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Inspectors General and the Law of Oversight Independence

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INSPECTORS GENERAL AND THE LAW OF OVERSIGHT INDEPENDENCE

Andrew C. Brunsten *

ABSTRACT

President Trump’s defiance of basic norms threatened the oversight institutions of American democracy. His brazen assault on the prosecutorial and investigative independence of federal law enforcement was well documented. Yet few have thoroughly scrutinized his violations of the oversight independence of internal institutions that monitor the government to promote integrity, transparency, and accountability. This Article examines the independence of Inspectors General (IGs), the internal watchdogs of the Executive Branch, and the President’s attacks on the institution. President Trump breached long-standing independence norms when he fired or replaced IGs in retaliation for their legitimate exercise of oversight duties. Then, in some cases, he named political appointees as acting IGs, despite clear conflicts of interest. This Article analyzes the constitutionality and policy implications of recent congressional proposals that seek to reinforce IG independence and prevent future abuses of power by codifying norms into law: specifically, proposals to limit the President’s appointment and removal authority, including statutory removal for cause protection and restrictions on acting appointments. Recently, in *Seila Law v. Consumer Financial Protection Bureau*, the Supreme Court narrowed the grounds for congressional removal protection. However, this Article argues that a constitutional basis exists in the Court’s reframed doctrine for Congress to enact IG removal protection because the President and agency heads are ultimately accountable for acting upon IGs’ investigative findings and recommendations. The Article also considers structural changes to the IG institution—a multimember commission, court-appointed officers, or agency appointees—as alternative forms of protection and applies removal protection to particular cases to evaluate whether it supplies the proper balance between IG independence and accountability. The Article then explains the validity of proposed restrictions on acting IG appointments and offers additional policy recommendations to enhance statutory qualifications for permanent IG appointments.

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The law of oversight independence reveals the interplay between internal constraints on executive power, the external separation of powers, and the dynamics of presidential accountability in the design of reforms to protect oversight institutions.

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INTRODUCTION

Donald Trump’s defiance of basic democratic norms threatened the oversight institutions of American democracy.¹ One of his primary targets was the prosecutorial and investigative independence of federal law enforcement.² Flagrant attacks on the Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI)³ met

¹ See, e.g., Dawn Johnsen, *Toward Restoring Rule-of-Law Norms*, 97 TEX. L. REV. 1205, 1207–08 (2018).

² See Daphna Rehna, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2207–08 (2018) (“Although many understand law enforcement to be a paradigmatic executive function, there is today a set of structural norms that insulate some types of prosecutorial and investigative decisionmaking from the President.” (footnote omitted)).

³ See, e.g., Eileen Sullivan, *Trump Takes up Call to Barr to ‘Clean House’ at Justice Dept.*, N.Y. TIMES (Feb. 19, 2020), <https://www.nytimes.com/2020/02/19/us/politics/trump-barr-jus>

widespread condemnation for their disrespect to the rule of law.⁴ Yet while the prominent refusal to follow norms of prosecutorial and investigative independence was well documented,⁵ the wider assault on oversight independence received significantly less attention. Oversight independence extends beyond criminal law enforcement agencies to institutions that monitor a range of government activity for potential misconduct and deficiencies; it is defined by the commitment to objective review, fact-finding, and reporting based on a sufficient degree of freedom from outside interference or political pressure.⁶ Significantly, President Trump’s violation of oversight independence norms embroiled Inspectors General (IGs), the internal watchdogs of the Executive Branch, when he fired two IGs and replaced three acting IGs for their legitimate oversight activities.⁷ This subversion of independence threatened the values of integrity, transparency, and accountability served by IG oversight.

tice-department.html [https://perma.cc/GNR5-WKBZ] (reporting on the President’s tweet calling on the Attorney General to “clean house” after criticizing line prosecutors’ sentencing recommendation in the Roger Stone case); David Shortell, Evan Perez & Josh Campbell, *FBI Agents Warn of ‘Chilling Effect’ from Trump and Barr Attacks*, CNN POLITICS (Dec. 12, 2019, 8:32 AM), https://www.cnn.com/2019/12/12/politics/fbi-chilling-effect-trump-barr-attacks/index.html [https://perma.cc/824J-2J8C] (noting the President and Attorney General’s critiques of the FBI after reports of deficiencies in their surveillance applications); see also Donald Trump (@DonaldTrump), Trump Twitter Archive, https://www.thetrumparchive.com [https://perma.cc/38C4-A3C5] (tracking 372 uses of the term “witch hunt” in tweets and retweets by President Trump from May 2017 to August 2020, most directed at Special Counsel Robert Mueller’s Russia investigation).

⁴ See, e.g., *DOJ Alumni Statement on the Flynn Case*, MEDIUM (May 12, 2020), https://medium.com/@dojalumni/doj-alumni-statement-on-flynn-case-7c38a9a945b9 [https://perma.cc/E4VT-VP53] (signed by nearly 2,000 former DOJ prosecutors and officials calling for the court to reject DOJ’s unprecedented motion to dismiss the Michael Flynn indictment due to “Attorney General Barr’s repeated actions to use the Department as a tool to further President Trump’s personal and political interests”); *DOJ Alumni Statement on the Events Surrounding the Sentencing of Roger Stone*, MEDIUM (Feb. 16, 2020), https://medium.com/@dojalumni/doj-alumni-statement-on-the-events-surrounding-the-sentencing-of-roger-stone-c2cb75ae4937 [https://perma.cc/H4P5-Z7DQ] (signed by over 2,500 former DOJ prosecutors and officials condemning the President and Attorney General’s intervention in the Roger Stone sentencing because they “openly and repeatedly flouted th[e] fundamental principle” of “equal justice under the law” and acted contrary to DOJ policies requiring independent prosecutorial decisions).

⁵ See, e.g., Andrew Kent, *Congress and the Independence of Federal Law Enforcement*, 52 U.C. DAVIS L. REV. 1927, 1932–42 (2020); Todd David Peterson, *Federal Prosecutorial Independence*, 15 DUKE J. CONST. L. & PUB. POL’Y 219, 220–23, 283–85 (2020); Rebecca Roiphe, *A Typology of Justice Department Lawyers’ Roles and Responsibilities*, 98 N.C. L. REV. 1077, 1078–81 (2020).

⁶ See Michael R. Bromwich, *Running Special Investigations: The Inspector General Model*, 86 GEO. L.J. 2027, 2032–33 (1998) (discussing the need for independence to conduct legitimate investigations and protect against politicization).

⁷ See, e.g., Melissa Quinn, *The Internal Watchdogs Trump Has Fired or Replaced*, CBS NEWS (May 19, 2020, 11:43 AM), https://www.cbsnews.com/news/trump-inspectors-general-internal-watchdogs-fired-list/ [https://perma.cc/UC9G-NTDY] (summarizing the President’s termination of IGs and replacement of acting IGs).

The end of the Trump presidency is an opportunity to assess and repair the damage done to our democratic institutions by presidential abuses of power.⁸ This Article takes stock of the erosion of oversight independence norms in the case of IGs and examines changes in the law that could better protect IG independence. Since the removal and replacement of IGs, Congress has offered several bills to rein in the President's removal and appointment authority.⁹ In addition, a number of opinion pieces by advocates and scholars have suggested proposals to address gaps in the law revealed by President Trump's disregard for IG independence.¹⁰ This Article seeks to expand and deepen exploration of these proposals. First, it conceptualizes independence as a product of law and norms that shape IGs' role as an institutional constraint on executive power. Scholarship on the "internal separation of powers" has noted that IGs serve as a check on the presidency from within the Executive Branch,¹¹ but few have focused in depth on IGs' key oversight role,¹² and legal scholarship has

⁸ See, e.g., BOB BAUER & JACK GOLDSMITH, *AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY* 7 (2020) ("[T]he case for reform is straightforward. Trump has shown that the current array of laws and norms governing the presidency is inadequate to protect institutions vital to the American constitutional democracy and to ensure that the president is, and appears to be, constrained by law.").

⁹ See generally CONG. RES. SERV., *LEGISLATIVE PROPOSALS RELATED TO THE REMOVAL OF INSPECTORS GENERAL IN THE 116TH CONGRESS* 1–3 (Dec. 9, 2020), available at <https://fas.org/sgp/crs/misc/IF11698.pdf> (summarizing the proposal fifteen separate bills between the House and Senate during 2020).

¹⁰ See Andrew Brunsten, *When Should the President Be Able to Fire a Watchdog?*, THE HILL (July 5, 2021), <https://thehill.com/blogs/congress-blog/politics/561560-when-should-the-president-be-able-to-fire-a-watchdog> [<https://perma.cc/GAY8-EZUV>]; Danielle Brian & Liz Hempowicz, *Good Governance Paper No. 11: Strengthening Inspectors General*, JUST SEC. (Oct. 27, 2020), <https://www.justsecurity.org/73075/good-governance-paper-no-11-strengthening-inspectors-general/> [<https://perma.cc/PG62-223G>]; Andrew Brunsten, *How to Protect Inspectors General*, THE HILL (Sept. 28, 2020), <https://thehill.com/opinion/judiciary/518635-how-to-protect-inspectors-general> [<https://perma.cc/Z8EA-8D9A>]; Aziz Huq, *Trump Loves to Fire His Watchdogs. The Supreme Court Just Made it Easier.*, WASH. POST (July 1, 2020, 9:27 AM), <https://www.washingtonpost.com/outlook/2020/07/01/inspectors-general-cfpb-executive-power-supreme-court/>; Jack Goldsmith, *A Constitutional Response to Trump's Firings of Inspectors General*, LAWFARE (June 10, 2020, 12:52 PM), <https://www.lawfareblog.com/constitutional-response-trumps-firings-inspectors-general> [<https://perma.cc/T4VH-DQK2>]; Jack Goldsmith & Ben Miller-Gootnick, *Legal Issues Implicated by Trump's Firing of the State Department Inspector General*, LAWFARE (May 18, 2020, 9:27 AM), <https://www.lawfareblog.com/legal-issues-implicated-trumps-firing-state-department-inspector-general> [<https://perma.cc/QK5T-XX5D>]; Donald K. Sherman, *Congress Should Take Steps to Protect the Independence of Inspectors General*, JUST SEC. (Apr. 17, 2020), <https://www.justsecurity.org/69707/congress-should-take-steps-to-protect-the-independence-of-inspectors-general/> [<https://perma.cc/5K8R-3ZZM>].

¹¹ See, e.g., Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 429 (2009); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2347–48 (2006).

¹² But see Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National*

not meaningfully addressed the dimensions of oversight independence as a core feature of the institution. Second, by engaging more fully with constitutional and policy questions related to IG independence and its safeguards, the Article addresses overlooked or underappreciated considerations at the intersection of the internal and external separation of powers, which are relevant to the design of reforms. Further, rigorous IG oversight during the Trump administration often challenged administration positions on law enforcement, immigration, public health, science, and treatment of the civil service, among other areas.¹³ The President's politically motivated firings and replacements were a clear expression of animus to such oversight. It is, therefore, crucial to articulate the nature of IG independence, to catalogue the normative deviations, and to weigh reforms that may restore independence.

Current law permits the President to remove an IG for any reason with notice to Congress thirty days in advance.¹⁴ Despite the absence of a removal limitation in the law, IGs have rarely been removed during a President's term in office, based on a generally accepted consensus across political parties to respect their independent oversight.¹⁵ President Trump shattered this long-standing consensus with the firings of IGs and replacement of acting IGs in April and May 2020.¹⁶ He terminated Michael Atkinson, the IG for the intelligence community, who had previously notified Congress about the whistleblower complaint that gave rise to the impeachment proceedings against President Trump related to Ukraine.¹⁷ He also fired Steve Linick, the IG for the State Department, at the request of Secretary Michael Pompeo, who was subject to several IG investigations at the time, including one for misuse of funds.¹⁸

Security Oversight, 65 STAN. L. REV. 1027, 1031 (2013) (evaluating the effectiveness of IG reviews of national security decisions that infringed individual rights during the George W. Bush administration); JACK GOLDSMITH, POWER AND CONSTRAINT 99–109 (2012) (offering an account of the Central Intelligence Agency (CIA) IG's review of interrogation practices during the Bush administration); Bromwich, *supra* note 6, at 2029–30 (former DOJ IG's comparison of IG practices with independent counsel investigations). For public administration scholarship that discusses the history of IGs, their duties, and powers, see generally CHARLES A. JOHNSON & KATHRYN E. NEWCOMER, U.S. INSPECTORS GENERAL: TRUTH TELLERS IN TURBULENT TIMES (2019); PAUL LIGHT, MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY (1993).

¹³ See *infra* Section I.B.3.

¹⁴ 5 U.S.C. § 3(b).

¹⁵ See, e.g., JOHNSON & NEWCOMER, *supra* note 12, at 7.

¹⁶ See Jeremy Herb, Zachary Cohen & Jason Hoffman, *Trump Defends Firing Intelligence Community Watchdog*, CNN POLITICS (Apr. 4, 2020, 7:10 PM), <https://www.cnn.com/2020/04/04/politics/trump-michael-atkinson-inspector-general-fired/index.html> [<https://perma.cc/5X9W-CYJD>]; Nicole Gaouette, Kylie Atwood, Jennifer Hansler & Zachary Cohen, *Fired State Department Watchdog Was Conducting 5 Probes Into Potential Wrongdoing*, CNN POLITICS (June 10, 2020, 7:28 PM), <https://www.cnn.com/2020/06/10/politics/linick-congress-transcript-state-dept/index.html> [<https://perma.cc/L3BV-VP3X>].

¹⁷ See Herb, Cohen & Hoffman, *supra* note 16.

¹⁸ See Gaouette, Atwood, Hansler & Cohen, *supra* note 16.

Moreover, the President replaced three acting IGs, who had issued critical reports or were engaged in sensitive ongoing oversight work, and, in some cases, he temporarily replaced them with agency political appointees subject to clear conflicts of interest.¹⁹ Nothing in the law prevented these removals and replacements.

One recent proposal to prevent future presidential abuses of power would codify the default norm against IG termination by restricting presidential removal to specific, documented reasons set forth in the law, including but not limited to “neglect of duty,” “a knowing violation of a law or regulation,” and “abuse of authority.”²⁰ Had this removal for cause protection existed when the President fired the intelligence community and State Department IGs, the provision would have prohibited such actions. In June 2021, the House of Representatives passed one of the bills—the Inspector General Independence and Empowerment Act—that provides IG removal for cause protection.²¹

However, if enacted, a substantial question exists as to whether the removal for cause provision would withstand constitutional scrutiny under existing case law. Soon after the President’s removal and replacement of IGs, the Supreme Court

¹⁹ Sam Mintz, *Democrats Blast Removal of Acting DOT Inspector General*, POLITICO (May 19, 2020, 5:25 PM), <https://www.politico.com/news/2020/05/19/democrats-blast-removal-of-acting-dot-inspector-general-268611> [<https://perma.cc/JS43-JE3K>] (describing replacement of the Acting IG for the Department of Transportation, who was purportedly investigating the DOT Secretary’s steering of funds to Kentucky to support Mitch McConnell’s reelection, and the naming of a political appointee as the new acting IG); Lisa Rein, *Trump Replaces HHS Watchdog Who Found ‘Severe Shortages’ at Hospitals Combating Coronavirus*, WASH. POST (May 2, 2020, 1:37 PM), https://www.washingtonpost.com/health/top-hhs-watchdog-being-replaced-by-trump-says-inspectors-general-must-work-free-from-political-intrusion/2020/05/26/5c83f41a-9f49-11ea-9590-1858a893bd59_story.html [<https://perma.cc/WQM4-BUBU>] (replaced the Acting IG for the Department of Health and Human Services, not long after she issued a report on hospitals’ challenges responding to the pandemic); Charlie Savage & Peter Baker, *Trump Ousts Pandemic Spending Watchdog Known for Independence*, N.Y. TIMES (Apr. 8, 2020), <https://www.nytimes.com/2020/04/07/us/politics/trump-coronavirus-watchdog-glenn-fine.html> [<https://perma.cc/JN3H-BBM6>] (replaced the acting leader of the Department of Defense IG, which also displaced him as the lead IG on a committee tasked with oversight of over \$2 trillion in emergency pandemic funds).

²⁰ See, e.g., Inspector General Independence and Empowerment Act of 2021, H.R. 2662, 117th Cong. § 102 (as passed by the House, June 29, 2021); Protecting Our Democracy Act of 2020, H.R. 8363, 116th Cong. §§ 702, 1201 (as introduced in the H. Comm. on Oversight & Reform in addition to other committees, Sept. 23, 2020); Inspectors General Independence Act of 2020, H.R. 6984, 116th Cong. § 2(a-1) (as introduced in the H. Comm. on Oversight & Reform, May 22, 2020); Inspectors General Independence Act of 2020, S. 3664, 116th Cong. § 2(a) (as introduced in S. Comm. On Homeland Security & Governmental Affairs, May 7, 2020); Inspectors General Independence Act of 2020, H.R. 6668, 116th Cong. § 2(a) (as introduced in H. Comm. on Oversight & Reform, May 1, 2020).

²¹ Inspector General Independence and Empowerment Act of 2021, H.R. 2662, 117th Cong. § 102 (as passed by the House, June 29, 2021).

decided *Seila Law LLC v. Consumer Financial Protection Bureau*, which held, by a five to four majority, that removal protection for the agency director was an unconstitutional encroachment on the separation of powers.²² Although the Supreme Court had long recognized legislative authority to limit presidential removal of officers,²³ the Court foreshadowed the instability of removal limits with its previous repudiation of multilevel good cause protections in *Free Enterprise Fund v. Public Company Accounting Oversight Board*.²⁴ *Seila Law* went further in reframing its prior precedents to narrow the grounds for Congress to protect the independence of officers with limitations on the removal power.²⁵ As captured by the dissent, in recasting without overtly overruling prior decisions, the Court hastened its further ideological drift toward the unitary executive theory's formalist conception of executive power and away from functional, legislative limits on removal authority.²⁶

The Court's recent invalidation of for-cause removal limits pose important constitutional considerations for Congress as it weighs such protection for IGs. This Article argues that Congress retains authority to place reasonable limits on the President's power to remove IGs. Despite the *Seila Law* majority's endorsement of a broad removal power, the Court left intact prior decisions that permitted some legislative limits on removal of officers, albeit reconfigured as narrow "exceptions" for (1) multimember commissions with "quasi-legislative" or "quasi-judicial" duties and (2) "inferior officers" with limited duties who lack policymaking authority.²⁷ Though IGs do not fall in the former exception because they are not part of a commission, they satisfy the latter.²⁸ IGs are inferior officers who lack direct enforcement authority and rely on higher-level executive officers to act upon their findings of deficiencies and recommendations for reform.²⁹ Removal protection for IG independence is permissible because ultimate accountability rests with the President and agency heads who retain control to act on oversight to promote good government.

Nonetheless, the Article explores additional considerations for crafting reforms. If Congress simply amends the law to provide removal protection for all IGs, the

²² 140 S. Ct. 2183, 2192 (2020).

²³ See *Morrison v. Olson*, 487 U.S. 654, 691–92 (1988); *Humphrey's Executor v. United States*, 295 U.S. 602, 629–32 (1935).

²⁴ 561 U.S. 477, 509–10, 514 (2010).

²⁵ 140 S. Ct. at 2198 (construing *Morrison* and *Humphrey's Executor* as "exceptions" to a "general rule" of at-will removal).

²⁶ See *id.* at 2225–26 (Kagan, J., dissenting in part). Compare Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 596–99 (1994) (articulating the formalist unitary executive theory), with Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 108–14, 116–18 (1994) (offering a functionalist critique).

²⁷ *Seila Law*, 140 S. Ct. at 2192, 2198–2200.

²⁸ See *Morrison*, 487 U.S. at 690–92.

²⁹ See *id.* at 654; *Edmond v. United States*, 520 U.S. 651, 660–61 (1989).

law may confront a *Free Enterprise Fund* problem by creating a dual for-cause removal structure with respect to IGs assigned to several agencies, boards, and commissions where the heads have such protection.³⁰ The Article also addresses three alternative IG institutional structures as possible mechanisms to strengthen IG independence and accommodate removal limits: (1) independent, multimember commissions; (2) court-appointed officers; and (3) agency appointees. These new structures are imperfect responses to presidential abuse and the Court’s departure from the long-standing constitutional principle identified by the *Seila Law* dissent—“Congress could protect from at-will removal the officials it deemed to need some independence from political pressures,” as long as limits did not impede the President’s execution of duties.³¹ The Article concludes that a tailored removal for cause provision, without a corresponding structural change, can reasonably protect independence, avoid the *Free Enterprise Fund* problem, and offer a workable standard that prohibits retaliatory terminations and reserves removal for instances that warrant accountability.

