



9. *The Offices of Inspectors General: Congress’s Indispensable Eyes and Ears Inside the Departments and Agencies of Government*

Overview

The Inspector General Act of 1978 (IG Act)¹ created the initial scheme of 12 Offices of Inspectors General (OIGs) within federal agencies and entities.² The IG Act represented a significant reorganization of the way federal agencies handled audit and investigative work, so as to ensure that these responsibilities were prioritized. It was passed in response to evidence of “clear... fraud, abuse and waste in the operation of Federal departments and agencies and in federally-funded programs [that had] reach[ed] epidemic proportions.”³ The purpose of the IG Act was to create independent, objective IGs whose responsibility is to prevent and detect waste, fraud and abuse and to promote economy, efficiency and effectiveness in each agency’s operations. From the outset, the IG scheme has reflected Congress’s understanding of oversight committees’ limited ability to effectively monitor and assess agency programs and enforcement responsibilities in a timely, on the spot manner. To shore up this weak spot, Congress imposed a dual reporting requirement on IGs to keep both agency heads and Congress (including committees and individual members) “fully and currently informed” about problems and deficiencies relating to agency programs and operations.

Since 1978, Congress has evidenced a continuing, bipartisan interest in maintaining the effectiveness of IG offices as vital adjuncts to the performance of its constitutional responsibility to oversee execution of its legislative actions and directions. As government has grown, the IG Act has been amended numerous times to establish an IG presence in virtually every important federal entity, and to provide IGs with the appropriate authorities to deal with their oversight duties and challenges. At present, there are 73 federal IGs.⁴ About half are appointed by the president subject to Senate confirmation (Establishment IGs) and half (called Designated Federal Entities or DFE IGs) are appointed by the head of an agency, which can be an individual, a board, or a commission.

1. Pub. L. No. 95-452, 92 Stat. 1101 (1978), as amended, *codified at* 5 U.S.C. App. §§ 1-13 (IG Act).

2. For valuable and informative resources on the history and operation of the OIG scheme, *see* WENDY GINSBERG AND MICHAEL GREEN, CONG. RESEARCH SERV., R43814, FEDERAL INSPECTORS GENERAL: HISTORY, CHARACTERISTICS, AND RECENT CONGRESSIONAL ACTIONS (June 2, 2016) [hereinafter *CRS OIG Report*]; WENDY GINSBERG, CONG. RESEARCH SERV., R43722, OFFICES OF INSPECTORS GENERAL AND LAW ENFORCEMENT AUTHORITY (2014) [hereinafter *CRS on OIG Law Enforcement Authority*]; COUNCIL OF THE INSPECTORS GENERAL ON INTEGRITY AND EFFICIENCY, PRESIDENTIAL TRANSITION HANDBOOK: THE ROLE OF INSPECTORS GENERAL AND THE TRANSITION TO A NEW ADMINISTRATION (2016) [hereinafter *CIGIE on Role of IGs*].

3. REPORT OF THE S. COMM. ON GOVERNMENTAL AFF., NO., TO ACCOMPANY H.R. 8588, S. REPT. NO. 85-1071, at 4 (1978).

4. The Inspector General Act Amendments of 1988, Pub. L. 100-504, 102 Stat. 2515, created the first set of DFE IGs, which have usually been at smaller federal entities. The 1988 Act also added to the reporting obligations of all IGs and agency heads, among other things.

In light of the considerable expansion in the number of IG offices, Congress determined there was need for an independent coordinating and policing entity for OIGs. Accordingly, in 2008, it passed legislation establishing the Council of the Inspectors General on Integrity and Efficiency (CIGIE).⁵ CIGIE's mission is to address integrity, economy, and effectiveness issues that transcend individual government entities. Thus, CIGIE coordinates cross-cutting projects among IGs on issues that span multiple agencies. CIGIE also seeks to increase the professionalism and effectiveness of OIG personnel by developing policies, standards and common approaches among OIGs. In this regard, CIGIE has established a Training Institute—which includes an Audit, Inspection & Evaluation Academy, an Inspector General Criminal Investigator Academy, and a Leadership and Mission Support Academy—which trains employees from throughout the OIG community. To support its policing mission, CIGIE has established the CIGIE Integrity Committee which is responsible for investigating allegations against IGs, their senior staff, and OIG employees acting with knowledge of the IG or whose alleged misconduct is related to an allegation against an IG. CIGIE also oversees periodic peer reviews of the OIGs' investigations and audits by another IG to ensure that these activities are conducted in accordance with professional standards. It also must report to Congress OIG allegations of wrongdoing or recommendations for corrective action and what was done about them. Finally, CIGIE coordinates and communicates OIG positions on potential congressional legislation affecting the IG community.⁶

This chapter will briefly describe the purposes Congress intended OIGs to accomplish; the appointment and tenure of IGs; the authorities provided IGs to fulfill the congressional design; the nature and scope of the independence accorded IGs; the requirements imposed on IGs to report to agency heads, the attorney general, CIGIE, Congress and the public; the practical value attributed to OIG efforts; and the challenges presented by executive branch efforts to delay or obstruct the performance of the IGs' statutory mission and Congress's definitive responses. The legislature's passage of the landmark Inspector General Empowerment Act of 2016 (Empowerment Act),⁷ addressing the most recent executive challenges, is discussed in detail.

