

**THE ACCOUNTABILITY STATE:
US FEDERAL INSPECTORS GENERAL AND THE
PURSUIT OF DEMOCRATIC INTEGRITY, 1978-2012**

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ABSTRACT:
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Democratic Integrity**

US federal inspectors general (IGs), have proliferated across the government since 1978. However, the success of the IGs in effecting accountability, and the import of the kind of accountability they bring, has been little studied by public administration scholars; much of the existing scholarship offers, at best, qualified endorsement of their work. Similarly, few democratic theorists have considered the significance of the multiplying 'monitory' bodies of accountability – of which the IGs are a prominent example – in contemporary democracies.

Using evidence provided in a historical overview of the IG community and three detailed case studies of IGs (Departments of State, Justice, and Homeland Security), I argue that despite certain failures and limitations, the IGs play an important and unrecognised role in the process of democratic accountability. They do not always contribute successfully to 'direct' accountability in the form of sanctions and immediate bureaucratic reforms, and indeed, at times have undermined the very efficiency and integrity they are tasked with promoting. However, their import lies primarily in their enabling function as narrative-builders and conduits of information in a wider 'web of accountability'. Their narratives are used instrumentally by the courts, Congress, the media and civil society; they thus have an indispensable function as legitimate and 'neutral' sources of information in processes of public accountability.

I contribute to three distinct literatures in making this argument. First, I make numerous concrete claims about the micro-foundations of the process of accountability, and thus address certain concerns of public administration scholars. These propositions regard the factors that condition the success and form of accountability that is effected by inspectors general (as preserving either efficiency or democratic values), and are supported by the historical narratives in the three case studies. Second, I contribute to the burgeoning field of 'accountability studies' by attempting to link these micro-foundations to a specification of the meaning of public accountability and its relation to broader democratic values. Third, I offer evidence for democratic theorists, who ask how contemporary democratic values and legitimacy are affected by processes of accountability.

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PART I: INSPECTING THE TERRAIN

The first part of this dissertation sets the theoretical, thematic and historical context for an empirical study of the US federal Inspectors General.

CHAPTER 1

Introduction: *Quis custodiet ipsos custodes?*¹

I. The Administrative-Democratic Paradox

In the early nineteen-fifties, Dwight Waldo sparked a debate with public administration theorist Herbert Simon over the mutual antagonism between the values of democracy and those of administration.² Whereas Simon championed the possibility of a science of administration based on facts and geared towards efficiency, Waldo questioned whether such a value-free science was possible, and argued that efficiency itself was a contentious political claim, a vision of the good life that is antithetical to democratic values such as deliberation and citizen participation. In Waldo's book, *The Administrative State*, he attacked the respective disciplines of public administration and democratic theory for failing to engage with each other, and argued that because administration is or claimed to be at the centre of modern democratic government, the two disciplines must address each other.³ He reserved his strongest criticism for administrative theory: it needed to recognise its own underlying political philosophy, and admit that its central principle of efficiency was neither value neutral nor easily reconciled with the principles of democracy.

The debate echoed earlier formulations of the tension by Woodrow Wilson, who promoted the politics-administration dichotomy as a solution to the (partisan) politicisation of administration, and Max Weber, three decades later, who reiterated

¹ 'Who will guard the guardians?' from Juvenal's *Satires* (Satire VI, lines 347–8).

² Dwight Waldo, 1952, "Development of Theory of Democratic Administration," *American Political Science Review*, Vol. 46, No. 1, p. 81-103; Herbert A. Simon, Peter F. Drucker, and Dwight Waldo, 'Development of Theory of Democratic Administration', *American Political Science Review*, Vol. 46, No. 2, p. 494-503.

³ Dwight Waldo, *The Administrative State: A Study of the Political Theory of American Public Administration* (New York: Ronald Press Co, 1948; rev ed New York: Holmes & Meier, 1984)

the need for a sharp distinction between politics and administration to prevent *Beamtenherrschaft* (rule by bureaucrats).⁴ Although Waldo and Simon contended over the distinctions between facts and values, and between policy and administration, at stake lay a variant of the classic trade-off between democratic representation and efficiency. Democracies – especially a pluralist democracy in the American tradition (i.e., a polyarchy) – need to provide citizens and groups the opportunity for direct engagement in the processes of the polity, including elections, deliberation, policymaking, and the maintenance of accountability. But because such processes are time-consuming and inefficient, bureaucracies are delegated policymaking authority without being held to account through regular elections or transparent practices, and this leaves citizens unable to influence the way they are governed.

If these anxieties concerned social scientists at the turn of the twentieth century, the growth of the administrative state – and in particular, the advent of the welfare state – merely intensified policy-making delegation to non-majoritarian institutions in the latter half of the century.⁵ But do the exigencies of efficient decision-making and policy implementation necessarily curtail citizens' opportunities to participate in the democratic process? Does the need for a growing, unelected bureaucracy to implement a nation's will undermine the fundamental democratic principles of equality, liberty, representation, and participation? Does the 'science' required to fashion an efficient bureaucratic machine preclude deliberation over the common good? Or is it possible for the competing and conflicting principles of administrative efficiency and democracy to be reconciled?

⁴ Woodrow Wilson, 'The Study of Administration' *Political Science Quarterly*, Vol. 2, No. 2, June 1887, p. 197-222; Max Weber, 'Politics as a Vocation', in *From Max Weber: Essays in Sociology*, Abingdon: Routledge, 1991, p. 77-128 [1919].

⁵ Mark Thatcher and Alec Stone Sweet, 'Theory and Practice of Delegation to Non-Majoritarian Institutions', *West European Politics*, Vol. 25, No. 1, January 2002, p. 1-22.

Despite its *prima facie* value conflict with democracy, public administration can also play a constitutive role in democracies, by channelling public interests, protecting common values, formulating and executing policies, and bringing accountability and predictability to government activity.⁶ The notion that bureaucratic structures might even foster democratic practices is not new. In his *Considerations on Representative Government*, J.S. Mill argued that ‘freedom cannot produce its best effects, and often breaks down altogether, unless means can be found of combining it with trained and skilled administration’.⁷ This ‘refining’ function potentially carried out by expert administrators provided a resource for would-be reformers faced with patronage-ridden politics. Following Wilson, Progressive-era reformers championed a ‘politics-administration dichotomy’ as a tool for reforming politics at the national level.⁸ According to American Political Development (APD) scholars Desmond King and Robert Lieberman, one key irony of the American state is that bureaucracy has proven to be a precondition for democratisation:

‘American experience differs from continental European trajectories in that a comprehensive democratic framework as a set of procedures was established before the expansion of national federal bureaucratic departments of the sort compelled upon politicians from the Civil War’.⁹

This alternative historical trajectory affected the character and resources of bureaucracies, as well. In contrast to their European counterparts, bureaucracies in the US built their own networks outside the government apparatus for programme implementation, and encouraged individual enterprise in building power.¹⁰ In part, it

⁶ B. Guy Peters and Jon Pierre, *The Handbook of Public Administration*, London: Sage Publications, 2003.

⁷ John Stuart Mill, *Considerations on Representative Government*, Auckland: The Floating Press, 2009 [1861], p. 143.

⁸ David Rosenbloom, ‘The Politics-Administration Dichotomy in Historical Context’, in ‘Junior-Senior Exchange: The Legacy of Dwight Waldo and *The Administrative State*’, *Public Administration Review*, January-February 2008.

⁹ Desmond King and Robert Lieberman, ‘Ironies of the American State’, *World Politics*, Vol. 61, July 2009, p. 547-588.

¹⁰ *Ibid.*

has been precisely the freedom to develop autonomous bureaucratic structures and to take recourse to extra-state actors that has allowed democratic ideas and interests to penetrate the American state apparatus. This phenomenon had a European correlate, too, for as Mark Warren notes, '[t]he more functional democracies were built within relatively high-capacity states, in part because these states provided a locus for accountability demands as part of democratization struggles'.¹¹ These experiences demonstrate that a tension between two seemingly irreconcilable principles can generate change and inspire new forms of democratic participation.

Yet how, and to what degree, can this occur? Over time, a number of democratic and legal theories have proposed ways of resolving, explicitly or implicitly, the value tensions between administration and democracy. Though they do not always employ the term directly, these approaches favour coherent accountability structures to preserve certain principles of democracy and representative government.

Even before the modern state provoked questions of administrative accountability, classic Madisonian constitutionalism provided an overall political framework designed to counter the potential abuses of power in a democracy and representative government. Although the writers of the *Federalist* gave little direct attention to the problem of administration as such, they devised a constitutional system intended to forestall the pathologies of democracy, namely, the concentration of power in the hands of a single office or group. The framers of the constitution pitted 'ambition against ambition' and constructed a system guided by, among other principles, the separation of powers and of checks and balances. The separation of powers is not given explicit legal legitimacy in the American constitutional system (in the sense of being codified as such), but the Constitution nonetheless embodies this

¹¹ Mark E. Warren, 'Accountability and Democracy', in *The Oxford Handbook of Public Accountability*, Oxford: Oxford University Press, 2014, p. 43.

principle through its clear separation of government functions,¹² and reflects Madison's view that '[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many [...] may justly be pronounced the very definition of tyranny'.¹³ The Constitution, moreover, implants various checks and balances in the relations between the branches: Congress checks executive action with its control over the 'purse strings' of government and exercises its oversight authority through committees. This echoes the belief that 'the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others'.¹⁴ Here Madison acknowledges the jurisdictional battles that might compromise the execution of government from within the executive branch, and applies his principle of accountability through separation and competition to the various administrators (and by extension, to what would eventually become the administrative apparatus). These constitutional arrangements prescribe a mode of governing with certain pragmatic consequences insofar as they encourage, at least in theory, the efficient running of government, and have the normative function of promoting a particular vision of political liberty.¹⁵

Madison failed to anticipate the emergence of the administrative state and of 'emergency governance', and the challenges to democratic integrity they would pose.

Later American democratic theorists countered that the classic Madisonian view

¹² Jeremy Waldron, 'Separation of Powers or Division of Power?', NYU School of Law, Public Law Research Paper No. 12-20, 2012, p. 2-3.

¹³ James Madison, Alexander Hamilton and John Jay, *The Federalist Papers*, ed., Isaac Kramnick, London: Penguin, 1987, Article 47, p. 304.

¹⁴ *Ibid*, p. 319.

¹⁵ Madison and Hamilton, of course, aimed to construct a republic rather than a direct democracy, distrusting the latter for its potential to devolve into tyranny. I do not mean to suggest here that their structure was designed to promote a pure democracy, but rather that it established a system of political accountability that should, in theory, check what I call the anti-democratic tendencies of administration (i.e., amongst other things, taking policy-making authority out of the hands of elected officials).

provides an insufficient account of the sources of accountability and political equilibrium because it fails to include the full scope of political activity in the public realm. For classic pluralists such as Robert Dahl, the balance of competing centres of power – interest groups, branches of government, parties – serves to temper the tensions between efficiency, deliberation and participation. In this view, ensuring a healthy balance of power and preserving democratic rule necessitates a particular institutional design (i.e., pluralism) not only to equalise citizen participation and representation, but also to correct the inherent tendency of democracies to bend towards a tyranny of the majority. Here, bureaucracy is a positive feature within a pluralist system, one locus of power amongst many, and an important actor in the separation of powers system. Similarly, for David Truman, the bureaucracy provided yet another access point into the policy making process, and exists as simply one political actor amongst many in a system of group pluralism.¹⁶ Dahl, too, viewed the growth of the bureaucracy as a natural and unexceptional component of the welfare state.¹⁷ However, the implicit trust these theorists had in the democratic integrity of existing arrangements was so great that they give little attention to the problems generated by bureaucracy, and like many normative strands of democratic theory, they offered few prescriptions for ameliorative administrative design.¹⁸

Most recently, legal scholars have proposed legal and institutional solutions to the anti-democratic tendencies of the administrative state. The legal literature on

¹⁶ David Truman, *The Governmental Process: Political Interests and Public Opinion*, New York: Alfred A. Knopf, 1951.

¹⁷ Robert Dahl, *A Preface to Democratic Theory*, Chicago: University of Chicago Press, 1956, p. 146; Douglas Yates, *Bureaucratic Democracy: The Search for Democracy and Efficiency in American Government*, Cambridge: Harvard University Press, 1982, p. 5-6.

¹⁸ Though Dahl's early work implicitly affirmed the status quo, his later work questions the health of American democracy, though without addressing administration directly. He imputes the failure of the United States to achieve true procedural democracy to corporate capitalism, the welfare state, and the US's position as an international power ('On Removing Certain Impediments to Democracy in the United States', and 'Procedural Democracy', in Robert A. Dahl, *Democracy, Liberty and Equality*, Oxford: Oxford University Press, 1977).

executive constraint and emergency powers provides a slightly different perspective on the problem of administrative discretion from the perspective of pluralists such as Dahl and Truman: its theorists are concerned with the consequences of building provisions into the legal order for emergency powers and the suspension of democratic politics. Critics argue that doing so would legitimate undemocratic decisions and thus undermine the very foundations of the liberal order; in times of emergency, the sovereign must simply exercise power to preserve the integrity of the legal order ('Schmittian exceptionalism').¹⁹ Others contend that the liberal order *must* accept the necessity of 'exceptional' (i.e., extra-legal) politics, and provide legal and institutional guidelines for how and when this power can be used, so as to keep it in check ('liberal legalism').²⁰

Although its focus is on an extreme case – the moment of emergency – this literature's insights about what Carl Schmitt calls 'the exception' are also relevant to the quotidian cases of routine administrative decision-making, and thus to the underlying tension between administration and democracy. Fundamentally, they ask whether there should be structures and practices *within* the administrative state to temper its undemocratic tendencies, or whether its regulation should be left to the competing power centres in a system of group pluralism. Much of the legal literature remains divorced from systematic empirical evaluation of routine administration, and moreover fails to consider the mutations in democratic practice – the 'side effects', as it were – that these checks on administrative discretion provoke. Can there be an

¹⁹ William Scheuerman, 'Emergency Powers and the Rule of Law After 9/11', *Journal of Political Philosophy*, Vol. 14, No. 1, 2006.

²⁰ In *The Executive Unbound*, Eric Posner and Adrian Vermeule provide an overview of the 'liberal legalist' argument for executive constraints, and point to David Dyzenhaus, Bruce Ackerman, and Richard Epstein as exemplars of this camp; Eric Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic*, Oxford: Oxford University Press, 2010.

institutional corrective to a structural problem in modern constitutional democracies?

What changes do such frameworks provoke in the practice of democracy?

These approaches to democratic accountability have built upon one another over time, refining the broad Madisonian constitutional framework in such a way as to accommodate the exigencies of the expanding administrative state and of emergency governance. Yet the efficacy of their solutions, and the political dynamics they provoke, remain in question.

II. Research Question

This dissertation is a historical inquiry into the sources and development of one such institutional solution to the administrative-democratic paradox: the US federal inspectors general (IGs). IGs are auditor/investigators placed in nearly every federal department and agency, and tasked with ferreting out fraud, waste and abuse in the federal bureaucracy. Do they restore the democratic integrity lost in the administrative state, or do they merely exacerbate its anti-democratic tendencies? When and under what circumstances do they affect the quality of democracy?

My argument focuses on one particular statutory framework – the Inspector General Act of 1978 – and its interaction with other political processes.²¹ Administrative accountability, where it has prevailed, has been the result of a growing ‘reflexive’ bureaucratic capacity to self-correct, reform, and generate endogenous change.²² In the modern state, apolitical, scientific-rational processes (e.g., audits) often replace politics as a mode of accountability and as a safeguard of democratic values. But do IGs temper this tendency or exacerbate it? To what degree and how

²¹ *Inspector General Act of 1978*, Pub. L. 95–452, Oct. 12, 1978, 92 Stat. 1101.

²² ‘Reflexive’ refers to the fact that the state’s capacity to effect change is ‘turned back’ on its own apparatus rather than projected onto the citizenry.

do they contribute not merely to administrative efficiency, but to deeper, more fundamental democratic values? In practice, the IGs' effects on bureaucratic behaviour and democratic practice vary widely. At its most successful, the inspector general model can improve the quality of democracy by providing basic administrative and political accountability, and by enhancing some of the prerequisites for citizen participation: transparency, information provision, and strengthening the rule of law. At their worst, the IGs can be complicit in the very same fraud and abuse that they were mandated to eradicate.

Unlike other frameworks intended to curb executive discretion, such as the Administrative Procedures Act, the National Emergencies Act or War Powers Resolution, the Inspector General Act has had a generative institutional effect, spawning, through periodic amendments, a growing army of inspectors general with expanding authority. IGs pursue accountability by providing an authoritative narrative to be disseminated to the Congress, the courts, and the public. In tandem with these external actors, the IG system is an attempted corrective to the undemocratic tendencies of the bureaucracy. It is my contention that the growth of this internal checking mechanism has altered the structure of executive accountability and political deliberation, and provoked dynamics in the wider politics of executive power. Although the IGs are far from the only institutional source of executive or bureaucratic accountability, they provide a glimpse into the micro-foundations of this developing democratic function.

Although I call the IG phenomenon the 'accountability state', in American Political Development (APD) fashion, IGs are only one mechanism of accountability among many. For a full elaboration of the concept of accountability, a wider-ranging treatment of all accountability mechanisms would be necessary. This would be a

fruitful path for future research, and would include careful consideration of the role of the courts, congressional oversight committees, and government watchdog groups, as well as statutory frameworks such as the Administrative Procedures Act and oversight bodies such as the Office of Special Counsel, in checking executive growth and activity. Most important, such an approach (if pursued comprehensively, taking into account the way these various institutions interact) would expose the redundancies and gaps in the overall architecture of accountability. However, the work of the IGs extends beyond ‘accountability’ *tout court*, and contributes to broader processes in democracy, such as public deliberation, information dissemination, and the forging of links between civil society and government.

It is important to underscore that the development of the IG as a mechanism of accountability is not a uniform one, and must be understood as a product of its historical context – as something that has grown alongside of and in reaction to the expanding administrative state and the growth of emergency executive powers. Drawing on insights from theories of democracy, administration, and institutional change, I document the emergence of an internal mode of democratic accountability that has evolved differentially across the state, and contributed to various democratic processes.

a. Preserving Democratic Integrity and Curtailing Executive Power:

Contributions to the Literature

This dissertation constructs its object of analysis at the intersection of multiple literatures: democratic theory, ‘accountability studies’, and the public administration literature on the inspectors general. I start by framing my investigation with the

questions prompted by democratic theorists and public administration scholars on accountability, and then address empirical deficits in the scant literature on IGs. Below, I briefly outline my analytic approach. I then review the literature and draw from it the questions that shape my enquiry.

b. *Analytic Approach*

I take an unorthodox analytic approach in this dissertation with the aim of responding to analogous calls from within two fields of scholarship. Scholars in both democratic theory, broadly speaking, and ‘accountability studies’ have lamented the chasm within their sub-disciplines that exists between the empirical and the theoretical, the institutional and the philosophical. Efforts to place these approaches in concert often run afoul of the methodological conventions and strictures that can serve to limit, rather than to refine, the conclusions of scholarship at either end of the spectrum.

However, in both fields, efforts have been made to bridge this gap. Political realism, an important, emerging school within political theory, posits the need for precisely this kind of methodological shift. It argues that, rather than start with prior normative commitments, political theory should begin with the here and now, the institutions that exist, and from there order the normative guiding principles of a theory of democracy.²³ In short, it demands a methodological inversion from top-down theorising (i.e., deriving theories from abstract principles) to bottom-up theorising (taking existing political institutions as the basis for building theories of democracy). This move cannot be reduced to the traditional distinction between

²³ Cf. William Galston, ‘Realism in Political Theory’, *European Journal of Political Theory*, Vol. 9, No. 4, October 2010, p. 385-411. Galston gives an overview of this emerging field, its analytic concerns, and its primary contributors, amongst whom he counts Bernard Williams, John Dunn, Raymond Geuss, Bonnie Honig, Chantal Mouffe, Mark Philp and Jeremy Waldron.

deductive and inductive reasoning. Rather than beginning one's inquiry with an abstract principle – say, a Rawlsian conception of justice – and then deriving the best possible institutional arrangement to achieve that end, without regard to the practices and institutions that exist now (and without regard to the institutional exigencies of the present era), we must first take into account the constraints of existing, historically-specific political and institutional conditions. In this case, given one demand of modern democracies – the need for large-scale apparatuses of administration – what are the features of contemporary political institutions such that classic democratic values can be preserved?

A similar drive towards methodological hybridity has been apparent in the field of accountability studies. Dubnick calls for a blend between two different 'ontologies' of accountability studies, the institutional and the relational. Whereas an 'institutional' focus highlights the precise structures and mechanisms of accountability in governance – audits, compliance measures, public disclosures – a 'relational' approach examines the link between practices of accountability and questions of moral philosophy and identity.²⁴ The main limit of a purely institutional approach to accountability mechanisms is that the singular focus on audits or investigations neglects the relationships that underpin these practices. Dubnick comments that, 'once a relationship becomes structured, formalised, and/or mechanised [through audits or performance measures], the social dynamic that underpins account-giving relations and behaviours is altered'.²⁵ The advent of the 'audit society' has left its mark on bureaucratic behaviours and expectations, and thus on the way that governments and legal systems are fundamentally structured.

However, an empirically rich study of specific accountability mechanisms in their

²⁴ Melvin J. Dubnick, 'The Ontological Challenge', *The Oxford Handbook of Public Accountability*, Oxford: Oxford University Press, 2014, p. 649-54.

²⁵ Ibid, p. 650.

historical context can illuminate much about the underlying relationships within bureaucracies, between rival bureaucracies, between branches of government, and between the government and the citizenry. The dynamics and quality of these relationships not only affect the immediate outcomes of governance, but also go to the heart of such fundamental principles as the separation of powers.

Through my hybrid empirical and ‘philosophical’ approach, I attempt to contribute to both of these conversations. My effort to establish the narrative setting of accountability practices and chart their development over time aims to weave the empirical insights of the institutional approach to accountability studies with the broad perspective of the relational option. This methodological movement parallels the political realists’ urge to take empirical data as the starting point for building theories of democracy. To the political realists, I offer concrete empirical evidence, through historical analytic narrative, so as to inform debates about the changing nature of democracy. Here, the aim of the study is to begin with an empirical account of the way existing institutions deal with certain recurring democratic problems, and then to offer preliminary thoughts about what these institutions and practices tell us about new modes of democratic engagement, and about the concept of the ‘political’ when key components of citizen participation are delegated to the state. The following narratives focus less on the specific outcomes, strengths and weaknesses of particular reviews, than on how the account-giving relationship is affected by these practices, and on what the consequences might be for the quality of democracy, broadly speaking.

c. The argument

My primary analytic question concerns what kinds of contributions, and with what effect and consequence, IGs have made to improve democratic processes. This question has both a first order, specific response in the form of concrete results from IG work, and a more general, second-order response framed in terms of broad, abstract democratic values. I begin with the former (in Chapter 2), by developing an IG-specific model and framework to trace the evolution of the IGs' work across time, and in Chapter 3, lay out the broad evaluative perspective to establish the 'stakes' of the enquiry for democratic governance.

On a very basic level, the narratives that follow (Chapters 5-10) demonstrate that federal IGs have contributed to effective governance and democratic integrity in much more diverse and unexpected ways than early observers would have predicted, and that they bear the imprint of multiple normative visions of accountability. Yet institutionally, their impact is still uncertain, and varies from one bureaucratic context to the next; no broad generalisations can be drawn about the overall value of their effects, either positive or negative, on the state and on democratic functioning. However, certain insights can be drawn concerning the way that the IG phenomenon has slowly altered the structure of the accountability relationships – bureaucratic and political – that condition the way the state governs. Moreover, the IGs' ascendancy points to a new form of delegation – the delegation of citizen participation in the form of accountability-holding – and suggests that the exigencies of the administrative state are transforming the nature of the 'political' in contemporary democracies.

In what follows, I will establish the foundations of my narrative of the development of the IG and use them as the basis for an exploration of the place of accountability in democracies. I first provide a more detailed review of the literature and highlight the relevant conceptual difficulties with which it struggles.

III. Literature Review

a. Democratic Theory: Preliminary Considerations of Accountability

The resolution of the tension between administrative discretion and democratic values lies in the concept of accountability. John Dunn makes this basic argument when he states that ‘[i]n the states of today, practices of democratic accountability form the key site of putative reconciliation between the norm of democracy and the apparently antithetical implications of state authority’.²⁶ Jeremy Waldron echoes this insistence on the necessity of accountability for democracy by rooting the practice of public account-giving in the traditional republican concept of the *res publica*, the idea that ‘the business of government is public business’.²⁷ Yet despite its ‘necessity’ to democracy, and despite a certain vogue in many social scientific academic circles, modern democratic theorists have typically marginalised accountability in favour of other democratic principles, such as participation and representation.²⁸ Historically, accountability has been approached implicitly, as the by-product of structural arrangements or electoral systems. Indeed, the term ‘accountability’ itself was hardly used by theorists and philosophers prior to the mid-twentieth century.²⁹

²⁶ John Dunn, in Adam Przeworski, Susan C. Stokes, and Bernard Manin (eds), *Democracy, Accountability and Representation*, Cambridge: Cambridge University Press, 1999, p. 330-31.

²⁷ Jeremy Waldron, ‘Accountability: Fundamental to Democracy’, Public Law and Legal Theory Research Paper Series, Working Paper no. 14-13, April 2014, p. 19.

²⁸ See J. S. Maloy, *The Colonial American Origins of Modern Democratic Thought*, Cambridge: Cambridge University Press, 2010, for a discussion of this tendency.

²⁹ Melvin J. Dubnick’s essay on ‘Accountability as a Cultural Keyword’ (in *The Oxford Handbook of Public Accountability*) provides statistical evidence of a dramatic increase in the use of the word ‘accountability’ in English language texts beginning in the nineteen-seventies (p. 24). It is noteworthy

Part of this neglect, and the related conceptual confusion, have to do with the term's imprecision.³⁰ Much contemporary scholarship works to pin down its various meanings, narrowing the term and differentiating it from its use in the vernacular as something akin to 'punishment'.³¹ Political scientists often reduce the concept to, or at least focus on, elections as the most fundamental mechanism for preserving democratic accountability.³² Yet such periodic forms of accountability hardly provide state-wide accountability, not least for the legions of unelected career bureaucrats directing the administrative and regulatory states. Legal scholar Edward Rubin goes further, arguing not only that elections are *not* primarily mechanisms of accountability, but also that the concept of accountability is 'intrinsically bureaucratic or administrative in character' and cannot be understood without reference to the administrative state.³³ Only administrative oversight and hierarchies provide true accountability; elections as a source of accountability are a 'myth'. Given the necessity of a large scale administrative apparatus with which to run modern states, returning full policy-making authority to the legislative branch on the principle of non-delegation would simply force the legislature to build an equally large – and unaccountable – infrastructure of unelected officials in order to carry out its tasks. Rubin's formulation serves as an argument against the 'accountability-enhancing'

that many key modern political philosophers who deal with this concept at least implicitly – for instance, John Locke, John Stuart Mill, James Madison and Alexander Hamilton – use the term 'accountability' (and its variants) sparingly, if at all.

³⁰ See Richard Mulgan, 'Accountability: An Ever Expanding Concept?', *Public Administration*, Vol. 78, p. 555-73.

³¹ Robert Behn, *Rethinking Democratic Accountability*, Washington, DC: Brookings, 2001; Mark Philp, *Political Studies*, 2009 Vol. 57, p. 28–53. See Behn (2001, Chapter 1) for an extended discussion of the myriad and competing definitions of accountability in contemporary scholarship.

³² Although it discusses other forms of accountability, the above mentioned seminal work of Przeworski, Stokes, and Manin (eds), *Democracy, Accountability and Representation*, devotes over half of its essays to electoral accountability. Indeed, the basic definition outlined in the introduction emphasises the ability to retain public officials in office through elections (p. 10).

³³ Edward Rubin, 'The Myth of Accountability and the Anti-Administrative Impulse', *Michigan Law Review*, 103, 2005, p. 2075.

impulses towards non-delegation, the devolution of central government, and a unitary executive, and roots the source of accountability in administration itself.

Aside from its frequent equation with elections, discussions of accountability are dominated by principal-agent (P-A) frameworks which comprise the chief analytic lens used for understanding accountability.³⁴ P-A theories frame the ‘stakes’ of accountability in the following way: democratic accountability implies that a principal (the public) can sanction an agent (a public official delegated some sort of responsibility) for failing to represent its interests or respond to its demands. Mechanisms of accountability are thus ways of limiting the discretion of public officials.³⁵ However, such frameworks suffer from numerous deficits with regards to accountability. In addition to oversimplifying the multiple relationships that constitute a system of accountability, they often imbue a fundamentally political dynamic with normative principles inherited from economics.³⁶ As Philp argues, it is erroneous to assume that the interests of a particular group are identical to those of ‘the people’. Holding an actor to account in the name of the people does not ensure that the aggregate interests of the people are the primary criterion for evaluation. Using P-A frameworks becomes even more problematic with regards to the IGs: IGs’ interests are not synonymous with their two direct principals, Congress and their department heads (who have, moreover, very different, often opposing interests from each other). Nor are they synonymous with their indirect principal’s interest, the ‘people’s’ interest (a plural and incoherent notion to begin with).

