESS'S AUTHORITY TO LIMIT THE REMOVAL OF INSPECTORS GENERAL 34](#) (2021).

<sup>59</sup> *Id.* at 13. Distinguishing between a principal office and an inferior office, as discussed in the preceding sections regarding removal, would depend on whether the individual is supervised by a higher official. *Id.* at 14.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 13-14. The Supreme Court indicated that an official's final decision-making authority indicates "significant authority" sufficient to constitute an official, though such an authority is not necessary. *See Lucia v. SEC*, 138 S. Ct. 2044, 2052 (2018). An official who lacks final decision-making authority may nevertheless constitute an officer if he or she maintains "significant discretion" in carrying out "important functions." GARVEY, *supra* note 58, at 29 (citing *Lucia*, 138 S. Ct. at 2053). Importantly for our purposes, investigative or informational authority or recommendatory powers are not considered sufficiently significant. *See Buckley v. Valeo*, 424 U.S. 1, 137 (1976).

chooses to do so—could produce functional ramifications and alter the landscape of IGs as they interact within both the executive and legislative branches.

## About the Authors

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## About the American Constitution Society

The American Constitution Society (ACS) believes that law should be a force to improve the lives of all people. ACS works for positive change by shaping debate on vitally important legal and constitutional issues through development and promotion of high-impact ideas to opinion leaders and the media; by building networks of lawyers, law students, judges and policymakers dedicated to those ideas; and by countering the activist conservative legal movement that has sought to erode our enduring constitutional values. By bringing together powerful, relevant ideas and passionate, talented people, ACS makes a difference in the constitutional, legal and public policy debates that shape our democracy.

*The views expressed in this issue brief are those of the author writing in their personal capacity. The views presented do not represent the American Constitution Society or its chapters.*



Appendix

Table 1: Key Takeaways from Legislative Proposals in the 116<sup>th</sup> Congress Relating to Inspectors General Removal<sup>63</sup>

Proposed Legislation	What are the acceptable causes for removal?	Is there a written notice requirement to Congress for removal?	Establish term limits for IGs?
Inspectors General Independence Act of 2020 (H.R. 6688 and S. 3664)	Allow for removal only for “permanent incapacity, inefficiency, neglect of duty, malfeasance, or conviction of a felony or conduct of moral turpitude.”	Retains the 30-day written notice requirement	Yes: Seven-year terms for IGs, though individuals could serve multiple terms, and presidentially appointed IGs could hold over in their positions for up to a year or until a successor is confirmed, whichever comes first.
Inspector General Independence Act (H.R. 6984)	Allow for removal only for “permanent incapacity, neglect of duty, malfeasance, conviction of a felony or conduct of moral turpitude, knowing violation of a law or regulation, gross mismanagement, gross waste of funds, abuse of authority, and inefficiency.”	Retains the written notice requirement to Congress but adds the requirement that explicit documentation associated with the cause for removal must be included in the notice.	N/A

<sup>63</sup> The following tables were populated pursuant to the Congressional Research Service’s roundup of legislative proposals related to inspectors general reform that were introduced in the 116th Congress. WILHELM, *supra* note 10.

<p>Securing Inspector General Independence Act of 2020 (S. 3994)</p>	<p>N/A</p>	<p>Amend the current 30-day notice to require presidents or heads of DFEs removing an IG to provide “a substantive rationale, including detailed and case-specific reasons” for removal and any information related to an open or completed inquiry related to the removal</p>	<p>N/A</p>
<p>Coronavirus Oversight and Recovery and Ethics (CORE) Act of 2020 (H.R. 7076 and S. 3855)</p>	<p>Allow removal only for: “permanent incapacity, neglect of duty, malfeasance, conviction of a felony or conduct of moral turpitude, knowing violation of a law or regulation, gross mismanagement, gross waste of funds, or abuse of authority.” Requires the CIGIE to investigate and report on IG removals. Also creates a cause of action to challenge the removal for any OIG staff member or any individual who was</p>	<p>N/A</p>	<p>Yes: A seven-year term with the ability to serve multiple terms</p>