A. The OIG Mission and Purposes

The mission of OIGs is to promote economy, efficiency and effectiveness in the programs and operations of the federal departments, agencies and entities with which they are affiliated. OIGs accomplish this mission by conducting independent and objective audits, inspections, investigations and other evaluations. The findings from the work of the OIGs are intended to help the affiliated entities improve operations and programs; to prevent and detect fraud, waste, abuse and mismanagement; and to inform Congress about those findings to enable it to determine whether any legislative remedial action is necessary. In most cases, OIGs produce reports, often made available to the public, that provide the findings and recommendations to their affiliated entities. Commonly, these recommendations find ways to increase federal efficiency or examine allegations of misconduct.

Generally, an audit, inspection or evaluation is conducted to examine organizational program performance and operations or financial management matters, typically of a systemic nature. In contrast, an investigation is conducted to address and resolve specific allegations, complaints or information concerning possible violations of law, regulation or policy. Investigations may involve a variety of matters, including allegations of fraud with respect to grants and contracts, improprieties in the administration of programs and operations, and serious allegations of employee misconduct. Together with the U.S. Office of Special Counsel (OSC), OIGs investigate alleged reprisals against whistleblowers. OIG sources for the initiation of investigations include referrals from OIG hotlines; referrals from the affiliated entity, the Government Accountability Office, and the Department of Justice; and congressional committee and member requests.

B. Appointment and Tenure of IGs

Establishment IGs include the 15 cabinet departments and larger federal agencies. Each such IG is appointed by the

5. Pub. L. No. 110-409, 122 Stat. 4302 (Oct. 14, 2008).

6. The 2008 Reform Act also amended reporting obligations, and salary, bonus and award provisions; amended removal requirements; and added budget protections, including requiring that Congress be provided with IGs' unaltered original budget requests.

7. Pub. L. No. 114-317, 130 Stat. 1595 (December 16, 2016).

president with the advice and consent of the Senate and can be removed only by the president. Designated Federal Entity IGs, which include the usually smaller boards, commissions, foundations and government entities, are appointed and removable by the heads of the entities. Neither category of IG has a term of office,⁸ and, unlike other political or high level appointees, IGs typically remain in office when presidential administrations change.⁹ But the IG Act contains congressional notification procedures regarding the removal of IGs. If the president intends to remove or transfer an Establishment IG, or an agency head intends to remove a DFE IG, they must communicate the reasons for the action in writing to both houses of Congress at least 30 days before the removal or transfer.¹⁰ This provision has been invoked only once.¹¹

C. OIG Authorities

To fulfill their mission, IGs are granted broad authorities. Among other powers, IGs are authorized to:

- Obtain access to all information and documents within their agency in relation to any program or operations over which the IG has responsibility, including grand jury information, unless otherwise explicitly prohibited by law;
- Share such information with congressional committees and individual Members of Congress;
- Request information or assistance from any federal, state, or local agency;
- Subpoena records and documents from any non-federal entity or individual;
- Exercise law enforcement powers if it is deemed necessary. These powers include the ability to carry firearms while engaging in official duties; to make arrests without a warrant; and to seek and execute warrants for arrests, searches of premises and seizures of evidence;
- Take statements under oath;
- Have direct and prompt access to the agency head for any purpose pertaining to the IG's responsibilities;
- Select, appoint, and employ officers and employees as necessary to carry out the functions, powers and duties of the IG;
- Receive and respond to complaints from agency employees, whose identity is to be protected; and
- Implement the cash incentive award program in their agency for employee disclosures of waste, fraud and abuse.¹²

Despite these broad powers, IGs are not authorized to take corrective actions themselves or compel agency management to implement recommendations. The IG Act prohibits the transfer of “program operating responsibilities” to an IG. But the agency is required to respond to each IG recommendation and state whether it agrees or disagrees with the recommendation. The status of IG recommendations must be included in each IG's semi-annual report to Congress and also to CIGIE.

8. There are two exceptions. The U.S. Postal Service IG has a seven year term, and the U.S. Capitol Police IG has a five year term and may be reappointed for not more than two additional terms.