Nonetheless, a P-A account such as Waldron’s offers the analytic advantage of highlighting the specific duties associated with each role. He, too, argues that

³⁴ Craig Borowiak, *Accountability and Democracy: The Pitfalls and Promise of Popular Control*, Oxford: Oxford University Press, 2011.

³⁵ Philp, 2009.

³⁶ Warren, 2014, p. 42.

democratic accountability must be at least partly divorced from its singular association with elections, and ought to be re-theorised as an integral component of a continuing political relationship. His version centres on the *duty* owed by the agent to the principal to give an account of its actions; he distinguishes it from other conceptions by emphasising that there must be a specific actor to whom accountability is owed, and that the principal can determine the standards to which the account-giver is to be held (as opposed to an objective legal standard administered by a tribunal).³⁷

Though Waldron does not argue it explicitly, the implications of his account are radical. In this argument, accountability becomes a permanent activity that impresses upon the government (the ‘agent’) the duty to narrate and justify its actions regularly. This inserts a radically modern principle into a classic state function: ritual self-justification, not with reference to divine right, reason of state, or even the will of the people, but to a set of substantive values increasingly articulated in administrative and economic language. The state justifies its actions with reference to efficiency, effectiveness, and accountability (often vague and imprecise in its invocation), and most important, derives its legitimacy from its perceived conformity with these principles.

Waldron’s account also underscores the precept of political accountability according to which the principal can determine the standards by which the agent (government actor) is to be judged. These standards can be procedural or substantive (a point that Rubin also makes), but crucially, they are set by the principal. For my purposes, the IGs are a kind of intermediary interpreter, at once the account-giver (as the narrator of the state’s activity), and the account-holder (as the implicit judge, able

³⁷ Waldron, 2014.

to choose and craft the standards by which the state's actions will be judged). With the latitude they have to choose which actions are worthy of being investigated, and to select the terms in which terms to narrate them, the IGs set the moral and ethical standards by which the government must then act.

The contributions of Philp, Rubin and Waldron suggest that the dynamic of accountability inherent in political and administrative relationships is part and parcel of democracy *tout court*. Accountability denotes not merely a relationship, but also a repeated action called into being by that relationship. Many of those critical of the P-A approach (and even some who espouse it, such as Waldron), emphasise the need to return to the earlier, narrative roots of the term as one meaning *to give an account*, rather than focus on the sanctions or punishment associated with the exchange.³⁸ Insofar as democracy is a practice rather than a state of being, it requires continuous re-enactment of the ritual of account-giving. But if accountability-holding is a fundamental part of the practice of democracy, it follows that *who* performs it is a matter of utmost importance, going to the heart of the question of democratic participation. Dunn places the onus of accountability on the citizen, claiming that '[m]ost of the weight, in seeking to secure accountability, has to be carried by the vigour of citizen participation and by the scope of rights and liberties open to citizens'.³⁹ This echoes a traditional conception of democratic participation according to which the vibrancy of democracy depends on citizen activity. However, Waldron's argument transfers this duty to the agent – i.e., the state – itself.

IGs fit uneasily with these considerations. If the principal (the 'people') should set the standards of assessment in a democracy, what happens to the integrity

³⁸ In addition to Philp, Waldron and Rubin, Jane Mansbridge offers a similar call to base the concept of accountability in account-giving (Jane Mansbridge, 'A Contingency Theory of Accountability' in *The Oxford Handbook of Public Accountability*, Oxford University Press 2014, p. 55-68.

³⁹ Dunn, 1999, p. 334

of democracy when that task is delegated to part of the state apparatus itself? The IGs' emergence thus prompts questions about the unintended, and potentially negative, consequences of accountability for democracy. (Philp also calls attention to the way certain kinds of accountability can have potentially negative consequences, as when demands for accountability diminish the government's latitude for exercising judgment, or when calls for accountability serve only to legitimise pre-existing substantive outcomes). IGs perform what Warren calls 'mediated accountability' – an arrangement in which one agent holds other agents to account on behalf of principals – and forms a part of the overall division of labour of accountability, but which complicates the simplistic P-A model, and diminishes its explanatory power.

b. 'Accountability Studies': The Public Administration Approach to Accountability

Understanding accountability in the abstract through P-A frameworks, or as a state function, goes only so far toward explaining its effects on democracy. If we shift analytic registers from the theoretic to the institutional to understand how the mechanics of accountability work, we gain purchase on how, and to what effect, they affect the quality of governance.

Just as in democratic theory, the tension between the sanction/punishment and narrative-giving dimensions of accountability dominates the myriad ways of disaggregating the concept of accountability from a public administration perspective. Indeed, this conceptual distinction has mirrored, and in turn given rise to, multiple mechanisms of public accountability that often work at cross-purposes. Depending on how such mechanisms are deployed and managed, the two approaches (for

instance, the ‘sanction-based’ and ‘trust-based’ accountabilities described by Jane Mansbridge) can foster governing contexts of either suspicion or trust, and so lead to vastly different outcomes.⁴⁰ This underscores a second dominant theme in the public administration literature: the unintended and often negative consequences of accountability and accountability-related public reforms.

A small sample of the concrete paradoxes that plague accountability reforms suffices to illustrate the underlying conceptual puzzle: first, it is a widely contested claim that performance management systems actually improve agency accountability.⁴¹ Second, some public sector reforms aimed at depoliticising public management by delegating more responsibility to specific bodies result in more intense politicisation as elected officials vie for control over the locus of policy implementation (Moshe Maor’s so-called ‘managerial paradox’).⁴² Third, heavy responsibilities levied on administrative bodies impede the process of learning and development.⁴³ Finally, Dubnick’s ‘reformist paradox’ calls attention to the way in which any reform geared towards increasing accountability inevitably undercuts existing accountability arrangements.⁴⁴

The phenomenon of unintended, even contradictory effects of reform measures goes by many names, including ‘multiple-accountabilities disorder’, and ‘bureaupathology’.⁴⁵ As discussed above, oversight mechanisms can contribute to the

⁴⁰ Mansbridge, 2014.

⁴¹ Christopher Pollitt, ‘Performance Blight and the Tyranny of Light’ Accountability in Advanced Performance Measurement Regimes’, in Melvin J. Dubnick and H. G. Frederickson (eds.) *Accountable Governance: Problems and Promises*, New York: M. E. Sharpe, 2011.

⁴² Christopher Hood and B. Guy Peters, ‘The Middle Ageing of New Public Management: Into the Age of Paradox?’ *Journal of Public Administration Research and Theory*, Vol. 14, No. 3, July 2004, p. 267-282.

⁴³ Christopher Hood, *The Blame Game*, Princeton: Princeton University Press, 2010.

⁴⁴ Barbara S. Romzek and Melvin J. Dubnick, ‘Accountability in the Public Sector: Lessons from the Challenger Tragedy’, *Public Administration Review*, Vol. 47, No. 3, 1987, p. 227-38

⁴⁵ Dubnick and Frederickson, 2011; Jonathan Koppell, ‘Pathologies of Accountability: ICANN and the Challenge of “Multiple Accountabilities Disorder”’, *Public Administration Review*, Vol. 65, p. 94-108;

very problems they were intended to solve: in the case of IGs and other bureaucratic oversight mechanisms, this includes adding to the size, complexity and unaccountability of a bureaucracy that they were designed to shrink and hold to account. Light frames the paradox in the following way:

‘By increasing the ratio of reviewers to doers, Congress and the president work against the accountability they seek, causing an impact never imagined by the IG founders. As the IG numbers go up, effectiveness may go down’.⁴⁶

Here he highlights the IGs’ role in exacerbating a form of ‘bureaupathology’, the phenomenon of organisational dysfunction that results from excessive bureaucracy. According to this logic, government expansion occurs both in size and in layers, multiplying and obfuscating the lines of accountability.⁴⁷ Reforms for accountability are reactions to this, but also contribute to a vicious cycle by making government bigger and less accountable. IGs diminish administrative efficiency and accountability by increasing government outlays and contributing to additional regulations.⁴⁸ In other words, bureaupathology breeds a form of negative policy feedback.⁴⁹

Edward J. Giblin, ‘Bureaupathology: The Denigration of Competence’, *Human Resource Management*, Vol. 20, No. 4, Winter 1981, p. 22-25.

⁴⁶ Light, 1993, p. 223.

⁴⁷ Light, 1993.

⁴⁸ Frank Anechiarico and James Jacobs, *The Pursuit of Absolute Integrity: How Corruption Control Makes Government Ineffective*, Chicago: University of Chicago Press, 1996; Frank Anechiarico and Lydia Segal, ‘Public Integrity Networks’, *Public Integrity*, Vol. 12, Fall 2010, p. 325-344; Light, 1993; Markert, 2003.

⁴⁹ Policy feedback is the loop-like process by which ‘policies produce politics’, politics that in turn influence the shape of future policies.⁴⁹ Policies, once enacted, can have numerous types of interrelated effects: on state-building (bureaucratic development); on interest group formation and behaviour; on the viability of future policies through ‘lock-in effects’; and on political participation. (That is, the mechanism by which a decision at time T1 limits the array of possible decisions at time T2, in effect ‘locking in’ the previous decision; this is the mechanism that gives rise to path dependence. See also, Daniel Beland, ‘Reconsidering Policy Feedback: How Policies Affect Politics’, *Administration and Society* 2010, Vol. 42, p. 568). Such feedback can come in both positive and negative varieties, with positive feedback leading to the path dependent entrenchment of a policy or institution, and negative feedback (or the recognition of failure) to pressures for institutional change.) As a means of ‘checking’ the excesses of bureaucratic behaviour, oversight mechanisms can in practice make the bureaucracy larger and less capable, and a hindrance to innovation.

A common feature of these paradoxes is that each reform prompted an unintended alteration of the underlying incentive structure for public officials, causing the actors in question to craft behavioural strategies in tension with what reformers intended. Hood provides a basic theory and mapping of such strategies: through a series of blame avoidance strategies, public officials and bureaucrats can avoid responsibility (in what American children might recognise as a game of ministerial ‘dodge ball’) by doctoring the presentation of their actions, by strategically distributing responsibilities within an agency, or by manipulating policy options and altering the process or the substance of government activity.⁵⁰ These behavioural strategies have grown in conjunction with – and cannot be considered apart from – the coeval management reforms of the late twentieth century and early twenty-first. With the restructuring associated with ‘New Public Management’ doctrines, including those that promoted public-private partnerships, responsibility could easily be passed on to other actors with no ‘end point’ in sight.⁵¹

But in part because of this widespread tendency towards ‘blame avoidance’, the state’s arsenal of instruments of accountability – under the principles of hierarchy, mutuality, competition, and contrived randomness – has grown.⁵² Many instruments incorporate elements of more than one of these principles. IGs, for instance, blend elements of mutuality (civil servants monitoring civil servants) and contrived randomness (launching unexpected audits and investigations). Analytically, too few studies have explored the hybrid forms of these instruments and explained how one particular mechanism interacts with and affects the others. Again, in the case of IGs: though they are often dismissed as being merely a form of auditor or ombuds and

⁵⁰ Hood, 2010.

⁵¹ Warren, 2014, p. 50.

⁵² See Christopher Hood, Oliver James, B. Guy Peters, and Colin Scott, *Controlling Modern Government: Variety, Commonality and Change*, Cheltenham: Edward Elgar, 2004 for a full explanation of this categorisation of instruments of accountability..

limited to compliance monitoring, IG work contributes to a range of parallel processes of accountability including transparency, watchdog journalism, and performance reporting, in addition to the accounting and rule compliance for which they are better known.

It is necessary to survey the state of scholarship on the IGs themselves to understand how they suffer from, overcome, or transform these paradoxes, and in so doing, how they contribute to ever-evolving, newly configured, ‘accountability regimes’.

c. Inspectors General

Congress established the IG framework in 1978 as a corrective to administrative discretion. I give a more detailed description of the IG Act’s remit in Chapter 2, as well as a historical account of the IG’s origins and development in Chapter 4. The following section will, instead, review and highlight the limitations of the existing literature on the IGs, nearly all of which issues from a public administration perspective. A brief caveat on the manner in which IGs have received scholarly attention: OIGs are not equivalent to bureaucracies: they do not provide services that gather coalitional support, and they are the agent of two opposing principals (Congress and their agencies). Moreover, the IGs themselves do not have the same incentives as other political appointees: they do not make policy, and are not, in theory, political. IGs cannot receive bonuses and operate on a pay scale separate from that of other federal employees. In other words, the dynamics governing their development should not necessarily be the same as a service-driven bureaucracy. But in many ways, OIGs are organised as bureaucracies and behave as

such. Their performance depends partly on the extent of their traditional bureaucratic capacities. Most literature on IGs has treated them as bureaucracies, and frames its analysis with the questions and narratives which emerge from that field. Such studies perform their evaluations using precisely the categories that IGs themselves set for self-evaluation (e.g., recovered funds, indictments, etc). While these are important measures of IG activity, they tell us little about the effect that the *phenomenon* of inspectors general has had on the functioning of democracy in the US.

There is a striking dearth of research on the IG itself, and much of what does exist is limited in scope to the IGs' immediate effect on bureaucratic waste, fraud and corruption from a public policy or public administration perspective. The primary study of IGs remains Paul Light's seminal (1993) monograph on the history of the IGs and their performance, *Monitoring Government*.⁵³ He builds his argument around the IGs' structural predisposition towards compliance monitoring over that of capacity-based or performance-based conceptions of accountability; this distinction has largely served to structure the terms in which IGs' effects have been debated.

The public administration literature revolves around two main problematics: IG effectiveness and independence. Much of the existing literature, especially the early work, emphasises the IGs' *limitations* and failure to provide a truly effective check on executive action. The National Performance Review of 1993 (Reinventing Government Act) suggested that IGs restrained innovation and thus limited departmental capacity. Light's study also suggested a number of limitations to the IGs' work: a lack of attention to systemic problems within the agencies and departments; a failure to fix problems once they are identified; and a failure to provide robust recommendations for improvement. The degree to which these

⁵³ Paul Light, *Monitoring Government: Inspectors General and the Search for Accountability*, Brookings: Washington, DC, 1993.

problems have been mitigated since the nineties is under-researched, and a key concern of this dissertation.

The IGs' performance is often assessed with quantitative measures such as savings, successful prosecutions, reports issued, and investigations opened and closed. Relying on such statistics to demonstrate IG effectiveness, impact, or accomplishment results in a failure to appreciate the scope of the IGs' reach, and makes cross-agency comparison difficult, if not meaningless. Extensive, qualitative reports that suggest management reforms by one OIG might be appropriate for its particular agency, but a different agency might benefit from many, smaller, technical audit reports. Comparing two such OIG 'outputs' leaves the analyst at a loss because simple numbers of reports generated or cases closed fail to indicate the qualitative effect that the IG reviews have had on agencies.⁵⁴ Moreover, within the context of emergency, there is more at stake in executive overreach than financial waste or fraud: civil rights and liberties are often the first casualties in times of crisis, and their curtailment by an unchecked executive is one of the most significant challenges to a well functioning democracy. For instance, CIA IG John Helgerson's report on the use of torture by the CIA 'didn't fit the metrics of an IG's semiannual report, but it had big weight and impact'.⁵⁵ Thus, charting the effects of the IG moves from being a quantitative calculation to being an appraisal of the IG's effect on legal structure, on administrative procedure, and on participation in processes of accountability.

Although a growing body of scholarship analyses IGs' impact on agency performance, few existing studies provide a rigorous explication of the IG model's relationship to democratic values and processes. Consequently, evaluation of their effect on the polity has been limited to public administration categories – frequently

⁵⁴ Charles S. Clark, 'Into the Limelight', *Government Executive*, March 2011, p. 24.

⁵⁵ Quote of Danielle Brian, Executive Director of POGO (2014), in Clark, 2011.

of the IGs' own creation – and judges according to the accepted values of public administration itself: efficiency and managerial reform. Although my aim is to move away from this line of analysis, the conclusions of the public administration literature are not inconsequential for the present study. Indeed, they have shaped the research agenda and the standard evaluative categories for understanding IGs. Initial scholarly studies in the early nineteen-eighties focused primarily on the history of the IGs without situating them in relation to models of policy formation or institutional development.⁵⁶ Later literature of the nineties still remained largely a-theoretical, but reflected the influence of New Public Management (NPM) principles and the 'reinventing government' movement in administrative design.⁵⁷ These strands of thought influenced IG development in two ways: NPM stressed the importance of market principles and the 'customer model' in structuring bureaucratic relationships; and 'reinventing government' (as laid out in the National Performance Review, or NPR) outlined specific methods to improve government performance. The latter movement urged a shift from compliance monitoring to proactive, ongoing evaluation, and expanded IG responsibilities to include performance-monitoring reviews.⁵⁸

⁵⁶ See, for instance, Mark H. Moore and Margaret Jane Gates, *Inspectors General: Junkyard Dogs or Man's Best Friend?*, New York: Russell Sage Foundation, 1986.

⁵⁷ Frank Anechiarico, *The Pursuit of Absolute Integrity: How Corruption Control Makes Government Ineffective*. Chicago: University of Chicago Press, 1996; Albert Gore, *From Red Tape to Results: Creating a Government That Works Better and Costs Less*, Report of the National Performance Review, Washington, DC: Government Printing Office, 1993; Paul Light, 'The Inspector General at Middle Age', *The Government Accountants Journal*, Vol. 47, No. 3, 1998, p. 40-49; Ronald Moe, 'The Reinventing Government Exercise: Misinterpreting the Problem, Misjudging the Consequences', *Public Administration Review*, Vol. 54, 1994, p. 111-122; Kathryn E. Newcomer, 'The Changing Nature of Accountability: The Role of the Inspector General in Federal Agencies', *Public Administration Review*, Vol. 58, No. 2, March/April 1998.

⁵⁸ Harris, Matthew, *Inspectors General: Exploring Lived Experiences, Impediments to Success, and Possibilities for Improvement*, Doctoral Dissertation, Graduate Faculty of the School of Business and Management, Northcentral University, November 2012.

Since the turn of the twenty-first century, individual in-depth studies have focused on the performance of state and local IGs;⁵⁹ the performance of single federal OIGs;⁶⁰ IG effectiveness;⁶¹ IG independence;⁶² and phenomenological accounts of the IG experience.⁶³ IG reviews also vary in their rigour and consequence. Whereas IGs initially focused solely on compliance monitoring – that is, adherence to bureaucratic rules and laws – their consequence can differ depending on the nature of the recommendations they give and the willingness of external actors to implement them. By focusing only on conformity with existing rules, the IG model neglects other strategies for accountability, such as the use of positive sanctions and the development of infrastructure.⁶⁴ It should be recalled that Light attributed this limitation to the IG *model* pushed by Congress, and not to the strategies of individual IGs. Similarly, Robert Behn suggests that, historically, IGs have suffered from an ‘accountability bias’, i.e., from focusing on objective rule compliance because they ‘have a better chance of catching a [guilty party] when they concentrate on finances and fairness’, rather than on more subjective conceptions of accountability or performance.⁶⁵ Moreover, Light’s original (1993) assessment of the IGs described their movement into white-collar crime against the government as a product of the

⁵⁹ A. Markert, *Government Oversight: A Study of the Development of Offices of Inspector General for the State of New York*, Doctoral Dissertation, Department of Criminal Justice, City University of New York, 2003; Patricia Salkin, ‘Ensuring the Public Trust at the Municipal Level: Inspectors General Enter the Mix’, *Albany Law Review*, Vol. 75, No. 1, 2011.

⁶⁰ Carmen Apaza, *Integrity and Accountability in Government: Homeland Security and the Inspector General*, Farnham: Ashgate, 2011.

⁶¹ Light, Paul, ‘Strengthening the Inspectors General’. *The Washington Post*, 2 December 2010; Kathryn Newcomer, ‘Federal Offices of the Inspector General: Thriving on Chaos?’ *American Review of Public Administration*, Vol. 34, No. 3, 2004, p. 235-251.

⁶² Project on Government Oversight, *Inspectors General: Many lack essential tools for independence*, 26 February 2008, <http://www.pogo.org/our-work/reports/2008/go-ig-20080226.html>, Accessed 30 September 2014; Salkin, 2011; Segal, Lydia, ‘Independence from political influence – A shaky shield: A study of ten Inspectors General’, *Public Integrity*, Vol. 12, Fall 2010, p. 297-314; Betty Vega, ‘Inspectors General: Evaluating Independence and Creating Capacity’, *Government Law and Policy Journal*, Vol. 13, No. 2, Winter 2011, p. 48-54.

⁶³ Harris, 2012.

⁶⁴ Light, 1993, p. 3-4.

⁶⁵ Behn, 2001, p. 13.

structural bias towards compliance, and predicted that this trend would only intensify.⁶⁶ More recent studies suggest that some IGs make a greater impact than mere compliance monitoring would indicate, but the extent of this varies widely across the IG community.⁶⁷ If the assertion that IGs have an ‘accountability bias’ towards compliance monitoring is correct, it remains a puzzle as to how IGs could expand their remit or influence, or make a meaningful contribution to improving the quality of democracy.

If academics have ignored the IGs, the public sector has more eagerly passed judgment on IG performance. The National Performance Review, led by Vice President Al Gore in 1993, played a decisive role in reorienting the trajectory of the IGs. Gore, a sceptic of the IG model and one of only six senators to vote against the original 1978 Act, took the IG community to task in his appraisal and suggested that IGs fundamentally alter the aims and methods of their work. The study claimed that Gore

‘heard Federal employees complain that the IG's basic approach inhibits innovation and risk-taking, heavy handed enforcement; the presence of the IG's watchfulness compels employees to follow every rule, document every decision, and fill out every form and has had a negative effect in some agencies’.⁶⁸

The review encouraged the IG community to ‘[c]hange the focus of Inspectors General from compliance auditing to evaluating management control systems’ and, ‘in addition, recast the IGs’ method of operation to be more collaborative and less adversarial’.⁶⁹ Though the review ultimately served as an authoritative directive to change, it also provided phenomenological evidence to support the negative claims of

⁶⁶ Light, 1993, p. 22.

⁶⁷ Apaza, 2011.

⁶⁸ Gore, 1993, Chapter 1, Part II, <http://govinfo.library.unt.edu/npr/library/nprprt/annrpt/redtpe93/24b2.html>, Accessed 30 May 2014.

⁶⁹ Gore, 1993, Appendix B&C, SMC03, <http://govinfo.library.unt.edu/npr/library/nprprt/annrpt/redtpe93/229a.html>, Accessed 30 May 2014.

many scholarly studies until that point: IGs often created more problems than they set out to solve.

The government watchdog group Project on Government Oversight (POGO) has also produced many analyses – in many ways amongst the most rigorous social scientific evaluations – of the IGs. Since it first began to investigate federal government-wide corruption and misconduct in 1990, POGO's reports have addressed both individual and system-wide problems in the IG community. Though many of its actions concern individual OIGs – such matters as excessively long vacancies, or misconduct within an OIG – POGO has issued periodic analyses of the entire IG model. Its most comprehensive, two-part review of the IGs to date, published in 2008-09, focused on their independence and accountability, and affirmed the overall value of the IG system. In short, POGO rejected the claim that IGs' limitations outweighed their benefits.⁷⁰ Drawn largely from survey and interview data, the most valuable contribution of the study was the isolation of independence, above and beyond resources, as the most salient variable in determining an IG's success. However, the review also cautioned that by its very nature, independence makes the IG community vulnerable to accountability problems of its own.

Yet this positive view remains the minority position. Other discussions of the IG model, from Moore and Gates's early (1986) historical account, to more recent analyses of the growth of government, interpret the IG phenomenon as a potential liability for government: on these accounts, IGs merely contribute to the size of government and thus make it even more difficult to ensure accountability.⁷¹ Much of the scholarship with positive assessments of IG activity limits analysis to what IGs

⁷⁰ Project on Government Oversight (POGO), 2008; POGO, *Inspectors General: Accountability is a Balancing Act*, 2009, <http://www.pogo.org/our-work/reports/2009/go-igi-20090320.html>

⁷¹ Anechiarico, 1996; Sean Gailmard, 'Multiple Principals and Oversight of Bureaucratic Policy-making', *Journal of Theoretical Politics* Vol. 21, 2009, p. 161-186; James Ives, 'Inspectors General: Prioritizing Accountability', *Journal of Public Inquiry*, Fall 2009, p. 25-31.

themselves target: for instance, Apaza's study of the DHS OIG's effectiveness judges it by its own categories, from within a public policy framework, and thus has difficulty rating the IGs' wider effects on political life. For instance, Apaza concludes that at least one OIG has (amongst many indicators) recovered a considerable sum of monies and produced a significant number of criminal convictions, and that this demonstrates, at least in part, the effectiveness of that IG's work. However, these criteria for success – the fulfilment of the office's self-determined targets on a list of specific types of fraud, waste and abuse determined by the IG community as a whole – indicate little about the longer-term effects of the DHS IG's recommended reforms, and say little as to whether or not these targets are rigorous to begin with. Questions abound: does the work of IGs deter future wrongdoing? Are their targets reasonable? Are their recommendations rigorous? Do the categories omit other systemic sources of departmental dysfunction? At what point do the ever-higher rates of funds recovered indicate 'success' or accountability in government? Or do these figures merely indicate an increasingly corrupt government bureaucracy?

Overall, the literature on IGs is circumspect about their historical record and their effects on bureaucratic efficiency, while allowing for limited success and future potential in curbing fraud, waste and abuse. The literature is largely silent about the IGs' effects on broader political values: citizen involvement, state building, transparency, and democratic integrity. Yet the IGs' role as part of the 'internal separation of powers' is not only a question of efficiency, but also of democratic integrity. To gauge the IGs' effect on the wider democratic system, it is necessary to look beyond their self-reported statistics, to their relationships with other actors, and to the way they build networks within their offices, between their offices and other OIGs, and with other government and non-governmental actors.

The themes highlighted in the preceding (selective) survey of various accountability literatures point to the need for a broader perspective that incorporates the wide purview of the democratic theorists with the empirical rigour and detail of institutional case studies. What is needed is a synthetic approach that connects these different analytic registers. The broad treatments of accountability by legal and democratic theorists establish that the activity of accountability is a fundamental and inevitable part of democracy. Yet the public administration literature demonstrates that in practice, this activity – as integral to democracy as it might be – does not always enhance democracy. Distinguishing its beneficial from its noxious effects demands a careful empirical treatment of the mechanisms of accountability, both in an isolated fashion and as part of ‘accountability regimes’. To address this question, we must turn to detailed institutional studies for indications of each mechanism’s dynamics. Here, the limits of the existing IG literature are clear: its limited, self-contained evaluative parameters fail to link it to the broader concerns of democratic theory, or even the more philosophical considerations of public administration. This dissertation assumes this mantle.

CHAPTER 2.
Research Proposition and Design:
‘Once You’ve Met One IG, You’ve Met One IG’

In this chapter, I develop an evaluative framework by differentiating between types of IGs and their concrete institutional effects, and offer a set of propositions to explain their differential effects across the state. I thus focus on the micro-foundations of the IGs’ work and distinguish types of IGs by their strategies and value orientations in order to explain the marks they have made on the American state and American democracy. Since the seventies, IGs have grown in number and developed a positive reputation inside and outside government. While not always successful in effecting change, and at times hampered by external obstruction or internal corruption, they have, broadly speaking, made distinctive contributions to the political role and dynamics of the bureaucracy. Whereas they initially adhered to a limited form of procedural compliance monitoring, they have shown increasing willingness to monitor civil rights abuses, interpret the substance of policy (including foreign policy) according to broad democratic norms, judge the propriety of government actions, and systematically disseminate information culled from sources beyond the public’s reach. Below, I set out a framework and set of propositions to explain this development. This will serve to give empirical grounding to my more abstract claims about democratic integrity, claims developed in the next chapter (Chapter 3).

I. Who Are the IGs?

Accountability, and the democratic integrity that it furthers, has traditionally been a structural feature of the American state; the 1978 IG Act is a direct reaction to the concrete failures of the separated system. As the chapter title implies, IGs

comprise a diverse population of bureaucrats, with varying statutory responsibilities and limitations, offices sizes, and focuses. Despite the common general framework of the 1978 Act and increasingly standardised training, IGs still retain much discretion as to how they organise their offices and what strategies they use in fulfilling their mandate. The differences give rise to very different types of ‘accountability’, and make both normative and empirical comparison difficult.⁷² Although I will provide a fuller account of the IG category and history in Chapter 4, a brief description of the 1978 Act and the circumstances of its birth is necessary. IGs are a key mechanism of bureaucratic oversight that combines audit, investigative and inspection functions. Though embedded in the executive branch, IGs report to Congress at least semi-annually on their continuing investigations of fraud and abuse in the general workings of government. In doing this, they follow standardised procedures set out in what are known as the ‘Yellow Book’ (for auditors), the ‘Blue Book’ (inspectors) and the Quality Standards for Investigation. Statutorily, the purpose of the IG is:

- ‘(1) to conduct and supervise audits and investigations relating to the programs and operations of the establishments;
- (2) to provide leadership and coordination and recommend policies for activities designed (A) to promote economy, efficiency, and effectiveness in the administration of, and (B) to prevent and detect fraud and abuse in, such programs and operations; and
- (3) to provide a means for keeping the head of the establishment and the Congress fully and currently informed about problems and deficiencies [...] and the necessity for and progress of corrective action’⁷³

Thus, in addition to its audits and investigations, the IG has a both positive (leadership) and negative (preventative and punitive) role. Most important is the third provision, which establishes the IG as a kind of information conduit between Congress and the executive, permitting the former to perform its oversight role. The

⁷² One IG reported that POGO, the public watchdog organisation, attempted to develop a metric with which to compare federal IGs, but abandoned the project as a result of the variation in IG activity (POGO staff were unavailable to verify this claim).