	<p>“harmed by an action of the establishment” following the IG removal and prior to Senate confirmation of a new presidentially appointed IG.</p>		
<p>Restoring the Public Trust Act (H.R. 706) and the Inspector General Protection Act (H.R. 1847)</p>	<p>N/A</p>	<p>If the president fails to fill an IG vacancy by the 210th day after the position became vacant, he or she must provide a written explanation to Congress detailing the reasons for the delay and timeline for appointing a new IG.</p>	<p>N/A</p>
<p>Heroes Act (H.R. 6800, H.R. 8406, S. 4800)</p>	<p>Variation of “for cause” removal provisions of those seen in the Inspector General Independence Act: same for-cause grounds, but does not explicitly require the notice to Congress to include documentation related to reasoning</p>	<p>Includes the expanded notice requirements found in the Restoring the Public Trust Act</p>	<p>N/A</p>
<p>Protecting Our Democracy Act (H.R. 8363 and S. 4880)</p>	<p>Similar for-cause removal provisions as the Inspector General</p>	<p>Similar expanded notice requirements as</p>	<p>N/A</p>

	Independence Act (H.R. 6984).	the Restoring the Public Trust Act (H.R. 706).	
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**Table 2: Key Takeaways from Legislative Proposals in the 116<sup>th</sup> Congress Relating to Inspectors General Vacancies<sup>64</sup>**

Proposed Legislation	Allow for non-duty status of IGs?	Who takes role of acting IG in the event of a vacancy?	Does this legislation apply to IGs other than those covered in the IG Act?
Securing Inspector General Independence Act of 2020 (S. 3994)	Yes, with a 15-day written notice requirement to Congress. However, if it's determined that the IG's continued presence is a threat, <sup>65</sup> then concurrent notice to Congress is allowed.	Either a specified first assistant or a presidentially designated individual who has worked in an IG office for a minimum of 90 days in the last year.	N/A
Coronavirus Oversight and Recovery and Ethics (CORE) Act of 2020 (H.R. 7076 and S. 3855)	Yes, with a 30-day written notice to Congress.	If possible, the first assistant would become the acting IG. If there is no first assistant, then the President would choose a temporary acting IG from select employees	Yes: In addition to IGs directed by the IG Act, this would cover IGs for the Intelligence Community, CIA, GAO, U.S. Capitol Police, Architect of the Capitol, Library of Congress, Government Publishing Office and special IGs for the Troubled Asset Relief Program

<sup>64</sup> WILHELM, *supra* note 10.

<sup>65</sup> Pursuant to Title 5, Section 6329b(b)(2)(A) of the United States Code. Under this provision, an individual's continued presence poses a threat if the employee, while in the notice period, may:

- (i) pose a threat to the employee or others;
- (ii) result in the destruction of evidence relevant to an investigation;
- (iii) result in loss of or damage to Government property; or
- (iv) otherwise jeopardize legitimate Government interests.

		already serving in “the Office or another Office.” <sup>66</sup> If the vacancy remains for 210 days or more, three IGs named by the CIGIE chair will appoint a temporary IG to serve until a presidentially appointed IG is confirmed by the Senate.	and for Afghanistan Reconstruction.
Restoring the Public Trust Act (H.R. 706) and the Inspector General Protection Act (H.R. 1847)	Yes, with a 30-day written notice requirement to Congress	N/A	N/A
Accountability for Acting Officials Act (H.R. 6689)	N/A	The first assistant becomes acting IG. If there is no first assistant, the President may appoint only an official serving in an OIG who occupies “a position at the Senior Executive Service level or higher.”	N/A
William M. (Mac)	N/A	Limits those who can serve as acting	N/A

<sup>66</sup> Coronavirus Oversight and Recovery Ethics Act of 2020, S. 3855, 116th Cong. § 8(c) (2020).



<p>Thornberry National Defense Authorization Act for FY2021 (H.R. 6395)</p>		<p>IG in a way similar to H.R. 6689: President can appoint only those who are either a first assistant or qualifying, existing OIG individuals</p>	
<p>Protecting Our Democracy Act (H.R. 8363 and S. 4880)</p>	<p>N/A</p>	<p>Similar provision as the Accountability for Acting Officials Act (H.R. 6689).</p>	<p>Yes: Extends for-cause removal and notice requirements to IGs in the intelligence community</p>
<p>Demanding Unconditional Accountability under the Law for Inspectors General (DUAL IG) Act (H.R. 8047)</p>	<p>N/A</p>	<p>Limits the acting IG’s duties to exclude “functions and duties of any other position within the Government.”</p>	<p>N/A</p>