The Article then examines a legislative proposal that would limit acting IGs to staff already assigned to IG offices. The Inspector General Empowerment and Independence Act sets a default rule that the “first assistant” in an IG office becomes acting IG in the event of a vacancy and, if unavailable, the President may then designate a senior official from within an IG office.³² By limiting succession to existing IG staff, this proposal would prohibit a future president from installing a political appointee outside the IG community into the acting role,³³ thereby preventing the conflicts of interest that resulted from President Trump’s temporary appointments. At the same time, existing proposals do not adequately respond to President Trump’s partisan selections for permanent IG appointments or long-standing IG vacancies.³⁴ The Article suggests revision of current eligibility requirements and appointment procedures to ensure objective qualification standards for IG appointments, introduce greater regularity in the appointment process, and enhance the likelihood of independent candidates for IG nominations.

³⁰ See *Free Enterprise Fund*, 561 U.S. at 514.

³¹ *Seila Law*, 140 S. Ct. at 2233 (Kagan, J., dissenting in part).

³² See Inspector General Independence and Empowerment Act of 2021, H.R. 2662, 117th Cong. § 102 (as passed by the House, June 29, 2021); see also Securing Inspector General Independence Act, S. 587, 117th Cong. § 3(a) (as introduced by S. Comm. on Homeland Security & Governmental Affairs, Mar. 4, 2021) (similar provisions on acting IGs).

³³ See *id.*

³⁴ See Inspector General Protection Act, H.R. 23, 117th Cong. § 3(a) (as passed by the House Jan. 5, 2021) (requiring a written explanation to Congress about vacancies of more than 210 days and notice to Congress when IG is placed on administrative leave); Coronavirus Oversight and Recovery and Ethics (“CORE”) Act, H.R. 7076, 116th Cong. § 8(d) (as introduced in the House Comm. on Oversight and Reform, June 1, 2020) (temporary IG appointment by a panel of IGs after 210 days).

The Article proceeds in three Parts. Part I provides an overview of the IG institution, explains the sources of IG independence, and sets forth the legal and historical background concerning the external separation of powers, including disputes between the President and Congress over IG independence.³⁵ Part II discusses adherence to norms of IG independence by past presidents who mostly observed restraint against removing IGs and describes President Trump's retaliatory removals and replacements of IGs, as well as his designation of existing political appointees as acting IGs and permanent IG nominations after the removals.³⁶ Part III analyzes proposals to reinforce IG independence.³⁷ This Part examines the constitutionality of IG removal for cause proposals, considers alternative IG institutional structures, and applies the proposed law to particular cases.³⁸ It also weighs the policy reasons for restrictions on acting IG appointments and stronger qualifications for permanent appointments.³⁹ Analysis of the law of oversight independence reveals the interplay between internal institutional constraints, the separation of powers, and the dynamics of presidential accountability.

I. INSPECTOR GENERAL INDEPENDENCE AND THE SEPARATION OF POWERS

This Part provides an overview of IGs as a central oversight institution of the federal government. In addition to historical background, this Part explains the sources of IG independence and conceptualizes the institution as part of the internal separation of powers. Further, it surveys relevant theories and case law pertaining to the external separation of powers, as well as underlying values of political accountability and good government. This Part also discusses some historical examples of disputes between the President and Congress about IGs and the separation of powers.

A. Inspectors General in the Federal System

IGs are the internal watchdogs of the Executive Branch assigned to departments and agencies to conduct investigations, audits, and evaluations of government employees, contractors, and programs.⁴⁰ The purview of IGs span across a spectrum of individual misconduct and systemic deficiencies. Broadly speaking, IGs make factual findings, offer recommendations, and issue reports concerning fraud, corruption, mismanagement, waste, abuse, conflicts of interest, performance failures, and noncompliance with law and policy.⁴¹ This oversight supports a range of

³⁵ See *infra* Part I.

³⁶ See *infra* Part II.

³⁷ See *infra* Part III.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See Bromwich, *supra* note 6, at 2030.

⁴¹ See generally COUNCIL OF THE INSPECTORS GENERAL ON INTEGRITY AND EFFICIENCY (CIGIE), THE INSPECTORS GENERAL 9 (2014).

potential remedial actions, including criminal prosecution, civil lawsuits, disciplinary actions, contractor debarment, programmatic reforms, and legislative policy changes.⁴² IGs have earned a reputation for enhancing public trust in the integrity and effectiveness of government.

Although IGs are an established component of the government's oversight infrastructure today, the institution's expansion remains a relatively recent phenomenon in American history. During the Revolutionary War, at George Washington's recommendation, the Continental Congress created an IG for the Army to review organizational problems in the military.⁴³ For nearly two hundred years, while the military continued to have IGs, other departments and agencies did not incorporate the institution, with a few exceptions.⁴⁴ The abuses of the Watergate era ushered in a host of government reforms.⁴⁵ During this period, Congress took incremental steps toward the expansion of federal IG oversight. In 1976, Congress created an IG for the Department of Health, Education, and Welfare, which later became the Department of Health and Human Services (HHS).⁴⁶ Soon thereafter, in 1977, Congress assigned an IG to the Department of Energy.⁴⁷ These predecessor statutes served as models for the Inspector General Act of 1978.⁴⁸

The Inspector General Act sought for IGs to (1) "to conduct and supervise audits and investigations relating to [agency] programs and operations"; (2) "to provide leadership and coordination and recommend policies" to "promote economy, efficiency, and effectiveness" and "detect fraud and abuse" in government programs; and (3) to inform agency heads and Congress about agency deficiencies and the need

⁴² See OVERSIGHT.GOV, <https://www.oversight.gov/investigations> [<https://perma.cc/WKE9-PBM6>] (last visited Oct. 27, 2021) (for the period from 2013 to 2020, reporting over 40,000 successful criminal prosecutions, 11,000 civil actions, 41,000 suspensions or debarments, 33,000 personnel actions, and \$146 billion in recoveries).

⁴³ DAVID A. CLARY & JOSEPH W.A. WHITEHORNE, *THE INSPECTORS GENERAL OF THE UNITED STATES ARMY 1777–1903* 23–27 (1985). Notable IGs for the Army included Baron von Steuben, whom some consider one of the most important military figures during the War alongside Washington, and Alexander Hamilton, who took on the role after Washington returned to lead the military in 1798. See *id.* at 59–60, 75–77.

⁴⁴ See LIGHT, *supra* note 12, at 27–29, 31–32 (discussing the creation of a statutory IG at the State Department in 1959 to audit foreign assistance programs and the hiring of an IG at the Department of Agriculture after a fraud scandal in 1962).

⁴⁵ These reforms included the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 5 U.S.C. app. § 401); Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended at 5 U.S.C. app. § 1101); and the Independent Counsel Act, Pub. L. No. 95-521, tit. VI, 92 Stat. 1824, 1867–73 (1978) (repealed 1999).

⁴⁶ Pub. L. No. 94-505, §§ 201–02, 90 Stat 2429 (1976).

⁴⁷ Department of Energy Organization Act, Pub. L. No. 95-91, § 208, 91 Stat. 565 (1977).

⁴⁸ Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101, reprinted as amended in 5 U.S.C. app. See *generally* CONG. RES. SERV., *STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER* 1–2 (2019) [hereinafter *STATUTORY INSPECTORS GENERAL*].

for “corrective action.”⁴⁹ Legislative history indicates lawmakers’ concerns with fraud, waste, and abuse of “epidemic proportions,” a lack of oversight resources, emphasis on “program operation over program oversight,” and the “inherent conflict of interest” posed by operational officials’ supervision of oversight units.⁵⁰ To remedy these problems, the 95th Congress enacted the Inspector General Act with strong bipartisan support.⁵¹

The Act effectuated a segregation of duties between IGs and policy administrators.⁵² IGs were explicitly excluded from having “program operating responsibilities,”⁵³ which remained the domain of administrators. Rather, the law granted IGs wide latitude to review agency operations and to determine the subjects for investigative inquiries.⁵⁴ IGs operate under the “general supervision” of the agency head, but the agency head is barred from “prevent[ing] or prohibit[ing] the [IG] from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation.”⁵⁵ IGs have substantial authority to conduct investigations as they are authorized to access agency records, subpoena records from nongovernmental entities, and take testimony under oath.⁵⁶ While the Inspector General Act originally assigned twelve IGs to federal departments, their number has since grown to seventy-four statutory IGs.⁵⁷

The President appoints roughly half of IGs with the Senate’s advice and consent, while the other half are appointed directly by agency heads, boards, or commissions.⁵⁸ Appointments must be made “without regard to political affiliation and

⁴⁹ Inspector General Act of 1978 § 2(a)(1–3).

⁵⁰ S. REP. NO. 95-1071, at 4–7 (1978); *see also* H.R. REP. NO. 95-584, at 5 (1977).

⁵¹ *See* 124 CONG. REC. 30955 (Sept. 22, 1978) (unanimous vote for the Act in the Senate); 124 CONG. REC. 9529, 10410 (Apr. 18, 1978) (only six votes opposed in the House, including then Representatives Al Gore and Leon Panetta).

⁵² *See* Inspector General Act of 1978 § 2 (stating that the “[p]urpose” of the Act was creation of “independent and objective units”); *see also* S. REP. NO. 95-1071, at 7 (1978) (explaining the intent to substitute IGs to address conflict “when audit and investigative operations are under the authority of an individual whose programs are being audited”).

⁵³ Inspector General Act of 1978 §§ 8G(b), 9(a)(2).

⁵⁴ *See id.* § 6(a)(2) (stating that IGs may initiate reviews “relating to the administration of the programs and operations of the [agency] as are, in the judgment of the Inspector General, necessary and desirable”).

⁵⁵ *Id.* § 3(a); *see also* United States Nuclear Regul. Comm’n v. FLRA., 25 F.3d 229, 235 (4th Cir. 1994) (describing the agency head’s “general supervision” authority over IGs as “nominal”).

⁵⁶ *See* Inspector General Act of 1978 § 6(a).

⁵⁷ *See* STATUTORY INSPECTORS GENERAL, *supra* note 48, at 4 (explaining that the Act governs 65 of the 74 statutory IGs in the federal system, and that the remaining IGs, such as IGs in the intelligence community, are governed by separate statutes).

⁵⁸ *See* Inspector General Act of 1978 §§ 3(a), 8G(c); JOHNSON & NEWCOMER, *supra* note 12, at 105 (distinguishing presidentially appointed and Senate confirmed IGs (PAS IGs) from designated federal entity IGs (DFE IGs) who are appointed directly by agency heads, boards, or commissions).

solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations.”⁵⁹ Removal of an IG requires that the relevant authority specified in the statute—the President or agency head—“communicate in writing the reasons” for removal to Congress thirty days in advance.⁶⁰

B. Oversight Independence and the Internal Separation of Powers

1. Oversight Independence in the Executive Branch

A fundamental principle of IG oversight is independence—the commitment to objective review, fact-finding, and reporting based on a sufficient degree of freedom from outside interference or political pressure.⁶¹ Similar to the concepts of prosecutorial or investigative independence,⁶² oversight independence involves the exercise of impartial professional judgment and some insulation from the programs and officials subject to review.⁶³ One primary difference is a matter of purview and mission: oversight independence extends beyond the work of criminal law enforcement agencies to oversight institutions that cover a broad field of inquiry relating to government activity.⁶⁴ In the case of IGs,⁶⁵ this work includes criminal investigations, often

⁵⁹ Inspector General Act of 1978 §§ 3(a), 8G(c).

⁶⁰ *Id.* §§ 3(a)(2), 8G(e)(2); *see also* Inspector General Reform Act of 2008, Pub. L. No. 110-409, § 3(a), 122 Stat. 4302, 4306 (codified as amended at 5 U.S.C. app. § 11) (adding the thirty-day requirement to the notice provision).

⁶¹ *See* CIGIE, QUALITY STANDARDS FOR INSPECTIONS AND EVALUATION 3–4 (2020).

⁶² *See, e.g.,* Peterson, *supra* note 5, at 262 (explaining that prosecutorial independence requires “insulation of federal prosecutors from political direction from the White House” because interference “delegitimize[s] the prosecutorial process by raising the risk of politically motivated decisions”).

⁶³ *See* CIGIE, QUALITY STANDARDS FOR INSPECTIONS AND EVALUATION, *supra* note 61, at 3 (stating that independence is necessary “so that opinions, findings, conclusions, judgments, and recommendations will be impartial,” and that oversight staff “be alert to possible threats to independence”); CIGIE, QUALITY STANDARDS FOR INVESTIGATIONS 7 (2011) (stating that independence may be compromised by external “[i]nterference,” requires staff “be positioned outside the staff or reporting line of the unit or employees under investigation,” and ensures that oversight decisions are “impartial and . . . viewed as impartial by knowledgeable third parties”).

⁶⁴ *See* CIGIE, QUALITY STANDARDS FOR FEDERAL OFFICES OF INSPECTOR GENERAL 4–6 (2012).

⁶⁵ Although this Article explores the concept of oversight independence by examination federal IG oversight, a number of institutions conduct independent government oversight and warrant further scholarly attention, including the United States Office of the Special Counsel (OSC) and the Office of Government Ethics (OGE), as well as state and local IG offices and ethics commissions. *See, e.g.,* U.S. OFF. OF THE SPECIAL COUNSEL, ANNUAL REPORT TO CONGRESS 9–10 (2019) (explaining that the OSC is an independent agency that investigates violations of several federal statutes, including the Hatch Act, the Civil Service Reform Act, and

conducted in joint partnership with prosecutors, but also encompasses noncriminal civil, ethics, or disciplinary investigations; financial audits; program reviews; contract vetting and monitoring; and scrutiny of government decisions for compliance with law or policy.⁶⁶ Oversight independence facilitates both a legitimate review process and the reception of its results as credible—determinations and recommendations are based on merit, rather than political or personal considerations.

What accounts for an oversight institution’s independence? As a feature of certain federal agencies and officers, independence does not take “a single form.”⁶⁷ One source of independence is law. Removal for cause protection that prohibits at-will discharge of an officer is generally considered the quintessential form of independence in establishing a layer of job protection.⁶⁸ Appointment procedures also bolster independence insofar as qualifications and vetting seek to ensure that the candidate will operate in an independent manner.⁶⁹ Scholarship on independent agencies has recognized additional, common legal structures indicative of independence, including a specified term of office, multimember leadership, partisan balance requirements, congressional reporting requirements, budgeting authority, and rule-making, adjudicatory, investigatory, or enforcement powers.⁷⁰

the Whistleblower Protection Act, with a primary objective of addressing prohibited personnel practices against federal employees); JENNIFER AHEARN ET AL., CITIZENS FOR RESPONSIBILITY & ETHICS, WHAT DEMOCRACY LOOKS LIKE 97–99 (Dec. 2, 2020) (describing the OGE’s role in administering federal government’s financial disclosure and ethics compliance, while recommending policy changes); CTR. FOR THE ADVANCEMENT OF PUB. INTEGRITY, AN OVERVIEW OF STATE AND LOCAL ANTI-CORRUPTION OVERSIGHT IN THE UNITED STATES 3–4 (Aug. 2016) (describing various state and local IG offices and ethics commissions with varying mandates and responsibilities).

⁶⁶ See generally CIGIE, PRESIDENTIAL TRANSITION HANDBOOK: THE ROLE OF INSPECTORS GENERAL AND TRANSITION TO A NEW ADMINISTRATION 8 (Dec. 17, 2020) [hereinafter PRESIDENTIAL TRANSITION HANDBOOK] (stating that IGs “have broad latitude to determine the reviews they conduct and the reports they issue,” to perform audits, evaluations, and inspections of agency programs and operations, and to conduct criminal, civil, and administrative investigations).

⁶⁷ Kirti Datla & Richard Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 772 (2013).

⁶⁸ See, e.g., Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1168 (2013) (“Commentators broadly agree that for-cause tenure protection is the sine qua non of agency independence.”); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 16 (2010) (describing and then challenging the agreement of many scholars that “the defining hallmark of an independent agency is that it is headed by someone who cannot be removed at will by the President but instead can be removed only for good cause”).

⁶⁹ Barkow, *supra* note 68, at 47 (“One way to create greater independence is to specify qualifications for appointees so that the pool of potential candidates from which the President picks is more limited and he or she cannot select solely on the basis of partisan leanings.”).

⁷⁰ See, e.g., Datla & Revesz, *supra* note 67, at 775 (listing “seven indicia of independence” of agencies).

Another source of independence is the informal norms that can mediate the relationships between government institutions and actors, such as IGs and the President or agency heads.⁷¹ They fill the interstitial gaps in law with regular practices and courses of dealing that come to overlay these relationships. For instance, where law may establish an oversight entity's authority to demand information from an agency, norms offer guidance as to engagement, cooperation, and compliance.⁷² Normative commitments operate in a similar fashion to moral obligation insofar as they induce respect for institutional independence.⁷³ In the absence of for-cause removal restrictions, for example, independence norms may counsel restraint against termination and supply a basis to judge deviations with blame, shame, or outrage.⁷⁴

IG independence then is a product of the laws and norms that enable their impartial review of government activity and operation as a check on executive power. To explore this connection between IG independence and their institutional role draws from and contributes to scholarship on the existence of an "internal separation of powers," which has focused attention on institutions within the Executive Branch that operate in some measure as constraints on the President and agencies.⁷⁵ The traditional separation of powers, by contrast, refers to the tripartite structure of the federal government that divides power into the Executive, Legislative, and Judicial branches.⁷⁶ Though the Court has recognized the "interdependence" of the branches of government,⁷⁷ its separation of powers rulings have primarily concerned "encroachment" of one branch into another's sphere or "aggrandizement" of excessive power in one branch.⁷⁸ The "internal separation of powers" discourse turns within the

⁷¹ See, e.g., Rehna, *supra* note 2, at 2189 (describing "norms" as "unwritten or informal rules of political behavior [that] provide the infrastructure that any particular President inhabits").

⁷² See *id.* at 2198–99.

⁷³ See Vermeule, *supra* note 68, at 1185 ("[C]onventions are (1) regular patterns of political behavior (2) followed from a sense of obligation.").

⁷⁴ See *id.* at 1201 (discussing several examples where norms of independence operated as "unwritten constraints on presidential removal," including the firings of United States Attorneys during the George W. Bush administration, where "the backlash was vigorous" due to "a widespread sense that unwritten norms of independence had been compromised").

⁷⁵ See Sinnar, *supra* note 12, at 1029–31; Metzger, *supra* note 11, at 429; Katyal, *supra* note 11, at 2347–48.

⁷⁶ See *INS v. Chadha*, 462 U.S. 919, 951 (1983) (describing the Constitution's separation of powers "into three defined categories, Legislative, Executive, and Judicial"); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (stating that the separation of powers sought to "diffus[e] power the better to secure liberty"); *Mistretta v. United States*, 488 U.S. 361, 380 (1989) ("[T]he separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.").

⁷⁷ *Youngstown Sheet & Tube Co.*, 343 U.S. at 635 (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.").

⁷⁸ *Mistretta*, 488 U.S. at 381–82; accord *Chadha*, 462 U.S. at 974 (White, J., dissenting).

Executive Branch to analyze the effectiveness of internal institutional checks at addressing the modern concentration of power in the presidency and administrative agencies,⁷⁹ as well as the advantages of internal constraints over the courts and Congress.⁸⁰

2. Sources of Inspector General Independence

Several legal and institutional characteristics configure the IG institution for independent oversight.⁸¹ To begin with, appointment criteria directs selection of qualified, independent IGs “without regard to political affiliation and solely on the basis of integrity and demonstrated ability” in relevant areas of experience.⁸² Procedural removal requirements of advance notice to Congress and a statement of reasons contemplates scrutiny that will follow removal decisions and the expectation of a persuasive justification.⁸³ The “structural insulation” of IG investigative and audit functions from agency administrative functions offers perspectival distance from matters under review, thereby enhancing objectivity and reducing risks of favoritism.⁸⁴ IGs are also considered a “separate agency” for certain administrative purposes and have specific line items for their funding in agency budgets.⁸⁵

Explicit prohibitions on agency head interference with investigative decisions, along with broad investigatory powers, empower IGs to make objective judgments about investigative steps.⁸⁶ IGs also observe certain professional standards and

⁷⁹ See Metzger, *supra* note 11, at 428 (explaining that “the focus of internal separation of powers scholarship is overwhelmingly on the Executive Branch, reflecting the view that the greatest threat of aggrandized power today lies in the broad delegations”); see also Jon Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 526 (2015) (“Mini-governments unto themselves, administrative agencies combined legislative, executive, and judicial functions in a way that effectively marginalized tripartite, constitutional government.”); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1816–20 (1996) (discussing the expanding power of the administrative state).