⁷³ IG Act of 1978, §2

IG's duties include reviewing existing policies, recommending policies, and keeping the head of its establishment and Congress informed.⁷⁴

As of 2014, IGs number seventy-three across the federal bureaucracy, and many hundreds in state and local governments.⁷⁵ Beyond their mandated semiannual reports, IGs respond to specific requests from Congress or from within their departments to conduct reviews of particular instances of fraud and abuse. Each of the seventy-three IGs testifies regularly before Congress, at times only once or twice, but often at six or more hearings in a six-month reporting period. They operate within their host agency,⁷⁶ but coordinate with other Offices of Inspector General (OIGs) within a framework for professional ethics, the Council of Inspector Generals on Integrity and Efficiency (CIGIE).⁷⁷ In addition to 'special IGs',⁷⁸ three main types of IGs populate the federal bureaucracy: federal establishment IGs, who supervise federal departments; intelligence entity IGs (CIA and Director of National Intelligence); and designated federal entity (DFE) IGs, who oversee many smaller federal entities.⁷⁹ Whereas the first two are Presidentially appointed, Senate confirmed (PAS), and removable only by the president, the DFE IGs are selected and can be removed by the agency head, and this affords them less independence.⁸⁰ These

⁷⁴ IG Act of 1978, §4(a)

⁷⁵ Council of the Inspectors General on Integrity and Efficiency, <http://www.ignet.gov/>

⁷⁶ As is the custom within the IG community, I often use the terms 'agency' and 'department' interchangeably to refer to the entire host unit, regardless of whether the IG is PAS or DFE.

⁷⁷ This body was so named in 2008, a consolidation of two separate entities, the President's Council on Integrity and Efficiency (PCIE), for departmental IGs, and the Executive Council on Integrity and Efficiency (ECIE), for IGs in Designated Federal Entities (DFEs).

⁷⁸ Special IGs are assigned to temporary projects such as Iraq Reconstruction (SIGIR), Afghanistan Reconstruction (SIGAR), and the Troubled Asset Relief Program (SIGTARP).

⁷⁹ Vanessa K. Burrows, 'Statutory Offices of Inspectors General (IGs): Methods of Appointment and Legislative Proposals, CRS report, November 6, 2009, p. 1.

⁸⁰ Independence is the degree to which an IG can pursue an issue without regard to the preferences of Congress, the agency head, or any other members of the agency; in this sense, it is closely related to the concept of bureaucratic autonomy, defined by Daniel Carpenter as a combination of 'preference irreducibility' and 'operational and discretionary latitude' (*The Forging of Bureaucratic Autonomy*, Princeton: Princeton University Press, 2001). Increasing the IGs' level of independence to increase their effectiveness has been a primary focus of congressional legislation.

federal IGs are distinct from a host of other IG models, such as military and non-statutory IGs, and from those used at the state and local level.

The IGs' mandate to pursue 'fraud, waste and abuse' was conditioned by the incentive structure designed by Congress through the original 1978 Act.⁸¹ Early literature on the IG suggested that Congress's intention was for IGs to engage in compliance monitoring because it provided numerous advantages for Congress.⁸² Such a structure provides easily quantifiable findings, results that are visible and that lend themselves to 'credit claiming'.⁸³ But the IGs have moved beyond this. Moreover, the mutation of the IG concept is not limited to the United States. In comparative perspective, the expansion of the American IG system to encompass impropriety, financial auditing and rights abuses is distinctive. Although a number of countries have various forms of IG, they do not combine the audit and investigative functions seen in the US federal model, nor do they always operate with the same level of independence. For instance, a French equivalent, the *Inspection générale des finances*, maintains a primarily financial orientation, while in the UK, an Independent Reviewer oversees terrorism legislation for potential compromises of civil and human rights; many other countries have equivalents in the military.⁸⁴ Internationally, the military model of IG has become common on the African continent, and both India and Pakistan have military IGs to oversee the police force. The only American-style

⁸¹ It is worth noting that, despite its widespread use in descriptions of IG work, including in CIGIE's reports, the term 'waste' is not mentioned in the original 1978 Act.

⁸² Paul Light, *Monitoring Government*, Washington, DC: Brookings, 1993; Mark H. Moore and Margaret Jane Gates, *Inspectors General: Junkyard Dogs or Man's Best Friend?*, Russell Sage Foundation, 1986.

⁸³ Light, 1993, p. 56-7.

⁸⁴ Inspection générale des finances, see http://www.igf.finances.gouv.fr/site/igf/Accueil/Qui-sommes-nous/Les_missions_du_serv; Independent Reviewer for Terrorism Legislation: <http://terrorismlegislationreviewer.independent.gov.uk/>

IG outside the US now operates in Iraq, and was an American ‘creation’, partly designed and organised by PCIE/CIGIE.⁸⁵

II. How Do We Classify IG Effects on Democracy? A Typology of IGs

The only existing typology relating to IGs belongs to Light (1993). However, this typology is not a typology of IGs per se, but rather of the various approaches to accountability taken by IGs. He distinguishes between compliance, performance, and capacity-building types of accountability, with the first referring to ‘conformity with carefully drawn rules and regulations’; the second, to ‘the establishment of incentives and rewards for desired outcomes’; and to the third, ‘the creation of organisational competence through technologies [...and] initial investment’.⁸⁶ His differentiation focuses primarily on what I call an IG’s ‘strategy’ – that is, concrete, institutional ends – and leaves aside the variation in more substantive values that arises in IG work. Therefore, I propose that we posit two broad characteristics of IG work: the *value orientation*, and the *institutional strategy*.

The *value orientation* indicates whether an IG uses administrative or democratic principles as the primary basis for its reviews. Does the IG aim primarily to improve the department’s performance for the sake of administrative success, or does it aim to curb threats to constitutional values and the democratic process? In practice, an IG’s value preference might not be clear-cut, and might vary widely between reviews. Indeed, in the administrative state (especially as a result of

⁸⁵ Personal interviews, CIGIE executive staff. Multiple semi-structured interviews were conducted for this dissertation, and all interviewees were asked permission for the direct attribution of quotes. In the footnotes accompanying statements of fact or opinion in the text, I cite the interviewee’s name and the date of the interview. A full list of interviews, with name of interviewee, professional position, and date of interview, is situated in Appendix A.

⁸⁶ Light, 1993, p. 3.

neoliberal influences), democratic values can take on an economic valence, where (as Olsen notes), '[r]esponsiveness and accountability imply the ability to discover and accommodate market signals'.⁸⁷ Analytically, however, there is a need to disentangle democratic values from administrative values (especially ideologically infused ones). The two orientations, 'efficiency' and 'democratic values', represent the poles that structure the administrative-democracy tension.

The use of such terms as 'economy' and 'efficiency' first appeared in IG legislation with the 1961 IGA amendments, and featured prominently in the 1978 Act.⁸⁸ IGs with this orientation concentrate on eliminating waste and redundancies to maximise performance and minimise cost. However, for my purposes, the 'efficiency' value orientation encompasses more than the colloquial sense of the term. Efficiency here serves as shorthand for a much more comprehensive approach to public management, influenced in part by the prescriptions of New Public Management (NPM, discussed further below) and related theories of public administration, which adopts a market-oriented logic. This extends the basic meaning of 'efficiency' to include 'performance'. Privileged strategies include a defense of privatisation and performance measurement, and betray an ideological commitment to market principles as the best safeguard against corruption and wrongdoing.⁸⁹

The alternative orientation, protecting democratic values, enlists a distinct set of criteria for evaluation, one whose point of reference lies in some constitutionally reflected democratic values, such as public integrity, equality, impartiality, rights protections and transparency. Their reviews cover instances of rule breaking for

⁸⁷ Johan P. Olsen, 'The Ups and Downs of Bureaucratic Reorganisation', *Annual Review of Political Science* 2008, Vol. 11, p. 20.

⁸⁸ Light 1994, p. 29.

⁸⁹ Christopher Hood, 'A Public Management for All Seasons?', *Public Administration*, Vol. 69, Spring 1991; Camilla Stivers, 'Resisting the Ascendancy of Public Management: Normative Theory and Public Administration', *Administrative Theory and Praxis*, Vol. 22, No. 1, 2000, p. 12.

partisan gain, political advantage, or ideological advantage; covering mistakes or violations of public integrity with further dissimulation; passing judgment on foreign policy and conformity with international treaties; and evaluating policies, programmes, and government actions for their conformity with civil rights and liberties laws. Within the national security state (as in all three of the cases narrated below), the split between efficiency and democratic values maps onto the broader tension between security and liberty; a highly efficacious programme may bolster security but undermine rights, or vice versa.

An IG's *institutional strategy* comprises the nature and targets of its recommendations, its institutional innovations, and its coordination with external actors. (In this, it is similar to Light's tripartite distinction described above). In short, it revolves around a tension between compliance and innovation, in both agency performance and capacity building, as strategies for oversight. At a minimum, IGs should assess compliance with existing rules and regulations, and try to deter future deviations from them with sanctions and punishment. The recommendations of an IG with this 'compliance monitoring' orientation can target the procedures and management structures of the department, and might point to some individual responsibility, but does not address the underlying or systemic sources of the violation.

However, IGs can adopt an alternative, 'intensified' strategy and target the legal and institutional infrastructure, both through their recommendations and in their coordination with other offices and political actors. Recommendations can point out underspecified law or require the development of overall management plans (e.g., in times of emergency). Beyond its recommendations, the IG can build the 'web of accountability', by cultivating networks with other OIGs and external actors so as to

strengthen continuous, ‘police patrol’ oversight. Outside of individual reviews, it can develop competencies within the OIG to focus on particular themes or pathologies within the host department.

These two axes, value orientation and institutional strategy, combine to form four types of IGs (Table 2.1). The two axes should be seen as continuous, rather than dichotomous variables; as a spectrum, rather than as mutually exclusive.

Table 2.1. Typology of IGs

		Primary Value Orientation	
		Improving Efficiency	Protecting Democratic Values
Primary Institutional Strategy	Building Legal and Institutional Infrastructure	Performative IG	Constitutional IG
	Compliance with Existing Procedures and Acceptance of Management Structures	Compliant IG	Political IG

It is important to underscore that these ideal types serve as both independent variables – as norms with effects on democracy – and as dependent variables – as the consequence of ideological, personal and institutional factors (elaborated upon below). Moreover, they are primarily descriptive classifications based on the empirical evidence, rather than analytical categories formulated prior to the empirical work. In practice, there is significant overlap between the four types, and different reviews issued from the same OIG in the same year will demonstrate evidence of all four. All IGs must at least begin with compliance monitoring to complete their work,

and the concepts of performance and democratic integrity are not necessarily mutually exclusive (even within the same review).

Three important caveats regarding IG labelling are in order. First, OIGs issue dozens, and sometimes hundreds, of audits, investigations, and other reviews each year. Some reviews issued from a single OIG might reflect a ‘performative’ conception of accountability, while others issued concurrently from the same OIG might reflect a concern with democratic values. Moreover, the subcomponent heads within each OIG come with different professional backgrounds and training, and each sets priorities within the subcomponents (i.e., the head of the audit division in an OIG will propose the priorities for audit reviews, while the head of the investigations division will choose the preferred investigations to pursue). Thus, to draw a uniform conclusion about the fundamental value orientation of an entire office over time based on a single review would be grossly misleading. Because of this, the characterisation of any ideal IG type is necessarily a glimpse in time, and reflects only loose or broad trends. The cases that follow *do* assign these labels to specific OIGs; however, the analytic value of such characterisations is not to fix a historical label definitively on a particular IG or OIG, but rather to demonstrate the range of possible IG effects on democratic functioning, and the factors that condition these effects. In other words, each case study serves as a stylised example of the way that a variety of factors can push an IG to choose different strategies and to operate with different value orientations.

Second, in practice since the nineties, IGs across the federal government are encouraged through CIGIE, through government-wide auditing standards, and through bureaucratic pressure to conform to the principles of NPM and ‘downsizing government’, with a view to promoting efficiency. This makes the ‘efficiency’ value

orientation a very common one with strong cultural and institutional reinforcement. Finally, this study provides only three in-depth case studies, and thus demonstrates only three of the four IG ‘ideal types’. The one type of IG not studied in depth is the Compliant IG, which is perhaps the IG type most akin to the original IG model, and thus is in some ways the ‘default’ type of IG. The three case studies thus demonstrate the ways in which the original model has evolved and expanded.

a. The *Compliant IG* focuses mainly on improving the administrative efficiency and performance of the host department, and does so primarily by checking that existing rules and procedures have been adhered to. It frames its reviews and long-term strategic goals in terms of effectiveness and efficiency. It also tends to rely more on routine audits and inspections than single-event, ‘gotcha’ investigations. In terms of its strategies, the Compliant IG is the type closest to the model designed by Congress in 1978: its strategies include using post-hoc investigations, recommending negative sanctions to punish perpetrators, and targeting individual instances of previous wrongdoing and inefficiencies rather than redesigning administrative structures to prevent future abuse. Because the Compliant IG’s orientation is retrospective, its recommendations do little to prevent future waste and inefficiencies. The effect of this IG’s work is limited to internal improvements in the host department, and does little to affect wider political processes.

b. The *Political IG* focuses on behavioural impropriety and the uncovering of individual instances of fraud and moral wrongdoing (e.g., embezzlement or sexual harassment) more than on finding the systemic sources of wrongdoing or improving administrative performance; but like the Compliant IG, its recommendations and

prescriptions focus on retroactive punishment for perpetrators, and on improving the gaps in departmental procedure that permit or encourage wrongdoing. Strategy-wise, the Political IG addresses wrongdoing by targeting the individual sources of fraud, waste and abuse. In contrast to the Compliant IG, the Political IG unearths political scandals and corruption more than ‘routine’ waste. Because its institutional strategy is to favour inspections and retroactive discipline, this type of IG does not address the systemic factors that underlie and perpetuate departmental problems.

c. The *Performative IG* is guided by a commitment to improving the performance of the department, but also concentrates on the broad structures – networks and incentives – that underpin that performance. IG reviews dictated by the performative perspective will frame the issue under investigation as one of efficiency and effectiveness, and implicitly or explicitly pass judgment on the programme’s utility for the department’s goals. This IG’s goals are similar to those of NPM: adopting a customer service model and working towards prevention rather than reaction. In alignment with its NPM orientation, it tries to move from hierarchy to ‘teamwork’ and mutual participation. It works on building institutional structures within the OIG and in consultation with other OIGs and on organisations in civil society, contributing to a ‘web’ of accountability. Thus, one of the Performative IG’s most salutary effects on democracy is not only (or even primarily) in the outcome of the review, but also its in shoring up the institutional foundations of future accountability. However, because efficiency remains the Performative IG’s main value, it can fall short when faced with rights abuses; in the context of national security, it falls on the ‘security’ side of the liberty versus security tension.

In its assessments, the Performative IG monitors not only compliance but also the department's reform strategies; in its recommendations, it proffers not only procedural remedies but also institutional innovations designed to improve performance and maximise oversight. What distinguishes the Performative IG from the Compliant IG is that the former not only assesses basic compliance and procedure, but also tries to institutionalise certain types of behaviour through law, organisation, and structure. Above all, this IG's reviews make marks on the rule of law, accountability, and the responsiveness of government.

d. The *Constitutional IG* frames its reviews as questions of moral wrongdoing or integrity. It does so in a number of ways. First, it focuses on the net power held by any given political entity by judging the scope of its actions, and evaluates a given action by the degree to which it prevents or permits the concentration and abuse of power in a single institution. The Constitutional IG also judges the propriety of the action, identifying wrongdoing whether or not it accords with existing law. In part, the expansion of the IGs' focus to include this perspective in their oversight was statutorily based: with the passage of the Patriot Act, the DOJ and DHS IGs were given a legal basis for investigating civil rights abuses, especially those related to the implementation of the Act. But determining what counts as an abuse of rights is partly an interpretive act, and consequently different IGs' pursuit of such violations has varied considerably. A review guided by this perspective will frame the issue as one of propriety of government action or rights violations. Like the Performative IG, Constitutional IGs publicise their reviews, making their narrative available for further citizen scrutiny and even judicial proceedings.

The IG's adoption of this perspective can lend it a quasi-judicial role, passing judgment on the legality or appropriateness of an action regardless of its compliance with existing law, and even in such a way as to challenge the existing legal framework. Although many IG reviews target management structures in their recommendations, at their most active, the reviews can question the very legal framework underpinning the legitimacy of the actions in question. In addition to affecting equality, freedom and the rule of law, much work done by constitutional IGs defends the 'liberty' side of the liberty/security dichotomy in national security.

III. Explaining the IGs' Differential Effects on Democracy:

Why do some IGs adopt different value orientations and strategies than others, and thus contribute more to certain democratic principles or detract from others? IGs are a form of bureaucracy, and bureaucracies need resources to carry out their tasks. On a basic level, IG work is grounded in material capacities and can be measured along classically Weberian indicators of bureaucratic power – material size, expertise, autonomy, coercive power, and reputation-based legitimacy. These dimensions are crucial to understanding the dynamics of the IGs' influence. Without resources, a robust organisational capacity, and the legitimacy underpinned by their reputation, the IGs' role as narrative-builders would be ineffectual. Tracing the development of these dimensions requires attention to the budgets and personnel numbers (relative to their host departments); the type and distribution of their expertise; and their independence. In short, understanding the IGs' emergence, growth, strategies, and effects necessitates attention to bureaucratic form and organisation.

However, as an explanation of the differential effect IGs have had on democratic functioning, these explanatory factors come up short in explaining the variation in the types of strategies that IGs employ, in the substantive content of accountability they pursue, and in the different norms related to the scope of executive action and bureaucratic behaviour that they defend. Why, for instance, would an IG choose to pursue an investigation of civil rights abuses over one that improves its host department's efficiency? In other words, how do IGs navigate the administrative-democratic tension? Beyond the material base, ideological, institutional and functional considerations play important roles in influencing the marks that IGs leave on the state and on the quality of democracy. Although IG appointments are statutorily non-partisan, ideological commitments can influence and compromise IGs' agendas and diagnoses. For instance, a strong commitment to improving certain departments' performance might be influenced by a strong ideological commitment to the War on Terror, and might lead an IG to privilege performance concerns over rights violations.

But ideological influences are not limited to individual partisan commitments; they infuse theories of administration that, in turn, shape the possible options available to administrative reformers. Taking cues from academic and business 'wisdom', both congressional and administrative actors can variously push compliance, results, or performance. As the dominant academic theories of administration change over time, the standards and practice of the IGs evolve accordingly. In the nineteen-seventies, during the development of the IG Act, and later in the nineties, administrative reform proposals bore the marks of numerous strands of administrative theory. A common perspective suggests that the concepts of 'classic' public administration remained in place until the late nineteen-seventies, and

were replaced by New Public Management (NPM) and neoliberal principles over the ensuing two decades.⁹⁰ NPM, the dominant intellectual framework in Anglo-American public administration scholarship and practice, introduced a new focus in accountability measurement, an emphasis that replaced an earlier focus on corruption, and based evaluation on the principle of the public good. It focuses on the efficacy and efficiency of a given action rather than its propriety. The NPM paradigm emphasises a set of doctrines for the conduct of public management, including ‘hands-on professional management’; standards and measures of performance; output controls; disaggregation of units in the public sector; public competition; private-sector management practices; and parsimonious resource use.⁹¹ However, Olsen argues that especially from an international perspective, this view is inaccurate.⁹² Rather, competing and sometimes incompatible strands of theory often coexist in single bureaucratic settings, with the insights of New Public Management being layered onto traditional administrative arrangements.

Despite a certain clarity in the schools of thought governing public administration and reform, the implementation of reform principles in practice is much less transparent. Bureaucracies are rarely ‘pure’ incarnations of theories of administration, but rather hybrids of different models that reflect diverse, and sometimes conflicting, sets of values. The competing theories influence IGs’ preferences indirectly through the practices encouraged in government agencies (for instance, ‘best practices’ shared between departments and agencies, and government-wide auditing standards such as the ‘Yellow Book’ of auditing regulations). The theories also influence IGs through their professional training and experience.

⁹⁰ Christopher Pollitt, Sandra Van Thiel, and Vincent Homburg, *The New Public Management in Europe: Adaptations and Alternatives*, Houndmills, UK: Palgrave Macmillan, 2007.

⁹¹ Hood, 1991, p. 4-5.

⁹² Olsen, 2008.

Personal professional backgrounds thus play a large role in determining IG strategy. IGs generally come to their positions with one of three professional backgrounds: legal training, law enforcement, and finance or accounting (auditing). IGs often cultivate the kind of expertise with which they themselves are most familiar, building institutional structures within an OIG to coordinate these skills. In other words, their backgrounds frequently condition the development of institutional structures that underpin and predispose OIGs to conduct certain types of reviews. By defining a distinctive mission and fostering specialised competencies, IGs can give their offices the focus and institutional support needed for writing consequential reviews. This entrenches an IG's tendency to pursue certain kinds of reviews and not to pursue others.

In addition to the 'intermediary' institutional structures built by the IGs themselves within their offices, another institutional factor plays a significant role in affecting the strength and consequence of IG work: independence. This, along with material (budgetary) security, has been the primary target of congressional legislation aiming to shore up the IG model. Functional considerations on the part of the IG can also factor into choices about the allocation of resources to different reviews; these can be deliberate choices based on the 'mission' of department/agency. According to this logic, the IG of, say, the Social Security Administration should focus primarily on auditing because the agency's *raison d'être* is to manage a high budget programme. In contrast, the Justice Department's IG might focus on legal issues since it represents the protection of the law on the federal level.⁹³ It should be noted that IGs might choose to operate on the basis of a limited interpretation of their role for the sake of

⁹³ In a personal interview, one IG suggested that he overrode his own professional background (law) and allocated more resources to the audit function than the investigative component of his office when he realised that the primary challenge to his department was financial waste. Another IG similarly suggested that an IG should 'let the department's problems dictate the focus of [an IG's] work' rather than the other way around.

democratic integrity and restraint of power. For instance, an IG might believe its role to be an advisory role rather than a productive or creative role. It might also take seriously the separation of powers, and decline to make judgments or take actions that would lend it a quasi-judicial or a policy-making role.⁹⁴

IV. The Process of Institutional Change: Exploiting Ambiguities

All of these factors have contributed to the variation in effects that IGs have had on democratic processes, to the expansion of the IG model, and to the expansion of the IGs' remit. Regardless of the substantive driver of change, institutional change requires the presence of discursive and institutional ambiguities that actors must exploit. These ambiguities will give rise to 'layering', a form of institutional change in which 'new rules are attached to existing ones, thereby changing the ways in which the original rules structure behaviour'.⁹⁵ Through amendments and revisions of existing rules and capacities, actors can 'alter the logic of the institution' and transform its original purpose.

This institutional and substantive expansion has been spurred by four interlinked sources of ambiguity in the IGs' immediate context: a dual source of legitimacy; a dual set of incentives; multiple, competing audiences; and a dual function in government. First, IGs derive their legitimacy from Congress (through statute and through Senate confirmation), and from the executive (through presidential appointment). As presidential appointees, individual IGs rely on the executive for their survival and have incentives not to interfere with the president's agenda. But the parent of the broader IG institution – the source of its mandate and

⁹⁴ Indeed, the virtues of self-limitation were a common theme amongst IGs in interviews.

⁹⁵ Kathleen Thelen and James Mahoney, *Explaining Institutional Change*, Cambridge: Cambridge University Press, 2010, p. 16.

the audience of its semi-annual reports – remains Congress, a distinct source of pressure. Second, IGs are firmly located within the executive branch, but are at the same time a creature of Congress, its ‘eyes and ears’ within the executive bureaucracy. This position straddling the branches establishes a dual set of incentives: on the one hand, the more waste, fraud and mismanagement IGs uncover, the more they are rewarded, and failure in this area will result in penalties or firing. On the other hand, IGs must be heedful of the preferences of the executive because the president can remove IGs without cause.

Third, IGs have multiple, competing audiences whose relative importance shifts over time. Both Congress and agency heads receive the IGs’ semi-annual and special reports, but the IGs also serve as the President’s policemen, keeping the bureaucracy in line; they use the media to give visibility to their reports, and are used in turn by the media as sources of internal information; and finally, they have at times been ‘parented’ by the Office of Management and Budget (OMB), which determines their levels of personnel and resources. Finally, the IG position is a fusion of two main distinct functions: an audit function and an investigative function. These two functions entail different bureaucratic orientations and cultures, and focus on different types of problems. The language and bureaucratic cultures of each function differ, and the relative strength of each within an individual OIG makes a difference in that office’s activity. The audit and investigative functions gradually expanded to include inspection and evaluation functions, but their relationship within each office has remained vexed. Because each function involves different methodologies and starting assumptions, they define problems differently and thus pursue different sorts of issues. And because it is the way that issues are defined that determines the types of

solutions that are appropriate to correct them, the framing of each issue will determine what kind of accountability is effected by a given review.

The IGs navigate these ambiguities through discursive interaction between actors – between IGs, members of Congress, and groups in civil society – and continuously re-forge the meaning of accountability. Although the term ‘discourse’ has been tainted, from the perspective of some political scientists, by its being a product of postmodern literary theory, it has enjoyed recent attention as a result of the renewed interest in the explanatory power of ideas in institutional change. Situating her work in the institutionalist tradition, Vivien Schmidt has recently rescued the term from its post-modern literary writers and offered a framework, ‘Discursive Institutionalism’, in which discourse – understood as the representation of ideas and the interactive, dynamic process of coordination and communication – takes on causal and explanatory power.⁹⁶ In this framework, ideas, which operate at different levels of generality and are of different types, are the primary drivers of institutional change, and do so thanks to interaction among policy makers and between policy makers and the wider public.

From this perspective, individual IGs, together with Congress and groups in civil society, generate, deliberate over, and legitimate specific conceptions of what a government bureaucracy *should* do and how it should behave. The range of potentially contradictory expectations and normative standards that IGs may privilege manifest themselves in the framing of problems and their solutions.⁹⁷ IGs also vary in their self-conceptions as well as their views of what constitutes the appropriate object of an OIG’s investigations and audits.

⁹⁶ Vivien Schmidt, ‘Discursive Institutionalism: The Explanatory Power of Ideas and Discourse’, *Annual Review of Political Science*, Vol. 11, June 2008.

⁹⁷ See Johan P. Olsen, ‘Accountability and Ambiguity’ in *The Oxford Handbook of Public Accountability*, Oxford: Oxford University Press, 2014, p. 106-123, for a discussion of the ways that ambiguity and accountability can both conflict with and complement each other.

These ambiguities have permitted individual IGs ample latitude in how they interpret their role, and this has led not only to the variation in IG performance and impact, but also, mediated through organisational capacities, the extension from an early, limited focus on compliance monitoring to a more consequential institutional strategies, and a deeper effect on democratic processes.

V. Some Propositions Regarding IG Contributions to Democratic Integrity

Above, I have outlined potential ways that IGs might affect democratic processes; however, considerable variation exists amongst IGs (and OIGs) in the way and the degree to which this occurs. The ambiguity of the IGs' mandate in its original formulation, coupled with the influence of multiple theories of public administration and with individual latitude in interpretation, has given rise to a diversity of IG types and correlate contributions to democratic integrity; this diversity goes to the heart of the administrative-democratic tension. I offer three propositions to explain the variation in the IGs' effects:

P1 [Heightened Effects]: Some IGs have transcended their structural bias towards compliance monitoring, and intensified the effect they have on democratic integrity (and efficiency).

The opposite proposition, that IGs continue to limit their scope to compliance monitoring, and that IGs are a form of bureaupathology with *negative* effects on administrative efficiency and democratic integrity, dominated the scholarly literature surveyed above, and the burden of proof to demonstrate the IGs' consequence remains. This proposition suggests that, contrary to earlier assessments, some IGs use the institutional strategy of 'building infrastructure' and, in expanding the purview of their values, protected democratic values previously unaffected by IG work.

Evidence that IGs have pursued other modes of accountability begs the question of *how* IGs have expanded the scope of their work.

Hence I offer two further propositions:

P2 [Value Variation]: Personal background and professional experience affect value orientation.

Legal backgrounds dispose IGs towards democratic values, while financial, auditing and management backgrounds encourage efficiency orientations. The skills some IGs develop as auditors give them knowledge of financial management and of ways to maximise the ratio of outputs to inputs (in profit or service provision). In contrast, IGs with legal backgrounds tend to be sensitive to legal nuances and the political and constitutional questions that arise in jurisdictional battles and in occurrences of moral wrongdoing.

P3 [Strategy Variation]: The material resources of an OIG, the professional background of its IG, and independence influence institutional strategy.