9. The first presidential administration changeover after the passage of the IG Act occurred in 1980 with the election of President Reagan. On taking office in 1981, he asked for the resignation of all presidential appointees, including the incumbent IGs who were then dismissed. This caused a congressional firestorm of protest that the Act was an attempt to politicize offices intended to be independent and nonpartisan. In response, President Reagan partially backed off by reappointing several of the dismissed IGs. See Robert Pear, *Ouster Of all Inspectors General By Reagan Called Political Move*, N.Y. TIMES, February 3, 1981; Francis X. Clines, *Reagan Reappoints Five to be Inspectors General*, N.Y. TIMES, March 27, 1981; CIGIE on Role of IGs, *supra* note 2, at 16. Since that time, every president has exempted OIGs as a group from the requirement that political appointees resign on the change of administration.

10. IG Act, § 3(b).

11. CIGIE on Role of IGs, *supra* note 2, at 6.

12. IG Act, §§6(a), 6(c), 6(e), 6 (f), 6(h) and 7; 5 U.S.C. § 4512.

D. The Elements of OIG Independence

The independent status of IGs is evidenced and reinforced in a variety of ways:

- Each OIG is to be considered a separate agency and the IG who is the head of the office has the functions, powers, and duties of an agency head.
- An IG has sole discretion in initiating, carrying out, or completing any audit or investigation, or issuing subpoenas, which may not be interfered with by an agency head except in very limited circumstances.¹³
- IGs determine the priorities and projects for their office without outside direction in most instances. IGs may decide to conduct a review requested by the agency head, the president, legislators, employees, or members of the public, but are not obligated to do so unless it is called for in law.
- IGs have the sole authority to select, appoint and employ such officers and employees as may be necessary for carrying out the functions, powers and duties of the office.
- An OIG responds directly to requests from congressional committees, members of Congress, and to invitations to testify at congressional hearings or to provide briefings.
- Under the IG Act, an IG's own budget requests must be separately identified within their agency's budget request when submitted to the Office of Management and Budget (OMB), and by OMB to Congress. IGs may comment to Congress on the sufficiency of their budgets if the amount in the president's budget would "substantially inhibit the [IG] from performing the duties of the office."
- IGs are required by law to obtain legal counsel independent from their affiliated agencies. Such counsel must report directly to the IG or to another IG, and may come from the CIGIE.
- The IG must have access to all records and other materials available to the affiliated agency which are necessary to accomplish its statutory tasks.
- An OIG may request information and assistance from any federal, state or local agency and federal laws limiting the sharing of information are inapplicable to such requests.
- All affiliated agency personnel are required to cooperate with the OIG in all audits, inspections, evaluations, and investigations and the agency is prohibited from retaliating against them for their cooperation.

The IG Act directs that each IG "shall report to and be under the general supervision of the head of the establishment involved or, to the extent such authority is delegated, the officer next in rank below such head, but shall not report to, or be subject to supervision by, any other officer of such establishment."¹⁴ This "general supervision" provision is not defined in the IG Act. An appellate court ruling reviewing the legislative history of the act concluded that an agency head's supervisory authority over an IG was "nominal."¹⁵ Any doubt that this "supervision" is limited and may not be exercised in a way that inhibits IGs' discretion to perform their mission, to undertake an audit or investigation, or to see these matters through to conclusion, has been put to rest by the provisions and legislative history of the Empowerment Act, discussed below.

13. Under the IG Act, the heads of seven agencies (the Departments of Defense, Homeland Security, Justice, and Treasury; and the Federal Reserve Board, the Consumer Financial Protection Bureau, and the U.S. Postal Service) may prevent their respective IGs from taking such actions, but only for reasons specified in the IG Act. *See, e.g.*, IG Act, §8. These reasons include, among others, preserving national security interests, protecting ongoing criminal prosecutions, or limiting the disclosure of information that could significantly influence the economy or market behavior. If agency heads invoke this power, they must send an explanatory statement to specified congressional committees within 30 days.

14. *Id.*, §3(a).

15. *United States Nuclear Regulatory Commission v. Federal Labor Relations Authority*, 25 F.3d 229, 235 (4th Cir. 1994).

E. Reporting Requirements of IGs

Transparency is a key attribute of the IG scheme. IGs and the CIGIE have various reporting requirements to Congress, the attorney general, agency heads, and the public that provide invaluable insights into agency actions and inactions. IGs must report suspected violations of federal criminal law directly and expeditiously to the attorney general.¹⁶ IGs are also required to report semi-annually in detail about the activities of the office with respect to the agency, and the agency head must submit the IG's report to the Congress within 30 days.¹⁷ The IG's report must include, among other items:

- descriptions of significant problems, abuses, and deficiencies relating to the administration of programs and operations of the agency during the reporting period, the recommendations made for corrective action, and whether responsive action was taken;
- identification of proposed corrective actions from previous reporting periods that have not been completed;
- a listing and summary of each significant audit and evaluation report issued during the period for which there has been no management decision or comment;
- a report of each investigation conducted by the office involving a senior government employee, where allegations of misconduct were substantiated, that contains a detailed description of the circumstances of the matter and its current status and disposition; and
- detailed descriptions of any instances of whistleblower retaliation, of any attempt by the agency to interfere with the independence of the office, and of the particular circumstances of each inspection, evaluation and audit conducted by the office that is closed and was not disclosed to the public.¹⁸

The agency head's submission to Congress must provide the IG's report unaltered, but may include comments from the agency head. These reports are to be made available to the public in another 60 days.¹⁹ IGs are also to report "particularly serious or flagrant problems" immediately to the agency head, who must submit the IG report (unaltered but with his or her comments) to Congress within seven days.²⁰ Information in such IG reports that would otherwise by law be prohibited from public disclosure "may be provided to any Member of Congress upon request."²¹

The spirit of transparency was applied in Congress's vestment in the CIGIE of policing duties over the IG community. The IG Act directed the CIGIE to establish an Integrity Committee which would "receive, review, and refer for investigation allegations of wrongdoing that are made against Inspectors General and staff members of the various Offices of Inspector General."²² For each investigation of allegations referred to the Integrity Committee, the chairperson of the committee must submit a report to the members of the committee and the chairperson of the council containing the results of the investigation. The congressional committees of jurisdiction are to be supplied with any such report as is any Member of Congress who requests it.²³

In addition to the semi-annual report to Congress, IGs have other mandatory reporting requirements, such as annual audits of agency financial statements, annual evaluations of information security programs and practices, annual discussions of top management challenges in their agencies, and annual reports on agency improper payments.²⁴

16. IG Act, §4(d).

17. *Id.* § 5(a), (b).

18. *Id.* § 5(a)(1)-(22). Sections 10(a) and (b)17-22 were added by the IG Empowerment Act of 2016.

19. *Id.* § 5(c).

20. *Id.* § 5(d).

21. *Id.* § 5(e)(4). This section was added by the IG Empowerment Act of 2016.

22. *Id.* § 11(d).

23. *Id.* § 7(B)(iii).

24. A list of important mandatory and recurring reporting requirements may be found in the appendix to *CIGIE on Role of IGs*, *supra* note 2.

F. The Practical Value of OIG Efforts

In a time of congressional concern over growing budget deficits that have inspired across-the-board executive agency funding sequestrations, pay freezes, and personnel reductions, even at OIGs, it appears counter-intuitive that a 2015 Brookings Institution study could conclude “that most OIGs are revenue-positive institutions.” The study explains that “OIGs conduct audits, investigations and other administrative and enforcement actions that allow the government to recoup money it is owed, ensure that money is spent more efficiently, and avoid future misappropriations of funds. The result is that most OIGs save the government far more money than they cost to operate. In this sense, OIGs—as well as other agency-level enforcement divisions—offer government a unique benefit that is more often associated with private enterprise or financial markets: a positive return on investment.”²⁵

The authors selected the 15 cabinet level agencies, in which the average OIG office cost \$103 million in 2014, plus three independent agencies active in fund recovery: the Environmental Protection Agency, the Office of Personnel Management, and the Social Security Administration. To obtain a Return on Investment ratio (ROI) they compared data on receivables (the funds that an OIG returns to an agency through audits and investigations, or prevents the agency from spending unnecessarily) with operating costs of each OIG and independent agency over a five year period (2010 to 2014). In most years, almost every OIG had a positive ROI. The mean annual ROI for OIGs was \$13.41; the median was \$6.38. The consistently highest was SSA at \$43.60 followed by the VA (\$38.00), HUD (\$29.59), and DOT (\$25.59). Those with the highest ROIs oversee agencies that are more distributive in nature, i.e., those focused on grants, loans, contracts and direct payments face serious public concerns over waste, fraud, and abuse and have been effective.²⁶

The IG Act’s semi-annual report requires submission of the values of each listed audit, inspection, and evaluation report and an estimation of the total value of questioned costs, including a separate category for the dollar value of unsupported costs.²⁷ Submissions tend to present more subjective values, but CIGIE and individual OIG reports have not been so far from the Brookings findings to dismiss them as exaggerated or self-promotions. In testimony before the House Committee on Oversight and Government Reform in a hearing dealing with agency interference with OIG access to information on February 3, 2015, Michael A. Horowitz, then IG for the Justice Department and the Chair of CIGIE, testified as follows:

In FY 2013, the approximately 14,000 employees at the [then] 72 federal Offices of Inspector General conducted audits, inspections, evaluations, and investigations resulting in the identification of approximately \$37 billion in potential cost savings and approximately \$14.8 billion from investigative recoveries and receivables. In comparison, the aggregate FY budget of the 72 federal OIGs was approximately \$2.5 billion, meaning that these potential savings represent about a \$21 return on every dollar invested in the OIGs, in addition to other valuable guidance we provide in the management of our agencies’ operations and programs. And all this was accomplished during a time of sequestration, when many of us in the Inspector General community, including the DOJ IG, were faced with significant budget cuts that directly impacted our work.