⁸⁰ See Michaels, *supra* note 79, at 534 (“Spawned, nurtured, and sustained by Congress and the judiciary, these sub-constitutional, rivalrous counterweights constrain the political leadership atop administrative agencies in ways more reliable and immediate than anything the legislature or courts could regularly do.”); Sinnar, *supra* note 12, at 1029 (describing arguments that the oversight of internal executive institutions are “necessitated by congressional enfeeblement and judicial abdication”); Metzger, *supra* note 11, at 439–40 (citing bicameralism and other barriers to legislative action, and the standing doctrine and other “jurisdictional barriers” to judicial intervention).

⁸¹ See Inspector General Act of 1978 § 3.

⁸² *Id.* §§ 3(a), 8G(c).

⁸³ See S. REP. NO. 110-262, at 4 (2008) (explaining that the notice provision seeks to “allow for an appropriate dialogue with Congress in the event that the planned transfer or removal is viewed as an inappropriate or politically motivated attempt to terminate an effective Inspector General”).

⁸⁴ See Metzger, *supra* note 11, at 429–30.

⁸⁵ Inspector General Act of 1978 §§ 6(e)(1)(A)(I), 6(g)(1), 8G(g)(1).

⁸⁶ See *id.* §§ 3(a), 6(a).

cultural norms that insist upon neutral, fact-based review.⁸⁷ IG reviews and reports adhere to quality standards for documentation, evidence, and methods.⁸⁸ Staff in IG offices include personnel from a range of disciplines, including attorneys, investigators, auditors, and data analysts, who are trained to perform objective investigations, audits, and reviews, and share fidelity to the cause of good government oversight.⁸⁹ The Council of Inspectors General on Integrity and Efficiency (CIGIE), an inter-agency entity comprised of IGs across the government, enhances coordination among the various IG offices and represents the interests of the IG community.⁹⁰

Further, Congress and civil society organizations offer external support for the IG mission. IGs are required through reporting to keep their respective agencies and Congress “fully and currently informed.”⁹¹ IG reporting supplements—or more critically compensates—for a lack of resources dedicated to congressional oversight of the sprawling, complex federal bureaucracy, as well as legislative challenges in compelling Executive Branch compliance with its demands for information.⁹² Consequently, members of Congress frequently call upon IGs to investigate particular matters.⁹³ Congress also holds oversight hearings to further explore IG findings and

⁸⁷ See generally STATUTORY INSPECTORS GENERAL, *supra* note 48, at I.

⁸⁸ See generally U.S. GOV'T ACCOUNTABILITY OFF., GENERALLY ACCEPTED GOVERNMENT AUDITING STANDARDS 1 (July 2018) (applies to audits); CIGIE, QUALITY STANDARDS FOR INSPECTIONS AND EVALUATION, *supra* note 61, at 1 (applies to other forms of programmatic review); CIGIE, QUALITY STANDARDS FOR INVESTIGATIONS, *supra* note 63, at 1 (applies to misconduct investigations of employees, contractors, or program grantees); CIGIE, QUALITY STANDARDS FOR FEDERAL OFFICES OF INSPECTOR GENERAL, *supra* note 64, at 3–4 (sets forth the general quality standards for the management, operation, and conduct of IG offices).

⁸⁹ See PRESIDENTIAL TRANSITION HANDBOOK, *supra* note 66, at 9 (noting that IG offices leverage “the multidisciplinary skills of investigators, auditors, evaluators, and lawyers”); *cf.* Michaels, *supra* note 79, at 544 (making a similar point about professional civil servants, who are generally thought to exercise nonpartisan skills and expertise with dedication to advancing their agency’s mission).

⁹⁰ See Inspector General Act of 1978 §§ 11(d)(2), (d)(4)(A) (Members of CIGIE include all federal IGs, and the organization considers “policies, standards, and approaches” to enhance IG “professionalism and effectiveness.”).

⁹¹ *Id.* § 4(a)(5).

⁹² See Molly E. Reynolds, *Improving Congressional Capacity to Address Problems and Oversee the Executive Branch*, BROOKINGS INST. (Dec. 4, 2019), https://www.brookings.edu/wp-content/uploads/2019/12/Big-Ideas_Reynolds_Congressional_Capacity.pdf [<https://perma.cc/8F6J-VZ2A>] (discussing the lack of sufficient resources for congressional oversight and challenges obtaining information from the Executive Branch); Metzger, *supra* note 11, at 444 (stating that “Congress needs information to conduct meaningful oversight of the Executive Branch,” and relies on “watchdogs [as] important sources of that information”).

⁹³ See, e.g., Letter from Elizabeth Warren et al., U.S. Senators, to Tammy L. Whitcomb, Inspector General for the U.S. Postal Service (Aug. 7, 2020) (requesting that the Postal Service IG investigate staffing and policy changes that slowed mail delivery and “appear[ed] to pose a potential threat to mail-in ballots and the 2020 general election”); Greg Clary & Devan Cole, *House Committee Chairs Call For IG Investigation into Use of Federal Officers*

legislative responses.⁹⁴ Given its reliance on IG oversight to shine light on internal executive practices, Congress has become an important defender of IGs' oversight independence. Civil society organizations focused on anticorruption and democratic reform agendas,⁹⁵ as well as the media,⁹⁶ bring additional public attention to oversight and buttress IG independence.

3. Inspectors General as Internal Constraint

Laws and norms, therefore, interact to create the structures, the patterns of behavior, and the commitments that we call IG independence. This independence is a core component of IGs' status as an "institutional counterweight" to executive power.⁹⁷ IG oversight during the Trump administration offers an abundance of examples where they scrutinized matters and challenged administration positions relating to

to *Quell Portland and DC Protests*, CNN POLITICS (July 19, 2020, 4:25 PM), <https://www.cnn.com/2020/07/19/politics/investigation-federal-authorities-portland-dc-protests/index.html> [<https://perma.cc/6V8Y-PPEF>] (reporting that the Chairs for the House Judiciary, Homeland Security, and Oversight and Reform committees called upon the DOJ and DHS IGs to investigate the deployment of federal agents in Portland, Oregon and Washington, DC to respond to protests of the killing of George Floyd).

⁹⁴ See, e.g., Testimony of Joseph V. Cuffari, Inspector General for the Dep't of Homeland Security, *Children in CBP Custody: Examining Deaths, Medical Care Procedures, and Improper Spending* House Committee on Homeland Security, at 1–9 (July 15, 2020), available at <https://www.oig.dhs.gov/sites/default/files/assets/TM/2020/oigtm-inspector-general-joseph-v-cuffari-071520.pdf> [<https://perma.cc/2G2L-XESG>] (testifying about Department of Homeland Security IG investigations of two child deaths at the border and problematic detention conditions, including overcrowding, after the expanded immigration enforcement of the Trump administration); Statement of Michael Horowitz, Inspector General for Dep't of Justice, DOJ IG FISA Report: Methodology, Scope, and Findings, Hearing on DOJ OIG FISA Report Before the U.S. S. Comm. on Homeland Sec., 116th Cong. (Dec. 18, 2019), available at <https://oig.justice.gov/node/16547> [<https://perma.cc/DH3C-UYX2>] (statement of Michael E. Horowitz, Inspector General, U.S. Department of Justice, on the DOJ IG report about the Russia investigation).

⁹⁵ See, e.g., 161 Cong. Rec. S8665 (insertion into the record of a letter to Senators Chuck Grassley and Claire McCaskill from the Executive Director of the Project on Government Oversight, arguing in favor of increased IG access to agency records).

⁹⁶ See, e.g., David Shortell et al., *Inspector General: Start of FBI Russia Probe Was Justified and Unbiased but Investigation Had Significant Errors*, CNN POLITICS (Dec. 9, 2019, 3:42 PM), <https://www.cnn.com/2019/12/09/politics/ig-horowitz-report-russia-trump/index.html> [<https://perma.cc/BU8C-BZZ7>]. A Westlaw search for media articles in the three weeks after release of the DOJ IG report about the Russia investigation yielded 1,090 articles.

⁹⁷ See Michaels, *supra* note 79, at 534. Jon Michaels uses this term to describe institutions within the Executive Branch that are "subconstitutional" and "rivalrous" constraints that not only check administrative power, but also, legitimize it. Michaels discusses a triangular structure of agency leaders, civil servants, and civil society that form an "administrative separation of powers." The role of civil servants in this system, as nonpartisan proponents of compliance with the rule of law and reasoned decisions, has affinities with IGs as counterweights, albeit as the watchdogs of administrative government. See *id.*

important public interests relating to criminal justice, immigration, public health, science, and the professional civil service. Consider these examples:

- the DOJ IG determined that the FBI had a reasonable basis for initiating the investigation of whether the Trump campaign coordinated with Russians to interfere with the 2016 presidential election;⁹⁸
- the Department of Homeland Security IG issued reports criticizing “serious” overcrowding at detention facilities for migrant families and children, as well failures to track children that DHS separated them from their parents;⁹⁹
- the HHS IG found a lack of preparedness for the COVID-19 pandemic and questions about the federal government’s initial response;¹⁰⁰
- the Department of State IG identified instances of political retaliation against civil servants by agency leaders;¹⁰¹
- the Environmental Protection Agency (EPA) IG and HHS IG determined that the agency heads violated travel policies resulting in a waste of government funds.¹⁰²

IG reviews of the Trump administration persist in its aftermath.¹⁰³

⁹⁸ OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, REVIEW OF FOUR FISA APPLICATIONS AND OTHER ASPECTS OF THE FBI’S CROSSFIRE HURRICANE INVESTIGATION i–viii (2019).

⁹⁹ OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., CBP SEPARATED MORE ASYLUM-SEEKING FAMILIES AT PORTS OF ENTRY THAN REPORTED AND FOR REASONS OTHER THAN THOSE OUTLINED IN PUBLIC STATEMENTS 5–11 (2020).

¹⁰⁰ OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF HEALTH AND HUM. SERVS., HOSPITAL EXPERIENCES RESPONDING TO THE COVID-19 PANDEMIC: RESULTS OF A NATIONAL PULSE SURVEY MARCH 23–27 1–9 (2020) [hereinafter HHS IG COVID-19 HOSPITALS REPORT].

¹⁰¹ OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF STATE, REVIEW OF ALLEGATIONS OF POLITICIZED AND OTHER IMPROPER PERSONNEL PRACTICES INVOLVING THE OFFICE OF THE SECRETARY 12 (2019) [hereinafter STATE IG PERSONNEL PRACTICES REPORT].

¹⁰² OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF ENV’T PROT., ACTIONS NEEDED TO STRENGTHEN CONTROLS OVER THE EPA ADMINISTRATOR’S AND ASSOCIATED STAFF’S TRAVEL 8, 13 (2019); OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF HEALTH AND HUM. SERVS., THE OFFICE OF THE SECRETARY OF HEALTH AND HUMAN SERVICES DID NOT COMPLY WITH FEDERAL REGULATIONS FOR CHARTERED AIRCRAFT AND OTHER GOVERNMENT TRAVEL RELATED TO FORMER SECRETARY PRICE 7–8 (2018).

¹⁰³ See, e.g., OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, *Department of Justice Inspector General Announces Investigation* (Jan. 25, 2021), <https://oig.justice.gov/sites/default/files/2021-01/2021-01-25.pdf> [<https://perma.cc/Y7TV-J85V>] (announcement of DOJ IG “investigation into whether any former or current DOJ official engaged in an improper attempt to have DOJ seek to alter the outcome of the 2020 Presidential Election”); Katie Benner & Glenn Thrush, *Federal Watchdogs Open Investigation Into Capitol Riot*, N.Y. TIMES (Jan. 15, 2021), <https://www.nytimes.com/2021/01/15/us/politics/capitol-riot-investigation>

These examples demonstrate, at a minimum, the fidelity of IGs during this period to conduct oversight of presidential and agency abuses. This is not to suggest that IG oversight was always effective. It is important to evaluate how well institutional safeguards performed in response to the excesses and abuses of the Trump administration.¹⁰⁴ Nonetheless, independence offered IGs a standpoint for speaking truth to power by identifying and publicizing wrongdoing, failures, or deviations from the rule of law. However, this period also revealed the fragility of that independence in the President's attacks on the institution. IG independence within the Executive Branch relies on support from outside it. Congressional efforts to strengthen the internal check of IG oversight implicates traditional separation of powers concerns regarding the respective constitutional powers of the Executive and Legislative branches.¹⁰⁵

C. Oversight Independence and the External Separation of Powers

The President wields extensive power over the administrative state, the direction of policy execution, and the supervision of agencies, including through the exercise of the appointment and removal powers.¹⁰⁶ Congress has the power to create and structure offices, as well as to determine their functions and powers.¹⁰⁷ External separation of powers doctrine generally comes into play when one of these branches is purported to intrude on the powers of the other.¹⁰⁸ For instance, when is congressional lawmaking that restricts the President's removal power a permissible limitation or an impermissible intrusion? Do statutory qualifications for officers infringe upon the President's appointment powers? Such questions receive different responses in formalist and functionalist conceptions of the separation of powers, in the decisions of a divided Court, and more specifically, in debates over the scope of IG independence.

-justice-federal.html [https://perma.cc/PT37-PUS2] (reporting coordinated review by several IG offices of the federal preparedness for and response to the Capitol riot on January 6, 2021).

¹⁰⁴ *Cf.* Sinnar, *supra* note 12, at 1031 (evaluating the performance of IGs conducting national security oversight in response to interrogation and detention abuses during the George W. Bush administration).

¹⁰⁵ *See* Metzger, *supra* note 11, at 426 (recognizing “the link between internal Executive Branch constraints and external legal doctrine,” and advocating “greater exploration of how separation of powers doctrine could be used to reinforce internal Executive Branch constraints”).

¹⁰⁶ *See* U.S. CONST. art. II, § 2.

¹⁰⁷ U.S. CONST. art. I, § 8, cl. 18 (the Necessary and Proper Clause); *id.* art. II, § 2, cl. 2 (authorizes appointment of “officers” to positions “which shall be established by law”); *Buckley v. Valeo*, 424 U.S. 1, 138–39 (1976) (per curiam) (“Congress may undoubtedly under the Necessary and Proper Clause create ‘offices’ in the generic sense and provide such method of appointment to those ‘offices’ as it chooses.”); *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (“[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.”).

¹⁰⁸ *See, e.g., Mistretta v. United States*, 488 U.S. 361, 381 (1989).

1. Formalist and Functionalist Theories

In a formalist conception of the separation of powers, the President is the ultimate source of administrative legitimacy.¹⁰⁹ Stephen Calabresi and Saikrishna Prakash, among others, have advanced the unitary executive theory, arguing that the text of Article II—mainly the Vesting Clause,¹¹⁰ but also the Take Care Clause¹¹¹—establish presidential control to direct and manage administrative action.¹¹² The theory asserts that an exclusive grant of law execution powers “prevents Congress from ever making the administration independent of presidential control.”¹¹³ This explains the unitary executive claim that, despite the absence of an explicit removal clause in the Constitution, “the President may remove executive officers using his Vesting Clause grant of ‘executive Power’ that allows him to superintend the execution of federal law.”¹¹⁴ Alongside the theory’s textual and structural arguments is an appeal to political accountability—the elected President, rather than unelected bureaucrats, gives administrative decisions their legitimacy.¹¹⁵

Functionalist critiques of the unitary executive theory not only challenge its textualist and originalist claims, but also, identify a constitutional commitment to legislative regulation of policy execution.¹¹⁶ Cass Sunstein and Lawrence Lessig charge that the unitary executive theory “ignores strong evidence that the framers imagined not a clear executive hierarchy with the President at the summit, but a large degree of congressional power to structure the administration as it thought proper.”¹¹⁷ In their view, Congress has authority, specifically under the Necessary and Proper Clause,¹¹⁸ to “act through *laws*” to define the “means” of law execution

¹⁰⁹ See, e.g., Calabresi & Prakash, *supra* note 26, at 544.

¹¹⁰ U.S. CONST. art. II, § 1, cl. 3 (“The executive power shall be vested in a President of the United States of America.”).

¹¹¹ U.S. CONST. art. II, § 3 (“[The President] shall take care that the laws be faithfully executed. . . .”).

¹¹² See, e.g., Calabresi & Prakash, *supra* note 26, at 580–84.

¹¹³ *Id.* at 570.

¹¹⁴ *Id.* at 598. See also Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165–66 (1992) (“The practical consequence of this theory is dramatic: it renders unconstitutional independent agencies and counsels to the extent that they exercise discretionary executive power.”).

¹¹⁵ See Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 59 (1994) (arguing that by “the President’s unique claim to legitimacy” is “being the only official who is accountable to a national voting electorate and no one else”).

¹¹⁶ See, e.g., Lessig & Sunstein, *supra* note 26, at 2–3.

¹¹⁷ Lessig & Sunstein, *supra* note 26, at 2.

¹¹⁸ U.S. CONST. art. I, § 8 (Congress has the power “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

and to craft some reasonable limits on the exercise of executive power.¹¹⁹ It is a nuanced view. The original constitutional arrangements permitted insulation of administrative officials from presidential control, though modern developments—expansive discretionary functions of administrative agencies and changing views on the political character of administration—demonstrate the need for a strong executive to comport with long-standing values of democratic accountability. Presidential control is necessary but can be circumscribed if sufficient institutional considerations and values warrant independence. Thus, Congress may create independent agencies, immunize certain functions from the President, and protect particular officers against removal without cause.¹²⁰

2. The Court’s Separation of Powers Jurisprudence

The Supreme Court’s case law and positions of individual Justices reflects the division between formalist or functionalist approaches to separation of powers questions. However, recent decisions on the removal power signal the ascendance of formalist notions of presidential control and political accountability.¹²¹ The brief summary of case law here aims to provide initial background and to highlight the competing values present in these cases. Relevant doctrine will be discussed further in Part III when examining the constitutionality of proposed IG removal for cause protections.

The Constitution is silent on the President’s removal power, and the Founders did not discuss the issue at the Constitutional Convention.¹²² Thus, in *Myers v. United States*, the Court turned for guidance to the First Congress and its enactment of a presidential removal provision for the Secretary for the Department of Foreign Affairs, later known as the “Decision of 1789.”¹²³ Based on an extended discussion of the Decision of 1789, the Court articulated a broad presidential removal power and invalidated a law requiring Senate consent to remove an executive officer.¹²⁴ However,

¹¹⁹ Lessig & Sunstein, *supra* note 26, at 68–69.

¹²⁰ *See id.* at 106–16.

¹²¹ *See, e.g.*, Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 376 (2020) (contextualizing *Seila Law* as the culmination of the unitary executive theory’s growing influence on the Court and describing the divisive majority and dissenting opinions as no “mere difference of interpretation, but rather a serious political confrontation”); Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 6 (2013) (tracing this ascendance in *Free Enterprise Fund* and challenging its assumed causal connections between removal, control, and democratic accountability).

¹²² *See Myers v. United States*, 272 U.S. 52, 109–10 (1928).

¹²³ *Id.* at 136 (while recognizing that a congressional enactment does not control determination of the constitutional removal power, the majority called the “the Decision of 1789” by the First Congress, which included a number of the Founders, a “precedent”).