Without sufficient resources, an IG cannot conduct audits and investigations with the depth and rigour it needs to check anything beyond compliance with existing regulations, nor can it devote the time and staff necessary to design capacity-building or performance-enhancing reforms and proposals. Similarly, without independence, an IG is left hamstrung in its ability to conduct reviews. Whether they are hampered by budget or staff limitations, lack of relevant experience, departmental interference, or by their own political ties to an administration, IGs who lack independence rarely risk more intensive forms of IG work such as building legal and institutional infrastructure. The broad institutional strategy adopted by an IG strongly influences

the intensity of its effects: targeting the infrastructure of accountability has a much wider-ranging effect on democracy than solely targeting administrative procedure and management practices; it requires sufficient material resources and the independence to pursue reviews without political or administrative pressure.

I evaluate these three propositions in the core of the thesis by assessing the outcomes of individual reviews, viewed in the context of the history of the OIG. I then relate these conclusions to the broader question of the IGs' effects on democratic integrity.

VI. Research Design

a. Methodology

To understand the differential effects that IGs have on democratic integrity, I focus on the micro-foundations of institutional growth and on IGs' institutional links with other actors in forging administrative accountability. The puzzle of the IGs' differential growth requires attention to traditional bureaucratic capacities and leadership on the one hand, and on the other, attention to the effects of the reviews themselves; in other words, to the various types of accountability and their effects on broader democratic processes. My analysis will operate on two levels. The first order analysis consists of a concrete examination of individual IG projects using measures appropriate to the nature of IG recommendations (standards, institutional innovations, etc). The second-order appraisal will evaluate how these very specific contributions affect much broader democratic values, and will thus address the question of how administration and democracy interact. I employ a comparative-historical approach to

how the IG institution has developed different strategies of accountability with different institutional effects.⁹⁸ This approach relies on a variety of methods to analyse processes across cases and within them over time: comparative narratives through process-tracing, statistics, and legal analysis. There are necessarily methodological limits to small-N research, including its tendency to have more causes than cases⁹⁹ and its limited generalisability to other cases.¹⁰⁰ However, small-N research permits scholars to uncover micro-level processes and the individual-level decision-making process.¹⁰¹ The centrality of individual IGs' decisions in the development process warrants this approach. Moreover, small-N research permits attention to be paid to the different causal processes that lead to the same outcome (equifinality).¹⁰² Given the different types of expertise developed by the two IGs with consequential, state-shaping reviews, a small-N study is necessary for a detailed account of the individual characteristics of each OIG and the individual decision-making process of IGs. Finally, the small universe of potential cases – thirty Presidentially appointed IGs – makes any kind of large-N study impossible.

My goal is neither to test nor to build a comprehensive theory of a systematic mechanism. Rather, it is to explain a particular historical outcome, what Gerring calls a 'single-outcome study':¹⁰³ the growth and differential development of different kinds of accountability and their effects on democratic processes. Within each narrative, I use process-tracing to provide a large number of causal-process

⁹⁸ John Gerring, *Social Science Methodology: A Criterial Framework*, Cambridge: Cambridge University Press, 2001, p. 28.

⁹⁹ Barbara Geddes, *Paradigms and Sand Castles: Theory Building and Research Design in Comparative Politics*, Ann Arbor: University of Michigan Press, 2003, p. 137.

¹⁰⁰ Gary King, Robert Keohane, and Sidney Verba, *Designing Social Inquiry*, Princeton: Princeton University Press, 1994.

¹⁰¹ Gerring, 2001, p. 45.

¹⁰² Alexander George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences*, 2004, p. 161.

¹⁰³ John Gerring, 'Single Outcome Studies: A Methodological Primer', *International Sociology*, Vol. 21, No. 5, September 2006, p. 707-734.

observations (‘context, process, or mechanism’), as opposed to data-set observations.¹⁰⁴ This allows for the accumulation of data at each step and for an explicit formulation of the linkage between explanatory variable and outcome. In each case study, I use process tracing to understand how each individual IG navigated the institutional constraints of the moment to create cues for further institutional evolution. In an initial overview chapter of the IG category, I set out the legislative and political history of the contemporary IG community, and highlight certain trends and problems in the community. I provide a narrative of the political history of each individual OIG, drawing attention to the material factors and decisions that shaped the quality of its reviews. I then provide an analysis of a significant OIG initiative (its immediate and long-term effects), and follow its historical implementation and use by other actors.

b. Case Selection

In selecting the departments to follow, I chose to limit the universe of possible cases to PAS IGs in order to avoid structural variation in the level of independence (i.e., the statutory elements of independence such as role in the budget process, appointment by the President) and to standardise the statutory framework. Because the impetus to the ‘imperial bureaucracy’ – that is, a proliferating, unaccountable bureaucratic apparatus – lies both in emergency politics and in the broader growth of the administrative state, I chose departments that have dealt with the effects of

¹⁰⁴ Henry Brady, David Collier and Jason Seawright, ‘Refocusing the Discussion of Methodology’ in *Rethinking Social Inquiry*, H.E. Brady and D. Collier, (eds.), Oxford: Rowman and Littlefield Publishers, 2004, p. 12.

‘emergency governance’ (i.e., the national security state).¹⁰⁵ The Departments of Justice, Homeland Security, and State were selected because of their dual role both in national security programmes and in domestic administration. This choice permits a greater appreciation of the IGs’ potential to monitor a range of problems, including rights violations.

In their classic work on qualitative methodology, King, Keohane, and Verba present the problem of selection bias (i.e., selecting cases based on the dependent variable). However, their solution to this problem is not random selection, but carefully planned selection that preserves variation among outcomes. To highlight the variation in the overall development of my dependent variable (effects on democratic integrity), I selected two ‘successful’ cases (i.e., OIGs that produced consequential reviews with positive effects on democratic integrity) and one ‘unsuccessful’ case (i.e., an OIG whose reviews provided limited accountability). This is open to the charge of ‘selecting on the dependent variable’, but because of the research-oriented approach, this risk is diminished.¹⁰⁶ Through a thorough preliminary investigation of the existing literature on IG performance, interviews, and familiarity with many individual reviews, I can place the chosen cases in a wider context that permitted a consideration of the successful and unsuccessful cases. Moreover, the inherent diversity between OIGs – their institutional variation – also considerably mitigates this problem: a frequent comment within the IG community is that ‘once you’ve met one IG, you’ve met one IG’.¹⁰⁷ The observation underscores the variation in size, organisation, purpose and orientation of each OIG, even those operating

¹⁰⁵ The ‘universe’ of cases was thus limited to: Homeland Security, Justice, State, Defense and Treasury (for its role in economic emergency).

¹⁰⁶ King, Keohane and Verba, 1994, p. 128.

¹⁰⁷ Michael Bromwich, personal interview, 2 January 2013.

within the same legal framework.¹⁰⁸ From a methodological perspective, this choice maximises the variation between cases and diminishes the severity of the charge of ‘selection bias’.

An organisation premised on the development of special competencies, and the recruitment of specific expertise, led two Offices of Inspector General (OIGs) – the Department of Justice (DOJ) and Department of Homeland Security (DHS) – to hold the executive branch to account by providing narratives to the wider public and Congress through frequent and consequential reviews of executive action over time. The capacity to hold the executive to account on display in the Justice and Homeland Security OIGs was not peculiar to these departments, but was nonetheless far from the rule across federal OIGs. A third office, the Department of State (DOS), struggled to build office capacity, and has issued few reviews of consequence. Common to Justice and Homeland Security, but absent in State, were long-term leaders who cultivated a specialised competency that focused material resources and expertise on a distinctive mission. In contrast, the State Department was plagued with long absences in the IG position, and manifested the traditional split between the two inspector general competencies of auditing and investigating that precludes internal cohesion.

The success of Justice and DHS in issuing consequential reviews with marked effects on democratic processes is also striking because of the institutional differences that existed between them. Whereas many of the DOJ IG’s consequential reviews were primarily special investigations conducted by investigative lawyers, the DHS IG relied more often on its audit function to rein in administrative discretion. The precondition for this accountability was a specific analytic capacity, peculiar to each, and cultivated by individual IGs. In the State Department, there was no institutional

¹⁰⁸ The government watchdog group Project on Government Oversight (POGO) attempted to construct a metric by which to compare the performance of IGs across the federal government, but concluded that OIGs were too diverse to create a meaningful measure.

framework that privileged expertise, nor was there an attempt to promote joint reviews that equivalently conjoined the audit and investigative functions. Indeed, ‘in house’ inspectors with little relevant expertise or experience were often privileged over more experienced personnel. Their reviews failed to create lasting state-building changes and accountability. However, the two successful cases differed in the type of accountability they brought to their host agencies. The institutional differences between DOJ and DHS were underpinned by different value orientations. Moreover, differences in the professional and political backgrounds of the IGs led them to follow different strategies in pursuing accountability. In each of the successful cases, the IGs consistently delivered reviews with far-reaching consequences for the scope of government action, civil rights, performance and law. But whereas many Justice Department reviews demonstrated a concern for constitutional and legal principles, the Homeland Security Department reviews operated according to efficiency and performance-based conceptions of accountability. The State Department reviews were limited to compliance and procedural accountability. Each of the three cases thus manifested characteristics of a distinct ‘ideal type’ of IG: Justice performed as a Constitutional IG; Homeland Security as a Performative IG; and State, as a Political IG. The type of accountability depended crucially on the types of capacity that each OIG had – the skills and expertise within the office – and the vision of the individual IGs.

In selecting individual reviews and projects from the hundreds produced by each OIG each year, I chose the most effective and largest reviews (in terms of length of investigation and cost) over time. This selection process was more problematic than the selection of OIGs because of the hundreds of reviews available and the difficulty of comparing them. The cases under review varied widely in size, nature

and severity. Individual reviews were chosen based on the input of multiple OIG staff members, and based on the kinds of media attention to the events under review. Accordingly, the individual reviews cannot be taken to be representative of all reviews of a particular OIG, and can only be taken to be as illustrative of some OIG work.

c. Data Collection and Analysis

I triangulated four major sources of data for this analysis: public records (including congressional debates and hearings, bureaucratic memos and letters, IG statistics, and policy reports); elite interviews; media, civil society and academic reports on the IGs and their reviews; and secondary literature. The lack of secondary source materials proved challenging because no established administrative or political history of the IGs as a community or of individual OIGs exists. (One exception to this: the memoir of former IG Clark Ervin provides a single perspective narrative account of some events in question.) The construction of the narrative was thus entirely novel and based on primary source materials, interviews and press accounts, rather than existing accounts. To supplement the limited archival access and scant secondary material, I relied heavily on official IG documents in the public domain, the IG reviews themselves, interviews and press accounts.

i. Public Records: Because of the recentness of the period in question, archival documentation was extremely limited (OIG records after 1990 are kept by the departments themselves, and require Freedom of Information Act [FOIA] requests to consult). The limited time frame of the research period

(two years) made it impossible to gather documents through FOIA. Of three FOIA requests made, the first dating to January 2013, none were granted by the completion of this dissertation.

ii. Interviews: I performed twenty-six elite interviews, primarily with current and former IGs, staff of OIGs, congressmen, and journalists with IG expertise. (These interviews, including each interviewee's name and position, and the date of the interview, are listed in Appendix A.) The interviews were semi-structured, selected through snowball sampling using multiple points of entry. Because I used the interviews to glean specific details to build a historical narrative, only a few of the questions were common to all interviewees; the majority of questions were specific to the experience of the individual being interviewed. Some general questions were also used to elicit broad commentary about IGs. In addition to the individual interviews, I also conducted two group interviews with coordinating members of the Council of Inspectors General on Integrity and Efficiency (CIGIE). This type of interview has the advantage of gauging the attitudes and perspective of an organisation as a whole.

Interviews have significant limitations. Actors can omit details that present them in an unfavourable light, or they might misremember events (or forget details entirely), or amend their perspective to avoid offence or retaliation. They might also be influenced by their perception of the interviewer's expectations or biases, and tailor their responses accordingly ('demand

characteristics’).¹⁰⁹ In some cases, interviewees’ willingness to be quoted diminishes the reliability of their accounts because it creates incentives for them to pander to certain perceived audiences and to exaggerate their own role in events. However, despite charges that they lack reliability (because actors overstate their importance or misrepresent past events), interviews remain a crucial way to gather contextual data unavailable elsewhere,¹¹⁰ and to ‘ferret out secret understandings’.¹¹¹ I attempt to overcome the limitations by being explicit, when using data from interviews, about the fact that the information represents only the perspective of one actor. The biases inherent in interviews can also serve as a type of evidence, when the bias itself is evidence of one side of a conflict (rather than proof of a neutral, accurate account of an event). In many of the narrative case study chapters, the explicit juxtaposition of the perspectives revealed in interviews provides evidence of the conflicts that marked the events in question. I also made use of a set of lengthy narrative interviews from the Foreign Affairs Oral History Collection of the Association for Diplomatic Studies and Training. These transcribed interviews, conducted between 1992 and 2012 and available in the public domain, proved invaluable because some key actors are no longer living or available for new interviews.

iii. Press Accounts and Media Citations: Press accounts provide a political context for decisions and can give an indication of both official and public reactions to specific events. Attention to press accounts can also allow

¹⁰⁹ Roger Gomm, *Social Research Methodology: A Critical Introduction*, Hampshire, UK: Palgrave Macmillan, 2004.

¹¹⁰ H. Dorussen, H. Lenz and S. Blavoukos, ‘Assessing the reliability and validity of expert interviews’, *European Union Politics*, Vol. 6, No. 3, 2005, p. 315-337.

¹¹¹ Richard Ned Lebow, ‘Social Science and History: Ranchers versus Farmers’, in *Bridges and Boundaries*, Colin Elman and Miriam Elman (eds.), Cambridge: Harvard University Press, 2001, p. 133.

a limited treatment of cases that were *not* investigated, or poorly investigated, by the IGs. Tracking press accounts also served as evidence of the IGs' salience. As an indicator of visibility, I used a simple form of content analysis to gather statistics about the number of media citations from the *Factiva* database for certain IG-related concepts and to provide an initial indication of the visibility of specific reviews. Unless otherwise stated, I used a time frame of four years in which to count media citations of particular reviews, and I include the search terms in footnotes, at times with an explanation of the choice of the terms with regards to Type I (overly inclusive) and Type II (overly exclusive) statistical errors.

d. Plan of the Dissertation

The dissertation will be organised as follows. Following the research design and democratic integrity framework chapters, I will provide a historical overview of the IG (Chapter 4). This preliminary chapter will introduce the IG concept in depth and emphasise the bureaucratic-congressional relations that shaped its development. I will then follow this with the three pairs of case study chapters: Department of State OIG (Chapters 5 and 6), Department of Justice OIG (Chapters 7 and 8) and Department of Homeland Security OIG (Chapters 9 and 10). Each case study comprises two chapters: a political history chapter that emphasises its institutional features and the historical circumstances affecting its capacities; and a shorter chapter with an analysis of select reviews. The political history provides not only the wider institutional and political constraints affecting the trajectory of the IG's work, but also analyses the political dynamics limiting the reviews, and the overall stability within

the office. In short, it aims to contextualise the actions of the IGs by identifying the institutional, political, and personal factors that shaped their choices and supported or stymied their efforts. The second chapter of each case study consists of an in-depth analysis of select reviews or initiatives, in their historical context. In Chapter 11, I assess the IGs' contribution to democracy by returning to a broad, democratic perspective, and in a final chapter (Chapter 12), I conclude.

CHAPTER 3.
‘In the “Zone of Twilight” Between the Branches’¹¹²:
IGs’ Contribution to Democratic Integrity

‘The sovereign of this nation is the people, not the bureaucracy’.

-Justice William O. Douglas, (*US v. Richardson*, 418 U.S., 166, 201 [1974])

In this short chapter, I situate the IGs and their historical development in the broad perspective of democratic integrity by building on the themes elaborated in Chapter 1, and outline the broad parameters for evaluating the effects of IGs on American democracy. While most literature on IGs (surveyed above) evaluates their performance and impact using metrics from public policy or the IGs’ own standards of evaluation (performance measures), this enquiry aims to assess the IGs’ activity from the broader perspective of democratic values and processes. This approach fundamentally broadens the critical normative perspective on the IG model from a limited focus on administrative efficiency to include democratic integrity.

This first requires an elucidation of the concept of ‘democratic integrity’ and its conceptual foundations. It also demands a specification of the parameters by which I will evaluate IG activity (that is, the framework and the indicators of IG contributions). ‘Democratic integrity’ refers to the quality of democracy. Quality of democracy is distinct from quality of governance, which can be understood either normatively, as, for example, impartiality in the exercise of laws and policies,¹¹³ or institutionally, as a function of the capacity and autonomy of the executive.¹¹⁴ In contrast, quality of democracy refers to the degree to which core democratic values such as equality and freedom are realised, maintained, and advanced.

¹¹² Quote from Justice Jackson’s concurrence in *Youngstown Sheet and Tube Co. v. Sawyer*.

¹¹³ Bo Rothstein and Jan Teorell, ‘What is Quality of Government: A Theory of Impartial Political Institutions’, *Governance*, Vol. 21, No. 2, 2008, p. 165-190.

¹¹⁴ Francis Fukuyama, ‘What Is Governance?’, *Governance*, Vol. 26, No. 3, July 2013, p. 347–368.

In the vast literature on democracy and the quality of democracy, many sets of descriptive criteria for empirical evaluation, derived from distinct normative models, compete to determine which principles and indicators are the most salient for a functioning democracy. On the basis of these, many metrics have been devised for the comparative appraisal of democracy. Indices of democracy are based upon a variety of basic normative conceptions of democracy: electoral, liberal, majoritarian, participatory deliberative or egalitarian.¹¹⁵ Many of the most widely used metrics are liberal in orientation, such as Freedom House, Vanhanen Index of Democratisation, and Polity.¹¹⁶ These, and similar indices, tend to make democracy a dichotomous or trichotomous variable, and this makes an assessment of the quality of established democracies less than fully precise.¹¹⁷ Looking beyond the liberal variant, one can draw out a variety of principles, at times conflicting, from the six conceptions: competition (from electoral conceptions); limited government, individual rights, horizontal accountability, civil liberties, transparency (from liberal); vertical accountability (from majoritarian); citizen involvement (from participatory); public deliberation (from deliberative); and political, social and economic equality (from egalitarian conceptions).¹¹⁸

Rather than making judgments about which values should comprise a single conception of democracy, I aim to use an inclusive, composite definition that demonstrates the *range* of possible conceptions of democracy (even when two principles conflict). This is largely the approach taken by Larry Diamond and

¹¹⁵ Michael Coppedge and John Gerring et al, 'Conceptualising and Measuring Democracy: A New Approach', *Perspectives on Politics*, June 2011, Vol. 9, No. 2, p. 253.

¹¹⁶ Gerardo Munck and Jay Verkuilen, 'Conceptualizing and Measuring Democracy: Evaluating Alternative Indices', *Comparative Political Studies*, Vol. 35, No. 1, 2002, p. 5-34.

¹¹⁷ David Altman and Aníbal Pérez-Liñán, 'Assessing the quality of democracy: Freedom, competitiveness and participation in eighteen Latin American countries', 2002, *Democratization*, Vol. 9, No. 2, p. 85-100.

¹¹⁸ Coppedge et al, p. 254.

Leonardo Morlino in their own effort to develop an assessment index for quality of democracy. Their index is also designed to assess the quality of democracy in well-established democracies, and is meant to take into account more substantive aspects of democracy (for instance, social and economic equality) without dictating the particular kinds of public policies that would realise such values.

Diamond and Morlino suggest the following eight broad principles to guide any assessment of democracy: rule of law; vertical accountability; horizontal accountability; freedom; equality; responsiveness; participation; and competition.¹¹⁹ Many of these values overlap and depend on the existence of the others; for instance, in order for a civil society organisation to hold government officials to account, they must have the freedom to do so, and must be protected by a fair legal system. Similarly, a system in which elected officials are accountable enables democracies to achieve some degree of liberty and equality. However, it is useful, analytically, to disaggregate these values. Although they are necessarily interdependent, they can also be, at times, in conflict with each other, and this leads to trade-offs in their implementation. The judgments that inspire political actors to privilege one value over another thus lead to different forms of democracy.¹²⁰

I adapt these eight principles to focus on the role that the IGs play in affecting democratic integrity, concentrating my framework into six democratic principles: rule of law, accountability, freedom, equality, responsiveness, and participation. My analysis will not provide an overall assessment of the quality of democracy in the American state, nor a classification with comparative utility, but rather a provisional indication of the range of effects that the IG model has had and can have on democratic integrity.

¹¹⁹ Larry Diamond and Leonardo Morlino (Eds.), *Assessing the Quality of Democracy*, Baltimore: Johns Hopkins University Press, 2005.

¹²⁰ Diamond and Morlino, 2005, p. 2-3.

I. Rule of Law

The rule of law is a *sine qua non* of any liberal democracy, as it provides the structure by which all democratic processes and rights are ensured. The capacity of any one political institution to hold another to account, or of citizens to hold the government to account, rely on the political equality of all citizens guaranteed by an independent judiciary. David Dyzenhaus provides a specific definition of rule of law (which he opposes to a ‘thinner’ concept, ‘rule *by* law’) as not only compliance with the ‘letter’ of existing laws, but also with the underlying principles of law (i.e., the norms of a legal system in a liberal democracy).¹²¹

On a basic level, IGs are responsible for upholding the law. Statutorily, they have full law-enforcement authority, and can refer criminal cases to the Justice Department for prosecution. This gives them great (potential) influence over public officials’ responsibility before the law. However, their traditional investigative role does not extend to influencing the content or structure of the legal system; their structural bent towards compliance monitoring precludes a capacity to influence the law. Nonetheless, some IGs have challenged legal structures in their reviews and recommendations. Moreover, Diamond and Morlino argue that ‘strong traditions of bureaucratic competence and impartiality’ contribute extensively to the development and robustness of the rule of law.¹²² To the degree that IGs can improve bureaucratic competence through programme reforms and a reduction of corruption, they have the potential to reinforce the rule of law.

¹²¹ David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency*, Cambridge: Cambridge University Press, 2006.

¹²² Diamond and Morlino, 2005, p. 10.

The rule of law also takes on special significance in periods of emergency. Legal scholars debate the correct place of emergency powers in the legal order: should there be explicit provisions that legitimate the executive's expansive use of power for limited periods, or will such provisions 'taint' the purity of the legal order? Liberal scholars prefer to delineate the executive's powers explicitly in the legal code as a means of keeping a check on the extent of those powers, and to this end, direct their efforts towards the development of emergency governance plans. Although the scope of the executive's emergency powers lies outside of IGs' remit, they (the National Security IGs above all) have the capacity to influence the content, robustness and comprehensiveness of emergency governance plans, thus either limiting or empowering the executive during periods of emergency.

While law enforcement is part of the IGs' job description (i.e., making sure that agencies comply with the law), in order to assess their *further* contribution to the rule of law, I look at how they frame legal matters (i.e., accepting or questioning the legal arguments given by the host agency); whether they attempt to standardise, clarify, or further specify administrative law or procedure; and whether they point out underspecified law.

II. Accountability

In the context of political behaviour, the concept of accountability suffers from overuse and lack of precision.¹²³ Definitions range from 'answerability and enforceability'¹²⁴ to various structural and temporal metaphors that describe the relationship between actors and within processes. Among 'spatial' metaphors, the

¹²³ See Behn, 2001.

¹²⁴ Andreas Schedler, Larry Diamond, Marc Plattner (Eds.), *The Self-restraining State: Power and Accountability in New Democracies*, London: Lynne Rienner, 1999.

leading distinction is between vertical (electoral mechanisms between citizen and government) and horizontal (between branches of government) accountabilities.¹²⁵ Accountability has also been described in temporal terms as a process with ‘stages’; see Clark’s four-stage process of the ‘architecture of accountability’: a process in time that begins with informing, moves to justification and evaluation and ends with rectification. This approach emphasises the narrative-building and problem-framing function (what Hugh Heclo calls the ‘collective puzzlement on society’s behalf’) of the process of accountability, but de-emphasises its relational aspect as a dynamic relationship between multiple actors.¹²⁶

Accountability is also often described as a relationship between two or more actors in which one actor has the authority to demand justification from a second actor for its actions, and to sanction this second actor if it fails to provide the narrative; in this sense, it is a fundamentally relational term. In many definitions, the ‘sanctions’ extend to the *content* of the narrative, not merely to the *provision* of the narrative. But on its most basic level, the emphasis lies in the requirement for the provision of a narrative by the actor being held to account.

Both the relational aspect and narrative-building function of accountability holding are crucial for the IG’s potential role in enhancing democratic integrity. The relational dimension enables the IG to strengthen horizontal accountability; by partnering with other OIGs and building formal and informal networks, IGs can shore up the institutional bases for accountability holding and also invite participation from civil society. The IG’s authorship of ‘official’ narratives invites citizens and societal organisations to participate in the ongoing monitoring of public officials. Its reviews

¹²⁵ See, e.g., Guillermo O’Donnell in Schedler, 1999.

¹²⁶ Hugh Heclo, *Modern Social Politics in Britain and Sweden*, 2nd Edition, Colchester: ECPR Press, 2010 [1974], p. 305.

and testimonies contribute to congressional hearings, public awareness, and further investigations by watchdog groups and the media.

In assessing the IGs' contribution to accountability, I analyse the narratives in each review and trace the role that it played (if any) in bringing about more formal processes of accountability (such as judicial proceedings, hearings or other congressional inquiries), or in provoking media attention. Although not all definitions of accountability include punishment for perpetrators or reparations for victims, I also assess whether the IG reviews led to discipline, firings, or relief for victims.

III. Freedom

Freedoms can be enumerated in the form of political, civil and social rights. If a democracy is to preserve these rights, it must have protections for individual liberties and respect for the rule of law. In practice, states uphold these freedoms through a variety of measures, such as constitutional protections and equal protection in the law. There must also be a wide and healthy public sphere for deliberation to make basic freedoms such as freedom of speech and of association meaningful and useful for the practice of democracy. By releasing information to the public, IG work can enable reasoned, informed deliberation in the public sphere.

In order for these rights to be protected, there must be also legal clarity regarding the protection of (and possible exceptions to) rights, as well as clarity about the recourse citizens have in redressing violations of rights. While rights monitoring is not an unambiguous function of the IG position (in the sense that it is not explicit in the original Act for all IGs), some IGs, especially in the National Security-related departments, have investigated host departments on the grounds of rights violations.

In some situations, IGs can point out underspecified law and offer recommendations for further legal clarity in the realm of rights. The language of rights need not be present for the IG to contribute – indeed, avoiding the language of rights while still recognising wrongdoing based on excluding or targeting specific races or genders can be an important contribution to the promotion of rights by distancing it from the contestable ideological associations with which rights concerns can be confused.

Such a conception of freedom leads to the following indicators: the critique of government behaviour on the basis of civil rights (or implicitly alluding to the concept of rights); ongoing dialogue between the IG and the agency (deliberation) over recommendations; wide employment of the narrative in civil society.

IV. Equality

Democracies safeguard equality – especially political equality – by preserving and encouraging citizen participation in civic life; by maintaining transparent political and deliberative processes; and by ensuring representation of all groups. In a highly bureaucratised democracy, participation is especially difficult to ensure because of the autonomy of the bureaucracy from traditional paths of political participation, and because of the isolation of decision-making from citizen input. In a democracy characterised by pervasive emergency and an expanding bureaucracy, transparency provides a corrective both to the secrecy of the national security state (and emergency-related decisions), and to the opportunities for corruption when decisions are made behind closed doors. Transparency is promoted through laws that permit the spread of government data and documents to the media and the public (i.e., Freedom of Information laws).

Under an expansive definition of equality that includes social and economic rights, democracies must also aim for a degree of efficiency in order to channel resources into infrastructure that will promote the capacity of all citizens, rich and poor alike, to participate in political processes.¹²⁷ In this respect, IGs' attention to administrative efficiency, rather than detracting from democratic equality, contributes to it. IGs contribute most directly to the dissemination of information and transparency by bringing information in comprehensible, narrative form to the public and Congress. This contributes to the foundations of equal, *knowledgeable* democratic participation by all citizens. Equally important, IGs have legal access to documents of which citizens might not be aware, a situation that makes the possibility of Freedom of Information requests moot. By directing public attention to the very existence of such documents, IGs can enable citizen groups to initiate their own process of accountability. IGs can also improve bureaucratic efficiency, thus indirectly enhancing the equal distribution of resources among the population.

Thus, assessing the IGs' contribution to equality involves noting their relationship to citizen participation through hotlines and through other whistleblowing channels; any attention paid to the targeting of selected groups; their efforts to disseminate previously undisclosed information to the wider public; and the wider use of their narratives by external actors to bring transparency to the government.

V. Responsiveness

To retain legitimacy, democratic governments must be able to respond to the interests and needs of citizens by enacting policies and programmes that meet their

¹²⁷ Diamond and Morlino, 2005, p. 26.

demands. The capacity to implement the will of the people is what translates citizen preferences into the concrete realisation of the common good. This can be aided through efficient and autonomous, but accountable, administration. It also requires political organisation and material and organisational capacities, and in particular, a well-functioning bureaucracy; the bureaucracy is in some ways the ‘machinery’ that translates citizens’ aggregated preferences into programmes with concrete outcomes. IGs cannot affect the way citizens’ preferences are aggregated and transformed into specific policies, but they do provide regular appraisals of the quality of government programmes, appraisals that in turn allow citizens themselves to evaluate the government’s responsiveness. IGs can also affect the transparency and professionalism of the bureaucracy, thus influencing the government’s capacity to implement its programmes.