With respect to his own office, he reported that “in FY2014 the DOJ OIG identified over \$23 million in questioned costs and nearly \$1.3 million in taxpayer funds that could be put to better use by the Department. And our criminal, civil and administrative investigations resulted in the imposition or identification of almost \$7 million in fines, restitution recoveries, and other monetary results last fiscal year. This is in addition to the \$136 million in audit-related findings and over \$51 million in investigative-related findings that the DOJ OIG identified from FY 2009 through FY 2013.”

25. JOHN HUDAK AND GRACE WALLACK, *SOMETIMES CUTTING BUDGETS RAISE DEFICITS: THE CURIOUS CASE OF INSPECTORS GENERAL RETURN ON INVESTMENT 2* (2015).

26. *Id.* at 5-8.

27. IG Act, §§5(a), (6) and (8).

G. Executive Challenges to IG Oversight and Congress's Institutional Responses: The Exemplar of the Inspector General Empowerment Act of 2016

Since its founding the IG scheme has been the object of executive challenge, most prominently spurred by the Justice Department and its Office of Legal Counsel (OLC). Over the years Congress has consistently responded with numerous enactments, from expansion of the number of OIGs to explicit clarifications of the nature and scope of IG authorities and responsibilities and the compliance duties of executive agencies. Timely congressional hearings have also sent clear messages of dissatisfaction that have resulted in remedial responses.

As noted, on taking office in 1981 President Reagan presumed the initial cadre of 15 IGs were typical political appointees who could be dismissed unilaterally with a change in presidential administration and fired them all. The immediate political backlash prompted the reappointment of five of those dismissed, and set an unwritten precedent that no incoming president since then has been tempted to ignore. In 1989, the OLC issued an opinion with respect to the authority of IGs to provide Congress with confidential information they have received about open criminal investigations in response to a congressional committee request pursuant to its oversight authority. It concluded that “as a matter of statutory construction... Congress did not intend [the reporting] provisions [of the IG Act] to require the production of confidential information about open criminal cases. Accordingly, IGs are under no obligation under the Act to disseminate confidential law enforcement information.”²⁸ Congress and the Congressional Research Service challenged this reading of the language of the act and its legislative history. For some time the opinion sowed doubt and confusion among some IGs as to their reporting responsibilities to committees until, by practice and acquiescence, DOJ appeared to relent. Throughout this period, though, DOJ had never raised a question about the authority of OIGs to request and receive confidential law enforcement information. Indeed, by 2010 Attorneys General Reno and Ashcroft had expanded the DOJ-OIG's jurisdiction to include oversight authority over all DOJ law enforcement components, including the FBI and the Drug Enforcement Administration.

Beginning in 2010, however, the FBI began to question the legal validity of the DOJ-OIG's access to certain categories of information, such as grand jury, wiretap, and credit information, as well as other categories. Similar refusals were made by the DEA. In most instances access was ultimately obtained, but only after lengthy delay and often first requiring permission from agency leadership—an apparent denial of the IG's independence and the IG Act's unequivocal direction to allow access to “all” needed documents. Refusals and delays respecting IG information requests soon spread to other agencies such as the Peace Corps, the Treasury Department, the Commerce Department, and the Chemical Safety and Hazard Protection Safety Board.

In May 2014, the then-deputy attorney general decided to ask OLC for a legal opinion on the legal objections raised by the FBI to providing the DOJ-OIG access to grand jury, Title III electronic wiretap, and Fair Credit Reporting Act (FCRA) information.

In August 2014, 47 inspectors general signed a letter to Congress noting that meaningful oversight depends on complete and timely access to all agency materials and data, and that agency actions that limit, condition or delay access have profoundly negative consequences for their work. The letter noted how such actions make OIGs less effective, encourage other agencies to take similar actions in the future, and erode the morale of the dedicated professionals that make up the staffs. The IGs asked for legislative remedial action.²⁹

In December 2014, in response to both the public concerns expressed by the DOJ-IG and the IG letter, the House and Senate Appropriations Committees included a provision (Section 218) in the Justice Department's fiscal 2015 appropriation that was designed to improve OIG access to department documents and information. It unequivocally provided that:

28. Cong. Requests for Info. From Inspectors Gen. Concerning Open Criminal Investigations, 13 Op. O.L.C. 77, 78, 83-87 (1989).