¹²⁴ *Id.* at 111–36, 163–64.

later cases recognized *Myers* as a narrow holding that the Senate could not misappropriate the removal power for itself by requiring its consent.¹²⁵

In *Humphrey's Executor v. United States*, eight years after *Myers*, the Court upheld removal for cause protection for members of the Federal Trade Commission, after President Roosevelt attempted to replace one of the commissioners.¹²⁶ The Court explained that the constitutionality of the for-cause limitation was dependent on “the character of the office,” and held that the provision was valid because the FTC commissioners performed “quasi-legislative and quasi-judicial” duties that must be “free from executive control.”¹²⁷ The Court contrasted the FTC’s implementation of legislative and judicial powers with “purely executive officers.”¹²⁸

Then, in *Morrison v. Olson*,¹²⁹ the Court shifted from a focus on the function of an office to consider whether the for-cause limitation impairs the President’s exercise of constitutional powers.¹³⁰ Though the Court in *Morrison* recognized that the independent counsel under the Ethics in Government Act had executive responsibilities of investigation and prosecution, the Court upheld the requirement that the Attorney General have good cause for termination.¹³¹ The Court explained that those functions, though relevant, were not the sole consideration for evaluating removal restrictions—“the real question” was whether the restriction “impede[d] the President’s ability to perform his constitutional duty.”¹³² The Court observed that the “independent counsel is an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority.”¹³³ Although the independent counsel had “no small amount of discretion and judgment in deciding how to carry out his or her duties,” the Court determined that the removal for cause limitation did not “unduly” interfere with the President’s authority.¹³⁴

In recent cases, however, the Court has rejected removal for cause requirements based, in part, on the President’s accountability for policy execution.¹³⁵ In *Free*

¹²⁵ *Bowsher v. Synar*, 478 U.S. 714, 720, 726 (1986) (holding that “Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment,” and interpreting *Myers* to prohibit Congress’s aggrandizement or participation in the removal power); *Morrison v. Olson*, 487 U.S. 654, 686 (1988) (same as to *Myers*).

¹²⁶ 295 U.S. 602, 629 (1935).

¹²⁷ *Id.* at 628, 631.

¹²⁸ *Id.* at 630–32.

¹²⁹ 487 U.S. 654 (1988).

¹³⁰ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2322–23 (2000) (describing this shift in *Morrison*).

¹³¹ *Morrison*, 487 U.S. at 691–92.

¹³² *Id.* at 691–93.

¹³³ *Id.* at 691.

¹³⁴ *Id.* at 691–92.

¹³⁵ See *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020); *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010).

Enterprise Fund, the Court confronted a double layer of removal for cause protections covering both the Securities and Exchange Commission (SEC) members and the Public Company Accounting Oversight Board (PCAOB) members under the SEC’s supervision.¹³⁶ Justice Roberts, writing for majority, stated that “[t]his novel structure does not merely add to the Board’s independence, but transforms it.”¹³⁷ The Court held the multilayered removal protection violated the Vesting Clause because it “stripped” removal authority from the President or a senior official directly accountable to the President.¹³⁸ More broadly, the opinion contained several snippets of expansive rhetoric decrying the arrangement as an affront to presidential accountability and control.¹³⁹

In June 2020, the Court in *Seila Law* rejected the good cause limitation on removal of the CFPB director.¹⁴⁰ Chief Justice Roberts, writing again for the majority, explained that the President’s removal power “follows from the text of Article II, was settled by the First Congress, and was confirmed in the landmark [*Myers*] decision.”¹⁴¹ The Court recast its prior case law as declaring a default at-will removal rule subject to two “exceptions” where good cause requirements are permissible: (1) multimember agencies that exercise “quasi-legislative” or “quasi-judicial” functions as in *Humphrey’s Executor*, and (2) “inferior officers” with limited duties that do not exercise policymaking or administrative authority as in *Morrison*.¹⁴² According to the Court, the CFPB director did not satisfy either exception because the CFPB is not a multimember agency, and its director wields significant enforcement authority by administering an array of consumer protection statutes.¹⁴³ Consequently, the Court refused to extend good cause protection to a “new situation”—a single agency head—that had no historical antecedent.¹⁴⁴ As in *Free Enterprise Fund*, the Court invoked democratic accountability, opining that “the Framers made the President the most democratic and politically accountable official in Government,”¹⁴⁵ while the CFPB director was “neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is.”¹⁴⁶

¹³⁶ 561 U.S. at 514.

¹³⁷ *Id.* at 496.

¹³⁸ *Id.*

¹³⁹ *See id.* at 514 (“Without such power [to remove the board members], the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else.”); *id.* at 497 (criticizing the “diffusion of power [that] carries with it a diffusion of accountability”); *id.* at 497–98 (“The people do not vote for the ‘Officers of the United States.’” (quoting U.S. CONST. art. II, § 2, cl. 2)).

¹⁴⁰ *Seila Law*, 140 S. Ct. at 2192.

¹⁴¹ *Id.* at 2191–92.

¹⁴² *Id.* at 2198–2200.

¹⁴³ *Id.* at 2200–01.

¹⁴⁴ *Id.* at 2201 (quoting *Free Enter. Fund*, 561 U.S. at 483).

¹⁴⁵ *Id.* at 2203.

¹⁴⁶ *Id.*

Justice Kagan, in a forceful dissent, laid bare shortcomings in the majority's reading of the text,¹⁴⁷ history,¹⁴⁸ and the Court's own precedents.¹⁴⁹ She argued that these sources "point not to the majority's 'general rule' of 'unrestricted removal power' with two grudgingly applied 'exceptions'."¹⁵⁰ Rather, the dissent maintained that text, including the Necessary and Proper Clause which went unmentioned in the majority opinion, and history "bestow discretion on the legislature to structure administrative institutions as the times demand, so long as the President retains the ability to carry out his constitutional duties."¹⁵¹ Despite the majority's acknowledgment of its past approval of removal limits, it "wipe[d] out" protection for the CFPB director by departing from precedent and rewriting the removal power doctrine.¹⁵² Contrary to the majority's foundation for a broad removal power in political accountability, the dissent countered that legislative removal limits permissibly advance values of "good governance."¹⁵³ According to the dissent, these values, along with concerns about the Court's institutional competence,¹⁵⁴ warrant a "deferential approach" to congressional actions that seek to secure independence to promote the integrity and effectiveness of administration.¹⁵⁵

This past term, in *Collins v. Yellen*, the Court also rejected removal protection for the director of the Federal Housing Finance Agency (FHFA), ruling that "our decision

¹⁴⁷ *Id.* at 2227–28 (Kagan, J., dissenting in part) (explaining that the Vesting Clause "can't carry all that weight" to support a broad removal power, noting Justice Rehnquist's conclusion in *Morrison* that the Court could not "'extrapolate'" such a broad power from "'general constitutional language.'" (quoting *Morrison*, 487 U.S. at 690 n.29)).

¹⁴⁸ *Id.* at 2229–31 (Kagan, J., dissenting) (describing the history of the First Congress on the removal power "'highly ambiguous and prone to overreading'" (quoting John Manning, 124 HARV. L. REV. 1965 n.135 (2011))). Consistent with Justice Kagan's observation, some scholars have rejected the Decision of 1789 as a source against limitations on the removal power. See Jed Handelsman Shugerman, *The Imaginary Unitary Executive*, LAWFARE (July 6, 2020, 8:54 AM), <https://www.lawfareblog.com/imaginary-unitary-executive> [<https://perma.cc/6Q6Q-GF8B>] (offering an account of the Decision of 1789 that identifies "historical errors" in the Court's reading of that history); Saikrishna B. Prakash, *New Light on the History of the Decision of 1789*, 91 CORNELL L. REV. 1021, 1073 (2006) (unitary executive theorist observing that "the Decision of 1789 did not endorse the view that Congress lacked authority to modify the Constitution's grant of removal power to the President").

¹⁴⁹ *Seila Law*, 140 S. Ct. at 2226 (Kagan, J., dissenting in part).

¹⁵⁰ *Id.* (Kagan, J., dissenting in part) (quoting the majority).

¹⁵¹ *Id.* at 2226–27 (Kagan, J., dissenting in part).

¹⁵² *Id.* at 2224, 2226 (Kagan, J., dissenting in part).

¹⁵³ *Id.* at 2236 ("Congress has broad discretion to enact for-cause protections in pursuit of good governance.").

¹⁵⁴ *Id.* at 2225 (Kagan, J., dissenting in part) ("[T]he Constitution—both as originally drafted and as practiced—mostly leaves disagreements about administrative structure to Congress and the President, who have the knowledge and experience needed to address them. Within broad bounds, it keeps the courts—who do not—out of the picture."); *accord* Free Enter. Fund v. Public Co. Acct. Oversight Bd., 561 U.S. 477, 523 (Breyer, J., dissenting).

¹⁵⁵ *Seila Law*, 140 S. Ct. at 2236 (Kagan, J., dissenting in part).

last Term in *Selia Law* is all but dispositive.”¹⁵⁶ Unlike *Selia Law*, however, the Court did not resolve the case by inquiring whether the FHFA director exercised ““significant executive power.””¹⁵⁷ Justice Alito, writing for the majority, declared that “the nature and breadth of an agency’s authority is not dispositive in determining whether Congress may limit the President’s power to remove [the agency] head.”¹⁵⁸ Justice Kagan agreed that *Seila Law* dictated the result, but rejected the majority’s “gratuitous” expansion of *Seila Law* into a blanket rule that single agency directors are subject to removal at will.¹⁵⁹

3. Separation of Powers Disputes over IG Independence

Inasmuch that separation of powers theory and case law reflect disagreement on the boundaries for legislative limits on executive power, periodic conflicts between the President and Congress over the scope of IG independence have reflected this dynamic. The issue has, at times, been a deeply contested point of contention involving disputes about presidential control and legislative constraint.

In 1977, prior to enactment of the Inspector General Act, the Department of Justice Office of Legal Counsel (OLC) published an opinion challenging its constitutionality and seeking modifications on the ground that “continuous oversight” by IGs would “assume the Executive’s role of administering or executing the law.”¹⁶⁰ More specifically, OLC objected that IG reporting to Congress would create “divided and possibly inconsistent obligations to the executive and legislative branches,” based on IG reporting requirements to Congress and a lack of presidential control.¹⁶¹ OLC also argued that notice requirements to remove an IG would violate the removal power

¹⁵⁶ 141 S. Ct. 1761, 1783 (2021).

¹⁵⁷ *Id.* at 1801 (Kagan, J., concurring in part and in the judgment) (quoting *Seila Law*, 140 S. Ct. at 2241).

¹⁵⁸ *Id.* at 1784.

¹⁵⁹ *Id.* at 1801 (Kagan, J., concurring in part and in the judgment) (charging that “the majority strays from its own obligation to respect precedent”).

¹⁶⁰ Office of Legal Counsel, Memorandum Opinion for the Attorney General: Inspector General Legislation 17 (Feb. 21, 1977) [hereinafter OLC IG Opinion].

¹⁶¹ *Id.* at 16; see also H.R. REP. NO. 95-584, at 9 (1977) (noting a DOJ argument that “provisions of the bill requiring reports of the Inspector General to be submitted to Congress without further clearance or approval would deprive the President of his constitutional right ‘to coordinate the replies and comments to Congress from departments and agencies in the executive branch.’” (quoting Letter from Patricia M. Wald, Assistant Attorney General, to Honorable Jack Brooks, Chair of House Committee on Government Operations (May 20, 1977))); *Establishment of Offices of Inspector General: Hearing on H.R. Before the H. Comm. on Intergov. Rels. & Hum. Res. Subcomms. of the Comm. on Gov. Ops.*, 95th Cong. 165 (1977) (statement of Rep. Laurence H. Fountain, chair of House hearings on the IG Act) (noting that “Presidents—not just this one—don’t want Congress seeking out or getting information statutorily because they feel that it in some way infringes upon their rights”).

“reserved to the President acting in his discretion.”¹⁶² Ultimately, the Inspector General Act’s reporting and notice requirements remained intact.¹⁶³

When Congress later contemplated the Inspector General Reform Act of 2008, it considered amendments to strengthen IG independence, including a bill proposing removal for cause protection and specified terms of office.¹⁶⁴ The impetus for these proposals were reports of politicization, pressure, and retaliation against IGs conducting oversight activities.¹⁶⁵ Conflicting information exists as to whether the IG community supported the removal for-cause and fixed tenure provisions.¹⁶⁶ The Bush administration threatened to veto the bill, asserting “grave constitutional concerns” with for-cause limits on the President’s removal power.¹⁶⁷ The House nonetheless voted overwhelmingly for the bill containing the removal for cause and

¹⁶² OLC IG Opinion, *supra* note 160, at 18. OLC also questioned the statutory qualifications for IGs as a possible violation of the appointment power, though it did not suggest any modification. *Id.*

¹⁶³ See H.R. REP. NO. 95-584, at 3 (declaring the need for IGs to bypass agency heads by reporting information to Congress “without further clearance or approval”); S. REP. NO. 95-1071, at 9, 26 (1978) (stating that notice sought “some justification” for removal beyond oversight that “embarrasses the executive,” and citing case law permitting removal limits for “those offices whose duties require a degree of independence”).

¹⁶⁴ See Improving Government Accountability Act, H.R. 928, 110th Cong. § 2(a–b) (as introduced in H. Comm. On Oversight and Government Reform, Feb. 8, 2007).

¹⁶⁵ S. REP. NO. 110-262, at 3 (2008) (“[T]he Committee is aware of several instances of real or perceived encroachments on IG authority. Just in the past year, for instance, there have been several public accounts from current or former [IGs] who believed they were being improperly pressured or denied resources to carry out needed oversight.”); H.R. REP. NO. 110-354, at 9 (2007) (expressing concerns with “campaigns by management to remove [IGs] who are aggressive in their investigations” and citing several examples of interference with IG oversight by agency officials).

¹⁶⁶ Compare Statement of Phylliss Fong, Inspector General for the U.S. Dep’t of Agriculture and Chair of the Legislation Committee of the President’s Council on Integrity and Efficiency (PCIE), House Committee on Oversight and Government Reform, at 4 (June 20, 2007), <https://www.usda.gov/oig/reports/statement-honorable-phyllis-k-fong-inspector-general-subcommittee-government-0> [<https://perma.cc/R4BZ-6547>] (stating of the bill’s removal for cause and fixed term provisions that “[a] majority of the IG community believes that these provisions of H.R. 928, if enacted, would enhance the independence of IGs”), with S. REP. NO. 110-262, at 5 (2008) (stating that while IGs “widely endorsed” advance notice requirements for removal, they “were divided over proposals to create fixed terms for IGs with dismissal only ‘for cause’”), and GEN. ACCOUNTABILITY OFFICE, HIGHLIGHTS OF THE COMPTROLLER GENERAL’S PANEL ON FEDERAL OVERSIGHT AND INSPECTORS GENERAL 6 (2006) [hereinafter GAO 2006 REPORT] (reporting that the majority of panel participants supported advance notice requirements, while implying the majority did not support removal for cause).

¹⁶⁷ George W. Bush, Statement of Administration Policy: H.R. 928—To Amend the Inspector General Act of 1978 (Oct. 1, 2007) (“The Administration strongly objects to this intrusion on the President’s removal authority and his ability to hold IGs accountable for their performance.”), available at <https://www.presidency.ucsb.edu/documents/statement-administration-policy-hr-928-amend-the-inspector-general-act-1978-enhance-the> [<https://perma.cc/F82C-QPNY>].

tenure provisions.¹⁶⁸ However, the Senate omitted these provisions from its own bill and inserted the 30-day notice requirement for IG removals, which ultimately became the law.¹⁶⁹

These past events suggest several observations. First, Congress has been motivated to reinforce good government oversight in response to abuse. The IG Act was a response to the Watergate era, widespread fraud, and the lack of independent oversight institutions in the Executive Branch.¹⁷⁰ Similarly, the Inspector General Reform Act responded to numerous instances of interference with IG oversight.¹⁷¹ Second, Congress has historically defended IG independence,¹⁷² but has not displayed uniform agreement as to the best methods for protecting oversight from interference or pressure. Third, constitutional considerations factor into political realities surrounding the development and advocacy for legislative proposals pursuing IG independence. Constitutional objections, as well as the veto threat, loomed large in debate over the removal for cause proposal that was originally part of the Inspector General Reform Act.¹⁷³ In addition to politics, the likelihood that a proposal will withstand constitutional scrutiny under existing law is a critical component in crafting policy choices. When threats to IG independence jeopardize the effective performance of objective IG oversight, it is necessary to examine how laws and norms performed in defense of independence from such threats, and to weigh the potential constitutional and policy implications of available legislative responses.

II. THREATS TO INSPECTOR GENERAL INDEPENDENCE

Threats to IG independence include interference or retaliation by the President, agency heads, and other executive officials that endangers the objectivity, legitimacy, and effectiveness of oversight.¹⁷⁴ Notwithstanding normative standards of independence, IGs they face risks of interference or retaliation because they probe

¹⁶⁸ See CONG. RES. SERV., STATUTORY INSPECTORS GENERAL: LEGISLATIVE DEVELOPMENTS AND LEGAL ISSUES 2 (2007) (noting that the bill passed the House by a 404 to 11 vote).

¹⁶⁹ See Inspector General Reform Act of 2008, Pub. L. No. 110-409, 122 Stat. 4302; see also Inspector General Empowerment Act of 2016, Pub. L. No. 114-317, § 6(1)(A), 130 Stat. 1595, 1603 (codified as amended in 5 U.S.C. app. § 6) (more recent example where Congress enacted legislative changes to reaffirm IG access to agency records after the Obama administration argued in favor of restrictions).

¹⁷⁰ See generally Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101, reprinted as amended in 5 U.S.C. app.

¹⁷¹ See generally Inspector General Reform Act of 2008, Pub. L. No. 110-409, 122 Stat. 4302.

¹⁷² See generally Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101, reprinted as amended in 5 U.S.C. app.; Inspector General Reform Act of 2008, Pub. L. No. 110-409, 122 Stat. 4302; Inspector General Empowerment Act of 2016, Pub. L. No. 114-317, § 6(1)(A), 130 Stat. 1595, 1603 (codified as amended in 5 U.S.C. app. § 6).

¹⁷³ See George W. Bush, Statement of Administration Policy: H.R. 928—To Amend the Inspector General Act of 1978 (Oct. 1, 2007).

¹⁷⁴ See *supra* notes 66–71 and accompanying text.

misconduct and expose failures.¹⁷⁵ This Part will focus specifically on use of removal and appointment powers to neutralize or punish oversight.

In April and May 2020, President Trump breached the norms of independence when he fired two permanent IGs and replaced three acting IGs for their legitimate exercise of oversight responsibilities.¹⁷⁶ This Part discusses the history of IG removals across administrations since the passage of the Inspector General Act, demonstrates that President Trump’s adverse actions against IGs were a significant normative deviation, and explains that the primary, current safeguard to prevent unjustified IG dismissals—advance notice to Congress—failed to operate as intended. In addition, this Part identifies additional challenges relating to IG appointments, including outstanding vacancies and the designation of acting IGs.

A. Presidential Abuse of the Removal Power

1. Norms of Restraint

Under current law, the President can remove an IG from their position with 30 days advance notice to Congress.¹⁷⁷ Despite the absence of protection beyond this procedural notice requirement, past presidents have mostly refrained from removal.¹⁷⁸ A long-standing, bipartisan consensus exists that IGs should retain their roles during transitions after elections, despite the fact that most political appointees leave during changes in administration.¹⁷⁹ Equally important, independence norms have supported the apolitical expectation that the President will not remove an IG for conducting oversight that questions, challenges, or critiques the administration.¹⁸⁰

This consensus arose, in part, because of the exceptions. When President Reagan informed Congress on his first day in office that he removed sixteen IGs, the response was swift bipartisan condemnation.¹⁸¹ Indeed, no President since Reagan has

¹⁷⁵ See Bromwich, *supra* note 6, at 2032–33.

¹⁷⁶ See Quinn, *supra* note 7.

¹⁷⁷ 5 U.S.C. § 3(b).

¹⁷⁸ See Daniel A. Farber & Anne Joseph O’Connell, *Agencies as Adversaries*, 105 CAL. L. REV. 1375, 1396 (2017) (“[U]nlike with most other political appointees, new administrations have refrained from asking current IGs to resign.”).

¹⁷⁹ See *id.*; Bromwich, *supra* note 6, at 2029 (observing that IGs are expected to “survive a change in party control of the White House”).

¹⁸⁰ See, e.g., Letter from Charles S. Grassley, Senator, et al. to Donald Trump, President, at 2 (Apr. 8, 2020) [hereinafter Grassley et al.].