In evaluating the IGs’ contribution to responsiveness, I look first at efficiency. Administrative efficiency is not a democratic principle; indeed, Dwight Waldo’s primary criticism of administrative ‘science’ was precisely that the value commitments and epistemological foundations of any kind of positivist project are necessarily in tension with the normative search for the common good. However, a commitment to administrative efficiency does not *ipso facto* contradict primary democratic values. In order for governments to respond and enact the will of the people, they must have the capacity and competence to execute that popular will. The IGs’ mandate to improve efficiency gives them an automatic inclination to pursue this goal in their work. Thus, in addition to the IGs’ contribution to bureaucratic efficiency (through recommendations that discourage waste and fraud), I also take rigorous performance evaluations as evidence of attention to democratic responsiveness.

VI. Participation

Democracies need the participation of as many citizens as possible at various points in a variety of democratic processes: elections; deliberation over fundamental values and policy prescriptions; policy making; accountability-holding. In the Dahlian conception of democracy, citizens must have an adequate and equal opportunity to voice their opinions by placing questions on the agenda, by stating their preferences about the final outcome, and by providing rationale for those preferences.¹²⁸ To these broad processes, Diamond and Morlino add the importance of citizen participation in accountability holding and in monitoring the behaviour of politicians and bureaucrats.¹²⁹

Who takes part in which democratic processes? The most basic contribution that IGs make to enhancing citizen participation is in their direct call for reports of wrongdoing. Each OIG must maintain, statutorily, a hotline clearly listed on its website to field complaints, thus providing a simple, legal, and public means for holding public officials to account. However, IG work can interact with and encourage a wider range of citizen participation. IGs are a first point of contact for media, watchdog, and rights monitoring organisations in civil society, and provide an ‘official’ critical narrative with which citizens can engage. In this way, they contribute to a healthy public sphere by disseminating the fruits of expert and ‘inside’ knowledge to the wider public, thus enhancing the public’s capacity to make informed judgments and take action regarding the conduct of public officials. Finding evidence

¹²⁸ Robert A. Dahl, *Democracy and Its Critics*, New Haven: Yale University Press, 1989, p. 109.

¹²⁹ Diamond and Morlino, p. 10.

of participation requires investigating the circumstances leading to the review and tracing its instrumental use after release.

My aim is not to claim that IGs always affect all aspects of democratic functioning, or that they necessarily always do this well, but rather to provide a framework within which to assess the various ways in which IGs can and have affected democratic functioning above and beyond their mandate to root out ‘waste, fraud, and abuse’ and their original orientation towards compliance monitoring.

CHAPTER 4.
An Inspector Calls (With Apologies to J.B. Priestley):
The Inspector General Category

*‘The Inspector General must have a horse allowed him and some soldiers to attend him and all the rest commanded to obey and assist, or else the service will suffer; for he is but one man and must correct many, and therefore he cannot be beloved. And he must ride from one garrison to another to see the soldiers do not outrage or scathe the country’.*¹³⁰

- Description of the traditional military ‘inspector general’, from the English Codes of Military and Martial Laws (1629)

I. Introduction

In this chapter I give an overview of the Inspector General (IG) category, provide a brief history of the modern IG (since the nineteen sixties), and discuss the questions at stake in its development, especially in relation to the politics of the national security state. These developments have direct consequences for the quality of democracy in the state. I chart the IG’s evolution into a ‘web’ of accountability, at first by sheer numbers, and later both institutionally, through coordination and the construction of bureaucratic infrastructure, and substantively, with its expansion into the national security arena and rights monitoring. This crystallisation into a web, however, has not prevented it from developing differentially across the state. Despite a certain formal, professional standardisation in their methods, the strategies and conceptions of accountability pursued by individual IGs vary considerably.

Across the board, the IGs’ performance has been by many measures successful. Statistics for 2012 show that IGs’ work resulted in \$46.3 billion in

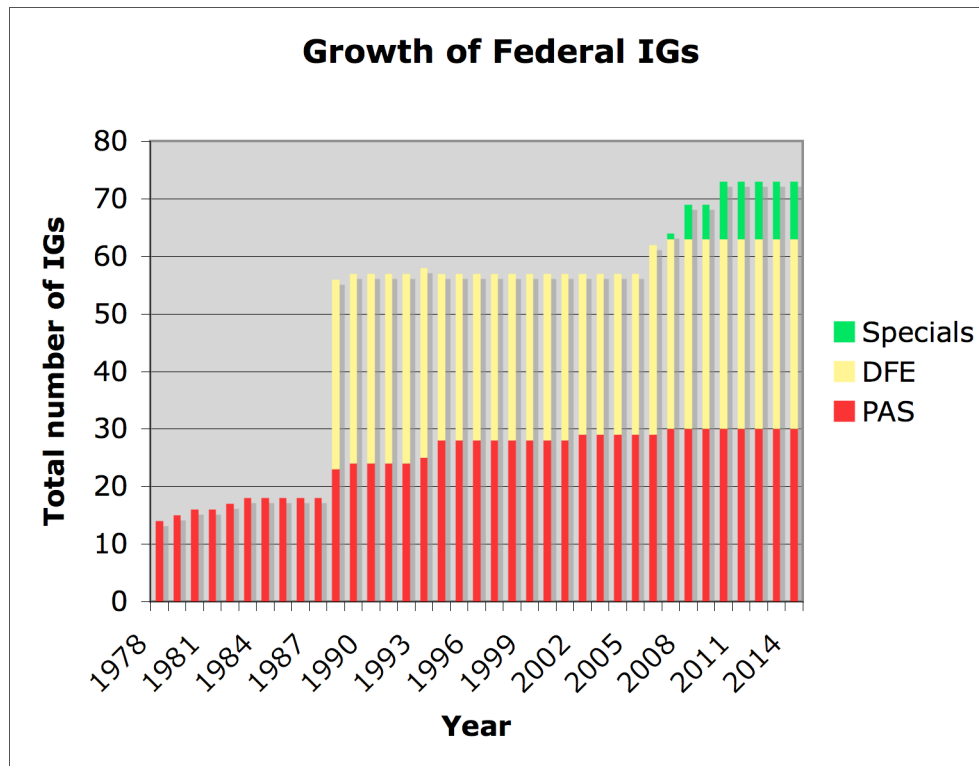
¹³⁰ Testimony of Hon Eleanor Hill, Strengthening the Unique Role of the Nation’s Inspectors General Hearing, Senate Committee on Homeland Security and Governmental Affairs, 11 July 2007 [Henceforth Strengthening Inspectors General Hearing].

potential savings and reported over 5,374 successful prosecutions; 1,069 civil actions; 5,805 suspensions or debarments, and over 6,669 indictments for all forms of waste, fraud, and abuse.¹³¹ By their own account, as a community the IGs produce a seventeen-dollar return on the taxpayer's investment in them.¹³² But beyond the dollars saved, their growing capacity has led the IG to review other forms of administrative discretion, such as assertions of executive privilege and curtailments civil rights and liberties. While some IGs serve agencies that manage large programmatic budgets, and thus are more vulnerable to fraud and waste, others, such as the national security IGs, monitor departments whose primary vulnerabilities to wrongdoing lie in their management of potentially rights-threatening activities. Within the broad framework of reviewing administrative decisions and behaviour, the distinctive goals of IGs vary from straightforward financial accounting to the pursuit of rights violations, regardless of legal status. In the national security agencies, they have provided transparency, probed areas of limited or under-specified legal protection, and used their expertise to frame policy recommendations. These objectives provide a focus beyond the general standards of bureaucratic oversight (i.e., fraud and waste) and give IGs the authority to reshape policy and, indirectly, law. Their authority, capacity, and scope of investigation have all expanded since the establishment of the IG position in 1978.

Chart 4.1. Growth of US Federal IGs by Type, 1978-2014

¹³¹ CIGIE, *Progress Report to the President*, FY 2012.

¹³² Ibid.

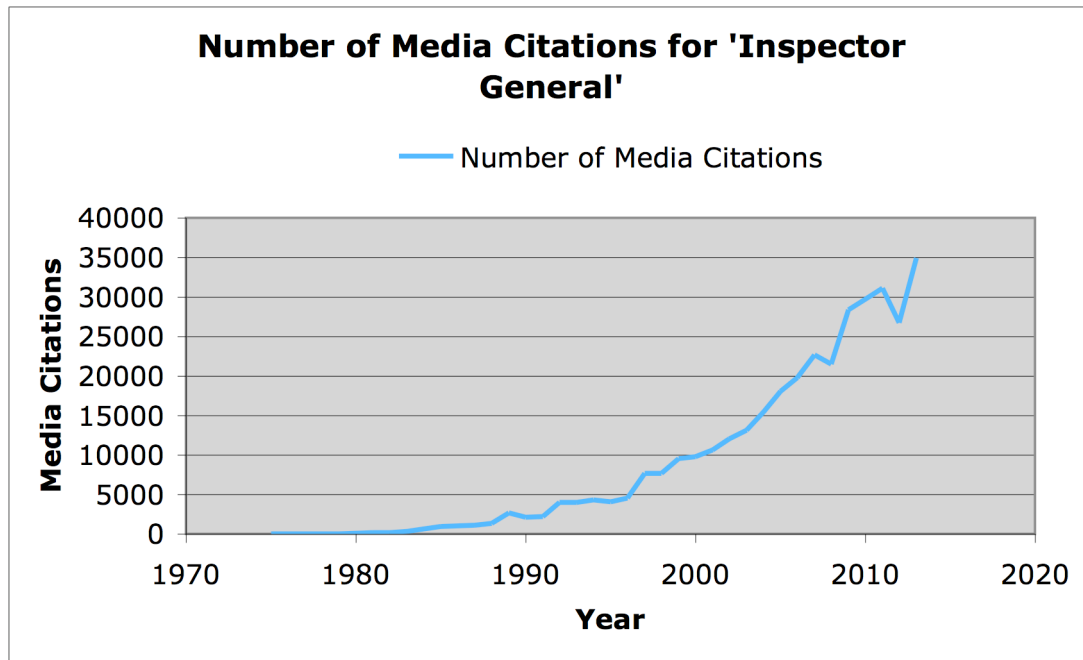


The IGs are growing in number, as well (Chart 4.1). Their expansion must be taken in the historical context of an expanding federal government, which has steadily added both height and girth to its once modest ranks. Vertically, Paul Light notes that seventeen executive titles were available in federal departments in 1960; by 2004, this number was sixty-four. Horizontally, the senior titleholders jumped from 451 in 1960 to 2592 in 2004.¹³³ The IGs have played no small role in this expansion. Finally, IGs have grown in reputation and visibility (Chart 4.2).

Chart 4.2. Media Citations in American News Outlets for ‘Inspector General’, 1975-2013¹³⁴

¹³³ Paul Light, ‘Fact Sheet on the Continued Thickening of Government’, 23 July 2004, Washington, DC: Brookings Institute.

¹³⁴ A Factiva search for the phrase ‘inspector general’ was conducted to determine its frequency in media reports and US government documents between 1975 and 2013. Because the acronym, ‘IG’ is commonly used, this chart likely suffers from a Type II statistical error (under-representing the frequency of the concept in the news media). However, because the acronym ‘IG’ could have a



Source: Factiva database search

Chart 4.2 gives a base indication of the degree to which the inspector general concept has grown in visibility and in public discourse. Visibility should not be confused with influence, and visibility does not always assist IGs; part of their legitimacy rests on the neutrality that comes from their relative anonymity and the absence of any promise of personal recognition resulting from IG work (this leads many in the IG community to look askance at post-review, ‘tell-all’ memoirs poorly). However, IG reviews cited or discussed in the press often come to the attention of members of Congress with more fanfare and urgency that topics merely covered in the routine semiannual reports that are sent directly to Congress. What the visibility statistics *do*

number of meanings (and thus appear in articles unrelated to inspectors general), I erred on the side of conservatism and limited the search to the full phrase. It was also restricted to American news sources: all non-American sources with more than 2000 hits were excluded from the sample. The top sources (all with greater than 2000 hits over this period) were: Associated Press; Fed News; Washington Post; BBC-All source; Targeted New Service; Dow Jones Newswires; the New York Times – All sources; congressional Documents; Reuters – All sources; the Wall Street Journal; Agence France Presse – All sources; Federal Register; CNN – All sources; PR Newswire; PR Newswire; Department of Justice Documents; The Times-Picayune; Platts – All sources; NewsRx Medical Newsletter; Aviation Week – All sources; the Boston Globe –All sources; Tampa Bay Times; Business Recorder; St. Louis Post-Dispatch; National Journal – All sources; LegAlert; M2 Presswire –All sources.

demonstrate is that media sources are aware of the IGs' work and use it as a source of data whose legitimacy is rarely questioned. Unless themselves embroiled in scandal, IGs are rarely the direct subject of media reporting. Rather, many references to IG work in mainstream media make no judgment about the accuracy of an IG's findings, and cite the reviews as though the IG's narrative were proven fact. When an IG's findings are contested, media articles frequently frame the story as a battle between two narratives competing for truth or legitimacy, oftentimes suggesting that the burden of proof rests on the accused bureaucrat(s) for offering a narrative at odds with the IG's. The visibility statistics thus suggest the widespread public perception of IGs as neutral, authoritative narrators of government behaviour.

A. Oversight Capacity: Statutory Bases

The key to IG's capacity to monitor administrative discretion lies its unique institutional position and its access to information. Institutionally, the IG straddles the executive and legislative branches by virtue of its placement in the executive and its responsibility to Congress. IGs are beholden to both through exhaustive reporting requirements in the form of semi-annual reports to Congress and to agency heads, and make use of a variety of provisions to balance their competing allegiances to each branch, such as a strict seven-day window in which to report to Congress special abuses discovered within the agency.¹³⁵ Their independence is supported by a presidential appointment and Senate confirmation, and by the statutory requirement that they be chosen 'without regard to political affiliation and solely on the basis of

¹³⁵ Known as 'seven-day letters', this provision is rarely invoked.

integrity and demonstrated ability’.¹³⁶ These provisions distinguish IGs from other Presidential appointees, since the incentives for accepting a usual appointment – for instance, policy-making authority and the advantages of political affiliation – do not apply. Legislation in 2008 (discussed further below) strengthened their independence by granting them access to independent legal counsel and a statement in the president’s budget that ensures they have sufficient funds to carry out their duties.¹³⁷ IGs also have informational power: in their audits and investigations, they have access to all records within their own agency and can both subpoena documents and request information from other agencies, which are required by law to provide such assistance.¹³⁸ The DOD IG, which receives its investigative authority from a separate statute, has testimonial subpoena authority that no other federal OIG enjoys.

However, sensitive information and national security provide a rationale for exceptions to these expansive and expanding powers. These have been codified as ‘Section 8’ exceptions: under Section 8 of the Act, the heads of the Defense, Justice, Treasury, and Homeland Security Departments may all suspend IG investigations in the name of national interest or of national security. In each case, the agency head may ‘prohibit the IG from carrying out or completing any audit or investigation, or from issuing any subpoena [...] to preserve the national security, or to prevent significant impairment to the national interests of the United States’.¹³⁹ National security IGs must also operate in a context in which their agencies may invoke national security exemptions, and this operates as a latent constraint on IG behaviour. Although in general the IG Act prevents agency heads from disallowing an IG from carrying out its audits and investigations, the heads of seven entities are granted the

¹³⁶ IG Act of 1978, § 3(b).

¹³⁷ IG Act of 1978, § 3(g) and § 6(f)(3).

¹³⁸ IG Act of 1978, § 6(b)(1).

¹³⁹ IG Act of 1978, § 8(i)(2); text from ‘Special provisions concerning the Department of Homeland Security’; nearly identical text exists in the provisions for the Treasury, Defense and Justice.

authority to block such activity on the grounds of national security or ‘sensitive information’: the departments of Defense, Homeland Security, Justice, the US Postal Service, the Treasury, the Federal Reserve and the CIA.¹⁴⁰

Moreover, ‘sensitive information’, which includes undercover operations; the identity of confidential sources; intelligence or counterintelligence matters; and ‘other matters the disclosure of which would constitute a serious threat to national security’,¹⁴¹ are also exempted from the blanket requirement that ‘[n]either the head of the establishment nor the officer next in rank below such head shall prevent or prohibit 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’.¹⁴² (Notably, similar text is not found in the provisions concerning the Intelligence Community, although stipulations within the US Code on the Director of National Intelligence permit the director to prevent IG activity on national security grounds, provided that an explanation is given to Congress within seven days.)¹⁴³ Despite the rare invocation of these exemptions by the departments, it nonetheless may act to deter IGs from providing a full check on agency activity.¹⁴⁴

IGs work within an institutional framework spearheaded by a professional and ethical standards council, the Council of Inspectors General and Integrity and Efficiency (CIGIE), which is chaired by the Deputy Director for Management in the Office of Management and Budget (OMB), and includes the Assistant Director for the FBI’s Criminal Investigative Division, Director of the Office of Government Ethics, Special Counsel of the Office of Special Counsel, and Deputy Director of the Office

¹⁴⁰ <http://www.gao.gov/products/GAO-09-660R>

¹⁴¹ IG Act of 1978, § 8(e)(a)(1)

¹⁴² IG Act of 1978, § 3A

¹⁴³ IG Act of 1978, § 8H; 50 U.S.C. §403q(b)(3)

¹⁴⁴ GAO, ‘Inspectors General: Reporting on Independence, Effectiveness, and Expertise’, Report to congressional Committees, GAO-11-770, September 2011.

of Personnel Management. This body was formed in 2008 and consolidated two similar councils, the President's Council on Integrity and Efficiency (PCIE) and the Executive Council on Integrity and Efficiency (ECIE), with the aim of increasing cooperation within the IG community and strengthening its authority through statute. CIGIE aims to serve as both a resource for and check on IGs, and develops policies and standards for the community as a whole, focusing on problems common to departments and agencies across the government. It also maintains a training academy for IG personnel and electronic networks for government-wide IG coordination and support.

B. Limitations on IGs' Capacity

Since 1978, IGs have grown to be a powerful check for certain kinds of executive activity – financial waste, petty corruption, misbehaviour – but their efficacy in preserving rights continues to be limited by multiple factors. Budgetary control, dismissal procedures, the scope of the IG's jurisdiction (especially in rights monitoring), politicisation, and inability to hold offenders to account all deter IGs from pursuing this type of abuse. IGs' independence can be curtailed through budget decisions that compromise their capacity to carry out investigations, and they have often cited budget constraints as a hindrance to their effective performance.¹⁴⁵ In the nineteen-eighties and nineties, in most Designated Federal Entities (DFEs), IG budgets were either jointly written by IGs and their agencies, or were left out of the

¹⁴⁵ See, for instance, 'Inspector General Act Oversight, Hearing, Subcommittee on Government Management, Information, and Technology, House of Representatives Committee on Government Reform and Oversight, 1 August 1995.

budget process entirely.¹⁴⁶ Second, IGs face the possibility of presidential dismissal, and although the president must report the reason for dismissal to Congress within thirty days, this opens considerable scope for political interference (for instance, with President Obama's controversial dismissal of AmeriCorps IG Gerald Walpin, a Republican, in 2009 on dubious grounds of 'loss of confidence').¹⁴⁷ In his first meeting with Secretary of State Jim Baker, Sherman Funk informed his new boss that, 'you can't fire me, only the President can'.¹⁴⁸ According to Funk, '[Baker] looked startled, and I said, "But don't get bent out of shape, all it takes is a phone call from you, I'm sure."' Then he smiled, and after that we had no problem'.¹⁴⁹ This limitation is compounded by the working relationship between the IG and the Agency (Department) Head. On the accounts of many former IGs, the personal relationship between the two is often the determining factor in successful IG reviews. Former Justice IG, Glenn Fine, opined thus:

'I believe that any variance in the effectiveness of Inspectors General has been less the result of any deficiencies with the statute and more a function of the outlook and practices of particular Inspectors General, as well as the attitude of the agency or agency head towards the Inspector General'.¹⁵⁰

Like others, he emphasised the contingent personal and contextual factors in shaping IG work; this is, in part, the empirical focus of this dissertation.

Third, the fact that IGs focus on statutory concerns, leaving constitutionality to the courts, means that the attention it pays to certain types of abuses is limited. This state of affairs makes the IG in some ways a positive complement to the courts, but also delimits the IGs' jurisdiction in a way that could miss rights violations. Legal

¹⁴⁶ Carmen Apaza, *Integrity and Accountability in Government: Homeland Security and the Inspector General*, Farnham: Ashgate, 2011, p. 71.

¹⁴⁷ Ed O'Keefe, 'Lawmakers Question Obama's Dismissal of AmeriCorps IG', *Washington Post*, 16 June 2009.

¹⁴⁸ Funk was the Commerce IG from 1981-1986, and State IG from 1987-1994.

¹⁴⁹ Sherman Funk, interview with Charles Stuart Kennedy, *The Association for Diplomatic Studies and Training, Foreign Affairs Oral History Project*, 14 July 1994, p. 15

¹⁵⁰ Testimony of Glenn Fine, Strengthening Inspectors General Hearing.

scholar Shirin Sinnar comments that ‘if one believes that constitutional law ought to constrain executive national security conduct, IGs may not be filling the gap in constitutional compliance’.¹⁵¹ In short, it is precisely the area in which IGs *might* function as a corrective to the courts’ traditional deference to the executive – constitutionality – that lies outside of their jurisdiction.

The politicisation of IG appointments, irrespective of the statutory prohibition of political appointments, has also plagued certain administrations. Although the Clinton Administration largely selected career public servants as its IGs, sixty percent of George W. Bush’s appointments had experience on a Republican staff, whereas only twenty percent had auditing experience.¹⁵² In the investigation of the Abu Graib military scandal, such partisanship was manifest when Army IG Lt Gen Paul Mikolashek’s ignored the role of Defense Secretary Donald Rumsfeld.¹⁵³ Direct political interference also reared its head in the Bush Administration, with Vice President Cheney’s interference in the IG’s office. The *New Yorker*’s Jane Meyer quoted one official as reporting that ‘[t]he whole IG’s Office was completely politicized’ and cowed into bending to the vice president’s wishes.¹⁵⁴

A final limitation to IGs’ capacity to check executive abuses beyond fraud and mismanagement is their reliance on political actors to carry out their proposed remedies. Although IGs provide recommendations and can monitor compliance, there is no statutory requirement for agency heads to follow through with the proposed reforms. Moreover, IGs have no power to compensate victims, and despite the ability

¹⁵¹ Shirin Sinnar, ‘Protecting Rights From Within? Inspectors General and National Security Oversight’, 65 *Stanford Law Review*, 2013, p. 55.

¹⁵² ‘The Politicization of Inspectors General’, Report prepared for Rep. Henry A. Waxman, 2005, Abstract.

¹⁵³ Ibid.

¹⁵⁴ Jane Mayer, *The Dark Side*, New York: Doubleday, 2008, p. 288-89.

to refer criminal wrongdoing to the Justice Department, they cannot hold top government officials to account after investigations have been carried out.

C. Role within the National Security State

In much of the federal bureaucracy, IG auditing saves billions of dollars and contributes to the efficient functioning of government programmes.¹⁵⁵ Within the national security state, however, infractions pose the threat not only of financial waste, but also of curtailing civil liberties and undermining the rule of law. It is in relation to the immediate and extended emergency powers of the executive that the IG's role has the most at stake. After 9/11, the government's use of National Security Letters, its immigrant detention policies, its coercive interrogations, and extraordinary renditions all received IG attention.

Despite the executive branch's resistance to national security IGs, congressional pressure to monitor security agencies gradually made its mark, with qualifications. The Defense department acquired an IG in 1982; State in 1986; Justice Department and Treasury in 1988; and the CIA in 1989.¹⁵⁶ Since the time of the 1975 Rockefeller Report on the CHAOS programme, in which the CIA spied on American citizens to monitor anti-war mobilisation, Congress supported a strengthened internal IG in the CIA, but it was not until the aftermath of the Iran-Contra scandal in 1986 that Congress turned to an independent, statutory IG as a solution to abuse within the Intelligence Community.¹⁵⁷ With the passage of the Patriot Act, an IG was placed in

¹⁵⁵ Testimony of Gaston L. Gianni, Jr, 'Twenty-Fifth Anniversary of the IG Act of 1978', Hearing, Subcommittee on Government Efficiency and Financial Management, Committee on Government Reform, US House of Representatives, 8 October 2002.

¹⁵⁶ Light, 1993, p. 26.

¹⁵⁷ Ryan Check and Afsheen John Radsan, 'One Lantern in the Darkest Night – The CIA's Inspector General', 4 *Journal of National Security Law & Policy* 247, 2010, p. 252-54.

the newly established Department of Homeland Security (DHS), and the IGs in both that department and in Justice acquired the responsibility of investigating abuses of civil rights and civil liberties, above and beyond violations related to the Patriot Act itself. In this way, the IG position grew not only in capacity and number, but also from one of management oversight to investigator of rights violations.

One of the murkier objects of IG investigations occurs when technically legal or congressionally approved actions potentially violate basic rights. When legal provisions permit rights violations, such as detaining terrorist suspects, or detaining immigrants past a statutory period, IGs have the authority to initiate reviews of government conduct, and hold them to account on the basis of civil liberties, and thus challenge their legality. In the case of post-9/11 immigrant detentions, the DOJ IG initiated a review that ultimately contested and publicised the DOJ's detentions. Similarly, CIA IG John Helgerson contested the CIA's use of enhanced interrogation techniques, despite the fact that Office of Legal Counsel member John Yoo had declared these techniques legal.¹⁵⁸ Thus, although IGs have come under criticism for 'address[ing] rule-based compliance without engaging broader conceptions of accountability',¹⁵⁹ the IGs' expansion into the domain of rights monitoring has challenged this conception of IG performance. In short, IGs have the potential to review government actions not only for their accordance with the letter of the law, but with the spirit as well.

In their role in the national security state, IGs negotiate the question of which powers the state should have and, through their reviews and interagency coordination, develop standards for the regulation of these powers. By passing judgment on what counts as rights abuse, and by making recommendations on the basis of the standards

¹⁵⁸ Mayer, 2008, p. 288.

¹⁵⁹ Ibid.

they themselves have helped to develop, they exercise a kind of discretionary power that contributes directly to the codification and inscription of emergency measures into the rule of law.

IG reviews have complemented, and provided parallel paths for, both congressional and executive oversight of national security, especially when the executive branch proves slow or in compliant during an executive-legislative standoff. For instance, in early 2014, a Senate Intelligence Committee's investigation into an allegedly illegal CIA programme uncovered unconstitutional CIA interference into the congressional investigation itself. In a speech to the Senate, Senator Dianne Feinstein (D-CA) charged that the CIA effectively spied on Congress during the investigation, breaching the Fourth Amendment, the Computer Fraud and Abuse Act, and Executive Order 12333, which makes domestic surveillance by the CIA illegal.¹⁶⁰ Although the Senate investigation had been compromised by CIA interference, the IG was able to refer the matter to the Justice Department for potential criminal violation. The IG report, when released, would serve as the basis for arbitration between the two branches, a role based on a position of neutrality from which the Senate committee could not operate.

¹⁶⁰ Statement of Dianne Feinstein (D-CA), US Senate, 11 March 2014, <http://www.feinstein.senate.gov/public/index.cfm/2014/3/feinstein-statement-on-intelligence-committee-s-cia-detention-interrogation-report>.

Table 4.1. Academic and Professional Backgrounds of Selected National Security Inspectors General, 2014

Department or Agency	IG	Academic Background	Professional Background
Central Intelligence Agency (CIA)	David Buckley	Military	Air Force investigator; Senate investigator; Defense OIG; national security consulting (private sector)
Defense	Jon Rymer	Economics and Business Administration	IG (FDIC); private sector management; auditing; accounting
Homeland Security	John Roth	Law	AUSA (MI); federal investigator; Attorney General's office
Intelligence Community	I. Charles McCullough, III	Law	Special agent (FBI); Senior counsel for law and intelligence (Treasury); NSA OIG;
Justice	Michael Horowitz	Law	DOJ Criminal Division (various posts); Deputy Assistant Attorney General; AUSA (Southern District of NY);
State	Steve Linick	Philosophy; law	AUSA (CA and VA); DOJ Criminal Division (various posts)

Within the security state, legislation has both supported and curtailed the IGs' independence and authority. National Security exemptions – FISA regulations in particular – have been a permanent battle ground for IG authorities. Support for the 2008 FISA bill rested in part on the reassurance that IG oversight would prevent national security programmes (notably the warrantless surveillance programme) from violating civil liberties. However, critics argued that the IG framework (at the time) was insufficiently robust to provide effective oversight.¹⁶¹ Beyond the obstacle that the National Security Agency (NSA) IG is appointed by its own agency head (and not statutorily independent), the Intelligence Community IGs lacked the resources and

¹⁶¹ Daily Kos, 'Those FISA IG Reports', *Daily Kos Website*, 8 July 2008, <http://www.dailykos.com/story/2008/07/08/548322/-Those-FISA-IG-reports>, Accessed 19 March 2014.

authority to investigate these programmes, including subpoena power beyond their host department. Although the IGs of the Intelligence Community are required (per the 2008 FISA Amendments) to submit comprehensive annual reviews on the implementation of FISA regulations, attempts by Senators Rob Wyden and Mark Udall of the Senate Intelligence Committee, and later Patrick Leahy of the Judiciary Committee, to mandate reviews of government surveillance programmes, all failed.¹⁶²

Moreover, some institutional innovations linked to homeland security, such as fusion centres, evade clear lines of accountability and authority and fall outside the IGs' sphere of responsibility. Fusion centres, which channel counter-terror information from multiple departments, agencies, local police, and the private sector, fall under the remit of no single IG. Individual IGs may be able to oversee limited components of fusion centre work, but their investigative powers end at the boundaries of their own host departments. The use of 'special' IGs – such as the 'web' of IGs described in Chapter 10 – might prove to be at least a partial corrective to this challenge.