29. The IG letter of August 3, 2014, together with CIGIE letters to OLC dated October 7, 2011 (objecting to DOJ refusals of access by the DOJ-OIG to Federal Rule of Criminal Procedure 6(e) material) and June 24, 2014 (submitting the CIGIE's views on DOJ's limiting the DOJ-OIG access to information protected by statutory nondisclosure provisions) are appended to the testimony presented by DOJ-OIG Michael E. Horowitz in a hearing before the Senate Committee on the Judiciary on August 5, 2015 examining “Inspector General Access to All Records Needed For Independent Oversight.”

No funds provided in this Act shall be used to deny the Inspector General of the Department of Justice timely access to all records, documents, and other material in the custody of the Department or to prevent or impede the Inspector General's access to such records, documents and other materials, unless in accordance with an express limitation of section 6 (a) of the Inspector General Act, as amended, consistent with the plain language of the of the Inspector General Act, as amended.

Despite Congress's unequivocal support for the OIG's access to documents, the FBI continued to maintain its position that OIG was not legally entitled to review certain records. The OIG reported four instances where the FBI had failed to provide the OIG with timely access to information, including two involving FBI whistleblowers.

The House and Senate jurisdictional committees, which had been conducting hearings on the access issue since the beginning of the 113th Congress, did not wait for the OLC opinion. Both reported bills, together with the Section 218 appropriations limitation, that made clear the understanding that IGs can gain access to all information from all sources unless such access is expressly precluded.³⁰

On July 20, 2015, the OLC issued its opinion, which concluded that Section 6(a) of the IG Act does not entitle the DOJ-OIG to obtain independent access to grand jury, wiretap, and credit information in the department's possession. The opinion argued that neither the IG Act's language authorizing an IG to have "access to all records," nor its legislative history or its general purpose, overrides the nondisclosure provisions of the governing statutes of grand jury,³¹ Title III,³² and FCRA information.³³ Also, OLC concluded that Section 218 did not abrogate the specific limitations found in the grand jury, wiretap, and credit laws. Because Section 218 did not expressly "repeal" these nondisclosure provisions, the appropriators did not "provide a clear statement that the IG Act should be interpreted to override the limitations on disclosure." In other words, OLC found that the admonition "all" in the IG Act does not mean "all."

The OLC opinion stoked the already simmering congressional criticism. The understanding that the opinion was not limited to the DOJ-IG but applied to all IG offices, coupled with revelations that obstruction continued at DOJ and was becoming endemic throughout the executive agencies, fueled it further. Exacerbating the situation was the fact there were perhaps 1000 nondisclosure provisions in force in laws that might be relied on by agencies to obstruct IG information gathering. In an attempt to tamp the situation down the Obama administration offered to restore full access for the DOJ-IG but not for the other 71 IGs, which offer was rejected by the IG community and House and Senate leaders from both parties.³⁴

Further compounding the ability of OIGs to fully accomplish their missions during this period were a number of other less prominent but no less important administration and agency actions, as well as certain CIGIE procedures, that raised issues that garnered the attention of the congressional oversight committees. They may be briefly summarized.

Computer Matching and Information: The Computer Matching Protection Act of 1998 (CMPPA)³⁵ prevents unregulated access to personal records for purposes unrelated to the reasons for which the records were collected. Computer matching of data is used by IGs to identify improper payments and potential fraud especially in federal benefit programs. The CMPPA requires a time consuming approval process and included a possible appeal to the Office of Management and Budget (OMB). Similarly, the Paperwork Reduction Act³⁶ requires approval of a senior official at an agency and from OMB for an information collection, such as a survey, in its area—also a lengthy process that has proved time consuming. The House and Senate committees proposed to grant exemptions.

Prolonged Vacancies in IG Positions: The Project on Government Oversight (POGO) has long spotlighted the length of

30. See H.R. REP. NO. 114-210 (2015); S. REP. NO. 114-36 (2015).

31. Fed. R. Crim. P. 6(e).

32. The Federal Wiretap Act, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. §§ 2510-2522.

33. 15 U.S.C. § 1681 (2012).

34. See, e.g., Eric Lichtblau, *Tighter Lid on Records Threatens to Weaken Government Watchdogs*, N.Y. TIMES, November 27, 2015.

35. 5 U.S.C. § 552a(a) (2012).

36. 44 U.S.C. § 35 (2012).

time it takes to fill vacant IG positions and the dangers of allowing an acting to serve for an indefinite period of time. Much of the time the vacancy is caused by the failure of the president to make a nomination, sometimes for years, and opens the potential for an acting not to perform in the best interests of the agency out of a self-interest in being nominated herself (and thus a reluctance to exercise the full powers of the position). Presidents cannot be forced to make nominations and the Senate can refuse to act on a nomination. Committees have suggested that the Government Accountability Office monitor vacancies and report to Congress and the CIGIE any problems with particular situations.³⁷

Testimonial Subpoena Power for IGs Over Non-Governmental Persons: IGs presently can subpoena non-governmental persons for document disclosures but not for testimonial purposes. That means IGs often cannot effectively investigate government contractors or grant recipients or federal employees who quit federal employment.