¹⁸¹ See Robert Pear, *Ouster of All Inspectors General by Reagan Called a Political Move*, N.Y. TIMES, Feb. 3, 1981, at B14 (discussing objections of Republicans and Democrats, including Representative Fountain, a chief sponsor of the IG Act, who said that despite the President’s removal power, “[i]t was never intended . . . that inspectors general be automatically replaced on a wholesale basis without regard to their individual merits whenever there is a change in administrations”); Francis Clines, *Reagan Reappoints Five to be Inspectors General*,

ordered a blanket termination of IGs with a change in administration, though some considered doing so. George H.W. Bush sought to terminate IGs but relented after objections by the IGs and Congress.¹⁸² Presidents Clinton, Obama, and George W. Bush do not appear to have sought to terminate IGs at the beginning of their administrations.¹⁸³ The Trump administration backed away from plans to remove IGs after IGs raised concerns.¹⁸⁴

Individual IG removals outside of changes in administration have been especially rare. One prominent case involved President Obama's termination of Gerald Walpin, the IG for the Corporation for National and Community Service, six months after Obama took office.¹⁸⁵ In his notice to Congress, President Obama simply stated that he "no longer" had "fullest confidence" in Walpin.¹⁸⁶ In subsequent letters and explanations, Obama administration officials set forth specific reasons for the termination, while members of Congress questioned the sufficiency of the White House's explanations.¹⁸⁷ Nonetheless, the D.C. Circuit Court ruled that the President's notice to Congress was adequate because the "explanation satisfie[d] the minimal statutory mandate" of the IG Act, which "impose[d] no 'clear duty' to explain the reasons in any greater detail."¹⁸⁸

Historically, presidents and agency heads have used the removal power sparingly. As an alternative, administrations have sometimes facilitated IG departures without the publicity that would result from outright removal by quietly pressuring IGs to resign their positions.¹⁸⁹ In addition, some resignations followed investigations of IG misconduct.¹⁹⁰ Yet, as to removal, presidents have mostly observed

N.Y. TIMES, Mar. 27, 1981, at B8 (reporting that Reagan later reappointed five of the removed IGs).

¹⁸² See JOHNSON & NEWCOMER, *supra* note 12, at 108.

¹⁸³ See *id.* at 122.

¹⁸⁴ See Steven Mufson & Juliet Eilperin, *Trump Transition Team Reverses Course on Warnings to Oust Inspectors General*, WASH. POST (Jan. 19, 2017), https://www.washingtonpost.com/business/economy/trump-transition-team-reverses-course-on-warnings-to-remove-inspectors-general/2017/01/19/09312a12-ddfa-11e6-918c-99ede3c8cafa_story.html [<https://perma.cc/78WS-VD4C>].

¹⁸⁵ See Neil A. Lewis, *White House Defends Inspector General's Firing*, N.Y. TIMES, June 18, 2009, at A24.

¹⁸⁶ See STAFF OF S. FINANCE COMM. & HOUSE COMM. ON OVERSIGHT & GOV'T REFORM, 111th CONG., *THE FIRING OF THE INSPECTOR GENERAL FOR THE CORPORATION FOR NATIONAL AND COMMUNITY SERVICE* 47 (2009).

¹⁸⁷ See *id.* at 23–24, 47–48 (noting several issues identified by administration officials to support Walpin's termination, including a complaint by an Acting United States Attorney, Walpin's telecommuting work arrangement, and his fitness to serve in office, and explaining that Walpin's office had recently investigated a political ally of the President prior to the termination).

¹⁸⁸ *Walpin v. Corp. for Nat'l and Cmty. Servs.*, 630 F.3d 184, 187 (D.C. Cir. 2011) (quotation marks omitted).

¹⁸⁹ See JOHNSON & NEWCOMER, *supra* note 12, at 128 (identifying two IGs pressured to resign by President George H.W. Bush and eight IGs pressured to leave by agencies).

¹⁹⁰ See *id.* (noting five IGs left office after investigations); H.R. REP. NO. 110-354, at 9–10

norms of restraint. Even with Reagan's summary removals at the beginning of his first term and Obama's solitary dismissal early in his first term,¹⁹¹ no President had systematically used the removal power to oust IGs under circumstances suggesting the move was retribution for past oversight or sought to impede ongoing scrutiny. Until President Trump.¹⁹²

2. President Trump's Removal and Replacement of IGs

Nothing compares with President Trump's dismissal of two IGs and replacement of three acting IGs over the course of six weeks in April and May 2020. A review of the timing and circumstances of these actions indicates retaliation for IGs' proper discharge of oversight responsibilities or an effort to subvert active matters.

On April 3, 2020, President Trump informed Congress that he was terminating Michael Atkinson, the IG for the intelligence community.¹⁹³ Atkinson had previously determined that the Director of National Intelligence must send Congress the anonymous whistleblower complaint alleging that President Trump solicited foreign interference in the 2020 U.S. presidential election by conditioning official actions, including foreign military aid, on Ukraine's agreement to investigate then presidential candidate Joe Biden.¹⁹⁴ After the disclosure,¹⁹⁵ the House pursued an impeachment investigation and later voted to impeach President Trump on charges of abuse of power and obstruction of Congress.¹⁹⁶ Following his acquittal by the Senate, the President proceeded to retaliate against individuals who reported information to Congress in connection with the impeachment investigation, including Atkinson.¹⁹⁷

(2007) (describing investigation of an IG "for taking trips with no apparent official purpose at government expense, retaliating against employees who objected and refused to sign the travel vouchers, and destroying emails after he was informed of an investigation into his travel").

¹⁹¹ See Pear, *supra* note 181; Lewis, *supra* note 185.

¹⁹² See Quinn, *supra* note 7.

¹⁹³ Letter from Donald Trump, President, to Richard Burr, Senator, Chair of the Senate Select Committee on Intelligence, and Mark R. Warner, Senator, Vice Chair of the Senate Select Committee on Intelligence (Apr. 3, 2020) [hereinafter Atkinson Notice of Removal Letter].

¹⁹⁴ See Letter from Michael Atkinson, Inspector General for the Intelligence Community, to Joseph Maguire, Acting Director of National Intelligence, at 6 (Aug. 26, 2019) (enclosing the anonymous whistleblower's letter and determining that the allegations constituted an "urgent concern" requiring the Director of National Intelligence to report to the Congressional Intelligence Committees).

¹⁹⁵ See Nicholas Fandos, *Complaint in Hand, Democrats Aim for a Fast, and Focused, Impeachment Inquiry*, N.Y. TIMES (Sept. 26, 2019), <https://www.nytimes.com/2019/09/26/us/politics/trump-impeachment-democrats.html> [<https://perma.cc/B2EQ-Q3TV>] (reporting that the whistleblower letter was released to Congress on September 26, 2019, after Maguire initially refused to disclose).

¹⁹⁶ Articles of Impeachment Against Donald John Trump, H.R. Res. 755, 116th Cong. (2019) (enacted).

¹⁹⁷ See Herb, Cohen & Hoffman, *supra* note 16; Ramsey Touchberry, *Trump's 'Retaliation'*

On April 7, 2020, President Trump displaced Glenn Fine from leadership of the Department of Defense (DOD) IG's office when he appointed the EPA IG to pull double duty by serving as Acting DOD IG.¹⁹⁸ The sudden acting appointment was surprising for a number of reasons. First, Fine had celebrated experience as an IG, including previous service as the DOJ IG, whereas the EPA IG was now tasked with leading two IG offices, despite appointment as an IG only four months earlier.¹⁹⁹ Second, CIGIE had recently designated Fine to lead the Pandemic Response Accountability Committee (PRAC), which was established in the Coronavirus, Aid, Relief, and Economic Security (CARES) Act to provide oversight of the Act's \$2 trillion in emergency federal spending.²⁰⁰ Because the CARES Act required the head of an IG office to hold the PRAC leadership position, Fine's replacement meant that he could no longer lead the committee.²⁰¹

On April 30, 2020, President Trump nominated a new HHS IG, not long after then Acting HHS IG Christi Grimm issued an April 3 report on hospital preparedness to respond to the COVID-19 pandemic.²⁰² At the time, state and local governments were criticizing the inadequacy of the federal government's response to COVID-19, pleading for the federal government to utilize its authority and resources to coordinate a national response strategy, add hospital capacity, obtain and distribute supplies, and expand testing, contact tracing, and other mitigation efforts.²⁰³ The HHS IG report qualified that it was "not a review of HHS response to the COVID-19 pandemic," but rather, sought to illuminate "hospitals' challenges and needs," and to assist HHS with its response efforts.²⁰⁴ The report found a "severe" dearth of testing supplies, identified "widespread" shortages of protective equipment for health workers, and noted hospitals' concerns about federal government assistance and guidance.²⁰⁵

Against Impeachment Witnesses Spurs Call to Investigate Amid Fierce Criticism, NEWSWEEK (Feb. 10, 2020), <https://www.newsweek.com/trumps-retaliation-against-impeachment-witnesses-spurs-call-investigate-amid-fierce-criticism-1486552> [<https://perma.cc/38UM-TXWK>].

¹⁹⁸ See Savage & Baker, *supra* note 19.

¹⁹⁹ See *id.*; John M. Donnelly, *Trump's Pick for Pentagon Watchdog Prompts Questions*, ROLL CALL (Apr. 20, 2020), <https://www.rollcall.com/2020/04/20/trumps-pick-for-pentagon-watchdog-prompts-questions/> [<https://perma.cc/H29J-QXP4>].

²⁰⁰ Press Release, CIGIE, *Glenn A. Fine Appointed Chair of CIGIE's Pandemic Response Accountability Committee* (Mar. 30, 2020), <https://ignet.gov/content/glenn-fine-appointed-chair-cigie%E2%80%99s-pandemic-response-accountability-committee> [<https://perma.cc/NXE5-58WK>].

²⁰¹ See Savage & Baker, *supra* note 19.

²⁰² Rein, *supra* note 19.

²⁰³ See, e.g., Robert Costa & Aaron Gregg, *Governors and Mayors in Growing Uproar over Trump's Lagging Coronavirus Response*, WASH. POST (Mar. 22, 2020), https://www.washingtonpost.com/politics/governors-and-mayors-in-growing-uproar-over-trumps-lagging-coronavirus-response/2020/03/22/98ac569a-6c49-11ea-a3ec-70d7479d83f0_story.html [<https://perma.cc/NR9H-G62S>].

²⁰⁴ HHS IG COVID-19 HOSPITALS REPORT, *supra* note 100, at 1.

²⁰⁵ *Id.* at 1–3.

After release of the report, President Trump stated during a COVID-19 briefing that the report was “wrong” and wrote on Twitter that it was “another Fake Dossier,” an allusion comparing the HHS report to a compilation of allegations that were part of the Russia Investigation.²⁰⁶

On May 15, 2020, President Trump notified Congress that he was terminating State Department IG Steve Linick.²⁰⁷ Congress opened an inquiry into the matter after reports, which the President confirmed, that Linick’s firing came at the request of Secretary of State Michael Pompeo.²⁰⁸ At the time, the State Department IG had ongoing matters relating to the Secretary of State’s office, including an investigation of Secretary Pompeo’s misuse of government resources and a review of an expedited \$8 billion arms sale to Saudi Arabia.²⁰⁹ As noted above, the State Department IG had also previously reported on substantiated instances of personnel decisions based on political factors in violation of civil service requirements.²¹⁰

Finally, on May 16, 2020, President Trump replaced the Acting IG for the Department of Transportation (DOT), Mitchell Behm.²¹¹ Media reports indicate that the DOT IG office was investigating whether DOT Secretary Elaine Chao, who is married to Senate Majority Leader Mitch McConnell, exercised preferential treatment for Kentucky by steering DOT funds to the state, possibly to help McConnell’s reelection in 2020.²¹²

The Inspector General Act required that President Trump provide a statement of reasons to Congress 30 days in advance of the Atkinson and Linick removals.²¹³ As the notice procedure does not apply to acting IGs, he was not required to explain the reasons for the replacements of Fine, Grimm, or Behm.²¹⁴ In both letters to Congress providing notice of the Atkinson and Linick removals, President Trump used identical language, stating that “it is vital that I have the fullest confidence in the appointees serving as Inspectors General,” and “[t]hat is no longer the case with

²⁰⁶ See Brett Samuels, *Trump Decries IG Report on Hospital Shortages as ‘Another Fake Dossier’*, THE HILL (Apr. 7, 2020), <https://thehill.com/homenews/administration/491561-trump-decries-ig-report-on-hospital-shortages-as-another-fake-dossier>.

²⁰⁷ Letter from Donald Trump, President, to Nancy Pelosi, Speaker of the House of Representatives (May 15, 2020) [hereinafter Linick Notice of Removal Letter].

²⁰⁸ See Catie Edmondson & Michael D. Shear, *Trump Ousted State Dept. Watchdog at Pompeo’s Urging; Democrats Open Inquiry*, N.Y. TIMES (May 19, 2020), <https://www.nytimes.com/2020/05/16/us/politics/linick-investigation-pompeo.html> [<https://perma.cc/A5KM-NP7Z>].

²⁰⁹ Transcript of Interview of Steven Linick, House of Representatives, Comm. on Foreign Affairs, at 42–43, 56–58 (June 3, 2020), https://foreignaffairs.house.gov/_cache/files/4/7/47b1f13c-7b02-4b58-a32d-d4cb74ee9291/4260E22C7282CBACBC5D94AA72FAB265.linick-final-redacted.pdf [<https://perma.cc/8DB5-YWCE>].

²¹⁰ See STATE IG PERSONNEL PRACTICES REPORT, *supra* note 101, at 12.

²¹¹ Mintz, *supra* note 19.

²¹² *Id.*

²¹³ 5 U.S.C. § 3(b).

²¹⁴ See *id.*

regard to this Inspector General.”²¹⁵ In candid public comments, however, President Trump elaborated on the terminations.²¹⁶ The President claimed justification for the termination of Atkinson because he had sent a “fake report” to Congress.²¹⁷ As to Linick, the President stated that Secretary Pompeo was “not happy with the job he’s doing” and suggested that the misuse of funds investigation relating to Pompeo was not “important.”²¹⁸

Members of Congress challenged the President’s explanations for the IG removals.²¹⁹ A bipartisan group of Senators, including Senator Chuck Grassley who has long supported IGs, argued that the President’s termination notice was “not sufficient” under the Inspector General Act “because Congress intended that inspectors general only be removed when there is clear evidence of wrongdoing or failure to perform the duties of the office, and not for reasons unrelated to their performance, to help preserve IG independence.”²²⁰ In response, the White House Counsel countered that the President has broad removal power, questioned the constitutionality of the notice requirement, and asserted that the President provided notice that was comparable to President Obama’s notice in the Walpin case.²²¹ Senator Grassley demanded further explanation of the reasons for both the Atkinson and Linick firings, and even briefly held up two unrelated nominations before the Senate.²²² After the White House provided additional explanations, Senator Grassley relented on the nominations, while stating that he disagreed with the purported reasons for the removals.²²³

President Trump’s firings and replacements retaliated against IGs for the legitimate exercise of their oversight responsibilities: appropriate communication of whistleblower allegations to Congress, reports of mismanagement and resource concerns for response to the pandemic, and ongoing investigations of alleged misconduct by

²¹⁵ Atkinson Notice of Removal Letter, *supra* note 193; Linick Notice of Removal Letter, *supra* note 207.

²¹⁶ See Herb, Cohen & Hoffman, *supra* note 16.

²¹⁷ *Id.*

²¹⁸ Aaron Rugar, *Trump’s Remarks About Firing the State Department IG Show How He’s Destroyed the Norm of Oversight*, VOX (May 19, 2020), <https://www.vox.com/2020/5/19/21263508/trump-inspector-general-steve-linick-firing-mike-pompeo-investigation> [<https://perma.cc/W2KL-V3EV>].

²¹⁹ Grassley et al., *supra* note 180.

²²⁰ *Id.* at 2 (questioning both the sufficiency of the notice and the placement of Atkinson on administrative leave during the 30-day notice period); see also Letter from Charles S. Grassley, Senator, to Donald Trump, President (May 18, 2020) (seeking explanation as to Linick’s termination).

²²¹ Letter from Pat Cippolone, Counsel to the President, to Charles S. Grassley, Senator, at 1–2 (May 26, 2020) [hereinafter Cippolone].

²²² See Kevin Breuninger, *GOP Senator Lifts Hold on Trump Nominees Despite Disagreeing with Inspector General Firings*, CNBC (June 19, 2020, 1:08 PM), <https://www.cnbc.com/2020/06/19/chuck-grassley-lifts-hold-he-placed-on-trump-nominees-over-ig-firings.html> [<https://perma.cc/A4YL-RNQR>].

²²³ See *id.*

administration officials. These actions flouted norms strongly favoring retention of IGs who legitimately perform their duties and served as a troubling warning to IGs about the perils of independent oversight. Further, the inadequate explanations for the removals revealed shortcomings in procedural notice requirements intended to prevent arbitrary IG terminations. As discussed below, the removals and replacements also underscore independence concerns that arise in relation to the vacancies created by such actions.

B. Presidential Misuse of Appointment Authority

1. Acting IG Appointments

Like the aforementioned removals and replacements, President Trump's acting IG appointments breached independence norms because President Trump did not select senior staff within the relevant IG offices to serve as the acting IGs and, in some cases, designated acting officials with conflicts of interest who appeared to lack nonpartisan qualifications.²²⁴ The IG acting appointments also reflected broader concerns that President Trump's use of acting appointments sought to install loyalists and forestall the Senate confirmation process for filling vacancies.²²⁵

The Inspector General Act does not specifically address acting appointments during the pendency of IG vacancies.²²⁶ Rather, the Federal Vacancies Reform Act of 1998 (FVRA) sets forth the mechanism for temporarily filling positions that require presidential appointment with the Senate's advice and consent.²²⁷ The FVRA applies when an official previously confirmed by the Senate "dies, resigns, or is otherwise unable to perform the functions and duties of the office."²²⁸ President Trump's removal of IGs raised several questions pertaining to this provision, including whether placement on administrative leave or termination itself constitute an inability to

²²⁴ See Anne Joseph O'Connell, *Watchdogs at Large*, BROOKINGS INST. (Aug. 6, 2020), <https://www.brookings.edu/research/watchdogs-at-large/> [https://perma.cc/73R6-SNY3] (listing some of the selected acting IGs who were selected from outside of the relevant offices of their appointment).

²²⁵ See Felicia Sonmez, *Trump Says He's 'in No Hurry' to Replace Acting Cabinet Members*, WASH. POST (Jan. 6, 2019, 3:47 PM), https://www.washingtonpost.com/politics/trump-says-hes-in-no-hurry-to-replace-acting-cabinet-members/2019/01/06/afac5fea-11e4-11e9-b6ad-9cfd62dbb0a8_story.html?utm_term=.fc627428ca1d [https://perma.cc/H2J6-4BJ3] (reporting that President Trump said he liked the "flexibility" of using "acting" officials to fill key positions without Senate confirmation); Becca Damante, *At Least 15 Trump Officials Do Not Hold Their Positions Lawfully*, JUST SEC. (Sept. 17, 2020), <https://www.justsecurity.org/72456/at-least-15-trump-officials-do-not-hold-their-positions-lawfully/> [https://perma.cc/HTM8-9LUG] (explaining that several acting appointments by President Trump violated the Federal Vacancies Reform Act and circumvented the Senate confirmation process).

²²⁶ See 5 U.S.C. §§ 1–13.

²²⁷ 5 U.S.C. § 3347; 5 U.S.C. § 3345.

²²⁸ 5 U.S.C. § 3345.

perform the duties of the office, thereby triggering the FVRA's procedures.²²⁹ Although the Inspector General Act requires the President to notify Congress "30 days before the removal,"²³⁰ the President placed Atkinson and Linick on administrative leave before the 30 days was up.²³¹ Further, President Trump created the vacancy by removing the IGs, so the inability of the removed IGs to perform their duties was entirely a situation of the President's making.²³²

The FVRA also addresses the categories of individuals who are permitted to hold a position in an acting capacity and the time limits on such acting appointments.²³³ It provides that the "first assistant to the office" automatically becomes the acting officer in the vacant position.²³⁴ As an alternative, the President is permitted to designate another official confirmed by the Senate to serve in the acting role, or another "officer or employee" of the same agency who served within the agency for a minimum of 90 days in the prior year.²³⁵ When President Trump named a new acting IG in the cases discussed below, he declined the default option of designating the IG's first assistant to serve in an acting capacity.²³⁶

At the time President Trump designated the EPA IG to serve as acting DOD IG, he also nominated a candidate to become the permanent DOD IG, subject to the Senate's advice and consent.²³⁷ If President Trump had not designated the EPA IG to become the acting DOD IG at the time of the nomination, Fine would have been the acting IG until confirmation of a permanent replacement.²³⁸ In other cases,

²²⁹ See Goldsmith & Miller-Gootnick, *supra* note 10 (analyzing the acting appointment after the State IG's dismissal in light of open FVRA questions as to whether administrative leave or firings render an official unable to perform).