*II. Inspector General Category*¹⁶³

After its statutory formation in 1978, the history of the IG community unfolds in waves: its first, 'glory days' decade,¹⁶⁴ in which it rose to prominence, but soon stumbled with institutional hiccups and political challenges; its subsequent neoliberal reorientation and redefinition in the nineties; and finally, following 9/11, its entry into

¹⁶² Senator Patrick Leahy (D-VT), 'Senate Judiciary Committee Approves Leahy-Authored Substitute Amendment To Reauthorization Of FISA Amendments Act', Press Release, 19 July 2012; Angela Canterbury, 'Electronic Surveillance Law 101', POGO blog, 26 June 2013, Accessed 3 March 2014, <http://www.pogo.org/blog/2013/06/20130626-electronic-surveillance-law-101.html>

¹⁶³ In the first part of this historical overview (from roughly 1962-93), I rely heavily, but not exclusively, on Light's (1993) seminal work on IGs, *Monitoring Government*.

¹⁶⁴ Thus dubbed by Light.

an ‘age of collaboration’ and its development into a ‘web’, using a distinct, novel model of collaborative OIG: the emergency ‘event-based’, special IG.

A. Conceptual Origins

Though its roots lie in military regulation, with the first IG appointed by George Washington in response to unethical behaviour by a general in the Continental Army,¹⁶⁵ in its twentieth century incarnation, the IG developed initially as a response to a Congress overwhelmed by its accounting and auditing role in the quotidian workings of government. The Budget and Accounting Act of 1921 established the budget system, removed the accounting and audit function from the executive branch and placed it within Congress’s remit. Between the passage of the original Budget Act and its 1950 amendment, the staff of the Government Accounting Office (GAO) peaked at nearly 15,000, replicating the Treasury’s own accounting function.¹⁶⁶ The inefficient system had, moreover, the significant limitation that the audit and accounting functions were performed by the same entity, thus failing to provide a crucial check on accounting practices.¹⁶⁷

Split between the need for information about the executive branch for oversight purposes and the overwhelming workload of accounting, Congress sought a mechanism within the executive branch for extracting information. Although the genesis of the move is hazy (as reflected in legislative reports), in 1959 Congress established an ‘inspector general and comptroller’ for foreign assistance, housed in the International Cooperation Administration of the State Department, and appointed

¹⁶⁵ Check and Radsan, 2010, p. 249.

¹⁶⁶ Light, 1993, p. 27.

¹⁶⁷ Ibid.

by the Secretary of State, in the Mutual Security Act amendments of 1959.¹⁶⁸ These amendments granted the IG access to any information that it needed to carry out its accounting and auditing function, but the means of that access remained underspecified. The crucial capacity upon which these amendments hinged was the IG's access to information with which to report to Congress. Light speculates that 'the establishment of the first IG reflected at least two goals – one concerning audit coverage and coordination, the other satisfying a thirst for information on what was happening inside this once easily inspected operation'.¹⁶⁹ These two goals would later shore up the bases for distinct forms of accountability pursued by IGs, and would provide the interpretive latitude for them to expand their activities.

B. The Inspector General Act of 1978 and the First IG Classes

In 1977, the House Government Operations Committee commissioned research to deal with the overall phenomenon of government fraud and waste. The commission reacted to the perceived lack of leadership, independence, and effective channels of communication with Congress, and proposed combining the audit and investigative functions of each department under an IG.¹⁷⁰ Prior to the IG Act's passage, the executive branch strongly opposed the creation of a set of statutory IGs that reported independently to Congress.¹⁷¹ On grounds of the separation of powers and executive privilege, the Office of Legal Counsel (OLC) argued that the President reserved the right to decide when and how executive employees could report to

¹⁶⁸ Light, 1993, p. 29.

¹⁶⁹ Ibid.

¹⁷⁰ GAO, 'Inspectors General: Enhancing Federal Accountability', GAO-04-117T, 8 October 2003, p. 18.

¹⁷¹ Check and Radsan, 2010, p. 253.

Congress.¹⁷² Although the House bill had originally granted IGs the authority to report ‘particularly serious or flagrant concerns’ directly to Congress without the approval of the agency head, the Senate version took into account the Administration’s protests by making agency heads provide consent and giving them the authority to edit the reports before submitting them to oversight committees.¹⁷³

Despite some concerns that the IG Act would be unconstitutional on grounds of the separation of powers, the Act passed on October 12, 1978 and established a system of twelve IGs based on the model of the HEW IG.¹⁷⁴ The Act was part of a package of post-Watergate reforms aimed at curbing executive overreach and improving accountability: alongside the Civil Service Reform Act and the Ethics and Government Act (which established the Office of Government Ethics), the Act established the Office of the Inspector General (OIG) and created twelve statutory IGs for executive departments.¹⁷⁵ Significantly, the IG Act of 1978 did not include any IG from a national security-related department or agency.

Although it met with indifferent reception, the institutional reorganisation and authority granted to the IG was significant. The Act combined audit and investigative functions; it insulated the new position from administrative politics through the condition that appointees be selected regardless of political affiliation, and through a dual reporting requirement to Congress and Agency (department) heads (including both regular and special reports; and by granting IGs access to all documents and

¹⁷² Richard Moberly, ‘Whistleblowers and the Obama Presidency: The National Security Dilemma’, *Employee Rights and Employment Policy Journal*, Vol. 16, 2012, p. 141.

¹⁷³ Thomas Newcomb, ‘In From the Cold: The Intelligence Community Whistleblower Protection Act of 1998’, 53 *Administrative Law Review*, 2001, p. 1258-9.

¹⁷⁴ Gianni testimony, 2002.

¹⁷⁵ In addition to the IG-HEW of 1976 and the IG-Energy in 1977, these were: Agriculture, Commerce, Housing and Urban Development, Interior, Labor, Transportation, Community Services Administration, Environmental Protection Agency, General Services Administration, National Aeronautics and Space Administration, Small Business Administration, and Veterans Administration.

information necessary to complete investigations.¹⁷⁶ Famously described by one former IG as ‘straddling the barbed wire fence’, the position required the IG to split loyalty between Congress and its agency or department.¹⁷⁷ ‘The Hill is always thinking we can go to our agencies, our agencies always think we’re finking to the Hill’, said Funk.¹⁷⁸ IGs were given functional independence within the executive and additional responsibility to Congress in the form of semi-annual reports. Finally, they were invested with investigative power, could issue subpoenas and initiate proceedings in the Justice Department.

Controversially, in 1981 President Reagan summarily ejected all of the incumbent inspectors general from their positions, a move that was quickly investigated and condemned by the Committee on Government Operations. This controversial decision was meant to give the appearance that Reagan was committed to building a strong corps of IGs and to ‘weed[ing] out’ some of Carter’s alleged political appointments.¹⁷⁹ Later that year, with E.O. 12301, Reagan instituted the President’s Council on Integrity and Efficiency (PCIE), a professional standards board for the IG community that brought IGs together with members of the Office of Management and Budget (OMB).¹⁸⁰ It served as ‘a kind of executive branch trade union’ and its aims were to bolster further coordination and to develop common standards for the oversight of government departments.¹⁸¹

In their first decade, especially after the first three rocky years, the IGs knew they could follow a clear script to win the resources they needed: hit the numbers in

¹⁷⁶ Light, 1993, p. 23-24.

¹⁷⁷ Sherman Funk, ‘Dual Reporting: “Straddling the Barbed Wire Fence”, *Journal of Public Inquiry*, Fall 1996, p. 13.

¹⁷⁸ Funk interview, p. 15.

¹⁷⁹ Light, 1993, p. 102-3.

¹⁸⁰ Gianni testimony, 2002.

¹⁸¹ Light, 1993, p. 107.

the war on waste through rigorous compliance monitoring.¹⁸² And the majority of them quickly set up shop, organised their offices, and developed strong relationships with Congress and the OMB. But the IGs' glory days', as Light called them, would come to a close with a major reform to the Act in 1988. Ten years after its passage, the 1978 Act received an update that expanded reporting requirements for IGs. The 1988 amendment also created a set of thirty-three Designated Federal Entity (DFE) IGs, non-departmental entities, and thus vastly expanded the size of the IG community. (DFEs were regulatory agencies of the federal government whose budgets were over \$100 million annually in federal funds).¹⁸³ Unlike the 'establishment' IGs, DFE IG appointments were not political appointments, but were selected by agency heads. The Act also added three 'establishment' IGs, to the Federal Emergency Management Agency (FEMA), the Department of Justice and the Treasury (the Defense Department had been added in 1981, and the State Department, in 1985). Two years later, President George H.W. Bush added a body parallel to the PCIE for the Designated Federal Entities, the Executive Council on Integrity and Efficiency (ECIE).

*C. The Neoliberal Reinvention, From Policing to 'Management Consultancy'
(1993-2001)*

In the early nineties, Light, one of the few scholars of the IGs at the time, criticised the IGs for being excessively compliance focused, and not attentive enough to performance concerns or capacity building. At the very moment of his seminal analysis, this orientation began to shift, though not strictly through the independent

¹⁸² Light, 1993, p. 102-4.

¹⁸³ H.R. Rep. No. 100-771, Inspector General Act Amendments of 1988, at 2, 13 July 1988.

decisions of the IGs themselves. In 1993, both Congress and the White House, through the Government Performance and Results Act and the National Performance Review (NPR), respectively, promoted a shift from procedural accountability (compliance monitoring) to performance-based evaluation. But the shift was not clear-cut, and IGs expressed concern over the ambiguity of their roles.¹⁸⁴ The NPR also ‘broaden[ed] the focus of the inspectors general from strict compliance auditing to evaluating management control systems’.¹⁸⁵ The PCIE and ECIE responded to the NPR and to the developing field of IG activity by crafting a set of revised principles as the basis for a proactive, rather than a limited and reactive, strategy, which privileged ‘a more consultative approach’ between the main actors.¹⁸⁶

Though the NPR presented IGs in dubious light, suggesting that their work more often stymied innovation than improved efficiency, Defense Department IG Eleanor Hill would later suggest that NPR’s criticism had a transformative effect on the IG community, forcing it to reckon with its role and to seek a greater balance between strict rule enforcement and constructive criticism akin to consulting.¹⁸⁷ In short, the NPR’s analysis promoted the capacity building and performance accounting whose absence earlier observers had lamented. Gore’s report specifically addressed the role of the IGs, and recast their relationship to their host agencies as one of service provider to client, and the report envisaged the citizen groups with stakes in each agency as ‘customers’ (with ‘customer’ notably replacing ‘citizen’).¹⁸⁸ In the government as a whole, the NPR pushed for an elimination of traditional bureaucratic

¹⁸⁴ Kathryn E. Newcomer, ‘The Changing Nature of Accountability: The Role of the Inspector General in Federal Agencies’, *Public Administration Review*, Vol. 58, No. 2, March/April 1998, p. 135.

¹⁸⁵ Albert Gore, *From Red Tape to Results: Creating a Government That Works and Costs Less*, Report of the National Performance Review, Washington, DC: US Government Printing Office, 1993, p. 33.

¹⁸⁶ Newcomer, 1998, p. 130.

¹⁸⁷ Testimony of Eleanor Hill, ‘Oversight of Investigative Practices of Inspectors General’, Hearing, Subcommittee on Government Management, Information, and Technology, US House of Representatives, Committee on Government Reform and Oversight, 24 June 1997.

¹⁸⁸ Ronald C. Moe, ‘The “Reinventing Government” Exercise: Misinterpreting the Problem, Misjudging the Consequences’, *Public Administration Review*, Vol. 54, No. 2, 1994, p. 113-14.

hierarchies in favour of an entrepreneurial, ‘committee approach’, in which the lines of accountability would become diffuse.¹⁸⁹

This neoliberal paradigm shift, according to its critics, had the potential to make the classic conception of public accountability evaporate. Although one of the goals of many New Public Management-style reforms (of which the Reinventing Government movement was one) was to increase accountability, in practice it made accountability relations more nebulous by diffusing responsibility amongst many actors, especially by making bureaucrats responsible both to politicians and its ‘customers’ (formerly known as citizens).¹⁹⁰ Paradoxically, the drive to promote horizontal accountability within the bureaucracy might enhance an agency’s capacity to learn and increase efficiency, but not necessarily permit greater democratic control. As one critic articulated the problem: ‘[e]fficiency is no guarantor of good political and social judgment, which is essential in securing genuine political accountability and legitimacy in a democracy’.¹⁹¹ The ‘mistake’ of NPM-style reforms, in this view, is to elide the distinction between private and public accountability. Whereas the former aims to maximise profit, the latter aims to preserve public values such as representation, participation, equality, fairness, impartiality and justice: in short, the values of democracy. The old administrative-democratic tension reared its head once again.

Whereas IGs would have in theory been the front line of (traditional) accountability holding, their new role as management experts elided the idea of holding actors to account for wrongdoing and reframed the concept in economic terms. However, like other New Public Management-inspired reforms in the

¹⁸⁹ Moe, 1994, p. 118-119.

¹⁹⁰ Per Lægreid, ‘Accountability and New Public Management’, in *The Oxford Handbook of Public Accountability*, Oxford: Oxford University Press, 2014.

¹⁹¹ Laegreid 2014, p. 331.

international arena, the NPR did not have the wide-ranging, transformative effects to which it aspired,¹⁹² and the IGs did not (entirely) abandon their role in compliance monitoring. In its 1995 Annual Report, the PCIE/ECIE ‘emphasize[d] two principal themes: how the IGs serve as "agents of positive change" and how they make effective use of “multidisciplinary teams”’ and proclaimed that

‘These efforts demonstrate how the IGs are not merely riding the train of “Reinventing Government,” but are also helping to stoke the engine. At the same time, the IGs remain vigilant in fulfilling their statutory mandate to prevent and detect fraud, waste, and abuse’.¹⁹³

Despite its potential to muddle the lines of accountability and ultimately compromise democratic legitimacy, this new form of ‘straddling’ – or ambiguity of mission – was to provide the opportunity for different actors to widen the IG model in ways that *enhanced* its potential to protect rights and democratic integrity.

The nineties also saw a host of other external reforms affecting IGs, beginning with the Chief Financial Officers (CFO) Act, which mandated in 1990 that the IGs audit federal agencies’ financial statements.¹⁹⁴ OIG practices changed significantly in the early and mid-nineties, as well: not only did many of them shift towards a more proactive, performance-oriented strategy (focusing on programme results), but also progressively more began to track departmental compliance with IG recommendations. However, the community as a whole suffered from the general climate of government downsizing and budget cuts. The added responsibility of the CFO Act, along with the IGs’ informal aid in carrying out the performance measurement of the Government Performance and Results Act, meant that IG capacity and independence came under threat. Between 1992 and 1996, sixty-five percent of PAS OIGs lost staff and thirty-nine percent operated with a reduced

¹⁹² Christopher Hood and B. Guy Peters, ‘The Middle Aging of New Public Management: Into the Age of Paradox?’, *Journal of Public Administration Research and Theory*, Vol. 14, No. 3, 2004.

¹⁹³ PCIE/ECIE Annual Performance Report FY 1995.

¹⁹⁴ Public Law 101-576.

budget. Over sixty-one percent of the entire community rated a ‘lack of resources/staff’ as the most important challenge facing their respective offices.¹⁹⁵

The IGs’ budding role in national security monitoring also provoked new challenges. A 1998 amendment known as the *Intelligence Community Whistleblower Act of 1998*, instituted the Inspectors General as the compromise between a recalcitrant administration, and a Congress eager to curb problems within the Intelligence Community.¹⁹⁶ The debate was merely a reworking of the question of balance between secrecy and transparency, but the Senate bill ultimately reaffirmed the arrangement reached in the IG Act of 1978: a system of ‘complex and longstanding accommodations between the legislative and executive branches’, in which Congress reacts to informally reported violations through budgetary reprisals.¹⁹⁷ The Act stipulates that whistleblowers must receive permission from their agency head before submitting complaints to congressional committees, and are not necessarily guaranteed protection from retaliation.¹⁹⁸ The Act did, however, make the pathway for whistleblowers clearer, by permitting, but delimiting, their access to Congress through the intelligence committees. Finally, the Reports Consolidation Act of 2000 introduced a statutory requirement for each IG to provide an annual list statement of its department’s top management and performance challenges, with an analysis of the department’s success in resolving them.¹⁹⁹

As IG powers grew, the national security agencies lagged in their willingness to be placed under such constraints, for fear of compromised security. By the end of the Reagan Administration, however, all of the related departments (Justice, CIA,

¹⁹⁵ Newcomer, 1998, p. 131.

¹⁹⁶ Public Law 105-272, title VII, §701(a).

¹⁹⁷ Newcomb, 2001, p. 1266-67.

¹⁹⁸ Elizabeth Newell Jochum, ‘Debate Erupts Over Whistleblower Rights For Intelligence Workers’, *Government Executive*, 14 May, 2009.

¹⁹⁹ Public Law 106-531.

State, Treasury, Defense and the National Security Agency) had an office of inspector general. The IGs' role was decisively amended in the aftermath of 9/11. The first change was that rights monitoring became an integral component of national security IGs' role. The Patriot Act established a new position within the Justice IG's office and in the new Department of Homeland Security specifically to oversee violations of rights and liberties.²⁰⁰ These positions were independent of, but coordinated with, the offices for civil rights within their respective departments.

The second development was that the IGs' authority was clarified, formalising an ambiguous authority that IGs had developed over time. Although the matter had been on the congressional agenda for some time, the Homeland Security Act of 2002 amended the IG Act to grant most establishment OIG special agents full law enforcement authority. This included the capacity 'to make an arrest without warrant while engaged in official duties, and execute warrants for arrest, search of premises, or seizure of evidence upon probable cause to believe that a violation has been committed'.²⁰¹ This capacity had previously only been given explicitly and permanently to four OIGs. However, the ability of any IG to 'access' such authority was not novel:

'As the role of the Inspector General has evolved, the need for such appointments became so consistent, and the volume of the requests so large, that "blanket" deputations evolved. Since 1995, virtually all criminal investigators in the offices of the twenty-three covered Inspectors General have exercised law enforcement authorities in cases under office-wide deputations. Thus, the grant of statutory law enforcement authority would not extend new authorities to IG personnel, but would merely recognize the authorities that are already in place'.²⁰²

²⁰⁰ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act of 2001), § 1001, Pub. L. No. 107-56, 115 Stat. 272.

²⁰¹ IG Act of 1978, §6 (e).

²⁰² Testimony of Nicholas Gess, Associate Deputy Justice IG, 'Legislative Proposals and Issues Relevant to the Operations of Inspectors General', Committee on Homeland Security and Governmental Affairs, US Senate, 19 July 2000.

If the practice was already standard, the new statutory basis lent the IGs' work legitimacy. Since 9/11, Congress has capitalised on the IGs' law enforcement power, directing them to investigate specific programmes in the War on Terror, including assessing many of the FBI's investigative tools, President Bush's warrantless surveillance programme, and surveillance policies on US citizens.

D. The 2000s: The Age of Collaboration and the Emergency 'Event-specific' IG model

In the first decade of the twenty-first century, the United States experienced a series of emergencies, beginning with 9/11 and the subsequent wars in Iraq and Afghanistan, then Hurricanes Katrina, Rita and Wilma, and finally the economic recession of 2008. Emergencies demand an immediate, but often temporary mobilisation of resources to manage them. And the exigencies of these multiple emergencies of the 2000s had a profound effect on the way that the IG community structured its approach to accountability. The first change was a shift in the organisational model and coordination of the IGs; the second was substantive, introducing an explicit focus on rights that complemented – or countered – the neoliberal turn of the nineties.

From its inception, the IG community occasionally pooled resources to conduct joint reviews that crossed into multiple IGs' jurisdiction. According to one report of PCIE in 1995, '[o]n average, in FY 1995, OIGs conducted just under seven percent of their investigations with other OIGs and more than nineteen percent with non-OIG investigative agencies'.²⁰³ By 2000, all of the PCIE OIGs had conducted at

²⁰³ PCIE/ECIE Annual Report to the President, FY 1995.

least one investigation with another non-OIG investigative unit, with some OIGs collaborating as much as sixty percent of the time (Housing and Urban Development); forty-two percent (Labor); thirty-six percent (Defense); thirty-two percent (State); and twenty-four percent (Justice). In addition to these inter-agency investigations, Defense OIG performed nineteen percent of its investigations with another OIG; the Office of Personnel and Management, fifty-five percent; and NASA, twenty-five percent.²⁰⁴ (In contrast, very few of the ECIE OIGs engaged in any joint reviews). In 2004, PCIE saw a jump in joint investigations, noting that, of the twenty-five PCIE OIGs, '[t]he highest portion of joint cases reported by an OIG was seventy-four percent [...which] indicate a substantially higher level of joint case activity than in FY 2003'.²⁰⁵ Joint OIG investigations are a reaction to, and a mirror of, governance trends of service provision through integration and horizontal coordination, known internationally as 'joined up governance' or 'whole-of-government' approaches.²⁰⁶

Table 4.2. Percent of IG Reviews Conducted Jointly With Other Federal Investigative Organisations

Year	Number of OIGs conducting joint reviews		
	<10% of total reviews	10-50% of total reviews	>50% of total reviews
2004	7	14	4
2005	5	16	4
2006	8	16	2
2007	10	15	2

Source: PCIE Annual Reports FY 2005-2008

While not a uniform trend upward in these years, the difference between these statistics and the figures for 1995 are striking. Moreover, in these years, at least one OIG reported that joint reviews comprised seventy-four percent (2004); seventy-three

²⁰⁴ PCIE/ECIE Annual Report to the President, FY 2000, p. 38.

²⁰⁵ PCIE/ECIE Annual Report to the President, FY 2004, p. 38.

²⁰⁶ Perri 6, 'Joined-Up Government in the Western World in Comparative Perspective: A Preliminary Literature Review and Exploration', *Journal of Public Administration Research and Theory*, Vol. 14, No. 1, p. 103.

percent (2005); sixty-one percent (2006); and ninety-six percent (2007) of total reviews. (Since 2008, CIGIE has not published statistics on joint reviews.) The joint reviews are organised when assessing a programme run by one department but funded by another (or jointly run by two agencies); when a review requires other Federal law enforcement support; and when programmes cross-departmental boundaries (such as programmes run in Iraq, which often require coordination between State, Homeland Security, and Defense Departments). They often concern international trade (for example, helping multiple agencies coordinate trade promotion activities), joint military-civilian programmes (such as monitoring US controls on defense-related exports), but also, domestically, can assess activities such as collaborations between the Agriculture Department and Environmental Protection Agency in implementing conservation practices.

Although the community had experimented with performing joint reviews in the nineties (collaborations between two or three OIGs, or between one OIG and another government agency such as the FBI), the intentional model of joint, collaborative reviews took hold after 9/11, and was even formalised as a new type of self-contained OIG. Following the attacks, not only did the community grow in numbers and responsibility (with a number of OIGs receiving explicit mandates to monitor potential civil rights and liberties abuses in addition to the usual fraud, waste and abuse), but also, Congress and the central IG coordinating bodies (PCIE and ECIE, later CIGIE) began to promote an event-specific, collaborative model of OIG. These temporary IGs drew the resources and expertise from multiple established offices with the purpose of monitoring specific, emergency-related recovery events, and received their own budget from Congress. Following the community-wide IG collaboration overseeing the 9/11 recovery process, Congress set up a special IG for

the reconstruction of Iraq (SIGIR) in 2004, and one for the oversight of the Hurricane Katrina in 2005. Later, it established both SIGAR (Afghanistan Reconstruction) and SIGTARP (for the administration of the Troubled Asset Relief Program funds) in 2008.

The new model of special IGs has not replaced the permanent, agency-based system – indeed, that network has only grown in size, with sixteen IGs added between 2000 and 2014 – but it has made the IG a more adaptive instrument for government oversight, and thus an easier tool to which legislators can have recourse. The federal IG model even spread beyond the executive branch proper with the so-called ‘legislative IGs’: the GAO, US Capitol Police, Library of Congress, Architect of the Capitol, Government Printing Office, and US House of Representatives all received an IG over the course of the 2000s. In 2006, the House Judiciary Committee approved a bill for the creation of an IG for the federal courts, though it never came to fruition.²⁰⁷

Because of its novelty, the emergency event special IG model also begs the question of how and when it will be employed. Some legislation has been drafted to authorise CIGIE to identify a ‘lead’ IG, or contingency IG, when an emergency event reaches a certain financial threshold.²⁰⁸ The special IG model contributes to the routinisation of emergency as part of the administrative state’s *modus operandi*, and the rules by which it comes into existence – financial limits – determine the state’s own definition of emergency. Organisationally, special IGs share the temporary, specific focus of independent counsel investigations, a similar instrument of executive oversight that underpinned the investigations into the Iran-Contra, Whitewater, and Monica Lewinsky scandals. However, in contrast to the Independent Counsel statute,

²⁰⁷ Mark C. Miller, ‘The View of the Courts from the Hill: Governance as Dialogue’, *PS: Political Science & Politics*, Vol. 40, No. 1, January 2007, p. 179.

²⁰⁸ Personal interview with David Gross, 28 July 2014.

special IGs have until now been used primarily in reaction to emergencies: larger, systemic crises stemming from unexpected, exogenous shocks, rather than the scandals of particular public officials. Special IGs lose the advantage of permanent OIGs, which develop location-specific competences, and moreover must contend with the large amount of contracting used in emergency management (a factor that can limit IGs' legal access to documents, thus impeding thorough investigations).

Table 4.3. Overview of Special OIGs

IG	Years in operation	Associated OIGs	Budget History (in millions)	Staff
SIGIR	2004-2013	State and Defense (reports directly to)	2006: \$24 2007: n/a 2008: 28.8 2009: 37.9 2010: 29.4 2011: 22.1 2012: 18.5	2006: n/a 2007: 99 2008: 131 2009: 138 2010: 100 2011: 95 2012: 86
SIGAR	2008-present	State, Defense, and USAID (reports directly to)	2009: \$7 2010: 26.5 2011: 32.7 2012: 44.4 2013: 49.9 2014: 49.7	2009: 57 2010: 117 2011: 138 2012: 185 2013: 193 2014: 198
SIGTARP	2008-present	Treasury, Federal Reserve, FDIC, SEC, Federal Housing Finance Agency, HUD, Tax Administration, GAO ²⁰⁹	2009: 50 2010: 33.5 2011: 39.1 2012: 41.8 2013: 41.1 2014: 43.1	2009: 60 2010: 135 2011: 155 2012: 164 2013: 169 2014: 165

Sources: SIGAR Quarterly Reports to Congress FY 2009-2014; SIGIR Annual Budget, FY2010-2012; SIGTARP Quarterly Reports to Congress FY 2009-2014

Alongside these reforms internal to the IG community, a battle waged in Congress over which tools were needed by the IGs to both strengthen them and keep them in check. In response to the prodding of individual IGs and POGO, Rep. Jim

²⁰⁹ Unlike SIGIR and SIGAR, the OIGs associated with SIGTARP do not provide direct supervision of the special IG, but they all form part of the TARP oversight council.

Cooper (D-TN), first introduced inspector general reform legislation in 2003.²¹⁰ Five years of debate led to the first comprehensive reform of the Act since the 1988 amendments. The 2008 Inspector General Act largely shored up the statutory bases for IG independence by requiring an independent budget line for the OIG; requiring the administration to notify Congress thirty days before attempting to remove or transfer an IG; and reaffirming the requirement for IGs to be chosen on the basis of qualifications, without regard to political affiliation. The Act passed after Republican reluctance regarding the potential seven-year term limit and stricter controls on the requirements for IG dismissal.²¹¹ Its most significant provision was the inclusion of independent legal counsel for all IGs (particularly important, in the eyes of Congress, for the DOD IG).²¹²

The second major effect of the 2008 Act pertained to the reorganisation of the IG ethics councils. The President's Council on Integrity and Efficiency (PCIE, for the major departmental IGs) and the Executive Council on Integrity and Efficiency (ECIE, for the DFE IGs) were established by executive order in 1981.²¹³ These were consolidated into the Council of IGs on Integrity and Efficiency (CIGIE). The aim of this reorganisation, according to its mission statement, was to permit the IG community to 'address...issues that transcend individual' agencies and departments.²¹⁴ CIGIE became the institutional backbone of the emerging IG model, and the link between the branches that facilitated Congress's use of the special IG. It also began the process of standardising the IG as a role – 'building a profession', in

²¹⁰ 'Bush Signs Legislation Giving More Autonomy to Government Watchdogs', *Associated Press Newswires*, 14 October 2008.