Availability of Information in Required Reports to All Members: OIGs are required to provide semi-annual reports on their activities to jurisdictional committees on specified topics. For years some committees have made special arrangements with OIGs to report on particular sensitive topics that are not statutorily required and are therefore not shared with all members of Congress. They include such matters such as closed investigations or audits by IGs that were not disclosed to the public; unimplemented IG recommendations; investigation of high-level employees engaged in misconduct but not prosecuted; and attempts by agencies to interfere with IG independence or resist or delay access to documents and reports that are not reported to the public, among others.

Assuring That IG Audits Are Timely Posted: The IG Act requires that IG audits or reports be posted no later than three days after any report is made publically available. Some IGs argued that publication is required only if there has been a FOIA request. The difficulty with this position was exposed when a Veterans Affairs OIG did not make 140 reports over a number years and it was revealed that many contained substantiated allegations of mistreated patients. The committees suggested the three-day clock begins running when the audit or report is submitted in final form.

The Need for CIGIE Investigative Guidelines: CIGIE's Integrity Committee had been found by committees to have uncertain processes for their investigations which require reorganization.



H.R. 6450, signed into law by President Obama on December 16, 2016 as the Inspector General Empowerment Act of 2016, reflects an extraordinary and important institutional achievement in the face of an historically dysfunctional political environment that pervaded the 114th Congress. Neither bill reported by the House and Senate jurisdictional committees in mid-2015 dealt directly with DOJ's refusal to supply the DOJ-IG with information protected by legislative nondisclosure provisions, presuming that the Section 218 appropriations limitation effectively settled the issue. The House report on H.R. 2395 mentioned the 2014 letter from the 47 IGs but concentrated on other issues, such as issuance of testimonial subpoenas for federal government contractors and former employees, exempting IGs from the requirements of the Computer Matching and Paperwork Reduction Acts, prolonged vacancies in IG positions, and the enhancement of CIGIE policing and reporting requirements. The Senate report on S. 579 acknowledged the IG concerns and the lack of support for the DOJ withholdings but concluded that "there does not appear to be any additional language the Committee could supply to the IG Act to make it clearer." Rather, it simply restated its belief that an agency must give IGs "prompt, unfettered access to agency documents." It did agree to strike the "supervision" language of Section 3(a) to assure that it should not be construed as giving agency heads any power to influence, control or supervise IGs. Otherwise, the report dealt with the same concerns reflected in the House report and bill.

As has been indicated, the committee reports were issued before the announcement of OLC's opinion, which dismissed the relevance and effect of the Section 218 appropriations limitation on DOJ withholdings and which implicitly authorized all agency heads to apply available nondisclosure provisions to block or delay timely compliance with IG requests. The immediate result was widespread executive agency obstruction. A bipartisan effort that involved the majority and minority leadership of both committees and both houses ensued to meet the challenge. The compromise bill, H.R.

37. See H.R. REP. NO. 114-210, at 11 (2015); S. REP. NO. 114-36, at 6-7 (2015).

6450, passed both houses by unanimous consent on consecutive days.³⁸ Senator Grassley summarized the nature, breadth and importance of the compromise:

...We agreed to remove some provisions of the bill related to IG leave policy and IG reporting requirements. Although we disagreed on those provisions, I am glad that we agreed to preserve the important parts of the bill. Namely, we preserved the provisions of the bill that provide inspectors general with timely access to all records of the agency that they are charged with overseeing. In addition, the bill contains numerous other provisions that strengthen IG independence and equip IGs with the necessary tools to weed out waste, fraud and abuse within the Federal Government.... It is a waste of time and money to have agencies at war with their inspectors general over access to information. The inspectors general need to spend their time identifying and helping agencies eliminate waste, fraud and abuse—not fighting for access to the information needed to do their job. The bureaucrats need to learn Congress intended for the law to mean exactly what it says. Unless a provision of law specifically mentions the inspector general and prevents access to certain kinds of documents, then those records should be provided. “All records” means “all records.”³⁹

The overall important legal outcome of the passage of the Empowerment Act is that it is now certain that IGs can get all the information they need to do their jobs and that committees and individual members are entitled to get every bit of information that IGs have. In the current political situation that appears crucial because it means that majority and minority party members will be able to find out what is going on within the agencies in a timely manner. The changes that may be wrought by the new administration will be, for the most part, out of public sight until their impact is realized. Early warnings will make for effective, useful oversight.