²³⁰ 5 U.S.C. § 2(a).

²³¹ See Goldsmith & Miller-Gootnick, *supra* note 10.

²³² Cf. Stephen Vladeck, *The Federal Vacancies Reform Act and the VA: A Study in Uncertainty and Incompetence*, LAWFARE (May 23, 2018, 11:25 AM), <https://www.lawfareblog.com/federal-vacancies-reform-act-and-va-study-uncertainty-and-incompetence> [<https://perma.cc/6W5C-9X6N>] (describing the purpose of the FVRA as "giv[ing] the president flexibility to deal with unexpected vacancies, not to create vacancies himself and then sidestep existing succession schemes").

²³³ 5 U.S.C. § 3345(a)(1–3).

²³⁴ 5 U.S.C. § 3345(a)(1).

²³⁵ *Id.* § 3345(a)(2–3). Although the law states that no acting officer may hold the vacant position for more than 210 days, an acting officer may generally serve much longer during the pendency of the first and second nominations of an official for Senate confirmation. See *id.* § 3346 (stating that a person may serve "no longer than 210 days beginning on the date the vacancy occurs; or . . . once a first or second nomination for the office is submitted to the Senate, from the date of such nomination for the period that the nomination is pending in the Senate").

²³⁶ See O'Connell, *supra* note 224 (listing some of the selected acting IGs and their previous positions).

²³⁷ See Donnelly, *supra* note 199.

²³⁸ O'Connell, *supra* note 224 (explaining that Fine was not acting DOD IG at the time of his demotion, though he was leading the office as its principal deputy, because time limits to serve in an acting capacity under the FVRA had expired).

President Trump selected a political appointee over career officials in the IG's office.²³⁹ For example, when President Trump fired the State Department IG, he designated Stephen Akard, who held a political appointment as the Director of Foreign Missions, to the acting role.²⁴⁰ Similarly, when President Trump replaced Mitchell Behm as Acting DOT IG, he named Skip Elliott, administrator of the Pipeline and Hazardous Materials Safety Administration (PHMSA) which is an agency within DOT, to serve as Acting DOT IG.²⁴¹

The State Department and DOT acting IG appointments implicated conflict of interest concerns because the new acting IGs had dual loyalties to policy responsibilities and oversight duties.²⁴² As noted above, at the time of the acting appointments, the State Department IG office and DOT IG office had ongoing investigations relating to the department heads.²⁴³ Senator Grassley implored the President to avoid "obvious conflicts" in acting appointments "that unduly threaten the statutorily required independence of inspectors general."²⁴⁴ The White House response did not address the conflict of interest concerns, but rather, touted the compliance of the acting appointments with the Vacancies Act and the qualifications of the new acting IGs.²⁴⁵ Separate from the conflicts concerns, critics had questioned the acting officials' lack of relevant investigative or audit experience.²⁴⁶

And therein lies the problem. Nothing in the FVRA or the Inspector General Act ultimately prevented President Trump from making acting appointments of individuals who had clear conflicts of interest and insufficient qualifications.

2. IG Permanent Appointments

President Trump's nominations for vacant IG positions also presented concerns that he sought loyalty in these appointees, rather than the requisite independence and expertise.²⁴⁷

²³⁹ *Id.*

²⁴⁰ See Deirdre Shesgreen, 'Lapdog' or Watchdog? The State Department's New Inspector General Under Fire for Conflicts of Interest, Inexperience, USA TODAY (June 1, 2020, 4:00 AM), <https://www.usatoday.com/story/news/politics/2020/06/01/trumps-pick-state-dept-watchdog-post-faces-conflicts-interest/5282680002/> [<https://perma.cc/WQ5A-27CN>].

²⁴¹ See Mintz, *supra* note 19.

²⁴² See Grassley et al., *supra* note 180, at 2.

²⁴³ See *supra* text accompanying notes 207–09, 211–12.

²⁴⁴ Grassley et al., *supra* note 180, at 2.

²⁴⁵ Cippolone, *supra* note 221, at 3–4.

²⁴⁶ See O'Connell, *supra* note 224 (noting these criticisms).

²⁴⁷ See, e.g., Morgan Chalfant, *Trump Nominates Former Aide to Serve as Intel Community Inspector General*, THE HILL (Sept. 23, 2020, 5:44 PM), <https://thehill.com/policy/national-security/517889-trump-nominates-former-nunes-aide-to-serve-as-intel-community> [<https://perma.cc/PZK8-LDUF>] (noting Trump's intelligence community IG nominee was a former aide to Representative Devin Nunes, a "loyal ally" of the President); Jessica Wehrman, *Democrats press DOT watchdog nominee on independence*, ROLL CALL (Aug. 6, 2020, 3:59 PM), <https://www.rollcall.com/2020/08/06/democrats-press-dot-watchdog-nominee-on-independence/>

Challenges filling vacancies with appropriate personnel are not unique to IGs. The appointment process is designed, in principle, for the President to nominate qualified individuals capable of responsibly carrying out the functions of high-level positions, with the Senate exercising its advice and consent to ensure nominees have the necessary skills, experience, and judgment to serve in the particular role.²⁴⁸ However, critiques of the appointments process cite a persistently high number of vacancies due to delays and a multitude of unqualified nominees who do not serve the public mission of agencies.²⁴⁹ IGs represent a specific case of the dual risks of extended vacancies and unqualified nominees.

Republican and Democratic administrations alike have been responsible for languishing IG vacancies, though the pace of nominations and appointments slowed considerably under the Obama administration.²⁵⁰ In the period from 2007 to 2016, the majority of IG positions had vacancies, and the appointment process to fill vacancies ranged from less than a month to over five years.²⁵¹ Concerns about IG vacancies continued during the Trump administration. As of July 2020, thirteen IG positions subject to presidential appointment remained vacant, with six pending nominations.²⁵² Several factors may explain the number and length of IG vacancies, including the increasingly contentious and laborious nature of the appointments process,²⁵³ qualifications requirements that may narrow the field of acceptable candidates,²⁵⁴ and even the pay scale for IGs, which could dissuade qualified candidates.²⁵⁵ Long-standing vacancies deprive an IG office of permanent leadership with

[<https://perma.cc/2KYT-52LY>] (discussing Senators' skepticism about the DOT IG nominee's stated commitment to independence after President Trump's removals of IGs).

²⁴⁸ See, e.g., 2 BRENNAN CENTER FOR JUSTICE, NAT'L TASK FORCE ON RULE OF LAW AND DEMOCRACY, PROPOSALS FOR REFORM 15 (2019).

²⁴⁹ *Id.* at 15–17.

²⁵⁰ See generally JOHNSON & NEWCOMER, *supra* note 12, at 69 (summarizing data showing the average period of IG vacancies for administrations from President Reagan through President Obama).

²⁵¹ GEN. ACCOUNTABILITY OFF., INSPECTORS GENERAL, INFORMATION ON VACANCIES AND IG COMMUNITY VIEWS ON THEIR IMPACT 11 (2018) [hereinafter GAO 2018 REPORT], <https://www.gao.gov/assets/700/690561.pdf> [<https://perma.cc/24XZ-ELQN>].

²⁵² See Oversight.gov, *Inspector General Vacancies*, <https://web.archive.org/web/20200617001129/https://oversight.gov/ig-vacancies> [<https://perma.cc/2MBJ-SDF4>] (last visited Oct. 27, 2021). See generally Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613, 654–55 (2020) (reporting that of 301 lower-level appointed, cabinet positions as of April 2019, acting officials occupied approximately 13 percent of the positions, and approximately 22 percent of the positions were vacant with no acting official in place).

²⁵³ See 2 BRENNAN CENTER FOR JUSTICE, *supra* note 248, at 15–17 (citing “hyperpartisanship,” “obstruction,” unqualified nominees, and “structural” factors such as a large number of positions to vet).

²⁵⁴ Cf. O'Connell, *supra* note 224 (arguing that legal requirements can influence the pace of confirmation process).

²⁵⁵ See GAO 2006 REPORT, *supra* note 166, at 11 (showing how under existing law, IGs

the authority to establish priorities and the support for independence derived from Senate confirmation.²⁵⁶

Permanent IG appointments warrant evaluation of a candidate's capacity to perform independent oversight that will inevitably involve some confrontation with agency officials over investigative steps, findings, or recommendations that may uncover wrongdoing or expose the administration to embarrassment, criticism, or further scrutiny.²⁵⁷ As noted above, the essential qualifications set forth in the Inspector General Act are independence and relevant expertise.²⁵⁸ Administrations might nonetheless seek to control oversight of their activities by appointing individuals to IG positions based on expectations of political loyalty, rather than a commitment to independence.

President Trump's post-removal nominations raised such concerns. For example, he nominated Eric Soskin, a DOJ attorney, to become DOT IG.²⁵⁹ Democratic Senators questioned his ability to maintain independence in light of the IG removals and the ongoing investigation of DOT Secretary Chao, Senator McConnell's wife.²⁶⁰ President Trump also nominated Allen D'Souza, then an attorney with the National Security Council, to become the IG for the intelligence community.²⁶¹ D'Souza had previously been minority staff director of the House Intelligence Committee and an aide to Representative Devin Nunes.²⁶² The irony of this nomination was unmistakable:

could be paid less than the Senior Executive Service (SES) staff in their offices who report to them).

²⁵⁶ Compare Letter from CIGIE to Mitch McConnell, U.S. Senate Majority Leader and Harry Reid, U.S. Senate Democratic Leader, at 2 (November 7, 2016), [https://www.ignet.gov/sites/default/files/files/CIGIE_Senate_Letter_IG_Vacancies_07Nov16%20\(1\).pdf](https://www.ignet.gov/sites/default/files/files/CIGIE_Senate_Letter_IG_Vacancies_07Nov16%20(1).pdf) [<https://perma.cc/3D4J-9LKK>] (“[N]o matter how able or experienced an acting Inspector General may be, a permanent IG has the ability to exercise more authority in setting new policies and procedures and, by virtue of the authority provided for in the IG Act, inevitably will be seen as having greater independence.”), with GAO 2018 REPORT, *supra* note 251, at 28–41 (referencing the survey responses of acting IGs who reported that acting status did not negatively impact their ability to fulfill IG duties).

²⁵⁷ Cf. Farber & O’Connell, *supra* note 178, at 1396 (referencing the relationship between IGs and agencies as “often adversarial”).

²⁵⁸ 5 U.S.C. 3(a) (requiring appointments “without regard to political affiliation and solely on the basis of integrity,” and to and “demonstrated ability” in relevant fields); see also S. REP. NO. 95-1071, at 25 (1978) (explaining that statutory qualifications sought to “safeguard against the appointment of an Inspector and Auditor General that is motivated by any considerations other than merit”).

²⁵⁹ Wehrman, *supra* note 247.

²⁶⁰ See *id.* In December 2020, the Senate confirmed Soskin along partisan lines by a 48 to 47 vote. See Charlie Savage, *Biden Faces Dilemma on What to Do With Watchdogs Appointed by Trump*, N.Y. TIMES (Feb. 2, 2021), <https://www.nytimes.com/2021/02/02/us/politics/biden-faces-dilemma-on-what-to-do-with-watchdogs-appointed-by-trump.html> [<https://perma.cc/BD6S-7E2P>] (noting tradition that most IGs were historically confirmed unanimously).

²⁶¹ Julian E. Barnes, *Trump Nominates Former Nunes Aide to Intelligence Watchdog Post*, N.Y. TIMES (Sept. 23, 2020), <https://www.nytimes.com/2020/09/23/us/politics/intelligence-community-inspector-general-nomination.html> [<https://perma.cc/EGB8-ZNBC>].

²⁶² See *id.* The Senate did not act on the D’Souza nomination after the 2020 election. See

President Trump selected a Nunes ally, who helped shape resistance to investigations of the President,²⁶³ to replace Atkinson, whose disclosure of the whistleblower complaint to Congress gave rise to the first impeachment investigation concerning Ukraine.²⁶⁴

In addition, following the IG removals, Congress created a Special Inspector General for Pandemic Recovery to oversee the federal government's emergency pandemic spending programs.²⁶⁵ For this position, President Trump nominated Brian Miller, who was confirmed largely along partisan lines.²⁶⁶ On the one hand, Miller appeared to be a suitable candidate because he previously served for 10 years as an IG for the General Services Administration.²⁶⁷ However, just prior to the Special IG nomination, he was an Associate White House Counsel, advised President Trump on responding to the first impeachment inquiry, and was involved in decisions to withhold information during the investigation.²⁶⁸ The failure to provide information during the investigation was part of the allegations for the obstruction of Congress charge in the Articles of Impeachment against President Trump.²⁶⁹

III. REINFORCING INSPECTOR GENERAL INDEPENDENCE

The President's use of the appointment and removal powers shapes the strength of IG independence. President Trump's removal of IGs subverted independence by misusing the removal power to punish or prevent the legitimate performance of oversight responsibilities. His appointment of permanent or acting IGs with conflicts of interest, political loyalties, or questionable qualifications created the reality or appearance of insufficient independence. Limitations on the President's exercise of these powers—both legal and normative—hold the potential to counter this abuse and prevent similar occurrences in the future. To reinforce IG independence, members of Congress have offered several proposals to amend the laws relating to the removal and appointment of IGs,²⁷⁰ and the House recently passed the Inspector General

also [Congress.gov, PN2248—Allen Robert Souza—Office of the Director of National Intelligence](https://www.congress.gov/nomination/116th-congress/2248), <https://www.congress.gov/nomination/116th-congress/2248> [<https://perma.cc/B76J-2M3F>] (noting that D'Souza's nomination was returned to the President).

²⁶³ See Barnes, *supra* note 261.

²⁶⁴ See *supra* notes 200–03 and accompanying text.

²⁶⁵ See Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 4018, 134 Stat. 482, 482–85 (2020).

²⁶⁶ See Courtney Buble, *Senate Confirms Brian Miller to Be Pandemic Inspector General*, GOV'T EXEC. (June 2, 2020), <https://www.govexec.com/oversight/2020/06/senate-confirms-brian-miller-be-pandemic-inspector-general/165842/> [<https://perma.cc/QY7N-KZEQ>].

²⁶⁷ *Id.*

²⁶⁸ See *id.*

²⁶⁹ See Articles of Impeachment Against Donald John Trump, H.R. Res. 755, 116th Cong. (2019) (enacted).

²⁷⁰ See generally CONG. RES. SERV., *supra* note 9, at 1–3 (summarizing bills).

Independence and Empowerment Act.²⁷¹ This Part analyzes the constitutionality of these proposals, examines policy application, and suggests several considerations for lawmakers.

A. Inspector General Removal for Cause Protection

In response to President Trump's IG terminations, members of the Senate and the House offered several bills that would require cause to remove an IG.²⁷² Historically, Congress has enacted an array of similar for-cause removal provisions for members of commissions²⁷³ and individual executive officers, including the Commissioner of Social Security,²⁷⁴ the Special Counsel in the OSC,²⁷⁵ and the now-lapsed independent counsel.²⁷⁶ The United States Postal Service (USPS) IG is the one IG who already has removal protection.²⁷⁷ However, the Supreme Court's recent decisions on the removal power indicate that an IG removal for cause provision would be susceptible to constitutional challenge.²⁷⁸

1. Constitutionality

The constitutionality of an IG removal for cause provision presents a specific iteration of the larger debate between formalists and functionalists surrounding the scope of executive and legislative powers. As previously discussed, formalists emphasize political accountability as the foundation for a broad presidential removal power, while functionalists focus on the countervailing value of good governance to justify modest legislative limits on that power and secure independence.²⁷⁹ Indeed,

²⁷¹ Inspector General Independence and Empowerment Act of 2021, H.R. 2662, 117th Cong. § 102 (as passed by the House, June 29, 2021).

²⁷² See generally CONG. RES. SERV., *supra* note 9, at 1–2 (listing nine separate bills in 2020 containing various formulations of IG removal for cause protection, some with fixed terms).

²⁷³ See *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2232–33 (2020) (Kagan, J., dissenting in part) (noting for-cause protections for members of the Federal Reserve, Federal Trade Commission, and other commissions).

²⁷⁴ 42 U.S.C. § 902(a)(3) (Commissioner “may be removed from office only pursuant to a finding by the President of neglect of duty or malfeasance in office.”).

²⁷⁵ 5 U.S.C. § 1211(b) (Special Counsel may be removed for “inefficiency, neglect of duty, or malfeasance in office.”).

²⁷⁶ 28 U.S.C. § 596(a)(1) (repealed) (no removal of the independent counsel except for “good cause, physical or mental disability (if not prohibited by law protecting persons from discrimination on the basis of such a disability), or any other condition that substantially impairs the performance of such independent counsel’s duties”).

²⁷⁷ 39 U.S.C. § 202(e)(3) (USPS IG “may at any time be removed only upon the written concurrence of at least 7 Governors [on the USPS Board], but only for cause.”).

²⁷⁸ See *Seila Law*, 140 S. Ct. at 2211; *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 513–14.

²⁷⁹ See *supra* Section I.C.1.

this division was on display in the *Seila Law* and *Free Enterprise Fund* majority and dissenting opinions, underscoring two different forms of accountability that modulate Justices' divergent approaches to removal protection: democratic accountability, which animates the formalist interest in presidential control, and good government accountability, which supports some functional constraint on that control.²⁸⁰ Constitutional analysis of IG for-cause protection offers an opportunity to integrate an understanding of the IG institution's function as an internal constraint on power into removal doctrine and to interpret its significance alongside concepts of presidential accountability, executive control, and its reasonable limits.

The *Seila Law* majority's framework would apply to IG removal protection. The Court narrowed the grounds for removal protection by recasting *Humphrey's Executor* and *Morrison* as exceptions, but did not overrule these decisions.²⁸¹ Removal protection may be permissible "for multimember expert agencies that do not wield substantial executive power" and "for inferior officers with limited duties and no policymaking or administrative authority."²⁸² The *Humphrey's Executor* exception does not apply to the proposed IG removal protection because IGs are not members of commissions.²⁸³ However, as officers who perform internal oversight functions of audits and investigations, IGs may qualify for protection under *Morrison* based on the nature of their office, duties, and powers.²⁸⁴

A closer look at *Morrison* is warranted. The independent counsel in *Morrison* was an office designed for investigation and prosecution of high-ranking officials in cases when the DOJ may have potential conflicts of interest. The Attorney General could request that a special court appoint an independent counsel and, once appointed, the independent counsel had the power to investigate and prosecute particular federal crimes.²⁸⁵ The law contemplated reporting by the independent counsel to Congress and an end to the independent counsel's tenure upon notice of the completion of investigations or prosecutions.²⁸⁶ In describing *Morrison*, the *Seila Law* majority identified the contours of its stated exception:

Although the independent counsel was a single person and performed "law enforcement functions that typically have been

²⁸⁰ Compare *Seila Law*, 140 S. Ct. at 2203 (articulating values of democratic accountability), with *Seila Law*, 140 S. Ct. at 2231 (Kagan, J., dissenting in part) (articulating values of good government accountability).

²⁸¹ See *Seila Law*, 140 S. Ct. at 2206.

²⁸² *Id.* at 2199–2200 (describing these grounds as "'represent[ing] what up to now have been the outermost constitutional limits of permissible congressional restrictions on the President's removal power.'" (quoting *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 196 (D.C. Cir. 2018) (en banc) (quoting Kavanaugh, J., dissenting))).

²⁸³ See *id.* at 2199.

²⁸⁴ See *Morrison*, 487 U.S. at 695–96.

²⁸⁵ See *id.* at 660–61.

²⁸⁶ See *id.* at 660–65.

undertaken by officials within the Executive Branch,” we concluded that the removal protections did not unduly interfere with the functioning of the Executive Branch because “the independent counsel [was] an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority.”²⁸⁷

Accordingly, based on the *Seila Law* reading of permissible removal protection under *Morrison*, this exception’s applicability turns on determinations that the role qualifies as an “inferior officer” and has limited duties and authority.²⁸⁸

The term “inferior officers” appears in the Appointments Clause.²⁸⁹ Unlike principal officers, who must be appointed by the President with the advice and consent of the Senate, Congress has the option to “vest” appointment authority for “inferior officers” in “the President alone, in the courts of law, or in the heads of departments.”²⁹⁰ In *Morrison*, the Court found that the independent counsel was an inferior officer, but observed that “[t]he line between inferior and principal officers is one that is far from clear.”²⁹¹ The Court has since made clear that the appointment method is not determinative because presidential appointment with the Senate’s advice and consent applies not only to principal officers, but also, is “the default manner of appointment for inferior officers.”²⁹²

In *Edmond v. United States*, one year after the *Morrison* decision, the Court linked the classification of inferior officers to their accountability to a higher-level officer:

Generally speaking, the term “inferior officer” connotes a relationship with some higher-ranking officer or officers below the President: Whether one is an “inferior” officer depends on whether he has a superior. . . . [I]n the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that “inferior officers” are officers whose work is directed and supervised at some

²⁸⁷ *Seila Law*, 140 S. Ct. at 2199.