²¹¹ Beverly Lumpkin, 'At Long Last, Congress Passes IG Reform Bill', POGO blog, 29 September 2008, <http://www.typepad.com/services/trackback/6a00d8341c68bf53ef010534dd96c5970b>, Accessed 12 January 2014.

²¹² *Ibid.*

²¹³ Gianni testimony, 2002.

²¹⁴ Inspector General Act of 2008, Public Law 110-409, H.R. 928, 14 October 2008.

the words of the head of the training institute – by establishing an institute for the training of IGs and dissemination of best practices.²¹⁵ The Act also made provisions to extend some protections previously enjoyed only by establishment IGs to DFE-IGs. This included codifying the non-political nature of DFE-IGs’ appointments (previously stated only as an intent in the conference report of the IG Act Amendments of 1988) and permitting them law enforcement authority (including the ability to make arrests without warrants).²¹⁶

In addition to these amendments, the 2008 Act streamlined funding procedures and made them more transparent by requiring a separate and more detailed budget request for the IG; expanded its power of subpoena to electronic and tangible items; and granted explicit law enforcement authority.²¹⁷ However, President Bush’s subsequent signing statement effectively nullified the budget provision, prompting an angry retort from the Senate Committee on Finance, signed by Senators Grassley (R-IA), McCaskill (D-MO), Lieberman (I-CT) and Collins (R-ME). Section 8 of the Act had required the President to ‘include a line item detailing the President’s budget request for each IG, as well as the IG’s budget request’.²¹⁸ As they argued in their rebuttal letter, ‘Congress included Section 8 in the law to prevent the use of the budget process to inappropriately influence, marginalize, or prevent important investigations initiated by IGs’.²¹⁹ Despite the signing statement, the overall effect of the 2008 Reform Act was to bolster IGs’ independence.

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 also included a number of provisions to bolster DFE IGs’ independence, including the

²¹⁵ Personal Interview with Tom Caulfield, 4 January 2013.

²¹⁶ Vanessa K. Burrows, ‘Statutory Offices of Inspectors General (IGs): Methods of Appointment and Legislative Proposals, CRS report, November 6, 2009, p. 5.

²¹⁷ Inspector General Act of 2008, PUBLIC LAW 110-409 [H.R. 928], OCT. 14, 2008

²¹⁸ Letter from Senators Charles Grassley and Claire McCaskill on the presidential signing statement on the Inspector General Reform Act, 30 October 2008.

²¹⁹ Ibid.

requirement of a two-thirds majority vote for IG removal in DFEs, the use of boards and commissions (rather than agency heads) to designate DFE IGs;²²⁰ a GAO assessment a year later offered a positive review of the reforms' implementation and, similarly, of the reforms of the 2008 Reform Act.²²¹ The Act also established a joint consortium of nine financial regulatory IGs, the Council of Inspectors General on Financial Oversight, to monitor the broader financial sector.

III. IGs in the Overall Web of Accountability

Where do IGs fit in the broader federal system of accountability? The IGs have grown into their own coordinated web of accountability, but work in tandem with other mechanisms of executive accountability. GAO, congressional committees, independent counsels, and whistleblowers often investigate or identify the same types of problems, and in relation to this constellation of monitors, the IGs are at times a complement, at times an overlap. It is useful briefly to highlight the differences and overlaps between these various mechanisms of accountability to understand how they fit as part of a broader 'architecture' of accountability.

GAO, Congress's own accountability agency, and the IGs maintain a relationship that is at once conflictual and complementary, and their work as 'congressional watchdogs' can overlap. Although the GAO's origins lie in financial oversight of the federal government, 'primarily scrutinis[ing] government vouchers and receipts', the scope of its current activities extends to performance audits, signalled by its name change from the Government Accounting Office to the

²²⁰ Public Law 111-203, H.R. 4173.

²²¹ GAO, 2011.

Government Accountability Office in 2004.²²² (The name change, enacted through the GAO Human Capital Reform Act of 2004, was made by the GAO itself to better reflect its workload, only fifteen percent of which comprised financial auditing).²²³ Though GAO and the IGs frequently collaborate on oversight projects, they also offer each other regular criticism (accountability through ‘mutuality’, or peer-monitoring and evaluation). In practice, GAO serves as one of the most consistent critical monitors of, and sources of accountability for, the IG community. However, the two bodies also provide complementary forms of executive oversight with slightly different foci. Whereas GAO takes a broad view and tackles government-wide problems, IGs target the problems specific to an agency or an event recovery. And in comparison to the IGs, GAO’s work is largely performance-based, and evaluates the utility of government programmes – what works, and what does not – rather than wrongdoing through individual instances of fraud and waste.²²⁴ Though the IGs moved closer to performance monitoring in the nineties, their reviews remain slanted towards compliance with regulations. Individual IGs also have more discretion to investigate problems as they arise, unlike GAO investigators, who rely on public laws or congressional committees to direct their work.²²⁵ And unlike GAO, IGs are full members of the law enforcement community.

Congressional investigations have long been the most visible and aggressive of the legislative tools of oversight (more so than appropriations, authorisations, and confirmations).²²⁶ In theory, there is the potential for considerable overlap between

²²² David M. Walker, ‘GAO Answers the Question: What’s in a Name?’ *Roll Call*, 19 July 2004.

²²³ Public Law 108–271, 118 Stat. 811.

²²⁴ Clark, 2011, p. 22.

²²⁵ Government Accountability Office, ‘About GAO’, <http://www.gao.gov/about/index.html>, Accessed 23 April 2014.

²²⁶ See Morton Rosenberg, ‘Investigative Oversight: An Introduction To The Law, Practice, And Procedure Of Congressional Inquiry’, CRS Report, 7 April 1995, for a detailed overview of the parameters of congressional investigations.

congressional and IG investigations, leading either to competition or to redundancy between the two efforts. In practice, however, congressional oversight committees use IGs as part of their investigative toolkit, and regularly request reviews from IGs to complement their parallel investigations. IGs feature regularly as prominent witnesses in congressional hearings, thereby contributing their work to the broader oversight effort. However, in one crucial instance, IG reviews provide a clear advantage to their legislative counterparts: they have unfettered access to agency information and (with few exceptions) can circumvent the executive secrecy privileges that can stymie congressional probing. IGs themselves have varying philosophies about how many, and which, congressional requests to accept: some accept all requests; others choose according to visibility or size; one accepts all requests from the committee chair as a matter of course, strongly considers requests from the Ranking Member, and dismisses most others.²²⁷ The two types of investigations can also vary in their intent: whereas IG investigations must be non-partisan, congressional probes frequently suffer from deep partisan biases. Despite some overlap in function, they can be seen as complementary, mutually reinforcing instruments of oversight.

In broader perspective, however, as early as the nineties, IG investigations began to grow in prominence in relation to independent counsel investigations authorised by the Ethics in Government Act (coeval with the original IG Act), slowly replacing them as a method of investigation. The Clinton years were punctuated with multiple special independent counsels to oversee the Whitewater and Monica Lewinsky scandals, but the statute died in 1999, in part as a result of excessive

²²⁷ Personal interviews with Richard Skinner (former Department of Homeland Security IG), 11 January 2012, and Calvin Scovel III (Department of Transportation IG), 17 January 2013.

partisan usage.²²⁸ But its demise as an instrument of executive oversight provided an opening for IG investigations to gain prominence. Although independent counsels were replaced with the Office of Special Counsel in 1999, by the next decade, the preferred method was to appoint an IG to oversee instances of wrongdoing.

Finally, the relationship between IGs and whistleblowers is vexed. Rather than mutually reinforce each other, in practice IGs have undervalued whistleblowers as a legitimate source of information, and at times have even punished them for their breaches of agency loyalty (as an analysis of the Defense OIG suggested).²²⁹ Individual whistleblowers also assume personal and professional risks that are far less menacing than those facing IGs, who have an institutional support on which to fall should their allegations provoke ire in the host agency. In part, the IGs' reluctance to view whistleblowers as serious sources of complaint stems from the very different motivations that the two have. Whistleblowers might call attention to the same types of misconduct that IGs seek, but their motivation to do so can be very different from the IGs'. Individual justice, revenge, idealism, publicity – that is, mostly personal drivers – can all colour a whistleblower's reasons for reporting wrongdoing. While this does not necessarily detract from their validity of their complaints – as one former IG inspector commented, 'where there is smoke, there is usually fire' – IGs at times find the need to separate the legitimate claims from the claims tinged with motives of personal revenge. But the suspicion – even irritation – with which some IG regard whistleblowers also colours the whistleblowers' own view of the possible channels through which to report wrongdoing. In an era increasingly concerned with the power and responsibility of whistleblowers (seen, for instance, in the controversy

²²⁸ Ken Gormley, 'Monica Lewinsky Impeachment and the Demise of the Independent Counsel: What Congress Can Salvage from the Wreckage – a Minimalist View', *Maryland Law Review*, Vol 60, No. 1, Article 9.

²²⁹ Clark, 2011, p. 24.

surrounding the case of Edward Snowden), destroying legitimate options for them to come out through legal, protected channels will undermine both their goals and the IGs' goals.

External groups (such as POGO) and Congress have developed some procedural and legislative reform proposals to encourage mutual support, rather than antagonism, between the IGs and whistleblowers, and in surveys, POGO found evidence that the IG community was receptive to reforms.²³⁰ For instance, in August 2012, the Justice Department added a further whistleblowing protection position within its OIG, the 'whistleblower ombudsman', which will 'train employees about the importance of reporting potential misdeeds and monitor investigations'; the decision, however, was met with scepticism by whistleblower advocates.²³¹ The relationship is crucial because IGs gather many, at times the majority, of their complaints through their much-advertised hotlines. But ultimately, the IG's choice of strategy – that is, whether it relies on the tip of a whistleblower, on congressional direction, or on its own intuition in pursuing a review – depends crucially on its level of independence.²³²

IV. Challenges and Countervailing Developments

IGs continue to face a set of political challenges that affect vacancies, misconduct, and resources. These problems are not unrelated: most IG misconduct occurs by, or under the watch of, Acting IGs, and partisans of reform over the selection process argue that carefully structured improvements in vetting minimise the

²³⁰ Ibid, p. 24.

²³¹ Eric Katz, 'Whistleblowers Will Have a New Friend At Justice', *Government Executive*, 10 August 2012.

²³² Clark, 2011, p. 24.

chances of corrupt IGs, and improve the likelihood of a speedy confirmation process.²³³

A. Vacancies

The phenomenon of IG vacancies has plagued the community since its inception, and despite the purported apolitical character of the IG, has played into partisan power struggles. On the one hand, many IGs note the unavoidable length of the confirmation process, particularly for the IG community.²³⁴ These often leaves OIGs in limbo for many months, if not years, with no cohesive organisational direction. On the other hand, leaving an IG post unfilled offers distinct advantages for a President reluctant to have important programmes inspected; it can also be a tool of congressional obstructionism (such as during the Obama Administrations). The IG positions in the key national security Departments of State, Homeland Security and Defense remained unfilled for five years, three years and two years respectively; in DHS, the Acting IG ultimately resigned for misconduct in 2013.²³⁵ Senator Chuck Grassley observed that Acting IGs ‘tend to function as caretakers of the office’ and ‘are not necessarily equipped to take on an entrenched bureaucracy and challenge senior officials with the tough questions necessary to get to the bottom of a controversy’.²³⁶ OIGs headed by Acting IGs often suffer from a lack of direction, and they find themselves subject to more intense political pressure because of their lack of

²³³ POGO, *Watching the Watchdogs: The Good, the Bad, and What We Need from the Inspectors General*, Report, 14 January 2014.

²³⁴ Personal interviews with Glenn Fine, 3 January 2012, Richard Skinner, 11 January 2012, and David C. Williams, 14 January 2013.

²³⁵ POGO, *Where Are All the Watchdogs?* <http://www.pogo.org/tools-and-data/ig-watchdogs/go-igi-20120208-where-are-all-the-watchdogs-inspector-general-vacancies1.html>.

²³⁶ Letter from Senator Grassley to Kevin L. Perkins, Chair, CIGIE Integrity Committee, regarding ‘Whistleblower allegations involving Operation Fast and Furious’, 8 March 2011.

job security. Frequently, they occupy more than one position within the department, and are vetted by the department's top officials, placing them in the conflicted position of having to criticise the very officials who will have influence over their employment. Finally, agency heads feel less pressure to implement the recommendations of Acting IGs. A survey conducted by the House Committee on Oversight and Government Reform found that 'agencies without permanent IGs have a disproportionately high number of open and unimplemented recommendations', meaning that even good quality work by Acting IGs can be ineffectual.²³⁷

²³⁷ *Open and Unimplemented IG Recommendations Could Save Taxpayers \$67 Billion*, Committee on Oversight and Government Reform, US House of Representatives, Staff Report of Darrell Issa, 5 March 2013.

Table 4.4. Average Tenure by Department/Agency, 1978-2014.

Agency or Department	Confirmed IG	Acting or Deputy IG
USAID	7 years, 7 months	7 months
CIA	5 years, 2 months	7 months
Corporation for National and Community Service	5 years	1 year, 11 months
Agriculture	4 years, 11 months	1 year, 4 months
Commerce	6 years, 4 months	1 year
Defense	2 years, 7 months	2 years, 6 months
Education	4 years, 11 months	6 months
Energy	8 years, 8 months	9 months
Health and Human Services	7 years, 3 months	1 year
Homeland Security	3 years, 3 months	1 year, 7 months
Housing and Urban Development	4 years, 4 months	1 year, 8 months
Interior	4 years, 5 months	1 year, 4 months
Justice	5 years, 4 months	1 year
Labor	3 years, 8 months	1 year, 2 months
State (and Broadcasting Board of Governors)	1 year, 3 months	1 year, 1 month
Transportation	5 years, 1 month	8 months
Treasury	3 years, 3 months	8 months
Treasury IG for Tax Administration	6 years, 4 months	1 year, 4 months
Veterans Affairs	8 years, 7 months	11 months
Environmental Protection Agency	5 years, 4 months	1 year, 5 months
Federal Deposit Insurance Corporation	7 years, 10 months	1 year, 9 months
General Services Administration	4 years, 8 months	5 months
NASA	7 years, 5 months	7 months
US Nuclear Regulatory Commission	11 years, 9 months	10 months
Office of Personnel Management	12 years, 11 months	1 year, 4 months
Railroad Retirement Board	13 years, 11 months	6 months
Small Business Administration	2 years, 9 months	1 year, 11 months
Social Security Administration	4 years, 7 months	9 months
Tennessee Valley Authority	11 years	1 year, 2 months
Total	6 years, 4 months	1 year, 3 months

IG reports led by confirmed IGs carry more weight with Congress and the press than Acting or Deputy IGs. The rigorous and lengthy vetting process for confirmed IGs lends them authority in the eyes of their stakeholders because of the assurance that

they are truly independent and competent. Moreover, Acting IGs do not have the capacity to set OIG priorities or strategic plans, leaving the office unable to adapt to the changing needs of the host department or agency. Given that many IG investigations span multiple years, the need for direction and leadership is crucial.

B. IG Misconduct: Who watches the watchdogs?

Though government officials regularly tout the IGs' success as reason for public trust, the phenomenon of IG misconduct has repeatedly reared its head, and the IG community's strategies for addressing it grow piecemeal. IG scandals regularly surface and weaken the IGs' overall public image. In 2007 alone, Department of Commerce IG Johnny Frazier and NASA IG Robert Cobb were both found guilty of misconduct, but neither received direct disciplinary action; DOS IG Howard Krongard resigned amid a flood of similar accusations.²³⁸ With the neither PCIE nor the Office of Special Counsel able to prod the President or department heads to discipline the intractable IGs, the onus fell to Congress's shoulders to address the problem. The 2008 Reform Act proved partly successful in its acknowledgement, and support, of IG accountability: by consolidating PCIE and ECIE into a single entity, the Act streamlined IG oversight from within the community, and moreover strengthened the Integrity Committee in place to assess IG misconduct, bolstering congressional oversight capacity of the IG community. The Act replaced the Executive Order that established PCIE and ECIE with a statute, which gave the council (and the Integrity Committee) permanent authority.

²³⁸ Letter from POGO to Clay Johnson III, Head of OMB, regarding the integrity of the IG system, 17 August 2007, Available: <http://www.pogo.org/our-work/letters/2007/go-ig-20070817.html>.

C. Political constraints

Though the IG community has voiced a continuous refrain of budget complaints since the late seventies, other challenges faced by the IGs have evolved. In the eighties and early nineties, many IGs complained about the congressional pressure for measurable outcomes – that is, immediate results in the form of numbers documenting funds recovered and saved, arrests, indictments and convictions – that precluded more effective, but less visible investigations.²³⁹ Legislators can easily use such data for political gain, more so than the less quantifiable, structural changes that have a greater long-term impact on departmental behaviour. In a 2013 survey of the IG community, however, IGs expressed more concern with a new type of congressional pressure: the growing number of statutory requirements for regular IG audits, inspections, and investigations of particular programmes, all of which limit the discretionary funds IGs have to pursue unexpected, but serious breaches of accountability.²⁴⁰ Yet the budget woes continued: the added congressional responsibilities came not with additional resources, but rather, with budget cuts. Despite the 2008 IG Act's support of IG independence, the fragility of the IGs' position and capacity to act can still be shaken simply by department heads unwilling to cooperate. An August 2014 letter to Congress, signed by forty-seven of the seventy-three federal IGs, wrote in defence of three IGs who experienced repeated blocks by their departments in accessing crucial documents for investigations and audits. Their grievance focused not on overt executive wrongdoing, but rather on 'restrictive' and 'cramped reading[s] of the IG Act' that stalled and prevented IG investigations from taking place:

²³⁹ Light, 1993, p. 211-13.

²⁴⁰ Association of Government Accountants (AGA), Kearney and Company, *Annual Inspector General Survey 2013: Effective Oversight in a Changing Environment*, September 2013.

‘The constricted interpretations of Section 6(a)(1) by these and other agencies conflict with the actual language and congressional intent. The IG Act is clear: no law restricting access to records applies to Inspectors General unless that law expressly so states, and that unrestricted access extends to all records available to the agency, regardless of location or form’.²⁴¹

The IGs found their fragile authority compromised by a set of agencies eager to guard their secrecy; the agencies overrode the IG Act by having ‘creative’ recourse to the legal arsenal at their command, exploiting legal ambiguities to render individual IGs powerless.

V. Conclusion

The history of the US Federal IG community since 1978 is one of proliferation, increased capacity, fortified independence, a slow expansion of the very concept of accountability, and gradual crystallisation into a coordinated, institutional web. The IG model has expanded outward – internationally, in many African countries (who have mostly adopted military-style IGs), in Iraq (the only American-style IG outside of the US), and in Europe – and inward, to state and local governments, which increasingly conform to the federal model.²⁴² This core model has strengthened as it has developed. While the majority of legislative provisions for IGs have supported their independence, Congress has also sought to expand their authority by codifying their capacities and responsibilities. Congress established a statutory requirement for OIGs in December 2007 to track the status of their recommendations, creating added pressure for departments to follow IG direction. Their mounting independence from host agencies has been accompanied by growing

²⁴¹ Letter of US Federal Inspectors General to the Chairmen and Ranking Members of the Committee on Oversight and Government Reform, US House of Representatives, and Committee on Homeland Security and Governmental Affairs, US Senate, 5 August 2014.

²⁴² Tom Caulfield, Phyllis Fong, Mark Jones, and Lynne McFarland, personal interviews, 24 July 2014.

institutional support in the form of CIGIE, as well as standards common to IG performance and training. Despite its early twentieth-century roots in financial auditing, the IG position has developed into a tool in the investigation of civil liberties abuses and an internal check on executive prerogative.

Yet both internal and external pressures plague the IG community. A poor internal accountability structure, coupled with their status as political appointees, make IG integrity dependent on the good will of individual IGs, and this has permitted periodic, but persistent IG scandals. Externally, the IGs' delicate institutional placement between the branches and their susceptibility to politically motivated budgetary reprisals ensure that their position will remain tenuous.

PART II: THE IGS AT WORK

The second part of this dissertation applies the themes introduced in Part I to detailed analyses of the organisational history of selected OIGs and of specific IG initiatives.

CHAPTER 5. Bungling Bureaucrats: Searching for Independence at State

MAYOR. Gentlemen, I have invited you here to convey to you some extremely unpleasant news. We are to be visited by a government inspector.

JUDGE. Inspector?

WARDEN OF CHARITIES. What inspector?

MAYOR. A government inspector from St Petersburg. Incognito. And, what's more, with secret instructions.

JUDGE. Well there's a thing!

WARDEN OF CHARITIES. As if we hadn't enough on our plates already!

-Nikolai Gogol, *The Inspector General*, Act I, Scene i²⁴³

I. Introduction and Context

In addition to many routine audits, inspections, and management reviews for efficiency, the State Department OIG conducted many reviews oriented towards ‘democratic values’: investigations that concentrated on impropriety of a political, ideological, and ‘rights-based’ sort. Many of its reviews addressed seemingly minor administrative infractions, but had deep implications for First and Fourth Amendment rights and the substance of foreign policy. For much of its history, the OIG’s success in effecting departmental change and accountability was limited, in part because of the weak institutional strategies of its IGs, and in part because of the extensive bureaucratic and political constraints on the office. These constraints included not only a perennial lack of resources, but also the weight of a pre-IG institutional legacy and a Department culture resistant to IG work. The length of tenure of its permanent IGs shrank rapidly in the two decades following the early nineties, leaving the office to be headed by successive career Foreign Service Officers with leadership stints of only a few months each.

²⁴³ Nikolai Gogol, ‘The Inspector General’, in *Plays and Petersburg Tales*, Trans. Christopher English, Oxford: Oxford University Press, 2008, p. 249.

Throughout its history, the OIG also suffered an acute case of audit-investigative animosity, a condition familiar throughout the IG community as a cause of compromised work. These two branches of the office maintained decades-long institutional rivalries that prevented the kind of cohesive bureaucratic culture necessary to the pooling of scarce resources and expertise. Historically, the inspection teams had taken pride of place in the OIG (in its various incarnations dating to 1906); this only served to worsen the audit-investigative tension that accompanied the 1978 Act and to dilute the office's capacities. State OIG's history demonstrates the precarious dependence of IGs on material resources, independence, a cohesive office culture, and on a broad web of actors to effect change. It also demonstrates that through its value orientation, an IG can at the very least articulate a conception of democratic integrity above and beyond the material fraud, waste and abuse pursued by the first generation of IGs.

A. Prehistory: Before the IG Act

Unlike any other Federal IG, the State IG traces its roots to the early twentieth century. The Department conducted routine inspections of its foreign posts beginning in 1906, through the Chief of the Foreign Service Inspection Corps. In 1957, this management function was formalised and renamed Inspector General of Foreign Service.²⁴⁴ Known as S/IG, this proto-IG resulted from an internal administrative decision. Periodic legislation and reorganisation in 1961, 1971, and 1980, amended the position: Section 624 of the Foreign Assistance Act of 1961 gave S/IG the further responsibility of overseeing foreign assistance; amendments in 1971 merged other

²⁴⁴ GAO, 'State Department Inspector General: Actions to Address Independence and Effectiveness Concerns Are Under Way', GAO-11-382T, 5 April 2011.

evaluation bodies from within the Department under the OIG,²⁴⁵ and finally, in 1980 in the Foreign Service Act,²⁴⁶ Congress declared the IG to be Presidentially-appointed, housed it in a separate OIG, and instituted a five-year cycle for foreign bureau inspections.

Yet the State IG avoided the reach of the 1978 Act for eight years after the Act's passage. Although all cabinet departments resisted the IG Act in 1978, the departments with national security functions proved most intransigent, and State was no exception. After a negative GAO review of State's OIG in 1982, Senator Jesse Helms (R-NC) pushed the issue of State's inclusion in the 1978 framework back onto the legislative agenda. The review reported that State OIG inspectors found impartiality impossible because of a threat of professional reprisal. Only on 16 August 1985 did Congress fold the State IG into the 1978 framework, again despite the resistance of Department staff, as part of the Diplomatic Assistance Act.²⁴⁷ State OIG's responsibilities were further specified a year later, in the Omnibus Diplomatic Security and Antiterrorism Act of 1986.²⁴⁸ The two Acts combined the requirements of the 1978 framework with State OIG's previous inspections duties. The slow process of institutional change in the OIG distinguished it from the development of other federal OIGs, whose offices were often created by fiat and rapidly cobbled together. In contrast, the legacy from State OIG's precursors within the department shackled the office and restrained its capacity to gain independence. IGs contended with an entrenched culture that resisted challenges to its long-standing practices and purposes.

²⁴⁵ GAO, 'State Department's Office of Inspector General, Foreign Service, Needs To Improve Its Internal Evaluation Process', ID-78-19, B-134192, 6 December 1978; GAO, 2011.

²⁴⁶ Public Law 96-465; 94 Stat. 2080; 17 October 17 1980.

²⁴⁷ Section 150 of Public Law 99-93; GAO, 'State Department's Office of Inspector General Should Be More Independent and Effective', AFMD-83-56, 2 June 1983.

²⁴⁸ Omnibus Diplomatic Security and Antiterrorism Act of 1986, section 4861.

Although State IGs have produced rigorous work at various points in the office's history, the OIG has also suffered persistent criticism and scandal that have crippled the capacity of its IGs to provide the quality of oversight seen in some other OIGs. State OIG's chequered history results largely from its institutional quirks, whose origins pre-date the 1978 structure. Even once the IG became a Presidentially appointed position, the office harboured only a single audit/investigations office until 1986, when the first PAS IG, Sherman Funk, carved out a separate unit for investigations. Whereas many other OIGs started with an institutional blank slate, State OIG had a long-standing institutional framework that dictated many of its practices. Because the State Department had long housed some form of inspector general, its inclusion under the 1978 Act meant that, unlike most other OIGs, the State OIG inherited a set of practices and 'expertise' that did not readily conform to the new statutory requirements.

In what follows, I analyse State OIG's distinctive institutional features, describe the nature of its reviews (and place this in the management context of the entire Department), and provide a brief overview of its IGs, highlighting their value orientations and institutional strategies. Though I provide some earlier history of the OIG, the organisational history given in this chapter will focus mainly on the OIG after its inclusion in the 1978 Act framework in 1986.

B. The State of State: the Management Context of the Department

The State Department, the first executive department to be established in 1789, directs the nation's relations with foreign states. Its foreign posts are scattered geographically and administratively, as are its satellite agencies. The State

Department's internal management dynamics created an operating context more troublesome than those in other federal departments. IG Sherman Funk observed that 'bureaucracy [...] is done with a particular lack of thought in the State Department', and though he made the quip in 1994, observers twenty years later echoed the same sentiments.²⁴⁹ State IGs battled not only individual instances of fraud, waste and abuse, but also a culture of excessive bureaucracy, and a custom, according to Funk, of not taking care of one's own.

Funk's observations revealed one perspective on the late Cold War-era State Department, but in 2001, Colin Powell announced his strategy to address the same dysfunction, still in place a decade later. The outlook that led to the mistreatment of individual staff also led to an allergy to management officials, with 'stacks of reports decrying the state of State now sit[ting] on Department officials' shelves'.²⁵⁰ The anti-management attitude came in part as a by-product of the Department's mission, which was to focus on foreign affairs and policy rather than the practicalities of management, and 'as a result of which the State Department perhaps has the worst logistical support arrangements of any federal agency'.²⁵¹ The culture at State prized diplomacy and policy expertise; management acumen fell by the wayside. Different agencies within the Department suffered different patterns of corruption and mismanagement. Whereas in the eighties and nineties the Foreign Service and

²⁴⁹ Gordon Adams, 'Running Hills: Why Senators Shouldn't head the Pentagon or Foggy Bottom', *Foreign Affairs*, 20 December 2012.

²⁵⁰ Brian Friel, 'The Powell Leadership Doctrine', *Government Executive*, 1 June 2001.

²⁵¹ Sherman Funk, interview with Charles Stuart Kennedy, 14 July 1994, Foreign Affairs Oral History Project, The Association for Diplomatic Studies and Training, p. 36-38. The narrative in this chapter (and the following chapter) relies heavily on a set of interviews conducted between roughly 1992 and 2011 by Charles Stuart Kennedy as part of the Association for Diplomatic Studies and Training (ADST)'s Foreign Affairs Oral History Project. Because many of the main actors from State OIG's early history are deceased or unavailable for interview, this archive provided a wealth of commentary and contextual data on the relevant events, for which archival documents were limited. However, like all interviews, they must be taken as the views of single individuals who had personal stakes in the events described. When using such data, I attempt to be explicit that it represents only the perspective of the interviewee.

consular offices had reputations for being free of corruption, Consular Affairs and the Immigration and Naturalization Service (INS) were permanent management headaches.²⁵² Yet according to one 2012 assessment, the only Secretaries in recent history committed to solving management problems were Colin Powell and Lawrence Eagleburger.²⁵³

By the end of the first decade of the twenty-first century, the Department's reputation for self-management sank even further. State lacked a budget office until 2005, but this office held jurisdiction only over programmatic functions, to the neglect of personnel or management.²⁵⁴ The disparate, independent entities that make up the United States' foreign policy apparatus – such as USAID, the Peace Corps, and the Export-Import Bank – pose the additional challenge to any management official of coordinating multiple functions, bureaucratic cultures, budgets, jurisdictional overlaps and gaps, and institutional allegiances.