Much credit goes to “old hands” that led the way for passage of the Empowerment Act. But it appears that in some way there has been a perceived need for almost 40 years for congressional preservation of an effective scheme of IG oversight that sustains and nurtures the democratic nature and goals of our administrative process. Public faith in the integrity of our governmental process is vital to its acceptance and success. The test will be great in a time when fundamental regulatory policy change is being demanded, and in many respects unilaterally implemented, by the new presidential administration. The Empowerment Act can play an important role in monitoring that change. Among the beneficial provisions of the Act, the following appear the most important:

- Access to “all” agency documents required by an IG means “all” unless a statute says otherwise.
- IGs have an exemption from all laws needing another agency’s permission to access matching computerized programs and from the Paperwork Reduction Act, which will enhance the ability of IGs to identify and prevent improper or fraudulent payments and thus better facilitate efficient oversight.
- GAO has to follow and advise agencies and alert Congress about the effects of prolonged vacancies in IG positions.
- IGs are now specifically allowed to request and get grand jury information that is exempted by Federal Rule of Criminal Procedure 6(e).
- IGs are now required to report to Congress about impediments agencies put up to collecting information, retaliations against whistleblowers, and about IG reports not otherwise available to the public.
- IGs must report to Congress and publically post recommendations they make to agencies for corrective actions that are not carried out.

38. See 162 CONG. REC. H7527-31 (daily ed. Dec. 8, 2016); 162 CONG. REC. S7130-31 (daily ed. Dec. 9, 2016).

39. 162 CONG. REC. 7130, 31.

- CIGIE policing of IGs is made meaningful and must be transmitted to Congress: allegations of IG wrongdoing—both their existence and what was done about the charges—have to be reported to Congress.
- CIGIE has been given mediating authority when conflicts occur between IGs in their overlapping investigations.

Perhaps the only important issue that was ducked was giving authority to IGs to subpoena non-government entities and persons to testify. Otherwise, the Empowerment Act is an unexpected bipartisan triumph.

Finally, as this chapter has discussed, executive actions to undermine or blunt IG effectiveness have persisted over time, even as Congress has met each individual challenge directly to reaffirm the essentiality of the oversight mission vested in the OIGs. In a disquieting note, however, the executive has already signaled its latest obstructive tactic: It will indefinitely delay filling vacant IG positions. The Senate Report decried such a stratagem:

The Committee believes the absence of permanent, Senate-confirmed or agency appointed IGs impedes the ability of these offices to identify and expose waste, fraud and abuse in the federal government. In addition, acting IGs in these roles create the potential for conflicts of interest, diminish independent IG oversight, and cause instability for IG offices.⁴⁰

Temporary, acting IGs are not secure in their positions and potentially could be vying to become permanent IGs. This creates an incentive to try to please leaders of the agency they are supposed to oversee, instead of maintaining independence. This can have a trickledown effect on the staff in those offices. The temporary nature of the job also gives acting IGs less authority in long-term planning, and can have a direct impact on the quality and effectiveness of that office's work. In the past, presidential failures to fill key administrative positions that require Senate confirmation have often had the purpose of stymying targeted programs.

As of the date of the presidential signing of the IG Empowerment Act there were a total of 11 vacancies in the 36 agencies that require presidential appointments. One had been vacant for over seven years. Two were confirmed on the day of the Act's passage and four other nominations by President Obama were pending. In March 2017, President Trump withdrew Obama's four IG nominations (for the Defense Department, the Office of Personnel Management, the National Security Agency, and the Social Security Administration) as well as a nomination for the head of the Office of Special Counsel, an agency that protects the federal whistleblowers. There are no nominations pending for three vacant positions at the Merit Systems Protection Board, which lacks a quorum to conduct its employee protection mission.⁴¹

The recourse for congressional committees in this situation is enhanced vigilance and effective utilization of the Empowerment Act's requirement that the Government Accountability Office monitor and report on the existence and effect of prolonged vacancies in OIG positions and to request the CIGIE to invoke its power to investigate the conduct of individual acting IGs.

For illustrations of some of the oversight powers, tools, principles, and obstacles discussed in this chapter, see the following case study in Part II:

Lydia Dennett, Elizabeth Hempowicz & Justin Rood: *The Roles of NGOs and Whistleblowers in the Oversight Process*

40. S. REPT. NO. 114-36, at 7 (2015); see also H.R. REP. NO. 114-210, at 3 (2015) ("Prolonged vacancies of Inspectors General can leave Offices of Inspectors General vulnerable and can diminish their ability to effectively conduct oversight duties.")

41. Nicholas Pacifico and Iulia Gheorghiu, *Vacancies Leave Whistleblowers Vulnerable*, POGO Blog, March 23, 2017, <http://www.pogo.org/blog/2017/03/osc-inspector-general-mspb-vacancies-leave-whistleblowers-vulnerable.html>.