²⁸⁸ *See id.*

²⁸⁹ U.S. CONST. art. II, § 2, cl. 2.

²⁹⁰ *See id.* *See also* *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (“Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary.”).

²⁹¹ *See Morrison*, 487 U.S. at 671–72 (holding that the independent counsel, whose appointment Congress had vested in a special court, was an inferior officer removable for cause by the Attorney General).

²⁹² *See Edmond v. United States*, 520 U.S. 651, 660–61 (1989) (holding that Coast Guard judges were inferior officers).

level by others who were appointed by Presidential nomination with the advice and consent of the Senate.²⁹³

The reliance on accountability for inferior officer determinations reveals a synergy with similar political accountability concerns in removal cases. This also suggests a mechanism for interpretation of IG removal for cause protection—removal limits may be permissible as long as the protected officer is accountable to a higher appointed officer.

In this light, IGs are inferior officers and satisfy the *Morrison* exception because their oversight relies, in large part, on the President and agencies for ultimate accountability.²⁹⁴ Each IG has limited jurisdiction with respect to a particular department or agency.²⁹⁵ The Inspector General Act explicitly states that IGs do not have policymaking authority²⁹⁶ and provides that IGs operate to some extent under the “general supervision” of the agency head.²⁹⁷ To be sure, IGs have broad investigatory powers and authority to review matters without interference from agency heads.²⁹⁸ However, while IGs report findings and make recommendations, these reports are advisory; they lack independent enforcement authority to compel the President or agencies to act on their findings or execute their recommendations.²⁹⁹ IGs thus have a degree of accountability to higher officers because they present information for further action that the President or agency heads deem appropriate.

Functional assessment of the IG role as an internal constraint on the Executive Branch demonstrates that removal is not the primary tool—much less a necessary one—for response to IG oversight and vindication of presidential accountability.³⁰⁰ IGs have significant responsibility based on their investigative duties and reporting obligations for transparency, but they cannot bind the Executive Branch to implement

²⁹³ *Id.* at 662–63.

²⁹⁴ *See Morrison*, 487 U.S. at 695–96; *Edmond*, 520 U.S. at 662–63.

²⁹⁵ *See* 5 U.S.C. § 6(e).

²⁹⁶ *See id.* at §§ 9(a), 8G(b) (stating that IGs do not have “program operating responsibilities”).

²⁹⁷ *See id.* at § 3(a); *see also* *NASA v. FLRA*, 527 U.S. 229, 241 (1999) (“As far as the [Inspector General Act] is concerned, NASA-OIG’s investigators are employed by, act on behalf of, and operate for the benefit of NASA.”).

²⁹⁸ *See id.* at §§ 3(a), 6(a).

²⁹⁹ *See Edmond*, 520 U.S. at 665 (“What is significant [for the inferior officer determination] is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers.”); *accord* *United States v. Arthrex Inc.*, 141 S. Ct. 1970, 1981 (2021) (explaining that “review by a superior executive officer” supported the inferior officer determination in *Edmond*).

³⁰⁰ *Cf.* Sitaraman, *supra* note 121, at 396 (arguing that “nothing but intuition” supports the connection between removal and political control because while “‘fear’ and ‘threat[s]’ is one approach to management[,] . . . it is not the only one”); Huq, *supra* note 121, at 33–34 (challenging the Court’s “binary” notion that presidential control turns on at-will removal authority exists, and arguing that the multiplicity of control mechanisms across institutions warrants analysis).

recommended reforms.³⁰¹ The President and agencies hold the power to discipline staff, to pursue remedies from contractors, or make policy changes based on IG reports. This arrangement highlights the relevance of alternative control mechanisms when evaluating whether at-will removal authority is truly a constitutional requirement for accountability.³⁰² The President and agency heads exercise control in response to IG oversight through administrative, policy, and personnel decisions that represent ultimate judgments of accountability.³⁰³ IG oversight facilitates the President's faithful execution of the law in providing factual information about government operations for these judgments of accountability that remain within the discretion of the President and agency heads. Accordingly, under the *Seila Law* framework, removal protection for IGs is permissible.

The analysis has two important caveats, however. First, though IG removal protection appears to comply with *Seila Law*, it may present a separate *Free Enterprise Fund* problem. Several IGs are assigned to oversee agencies, boards, or commissions where its head or members already have removal protection.³⁰⁴ Were Congress to enact a blanket removal protection for all IGs, it would create dual for-cause protection, which arguably runs afoul of *Free Enterprise Fund*.³⁰⁵ However, "considerable uncertainty about the scope of its holding" remains.³⁰⁶ On the one hand, the holding applied to PCAOB members who were "inferior officers" within a dual for-cause structure.³⁰⁷ Justice Breyer's dissent provided a list of hundreds of inferior officers who also had removal protection within a dual for-cause structure and, therefore, warned of the decision's potentially far reaching implications.³⁰⁸ To address this concern, Justice Roberts's majority opinion suggested *Free Enterprise Fund* was a narrow holding when he declared that "none of the positions [the dissent] identifies are similarly situated to the Board."³⁰⁹

³⁰¹ See 5 U.S.C. § 2.

³⁰² See Huq, *supra* note 121, at 26–32 (discussing a range of "alternative control mechanisms" to removal and arguing that the "observed varieties of political control technologies" undermine the Court's presupposed centrality of removal to presidential control).

³⁰³ See *id.*

³⁰⁴ See 12 U.S.C. § 242 (Federal Reserve); 15 U.S.C. § 2053(a) (Consumer Product Safety Commission); 5 U.S.C. § 7104(b) (Federal Labor Relations Authority); 46 U.S.C. § 301(b)(3) (Federal Maritime Commission); 15 U.S.C. § 41 (FTC); 29 U.S.C. § 153 (National Labor Relations Board); 42 U.S.C. § 5841(e) (Nuclear Regulatory Commission); 39 U.S.C. § 502(a) (Postal Regulatory Commission); 42 U.S.C. § 902(a)(3) (Social Security Administration); 49 U.S.C. § 1301(b)(3) (Surface Transportation Board).

³⁰⁵ See *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 496–97 (as noted above, the USPS IG is the one IG who is already part of a dual structure under USPS governors with good cause protection); see also 39 U.S.C. §§ 202(a)(1), (e)(3).

³⁰⁶ See *id.* at 536–37 (Breyer, J., dissenting).

³⁰⁷ See *id.* at 483–84.

³⁰⁸ See *id.* at 540–41 (Breyer, J., dissenting) (identifying forty-eight agencies, more than five hundred SES officials, and Administrative Law Judges (ALJs) with dual for-cause protection).

³⁰⁹ See *id.* at 506; see also Patricia Bellia, *PCAOB and the Persistence of the Removal*

Though this declaration is difficult to square with the apparent breadth of majority's reasoning elsewhere, the functional analysis of IG duties above supports the distinction. Whereas the PCAOB can initiate disciplinary proceedings and issue substantial monetary penalties,³¹⁰ IGs report to higher level officials who have the discretion to take further action, which may place IG removal protection on safer ground within a dual for-cause structure. Congress has the option to test this approach by proceeding with the existing proposal that applies to all IGs or avoid any potential problem by omission of removal protection for IGs who would otherwise be within a dual structure. If the latter, most of this subset of IGs would retain the existing procedural protection derived from the requirement that a majority of board members or commissioners vote to remove the IG.³¹¹

Second, despite the arguments above, the Court's recent wariness to extend removal protection to "new situation[s]"³¹² suggests that it may decline application of *Morrison* to IG removal protection based on distinctions between the independent counsel and IGs. Unlike the independent counsel in *Morrison*, IGs do not have a limited tenure, though Congress could address the issue by conjoining removal protection with a fixed term of office.³¹³ In addition, the independent counsel's jurisdiction in *Morrison* required appointment by a special court upon request of the Attorney General and ended upon completion of the underlying investigation or prosecution.³¹⁴ In contrast, IGs retain ongoing authority to initiate review of agency matters for fraud, waste, and abuse without need for a special request by another official.³¹⁵

But these distinctions do not justify confinement of *Morrison*. IG powers of review are "trained inward" toward government officials as was the case with the independent counsel.³¹⁶ Further, as argued above, the results of review are subject

Puzzle, 80 GEO. WASH. L. REV. 1371, 1411 (2012) (explaining that "the Court sought to refocus assessment of removal disputes" but "took pains to emphasize the narrowness of its holding—in particular, that the holding carried no implications for the civil service or for ALJs").

³¹⁰ See *Free Enterprise Fund*, 561 U.S. at 485–86.

³¹¹ See 5 U.S.C. § 8G(e)(1) (two-thirds majority for board or commission to remove an IG); 39 U.S.C. § 202(e) (seven of nine governors must concur to remove the USPS IG).

³¹² See *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2201 (2020).

³¹³ Compare Inspectors General Independence Act of 2020, S. 3664, 116th Cong. § 2(a–b) (as introduced in S. Comm. On Homeland Security & Governmental Affairs, May 7, 2020) (proposing a seven-year term of office), with Protecting Our Democracy Act of 2020, H.R. 8363, 116th Cong. §§ 702, 711 (as introduced in the H. Comm. on Oversight & Reform in addition to other committees, Sept. 23, 2020) (no fixed term). One potential concern is that fixed terms may politicize the role if an IG seeks reappointment, though vetting for a renewed term would likely consider the candidate's reputation for independence. A term of office also offsets the stronger removal protection by providing an opportunity at a fixed point in time to evaluate work performance. See *Datla & Revesz*, *supra* note 67, at 791 ("[A] term of tenure ensures that the Senate will have a chance to review an officer's performance").

³¹⁴ See *Morrison v. Olson*, 487 U.S. 654, 661 (1988).

³¹⁵ See 5 U.S.C. § 6(a)(2).

³¹⁶ See *Morrison*, 487 U.S. at 661.

to the discretion and control of other executive officials.³¹⁷ The logic of *Morrison*, when read alongside *Edmond*, applies to IGs because they are inferior officers with limited powers reliant on higher-level officials to act on oversight. Fidelity to these precedents warrants reading them to permit Congress to protect IGs from removal.

Nonetheless, the Court's tone in recent cases suggests it is less inclined these days to "toggle" between formalist rules of executive power and functional standards of congressional limitation to suit the needs of independence than it has been in the past.³¹⁸ Consequently, in addition to consideration of the constitutional implications of IG removal protection, Congress should also evaluate alternative structural arrangements that may incorporate removal protection and enhance IG independence. These options include restructuring the IG institution as an (1) independent, multi-member commission; (2) court-appointed officers; or (3) agency appointees. This section will offer some general observations about these options.

An IG commission would have benefits from an institutional perspective in coordinating the oversight activities of the IG community by leveraging existing CIGIE structures. With commissioners appointed by the President to provide overall direction for agency oversight, subordinate IGs could continue in their assignments to specific agencies. However, such a commission would mean IGs no longer reside within their agencies. Further, while at first glance the structure would appear to fit under *Humphrey's Executor* as a basis for removal protection, an IG commission would present its own constitutional challenges.³¹⁹ The *Seila Law* majority described *Humphrey's Executor* as "permit[ing] Congress to give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power."³²⁰ An IG commission would not provide a foundation for removal protection due to the commission's performance of executive investigative and audit functions.³²¹

Another possible alternative would transform IGs into court-appointed officers as in *Morrison*.³²² As noted, the independent counsel provisions gave a special court, upon application by the Attorney General, the authority to appoint the counsel and gave the President, through the Attorney General, the authority to remove for cause.³²³

³¹⁷ See *Edmond v. United States*, 520 U.S. 651, 662–63 (1989).

³¹⁸ See Aziz Huq & Jon Michaels, *The Cycles of Separation of Powers Jurisprudence*, 126 *YALE L.J.* 346, 349 (2016) (explaining that the Court employed an "open textured standard" in *Morrison*, versus a "hard-edged rule" in *Free Enterprise Fund*).

³¹⁹ See Shugerman, *supra* note 148 (suggesting a commission structure for IGs as a mechanism to "take presidents and precedents seriously, and . . . value the historical evolution of independence within the executive branch").

³²⁰ *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2199 (2020).

³²¹ See *id.* at 2200 n.4 (rejecting the dissent's "imagined *Humphrey's-through-Morrison* framework" for applying removal limits to executive officers with significant rule-making, enforcement, and adjudicatory powers).

³²² See Huq, *supra* note 10 (suggesting IG appointment by the courts as a response to *Seila Law*).

³²³ See *Morrison*, 487 U.S. at 663.

The delegation of IG appointments to a court would bring IGs in closer proximity to the independent counsel structure in *Morrison*.³²⁴ However, as discussed above, the appointment structure does not dictate the constitutional availability of removal protection.³²⁵ Moreover, this interbranch appointment method is better aligned with a counsel who will make charging decisions and may litigate in court than with IGs who hold nonlitigating, oversight positions.

A final option involves vesting agency heads with sole appointment authority for all IGs. This is a familiar structure in that agency heads already appoint roughly half of IGs, without the need for any Senate approval, and have removal authority. Congressional intent to vest agency heads with appointment authority may also offer some additional support to a constitutional determination that IGs are inferior officers.³²⁶ However, one advantage of presidential nomination of IGs is the separation of agency heads from the selection of the IGs who will monitor their agency, which could risk compromising independence.

These new structures are reasonable, albeit imperfect options for Congress to consider in response to presidential abuse and the Court's departure from the long-standing constitutional principle identified by the *Seila Law* dissent—"Congress could protect from at-will removal the officials it deemed to need some independence from political pressure," as long as limits did not impede the President's execution of duties.³²⁷ However, because these options present their own constitutional or policy challenges, the advisable course for Congress to enhance independence is an amendment providing removal for cause protection, along with a fixed term of office, and consideration of a possible *Free Enterprise Fund* carve out to avoid dual for-cause structures.

2. Policy Application

In addition to its constitutionality, it is important to examine the policy implications of an IG removal for cause proposal—both whether the proposed law provides IGs with adequate protection against removal for legitimate performance of their oversight duties and articulates an administrable standard that sets forth acceptable reasons for termination with a reasonable degree of clarity.

Removal for cause protections seek to secure independence from presidential or agency head interference by minimizing the threat of arbitrary terminations.³²⁸

³²⁴ See Huq, *supra* note 10.

³²⁵ See *supra* Section II.A. See *supra* notes 316–18 and accompanying text.

³²⁶ See *United States v. Perkins*, 116 U.S. 483, 485 (1886) ("We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of departments it may limit and restrict the power of removal as it deems best for the public interest."); see also *Morrison*, 487 U.S. at 689 n.27 (citing *Perkins* approvingly).

³²⁷ *Seila Law*, 140 S. Ct. at 2233 (Kagan, J., dissenting).

³²⁸ See Barkow, *supra* note 68, at 30 ("A removal restriction undoubtedly gives an agency head greater confidence to challenge presidential pressure.").

They specify permissible reasons for a removal action and prohibit terminations that lack proper justification.³²⁹ But the meaning of statutory good cause protections remains unclear because the Court has not decided a case interpreting the meaning,³³⁰ though it has occasionally offered passing comments on the scope of protection.³³¹ Recently, in *Seila Law*, the Court declined the invitation to engage in constitutional avoidance by construing the CFPB director's removal for cause provision "to reserve substantial discretion to the President," stating that the argument had not offered "any workable standard derived from the statutory language."³³² This underscores the importance of testing the practical application of the IG removal for cause proposal in real and potential cases—a workable statutory standard may factor into the constitutional analysis.

The Inspector General Independence and Empowerment Act bars IG removal unless the action satisfies one of several specified reasons:

- (A) Documented permanent incapacity.
- (B) Documented neglect of duty.
- (C) Documented malfeasance.
- (D) Documented conviction of a felony or conduct involving moral turpitude.
- (E) Documented knowing violation of a law or regulation.
- (F) Documented gross mismanagement.
- (G) Documented gross waste of funds.
- (H) Documented abuse of authority.
- (I) Documented inefficiency.³³³

³²⁹ Cf. Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does it Matter?*, 77 N.Y.U. L. REV. 6, 9–10 (2002) (describing the operation of good cause requirements as to private employees).

³³⁰ See Datla & Revesz, *supra* note 67, at 787 (explaining that "[t]he exact meaning of for-cause protection clauses is uncertain" because "the Supreme Court has not decided a case defining th[e] terms"); Lessig & Sunstein, *supra* note 26, at 110 (noting that "the Court has not said what 'good cause' means," and "also failed to define 'inefficiency, neglect of duty, or malfeasance in office'—the ordinary standards for presidential removal").

³³¹ See *Free Enter. Fund v. Public Company Acct. Oversight Bd.*, 561 U.S. 477, 503 (2010) (describing the "unusually high standard" for removal of PCAOB members requiring "willful" violations of securities law, abuse of authority, or "unreasonable failure to enforce compliance"); *Morrison*, 487 U.S. at 692 (without deciding the scope of "good cause" protection, suggesting that misconduct would be a permissible basis to remove the independent counsel); *Bowsher v. Synar*, 478 U.S. 714, 715, 729 (1986) (describing the terms of a for-cause removal provision as "very broad" and allowing removal "for any number actual or perceived transgressions").

³³² *Seila Law*, 140 S. Ct. at 2206 (considering the "inefficiency, neglect of duty, and malfeasance in office" provision for the CFPB director).

³³³ See Inspector General Independence and Empowerment Act of 2021, H.R. 2662, 117th Cong. § 102 (as passed by the House, June 29, 2021).

This language offers a broader set of reasons for removal than numerous existing removal for cause statutes,³³⁴ as well as other recent bills containing IG removal for cause protection.³³⁵ The provision also requires that reasons be “documented” in the requisite notice to Congress.³³⁶ The documentation requirement in the IG removal for cause proposal shares an interest in justification with a separate proposal before the Senate that seeks to enhance the procedural notice requirements for removal.³³⁷ However, enhanced notice, which responds to President Trump’s inadequate explanations when he fired IGs, does not provide a substantive standard to evaluate the propriety of removals. Conversely, the IG removal for cause proposal imposes both substantive and procedural requirements.

As a response to President Trump’s removal of IGs, the proposed law offers IGs protection from future retaliatory terminations for their legitimate performance of oversight responsibilities. Had IG removal for cause protection existed at the time, the President’s terminations of Atkinson and Linick would have violated the law. In Atkinson’s case, post hoc explanations by the White House and Attorney General contend that Atkinson erred in his judgment that the anonymous whistleblower reported an “urgent concern” requiring disclosure to Congress.³³⁸ However, Atkinson followed the law by initially reporting his determination to the Director of National Intelligence and, when they disagreed about reporting to Congress, notifying Congress about the disagreement; the Director, not Atkinson, ultimately shared the letter with Congress.³³⁹ Atkinson’s compliance with requirements for handling the Ukraine

³³⁴ See Datla & Revesz, *supra* note 67, at 787 (generally describing “inefficiency, neglect of duty, and malfeasance” as the typical grounds for removal in for-cause statutes).

³³⁵ See Inspectors General Independence Act of 2020, S. 3664, 116th Cong. § 2(a–b) (as introduced in S. Comm. On Homeland Security & Governmental Affairs, May 7, 2020) (proposing fewer grounds for removal); Inspectors General Independence Act of 2020, H.R. 6668, 116th Cong. § 2(a–b) (as introduced in H. Comm. on Oversight & Reform, May 1, 2020) (same).

³³⁶ Inspector General Independence and Empowerment Act of 2021, H.R. 2662, 117th Cong. § 102 (as passed by the House, June 29, 2021).

³³⁷ See Securing Inspector General Independence Act, S. 587, 117th Cong. § 2(a) (as introduced by S. Comm. on Homeland Security & Governmental Affairs, Mar. 4, 2021) (proposed requirement that the President’s notice include the “substantive rationale, including detailed and case-specific reasons” for IG termination).

³³⁸ See Letter from Senators Dianne Feinstein and Mark Warner to Jeffrey Ragsdale, Office of Professional Responsibility, and Michael Horowitz, DOJ IG (Apr. 17, 2020) [hereinafter Letter from Feinstein & Warner] (discussing these explanations).

³³⁹ See 50 U.S.C. § 3033 (k)(3)(A)(i) (stating that the intelligence community IG “shall immediately notify, and submit a report to, the congressional intelligence committees on [any] matter” where the IG is unable to resolve disagreement about execution of IG duties with the Director); see also Letter from Feinstein & Warner, *supra* note 338. Congress has also introduced legislation that would eliminate the requirement that the intelligence community IG first bring an “urgent concern” to the Director of National Intelligence before reporting to

whistleblower complaint defeats any suggestion that his lawful disclosures would have satisfied one of the removal grounds under the proposed law.

In Linick's case, Secretary Pompeo's purported reason for termination was alleged IG office leaks to the media about a draft version of the report on politicized personnel actions at the State Department, but his advisor conceded that Linick was not personally responsible for the purported leaks.³⁴⁰ After Linick's termination, the matter was referred to CIGIE's Integrity Committee for review, which determined that Linick not only did not disclose information about the draft report to the media, but had requested that a separate IG office investigate the allegation.³⁴¹ While the demonstration of improper disclosures about an ongoing investigation could qualify as an abuse of authority or violation of law in other circumstances, these grounds did not apply to Linick.³⁴² The absence of evidence strongly suggests that the proffered reason sought to manufacture a basis for termination of an IG whose office had previously reported politicized personnel decisions and been actively investigating matters relating to the Secretary.

These cases demonstrate that an IG removal for cause provision would prohibit retaliatory terminations for legitimate oversight decisions, including the initiation of particular investigations, lawful disclosures, or reports of findings and recommendations. The challenge for policymakers is designing a law that also addresses scenarios beyond the politically motivated removals that gave rise to the proposal in the first place, including circumstances when the President or agency head should retain some discretion to remove an IG, such as substantiated instances of sufficiently serious misconduct, abuse of authority, mismanagement, or lack of integrity that may compromise IG independence.

The proposed law sets forth grounds for removal that appear to cover these circumstances.³⁴³ Consider its application to past conduct by IGs:

Congress and expand matters that constitute an "urgent concern." See Protecting Our Democracy Act of 2020, H.R. 8363, 116th Cong. § 712 (as introduced in the H. Comm. on Oversight & Reform in addition to other committees, Sept. 23, 2020).

³⁴⁰ Chris Cillizza, *Mike Pompeo's Explanation for the Firing of State's Inspector General Doesn't Make Sense*, CNN (May 19, 2020, 11:57 AM), <https://www.cnn.com/2020/05/19/politics/mike-pompeo-steve-linick-state-department/index.html> [<https://perma.cc/ZDU2-HDW6>].

³⁴¹ See Letter from Kevin H. Winters, Chairperson of the CIGIE Integrity Committee and Deborah J. Jeffrey, Vice Chairperson of the CIGIE Integrity Committee, to Michael E. Horowitz, Chairperson of CIGIE, and Allison C. Lerner, Vice Chairperson of CIGIE, at 1–2 (Dec. 29, 2020).

³⁴² See *id.* (finding "no reasonable basis to believe that IG Linick abused his authority in the exercise of official duties or while acting under color of office, or otherwise engaged in substantial misconduct, such as gross mismanagement, gross waste of funds, or a substantial violation of law, rule, or regulation, or conduct that undermines the independence or integrity reasonably expected of an Inspector General").

³⁴³ See Inspector General Independence and Empowerment Act of 2021, H.R. 2662, 117th Cong. § 102 (as passed by the House, June 29, 2021).

- A report determined that former FHFA IG Laura Wertheimer created “a culture of witness intimidation” by “ridiculing, belittling, and bullying her staff” for making lawful disclosures and obstructed the Integrity Committee investigation by withholding requested information.³⁴⁴
- Former State Department IG Howard Krongard was alleged to have, among other things, interfered with a labor trafficking investigation of a construction contractor working on the Iraq embassy and an arms smuggling investigation concerning a private security company where his brother was a board member.³⁴⁵
- A report found several actions by former NASA IG Robert Cobb created the appearance of a lack of independence, including decisions not to report a computer intrusion to the State Department after NASA failed to do so or to allow a public notice seeking information about the theft of a ring from the remains of a deceased Astronaut in the 2003 Columbia Space Shuttle explosion.³⁴⁶
- Another report determined that the former Department of Commerce IG Johnnie Frazier demoted two employees after they made complaints about his inappropriate travel expenditures.³⁴⁷
- Additional reports have found instances where IGs failed to disclose spousal employment in an agency unit that had been audited by the office or made improper discriminatory comments in the workplace.³⁴⁸

Each of these cases appear to meet the definition of removable offenses under the proposed law. In Wertheimer’s case, the report concluded that she “abused her authority” by engaging in the mistreatment of staff and witnesses in connection with

³⁴⁴ See Letter from Kevin H. Winters, Chairperson of the CIGIE Integrity Committee, to President Joseph R. Biden, at 4 (Apr. 14, 2021) [hereinafter Winters]; see also Rachel Siegel, *Inspector General Overseeing Federal Housing Agency Resigns, Months After Watchdog Report Finds Abuse of Authority*, WASH. POST (June 30, 2021, 6:00 AM), <https://www.washingtonpost.com/us-policy/2021/06/30/fhfa-inspector-general-resigns-laura-wertheimer/> [<https://perma.cc/X5GJ-YPHJ>] (reporting on the FHFA IG’s resignation).

³⁴⁵ See *Assessing the State Department Inspector General: Hearing Before the Comm. on Oversight and Government Reform*, 110th Cong. 1–4 (2007) (statement of Representative Henry A. Waxman, Chair) (describing complaints by senior IG officials that Krongard prevented a meaningful investigation of the embassy project, refused to cooperate with DOJ, and disclosed the existence of the security contractor investigation without DOJ’s permission).

³⁴⁶ Letter from James H. Burrus, Jr., Chair of the Integrity Committee, to Clay Johnson, III, Chairman, President’s & Executive Councils on Integrity and Efficiency (Jan. 7, 2007) (reporting on these issues, as well as the IG’s creation of an abusive work environment).

³⁴⁷ H.R. REP. 110-354, at 12 (2007) (discussing the OSC report and noting the IG’s retirement following its issuance).

³⁴⁸ See Integrity Committee, Fiscal Year 2014 Annual Report to Congress and the President, at 3–4 (2014), available at <https://www.oversight.gov/report/cigie/cigie-integrity-committee-fiscal-year-2014-annual-report> [<https://perma.cc/UTZ4-CLFF>].

the investigation,³⁴⁹ which shows an express finding that would satisfy the abuse of authority ground for removal under the proposed law.³⁵⁰ Krongard and Cobb would likely have been subject to removal for abuse of authority, neglect of duty, or inefficiency because the evidence in their cases, which included statements of officials in their IG offices, showed that they took steps contrary to accepted investigative standards and acted with insufficient independence.³⁵¹ Frazier would also have been subject to removal for a violation of law, malfeasance, or, possibly, a gross waste of funds for his proven retaliation against staff and inappropriate travel expenses.³⁵² In addition, the multiple grounds for removal cover a range of activities that qualify as potentially removable offenses, including the failure to disclose conflicts of interest and the creation of a discriminatory or hostile work environment.³⁵³

That the proposal requires “documented” grounds for removal responds to critiques that it lacks a workable standard.³⁵⁴ This documentation requirement contemplates some investigation that develops evidence for or against the legal conclusion that one of the specified grounds for removal exist. CIGIE’s Integrity Committee (IC) is an existing system for investigation and substantiation of IG misconduct.³⁵⁵ It reviews allegations that “involve abuse of authority in the exercise of official duties or while acting under color of office, substantial misconduct, such as gross mismanagement, gross waste of funds, or a substantial violation of law, rule, or regulation, or conduct that undermines the independence or integrity reasonably expected of” an IG.³⁵⁶ When an investigation substantiates one of these allegations, the IC refers the findings to, among others, the appointing authority and may include recommendations for disciplinary action.³⁵⁷

The IC system demonstrates that the meaning of law can be given further specificity through the fact-based determinations of investigation. IC determinations offer an independent basis for documenting and taking any adverse actions. Except in egregious cases, the President and agency heads should consider refraining from removal until the IC has investigated the underlying reasons.³⁵⁸ Legislators may also

³⁴⁹ Winters, *supra* note 344, at 28.

³⁵⁰ Inspector General Independence and Empowerment Act of 2021, H.R. 2662, 117th Cong. § 102 (as passed by the House, June 29, 2021).

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *See id.*

³⁵⁵ *See* 5 U.S.C. § 11(d)(1) (The Integrity Committee is composed of four IGs, an FBI representative, and the OGE Director or designee).

³⁵⁶ CIGIE, INTEGRITY COMMITTEE POLICIES AND PROCEDURES 2018 6 (2018), available at https://www.ignet.gov/sites/default/files/files/Integrity_Committee_Policies_andProcedures_Revised_Jan-2018_Final.pdf [<https://perma.cc/WK75-KUL8>].

³⁵⁷ *Id.* at 11–12.

³⁵⁸ *See Metzger, supra* note 11, at 433 (noting that the President may voluntarily impose internal constraints or procedures); *see also* CORE Act, H.R. 7076, 116th Cong. § 8(b) (as

look to revise the for-cause proposal by explicitly including IC determinations as an additional ground for removal: specifically, documented misconduct substantiated by the IC, where it has recommended removal as a possible disciplinary action.³⁵⁹

In sum, the proposed IG law would provide protection against retaliatory terminations for an IG's legitimate performance of oversight responsibilities. It also retains a broad set of grounds when exercise of the removal power is permissible. In such cases, whether to remove an IG turns on normative considerations, rather than law, but requires factual support for dismissal. A removal for cause statute can protect IG independence and, when appropriate, permit accountability.

B. Inspector General Appointment Qualifications and Restrictions

Congress is also considering reforms related to appointments of permanent and acting IGs.³⁶⁰ While the IG removal for cause proposal proceeds against the backdrop of recent disputes before the Court over the constitutionality of removal protections, the proposed IG appointment reforms stand on firm constitutional ground. They also respond to several of the appointment threats discussed earlier.

Bills before Congress confront the fact that no law restricted President Trump's designation of acting IGs with conflicts of interest and inadequate qualifications.³⁶¹ These designations of political appointees from outside IG offices were especially problematic because the appointees were then charged with leading oversight investigations of the agency heads to whom they reported in their political roles.³⁶² The bills create a presumption that "the first assistant" to a departing IG would assume the acting role and, if unavailable, require designation of senior officials from within the IG community.³⁶³ This change, therefore, bars the selection of political appointees from outside IG offices for acting positions, as occurred with President Trump's acting appointments at the State Department and DOT IGs.³⁶⁴

introduced in the House Comm. on Oversight and Reform, June 1, 2020) (would require IC investigations of IG removals).

³⁵⁹ See Winters, *supra* note 344, at 29 (recommending "consideration of substantial disciplinary action, up to and including removal" for the former FHFA IG).

³⁶⁰ See generally CONG. RES. SERV., *supra* note 9, at 1–3.

³⁶¹ See Inspector General Independence and Empowerment Act of 2021, H.R. 2662, 117th Cong. § 301(a) (as passed by the House, June 29, 2021); Securing Inspector General Independence Act, S. 587, 117th Cong. § 3(a) (as introduced by S. Comm. on Homeland Security & Governmental Affairs, Mar. 4, 2021).

³⁶² See *supra* Section II.B.1.

³⁶³ See Inspector General Independence and Empowerment Act of 2021, H.R. 2662, 117th Cong. § 301(a) (as passed by the House, June 29, 2021); Securing Inspector General Independence Act, S. 587, 117th Cong. § 3(a) (as introduced by S. Comm. on Homeland Security & Governmental Affairs, Mar. 4, 2021).

³⁶⁴ See *id.*

Congress derives constitutional authority for these limits from the Appointments Clause.³⁶⁵ The text requires the President to have Senate consent to appoint principal officers and permits Congress to “vest” appointment authority in the President for inferior officers.³⁶⁶ Presidential acting appointments are thus contingent on congressional authorization and subject to legislative restriction.³⁶⁷ History further demonstrates Congress’s constitutional role in determining the scope of the President’s authority to temporarily fill vacant offices. The purpose of the FVRA, for example, was to set stricter limits on presidential acting appointments after “various administrations’ noncompliance with the Vacancies Act.”³⁶⁸ Both text and history then support Congress in the establishment of a default rule that the first assistant becomes acting IG when a vacancy arises, with a presidential choice from among senior personnel in IG offices only if the first assistant is unavailable.³⁶⁹

Congress can use its power over temporary appointment procedures to deter arbitrary removals and promote filling vacancies. Though the restrictions not only prevent future temporary appointees with conflicts or insufficient qualifications, they also indirectly alter the calculus of politically motivated IG terminations. With knowledge that a termination would automatically place an IG’s first assistant into the acting role, a President or agency head may be less inclined to pursue the termination when the replacement would be little different in orientation to the role from the predecessor.³⁷⁰ The first assistant’s succession to the acting position likely means the designation of a person who will continue pursuit of ongoing investigations, satisfy the requisite qualifications for the office, and exercise impartial oversight. Further,

³⁶⁵ U.S. CONST. art. II, § 2, cl. 2.

³⁶⁶ *Id.* (providing that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States”); U.S. CONST. art. II, § 2 (stating that Congress “may by Law vest the appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Head of Departments”).

³⁶⁷ U.S. CONST. art. II, § 2; *see also* Office of Legal Counsel Opinion, Authority of the President to Remove the Staff Director of the Civil Rights Commission and Appoint an Acting Staff Director, at 104–05 (Mar. 30, 2001) (stating that the President has authority to make temporary appointments subject to “congressional prohibition” (quotation marks omitted)).

³⁶⁸ S. REP. 105-250, at 8 (1998).

³⁶⁹ *See* Goldsmith, *supra* note 10 (explaining the constitutionality of restrictions on presidential acting IG appointments). Because, as discussed above, IGs are inferior officers, possible objections to acting appointees serving as principal officers do not apply here. *See* NLRB v. SW General, Inc., 580 U.S. 929, 947–49 (2016) (Thomas, J. concurring) (opining that the FVRA may violate the Appointments Clause where an inferior officer was designated to temporarily fill a principal office); E. Garrett West, Note, *Congressional Power Over Office Creation*, 128 YALE L.J. 166, 214–19 (2018) (offering a “special-and-temporary-office theory” for the constitutionality of acting appointments).

³⁷⁰ *Cf.* Ben Miller Gootnick, Note, *Boundaries of the Federal Vacancies Reform Act*, 56 HARV. L. REV. 459, 490 (2019) (recommending amendment of the FVRA to require the first assistant become acting in the event of a firing, because “[i]t recognizes the unique constitutional concerns removal presents, and the heightened interest the Senate retains in protecting its advice and consent role when an officer is fired”).

strict limits on acting IG appointments may encourage the nomination of candidates for permanent IG positions.

Additional bills offer modest changes to facilitate filling long-standing IG vacancies. One bill passed in the House would require the President to produce a written explanation to Congress if no one has been nominated to a vacant IG position within 210 days of the vacancy,³⁷¹ while another bill would allow a panel of three IGs designated by the CIGIE chair to appoint a temporary IG after the 210-day period.³⁷² These proposals should be considered in conjunction with renewed attention to the statutory qualifications of permanent IGs and the procedure for appointments. After the removal and replacement of IGs, President Trump nominated candidates with partisan backgrounds, including recent White House or legislative experience, that called into question their ability to exercise the necessary independence for IG oversight.³⁷³

As the Court acknowledged in *Myers*, Congress has the power “to prescribe qualifications for office” as long as “the[se] qualifications do not so limit selection and so trench upon executive choice as to be in effect legislative designation.”³⁷⁴ In his *Myers* dissent, Justice Brandeis elaborated that “a multitude of laws have been enacted which limit the President’s power to make nominations,” including particular types of experience.³⁷⁵ Congress exercised this authority with respect to IG appointment by requiring that the President and agency heads appoint IGs “without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations.”³⁷⁶ However, the generality of the qualification criteria is arguably too malleable to ensure nomination and appointment of individuals with the necessary independence or experience.

More stringent requirements, including a specified number of years in a management or enforcement role with an IG office, prosecutor, or audit organization may better target candidates with suitable law enforcement, investigations, or audit experience than the “demonstrated ability” qualification in current law. Objective requirements, rather than amorphous categories such as “public administration” experience, are more likely to reduce risks of politicized or unqualified appointments

³⁷¹ Inspector General Protection Act, H.R. 23, 117th Cong. § 3(a) (as passed by the House Jan. 5, 2021).

³⁷² CORE Act, H.R. 7076, 116th Cong. § 8(d) (as introduced in the House Comm. on Oversight and Reform, June 1, 2020).

³⁷³ See *supra* Section II.B.2.

³⁷⁴ *Myers v. United States*, 47 S. Ct. 21, 29 (1926).

³⁷⁵ *Id.* at 265 (Brandeis, J., dissenting). Compare West, *supra* note 369, at 201–05 (arguing that Congress’s authority to create offices “by Law” entail the power to impose qualifications), with Hanah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONST. L. 745, 746–47 (2008) (arguing that the Appointments Clause bars qualifications for principal officers and permits them for inferior officers).

³⁷⁶ 5 U.S.C. § 3(a).

for IG positions.³⁷⁷ In addition, Congress should consider requiring that the President and agency heads select IGs from lists of qualified candidates.³⁷⁸ CIGIE is already required to recommend qualified candidates for IG nominations,³⁷⁹ but the appointing authority is not required to select from such recommendations. Mandatory selection from CIGIE lists could screen out partisan or unqualified choices. Additional requirements would arguably exacerbate the length of vacancies by narrowing the field of eligible candidates. However, CIGIE offers a reliable mechanism for identifying candidates with sufficient qualifications and commitment to independence. The Senate, too, can insist upon confirmation of candidates who demonstrate this commitment.

CONCLUSION

Attacks on the rule of law and democratic norms during the Trump administration have properly focused public attention on assessment of the damage to institutions and safeguards for the future. Oversight independence enabled IGs to operate as a check on the Executive Branch by conducting reviews that uncovered wrongdoing and failures, but also, exposed them to retaliatory abuse. Codification of well-established norms into law, such as removal protection and appointment restrictions, is one path to reinforcement of oversight independence. The structure of the IG institution as an internal constraint on the Executive Branch is constitutionally relevant to separation of powers challenges to independence protections. As explained, removal protection is permissible because IG reports of deficiencies and recommendations for reform are presented to the President and agencies for their ultimate decisions about action and accountability. In other words, the good government accountability supplied by IGs depends, in significant part, on presidential accountability.

However, the duties and powers that qualify the IG institution for independence protections—the lack of direct enforcement power and reliance on others in the Executive Branch for accountability—also may inhibit its effectiveness. IGs performed an array of critical oversight functions during the Trump administration. Yet further inquiry of IG effectiveness is necessary to evaluate whether the hostility and

³⁷⁷ Cf. Rebecca Jones, *Inspectors General Wanted: Swamp Creatures Need Not Apply*, PROJECT ON GOVERNMENT OVERSIGHT (Jun. 2, 2020), <https://www.pogo.org/analysis/2020/06/inspectors-general-wanted-swamp-creatures-need-not-apply/> [<https://perma.cc/DZ2E-A294>] (noting that some of President Trump’s nominees for permanent IG appointments were “alarmingly unqualified” and did not satisfy expectations for the position).

³⁷⁸ See *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (upholding the statutory requirement that the President select three judges for U.S. Sentencing Commission from a list of six judges compiled by Judicial Conference of the United States); *Bowsher v. Synar*, 478 U.S. 714, 728–29 (1986) (noting the Comptroller General is selected by the President from a list of three candidates provided by House Speaker and President *pro tempore* of the Senate).

³⁷⁹ 5 U.S.C. 11(c)(1)(F).

resistance to oversight during this period may have frustrated the ability of IGs to serve as a meaningful constraint on executive power and mechanism of accountability.³⁸⁰

The law of oversight independence provides safeguards against presidential abuses of power. Deeper normative commitments to oversight accountability are required to reinforce the values and practices of good government.

³⁸⁰ *Cf.* Sinnar, *supra* note 12, at 1031 (analyzing effectiveness of IG national security reviews during the George W. Bush administration).