State's management difficulties had a direct impact on its performance. Poor management led to lax security, a charge levelled at the Department repeatedly in IG reports beginning in the early nineties and continuing steadily over the next twenty years. Yet the IG reports merely echoed what a host of other reports confirmed: studies by the Overseas Presence Advisory Panel (November 1999) and the Henry Stimson Center (October 1998), amongst others, both detailed the poor management and security controls of the State Department.²⁵⁵ Notoriously, less than nine months before the September 11 attacks, the Hart-Rudman Commission Report of January 2001 on 'National Security in the 21st Century' suggested that an attack on American soil was likely as a result of changes in the international security environment, and

²⁵² Funk interview, p. 47, 52.

²⁵³ Adams, 2012.

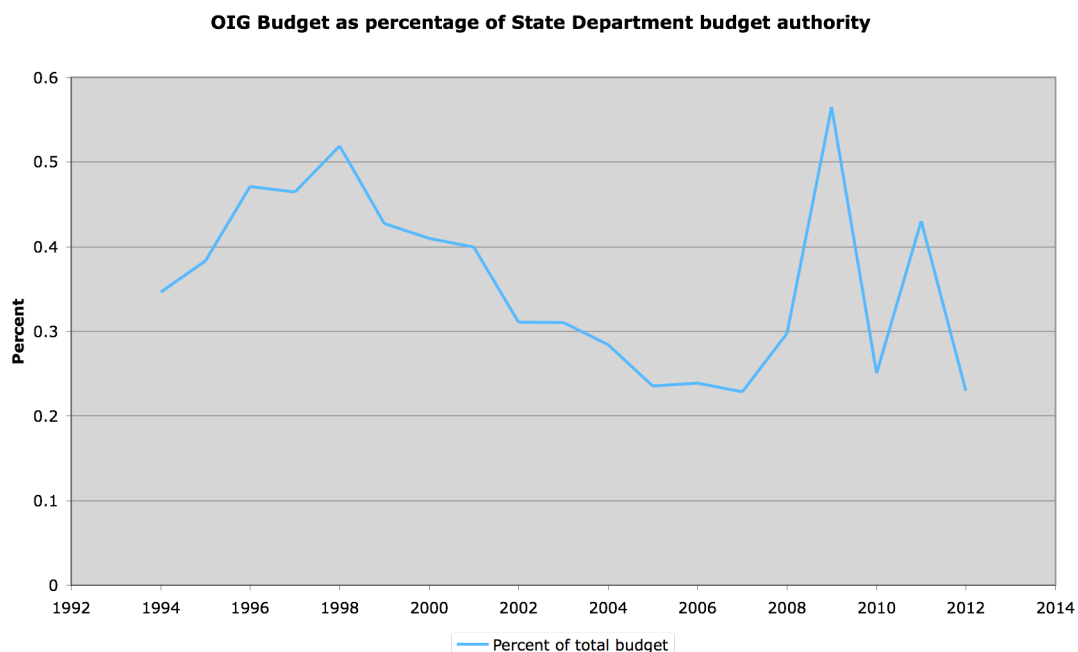
²⁵⁴ Ibid.

²⁵⁵ Friel, 2001, p. 2.

that the United States needed to reorganise its foreign policy and security institutions. All of these reports offered suggestions for reform of the State Department that were left unheeded by successive Secretaries.

Over the past three decades, Congress has duly lacked any faith that State could manage itself efficiently or effectively, and this has limited State's resources. Partly in response to 9/11, and partly as a result of Secretary Powell's 'resource-for-reform' management strategy, in which the Department promised a more efficient use of resources in return for a larger budget, Congress increased State's budget by fifty percent (constant dollars) between 2001 and 2005; this was in marked contrast to its stagnant – in some years even shrinking – budget in the previous decade. Yet even during this period of resource expansion, and unlike the budgets of other OIGs, the IG's budget was increased a mere one percent.²⁵⁶

Chart 5.1. OIG Budget as Percentage of State Department Budget



²⁵⁶ GAO, 'Inspectors General: Activities of the Department of State Office of Inspector General', GAO-07-138, March 2007, p. 1.

The spikes in revenue seen in 2009 and 2011 reflect supplementals related to the State OIG's oversight of the Special Inspector General for Afghanistan (SIGAR). Aside from SIGAR, the State OIG's budget as a percentage of the Department's budget fell steadily from the mid-nineties.

C. Institutional Features and Particularities

Even before its establishment as a statutorily independent IG in 1985, the OIG was saddled with duties that overwhelmed the organisation's meagre resources. The State OIG operates under a statutory requirement to inspect all foreign bureaus and posts. This responsibility finds its roots in Theodore Roosevelt's 1906 request to Secretary of State John Hay to establish a corps of inspectors to monitor consular competence. These became known as Consuls at Large, and wielded considerable power to dismiss staff of embassies and consulates abroad.²⁵⁷ The inspection function thus preceded any other monitoring function in the future State OIG. This institutional legacy has had dramatic consequences for the expertise, appointment, and turnover of its staff; its apportionment of resources; and its organisational structure. Familiarity with the experience of living in foreign posts was prized as expertise above and beyond audit or investigative expertise, and led IGs to marginalise these functions.

The primary practice inherited from the OIG's pre-1986 *modus operandi*, and the primary impediment to its independence and impartiality, was its custom of appointing Foreign Service officials (FSOs), especially active-duty ambassadors, as

²⁵⁷ Funk interview, p. 26.

the leaders of inspection teams. On the face of it, this practice clearly compromises the ability of OIG inspectors to report with impartiality; the targets of their inspections are former colleagues and friends, and perhaps future supervisors. Yet because of the history of State inspections in providing support and a line of communication between Washington and the foreign outposts, many OIG members have defended such in-house familiarity. Although in the 1985 Act, Senator Jesse Helms (R-NC) ensured that the IG itself could not be a Foreign Service officer, this prohibition did not extend to the inspection team leaders, who continue to be active-duty ambassadors. One solution to the compromised independence, developed over the nineties and 2000s, was to take only officers at the end of their careers, when they unlikely to be recycled back into the Foreign Service, as a last assignment.²⁵⁸

As a result, the kinds of ‘expertise’ in State OIG differed from other OIGs. Unlike inspectors in other OIGs, State inspectors brought experience of the field rather than ‘site-based expertise’, and this made critical evaluation difficult. Inspection teams might only be deployed only for short periods, with teams making rounds of multiple countries and staying in each for a few weeks at a time. Foreign Service Officers brought familiarity with the challenges of living abroad in a US-diplomatic bubble; however, they lacked knowledge of the particular difficulties in the host countries (that is, of the demands related to each post’s political and economic situation). Most inspectors worked for the OIG for stints of two years or less. In short, their expertise was that of ‘experience’, and not of a technical kind in line with the government-wide inspection or auditing standards.

In most OIGs, audits and investigations traditionally comprise the backbone of IG work, with inspections (and evaluations) a later, secondary development; in State

²⁵⁸ Michael Yoder, personal interview, 23 June 2014.

OIG, the situation was the reverse. The inspections function has historically dominated the OIG's work. A 1982 GAO review of State's inspection practices revealed that in the OIG 'only two or three auditors and a handful of investigators' worked in the office.²⁵⁹ Over time, individual IGs (including Acting IGs, such as Harold Geisel) have gradually altered the balance of audits, inspections, and investigations, but even as of 2014, 'investigations' still does not appear as a primary report category on the OIG's website. Nearly two decades after State OIG was folded into the 1978 Act, the office still had not developed strong audit capacities. As a result, the office lacked a cohesive identity and a culture conducive to combining resources and expertise.

D. Lack of Independence

Two of the distinctive institutional traits – the use of FSOs instead of external personnel, and the use of inspections instead of audits – provoked the consistent condemnation by GAO, Congress, and external observers in the media and civil society. Their reports highlighted both the real and perceived threat posed to State OIG's independence by the use of Foreign Service personnel. The substance of these reports hardly changed from the seventies to the second Obama Administration. A 1982 GAO letter to Jack Brooks, Chairman of a subcommittee of the House Committee on Government Operations, decries the compromised independence of an FSO-run OIG, and urges him to place State OIG under the 1978 Act framework.²⁶⁰ (The accompanying report provoked Senator Jesse Helms to put the State OIG question back on the legislative agenda, and this eventuated in the 1985 conversion to

²⁵⁹ Funk interview, p. 27.

²⁶⁰ GAO, 1993.

the 1978 framework.) Twenty-five years later, GAO issued a near-identical assessment: State OIG's practice of using Foreign Service officials as Acting IGs and inspection team leaders severely compromised its independence and effectiveness.²⁶¹

The OIG's reliance on inspections over audits and investigations also troubled external observers. Within the OIG, a saying suggests that 'audits are an inch wide, but a mile deep; inspections are a mile wide, but an inch deep'.²⁶² A 2011 GAO assessment of the merit of inspections was even less positive: 'GAO also reported that inspections, by design, are conducted under less in-depth requirements and do not provide the same level of assurance as audits'.²⁶³ A year earlier, an external peer review conducted by NASA of State OIG's Middle East Regional Office (MERO) identified multiple deficiencies in its auditing practices.²⁶⁴ NASA OIG's assessment demonstrated that State OIG's 'audits' did not even pass muster *as audits*, and its discoveries forced State OIG to reclassify all of its audits between 2008-09 as 'assessments reports'.²⁶⁵ A government watchdog group, Project on Government Oversight (POGO), pressured Congress to address State OIG's problems,²⁶⁶ and the topic was taken up in a hearing of its own in the House Committee on Foreign Affairs, called 'Watching the Watchers: The Need for Systemic Reforms and Independence of the State Department Inspector General'.

E. *Nature of State OIG work*

²⁶¹ GAO, 'State Department Inspector General: Actions to Address Independence and Effectiveness Concerns Are Under Way', GAO-11-382T, 5 April 2011.

²⁶² Doug Welty, personal interview, 15 July 2014.

²⁶³ GAO, 2011.

²⁶⁴ NASA/OIG, Report No. IG-11-002.

²⁶⁵ Letter from POGO to the President concerning the independence of the State Department's inspector general, 18 November 2010.

²⁶⁶ *Ibid.*

What is the nature of State OIG activity? First, the historical legacy of the Foreign Service Inspection Corps has resulted in its inspections performing a role unlike those of any other OIG inspection teams: that of psychological counsellor. Second, its audits and investigations are *political*. Though over time, external criticisms of State OIG's performance have pointed to numerous compromised reviews and a lack of independence, the perspective from which such reports emanate often reflects ignorance of the office's unique historical functions. The inspection function, usually considered a second-rate means of oversight in other OIGs, has long formed the bread-and-butter of State OIG's activities since the early twentieth century. But this bias hid the ancillary functions that evolved out of State's historical inspection role. In particular, State OIG's inherited mandate to conduct consular inspections – a large drain on its resources – pushed it into the business of counselling. The original consular inspectors served as 'sort of travelling psychiatrists' for Foreign Service officers and consular staff who had been working in foreign posts for decades and felt estranged from the bureau in Washington.²⁶⁷

'I found that people, if you approach [foreign service officers] properly in an embassy in private interviews, began to unburden themselves in a way they would perhaps to a priest or something, or to a dear, close friend. There was an assumption on their parts that it would be discreet, that we could be trusted, we weren't going to get them into trouble, and, therefore, they could pour out their hearts to us'.²⁶⁸

Nowhere else in the federal IG system do IGs cultivate a 'soft', supportive role in their host Department. Rather, the oft-cited query, 'watchdog or lap dog?', reinforces the role and disposition assumed to be characteristic of a successful IG: a tough, no-nonsense enforcement officer trained to root out fraud and waste, or at the very least, a hard-nosed management consultant.

²⁶⁷ Funk interview, p. 26-27.

²⁶⁸ Robert S. Steven, interview with Charles Stuart Kennedy, 3 August 2001, Foreign Affairs Oral History Project, The Association for Diplomatic Studies and Training.

With pressure from Congress, a wave of ‘audit qualified inspectors’ sent from GAO dealt a blow to the office’s counselling culture in the eighties. ‘The new inspection thing’, as one former FSO referred to the reforms pushed by GAO and Congress, made Department members ‘treat [OIG staff] as someone you’ve got to have an attorney sit with you when you go in’ rather than as a counsellor or friend.²⁶⁹ The importance of the counselling function for OIG and Department members proved difficult to convey to Congress. It also reinforced another controversial element of OIG practice – the use of Foreign Service Officers as OIG staff – because field inspectors need to have knowledge and experience to provide the psychological and logistical support demanded by the counselling expectation. In contrast to the antagonistic relationship that exists between some inspection teams and their host departments in other OIGs, State office and embassy staff often viewed IG inspections as opportunities to gain leverage with Washington and obtain support for additional resources.²⁷⁰ Moreover, inspection reports lack the ‘gotcha’ language so valuable to members of Congress seeking blatant evidence for their political crusades.

If the counselling function has dominated State OIG’s inspections, its political function strongly tinges its audits and investigations. State IG reviews can be political in a way that few other federal IG reviews have the potential to be. The State IG has the capability – some IGs would claim the obligation – to weigh in on ideologically driven actions by the State Department, to provide evidence for political appointments, and to assess the overall success of foreign policy initiatives. In theory, there exists a distinction between questions of management and questions of foreign policy; any IG’s domain should encompass the management problems of the

²⁶⁹ Quote of Charles Stuart Kennedy, 3 August 2001.

²⁷⁰ Michael Yoder, personal interview, 22 June 2014.

department. Yet in practice, such a distinction is tenuous, as former IG William ‘Bill’ Harrop explained:

‘There has always been, in the Foreign Service and in the Department of State, an odd dichotomy between administration, management, budget, and personnel questions on the one hand, and policy questions on the other [... The IG] doesn’t intervene in policy matters, although his inspectors do try to take a look to see that the policy being pursued is appropriate and coherent and makes sense’.²⁷¹

State OIG is the ‘war zone’ IG, and a different standard is immediately at play: is the Department’s action in accordance with United States Foreign Policy? This requires an interpretive schema very different from that of an OIG focused on accordance with rules and regulations. Unlike the departments such as Health and Human Services or Veterans’ Affairs, the State Department does not operate high-budget programmes at great risk of fraud. Its most immediate ‘constituency’ comprises the many Americans living or travelling abroad, including those stuck in foreign prisons or caught in emergencies, all of whom depend on the resources and diplomatic skills of State Department officials. Bringing in the ‘new’ inspectors, trained by the Yellow Book standards, brought with it a demand for quantitative indicators of failure. But as Robert S. Steven, former inspector at State OIG, demanded,

‘If your visa rejection rate and visas were so bad, INS picking people up back here, you can measure that, but how do you measure success in foreign policy? Even in economic sections you could quantify it sometimes – was the economic reporting [and] forecasting logical or not? – because you could see what happened; and with the business assistance, did they get business? The political side of it particularly was extremely difficult to measure. We still have never really found a good way to do that’.²⁷²

How do you measure success in foreign policy? The question fits uneasily with the 1978 inspector general model’s emphasis on efficiency and effectiveness. Successive IGs would contend with questions of how to evaluate decisions in

²⁷¹ William Harrop, interview with Charles Stuart Kennedy, 24 August 1993, Foreign Affairs Oral History Project, The Association for Diplomatic Studies and Training, p. 80.

²⁷² Steven interview, p. 122.

accordance with US foreign policy, marking a set of evaluative criteria very different from those applied by OIGs concerned primarily with financial waste. While inspection teams performed the bulk of State's IG work prior to the nineties, and contended with dilemmas of poor policy planning, investigations provided the grist for the high-profile incidents that made their way to the ears of Congress and the press. GAO's periodic negative reviews of State OIG, though accurate in their charges of compromised independence, have been issued from a standardised perspective on IG work that pays little attention to the distinctive history and requirements of the State Department. The difficulty of defining 'success' also highlighted a problem within State regarding policy planning that was (partially) addressed by IG Bill Harrop during the transition to the 1978 framework. IG inspectors had long experienced difficulty in assessing individual embassies because they could not ascertain which policies were in place. No policy papers were available to inspectors, who then fumbled to ascertain, often in the space of two weeks, which country-specific goals the individual embassy was pursuing. In 1985, Harrop persuaded Secretary of State George Shultz to require a basic policy planning practice, but the process was limited in scope and ultimately overlapped with the fruits of the National Security Council's foreign policy planning.²⁷³

II. Trajectory of the OIG: Organisational Developments and the Mark of Individual IGs

A. Sherman Funk: Confronting the Counselling Culture

²⁷³ Robert Sayre, interview with Charles Stuart Kennedy, 31 October 1995, Foreign Affairs Oral History Project, The Association for Diplomatic Studies and Training, p.40-42.

By the early eighties, Congress and GAO were determined to fold State OIG into the 1978 framework. The 1982 GAO report reproving State OIG for ineffectiveness and compromised independence gave Senator Jesse Helms ammunition for his ‘relentless campaign against career Foreign Service professionals’.²⁷⁴ Bill Harrop, in the seat of the OIG, found himself waging a ‘defensive operation’ against Helms to save the OIG as it was.²⁷⁵ It was a war Harrop ultimately lost, and it cost him his job. State’s model of IG – an inside source of support, a management tool, a counsellor that engaged in what was affectionately termed the ‘non-confrontational inspection’ – was abhorrent to Helms. Congress wanted a tough inspector general to serve as an enforcement mechanism, and through the 1985 amendments, formally brought State OIG under the banner of the 1978 framework, ruling that State OIG’s Director General (the IG) could not be Foreign Service.

In the ‘new’ OIG’s first years, the ‘counselling and inspection’, and the ‘federal statutory model’ models of IG co-existed side by side. The new, congressional system ‘basically wasn’t even staffed; it was a theoretical organisation’.²⁷⁶ Although the confrontation, and slow resolution, of the two models had begun in the years preceding the 1985 transition, and resulted in part from the ‘cross-fertilisation’ that took place in monthly PCIE meetings with other federal IGs, the ultimate integration of the two would take years. Just prior to the passage of the 1986 Act that caused Harrop to lose his job, Sherman Funk, the Commerce Department IG, found himself professionally restless and submitted his name to the White House for consideration at the IG posts in State and Defense. The IG vetting process in the eighties depended less on expertise than on political connections, as

²⁷⁴ Harrop interview, p. 77.

²⁷⁵ Ibid.

²⁷⁶ Steven interview, p. 147.

Funk, a registered Republican, well knew.²⁷⁷ His time at Commerce gave him IG experience and allowed him to build a reputation that later satisfied the White House, Secretary of State Schultz, and Senator Helms. In August of 1987, Funk was confirmed and succeeded his old Harvard friend Harrop as State IG. Funk and Harrop had been classmates at Harvard in the late forties, along with Freddie Chapin, whom Funk enlisted as one of his inspection team leaders.²⁷⁸ These old college ties lent the early State OIG an ‘old boys’ quality that mirrored the tight-knit networks of the Foreign Service.

Table 5.1. Academic and Professional Backgrounds of State IGs

Inspector General	Date Confirmed	Academic Background	Professional Background
Steve Linick	September 9, 2013	Philosophy; law	AUSA (CA and VA); DOJ Criminal Division (various posts)
Harold Geisel (Acting IG),	June 2, 2008	Finance	Foreign Service (Ambassador); State Department management
William E. Todd (Acting IG),	January 2008	Accounting	Foreign Service (Ambassador)
Howard J. Krongard	May 2, 2005	Law	Private lawyer
Cameron R. Hume (Acting/ Deputy IG)	August 23, 2004		Foreign Service (Ambassador)
John E. Lange (Acting Deputy IG)	August 3, 2004	Law	Foreign Service (Ambassador)
Anne W. Patterson (Deputy IG)	September 28, 2003		Foreign Service
Anne M. Sigmund (Acting/Deputy)	January 24, 2003		Foreign Service (Ambassador)
Clark Kent Ervin	August 3, 2001	Law	Law (private practice and state attorney general)
Anne M. Sigmund (Acting)	February 4, 2001		Foreign Service (Ambassador)
Jacquelyn L. Williams-Bridgers	April 7, 1995	Public Management	GAO (managing director);

²⁷⁷ Funk interview, p. 61.

²⁷⁸ Ibid, p. 6.

			accountability consultancy
Harold Geisel (Acting)	June 12, 1994	Finance	Foreign Service; State Department management
Roscoe S. Suddarth (Acting)	February 15, 1994	Liberal arts; music	Foreign Service (Ambassador)
Sherman M. Funk	August 14, 1987	Liberal arts; military	Military and federal management; Commerce IG
H. Byron Hollingsworth (Acting)	August 27, 1986		Foreign Service
William C. Harrop (Acting)	August 16, 1985	Liberal arts; military	Foreign Service (Ambassador)

Though nearly all IGs came with backgrounds in criminal law, investigation, or auditing, Funk brought expertise in general management. With his arrival, the OIG expanded its size and remit, growing from a single unit that combined audit and investigative functions, to a five-unit office with a considerable staff increase.²⁷⁹ Together, Funk and Hollingsworth built a staff of around 260, including roughly one hundred auditors; this low number was a decision Funk was later to regret. Despite disapproval from GAO, Funk did not buck State's tradition of using internal candidates as the bulk of his army of inspectors; he drew his teams almost uniformly from the Foreign Service. Other members of the OIG appreciated Funk's prudence in respecting long-standing organisational culture, but the sheer lack of auditing expertise in the office forced him to import auditors and accountants gradually from GAO and other departments; he tripled the number of accountants during his tenure.²⁸⁰ The clash of cultures between State OIG's cosy inspection practices and the Yellow Book auditing standards proved tense, and required a great deal of

²⁷⁹ Light 1993, p. 177.

²⁸⁰ Quote of Charles Stuart Kennedy, 15 March 2000, Foreign Affairs Oral History Project, The Association for Diplomatic Studies and Training.

adjustment on both sides. Sarah Horsey-Barr, a career FSO who served as an inspector from 1989-1990, described the culture clash thus:

‘One of the things that we would have endless arguments about was, first of all, what was the difference between an audit and an inspection and, secondly, whether one could apply the approaches used by financial auditors to what in the Department we call substantive work like political and economic reporting. Many of them had this idea that you could set up a grid and via this grid you could evaluate the effectiveness of, say, a political section, how many contacts, how many phone calls, how many lunches, how many cocktail parties, how many cables sent. [...] [The political and economic officers] were just absolutely rabid about the idea that this was a way to measure the effectiveness of a political section’.²⁸¹

Here, the practicalities of following the IG Act’s injunction to combat ‘fraud and waste’ and to ‘promote economy, efficiency and effectiveness’ produced confusion when applied directly to the State Department’s work. Accountability has little meaning outside of context; it can be, *inter alia*, political, legal, moral or hierarchical. These discussions amongst OIG staff led to the discursive construction of a political and democratic conception of accountability by forcing them to reckon with their own organisational purpose. The challenges of implementing a standardised methodology (that is, the rules governing audits and inspections) and its attendant problems also played a decisive role in determining accountability’s substance.

During Funk’s tenure, external auditors learned to adapt to the exigencies and limits of two-week inspections, and the in-house State OIG staff augmented its level of professionalism, but the tension between the two, and the doubt about their ultimate reconcilability, remained.²⁸² State OIG opposition to embracing fully the congressional IG model came not merely from cultural resistance, but also from the misfit between State’s mission and the exigencies of the dominant federal IG model, a tension often not appreciated by external observers.

²⁸¹ Sarah Horsey-Barr, interview with Charles Stuart Kennedy, 15 March 2000, Foreign Affairs Oral History Project, The Association for Diplomatic Studies and Training.

²⁸² Steven interview, p. 156.

In the mid eighties – even prior to Funk – State OIG fell into yet another hiring practice distasteful to GAO: rehiring retired FSOs as contractors and paying them both full pensions and the hourly rate awarded to contractors. Because of their experience, the contractors often supervised actual Department members, despite the regulations prohibiting such an arrangement. Former ambassador Bob Steven observed, ‘[t]here are rules about contracting, what can be done by contractors and what requires regular government employees, and they were breaking every rule in the book’.²⁸³ By 1990, after embarrassing GAO testimony in Congress, the OIG discontinued the practice and replaced it with ‘WAE’ (‘When Actually Employed’), a system that regulated the amount a retiree could work and be compensated.

If Funk’s strategy towards his own Department was accommodating of its culture, he saved his toughness for his dealings with Congress. When resisted by members of Congress, he used a strategy of ‘indirect intimidation’, presenting their lack of compliance with his recommendations as grounds for certain electoral failure. ‘Of course it was [blackmail]’, Funk asserted when describing his approach.²⁸⁴ Yet, the power game worked in both directions. Despite his strong reputation, Funk experienced first hand the precariousness of the IG position vis-à-vis Congress. Jesse Helms, who had pushed for State’s inclusion under the 1978 Act, and who had personally supported Funk’s appointment at State, later took umbrage at a report contradicting his concerns about a covert operation in Nicaragua. The Senate Foreign Relations Committee believed the State Department was financially supporting Nicaraguan Contras who supported the candidacy of future President Violeta Barrios de Chamorro. Under the guise of a relocation programme, President George H.W. Bush was suspected of attempting to manipulate the 1990 Nicaraguan elections by

²⁸³ Ibid, p. 162.

²⁸⁴ Funk interview, p. 22-23.

supporting the Contras with cash payments.²⁸⁵ The review had been commissioned by the unlikely pair of Helms and Senator Christopher Dodd (D-CT), but its outcome – exonerating the State Department – so infuriated the Republican senator that he drafted legislation to have Funk removed from his position and, moreover, to limit all IG positions to a maximum of six years.²⁸⁶ The bill failed, but underscored the power of Congress – in addition to the President’s own power – to exercise *de facto* removal power when dissatisfied with IG work.

The Nicaraguan incident with Dodd and Helms also put into question Funk’s own biases. Despite Funk’s self-styled reputation for being a ‘junkyard dog’ (according to the plaque on his desk), the two senators claimed that the IG had given the Department a free pass in order to improve his chances of keeping his job in the Clinton Administration (a strategy that worked). The Committee charged that Funk limited his investigation to select members of the Department accused of complicity, and failed to interview any Nicaraguans involved. Funk defended his methodology, claiming that the Committee’s original request for the investigation asked only for an account of the State Department’s role in the affair.²⁸⁷ After considerable congressional pressure – and after the 1992 Presidential election – Funk agreed to reopen and expand the investigation to include recipients of the payments.

Funk’s strategic investigation design in the Contras case may well have been motivated by personal concerns, but the impulse for IGs to restrict the scope of their investigations can stem from the practicalities of permanently inadequate resources. (Years later, State IG Clark Kent Ervin would be accused of the same offence – producing a substandard report as a result of circumscribing the investigation – by

²⁸⁵ George Gedda, ‘CIA Program Draws Fire From Odd Senate Alliance’, *The Associated Press*, 17 December 1992.

²⁸⁶ Funk interview, p. 30.

²⁸⁷ Stephen A. Holmes, ‘Man in the News; An Inspector With No Shortage of Enemies: Sherman Maxwell Funk’, *The New York Times*, 20 November 1992.

Senators Susan Collins (R-ME) and Joseph Lieberman (D-CT), who ultimately prevented his confirmation as Homeland Security IG in 2004.) The meagre resources at an IG's disposal force the IG to make hard decisions about what can be investigated. Many investigations are statutorily mandated (for instance, the requirement that the Homeland Security IG oversee parts of the Patriot Act), and much of the audit 'agenda' is determined by risk assessments that dictate which programmes are most likely to be in danger of fraud, waste or abuse. The discretionary budget available to an IG varies by department, and amongst federal OIGs, State suffers from having perhaps the least latitude. In addition to the constraints felt by other OIGs, it must reserve part of its budget for the regular inspection of foreign posts, and, because of George Schultz's decisions, manages security oversight for the Department, a situation that leaves the IG even less scope and capacity to pursue unexpected matters.

Earlier in 1992, Funk's office undertook an equally controversial review, one that soured already strained US-Israeli relations. Originally part of a routine audit to track illicit sales of US weaponry by foreign governments, the investigation led quite clearly to Israel. Funk's classified report, whose draft version was publicised by the *Wall Street Journal*, provided evidence of Israel's fault in the matter. The investigation uncovered a host of legal violations by Israel with regards to US weapons and technology regulations dating to 1983, including the resale of American arms to China, South Africa, Ethiopia and Chile without US approval.²⁸⁸ Yet a parallel investigation by the State Department, led by a team of seventeen investigators, found no evidence that Israel had transferred a Patriot missile to China, and publicly absolved Israel of wrongdoing in an effort to ease tensions relations

²⁸⁸ Carol Giacomo, 'Israel Arms Transfer Row Far From Over', *Reuters News*, 3 April 1992.

between the two countries.²⁸⁹ (This inquest was far more limited in scope than the IG's, and examined a single instance of an alleged arms sale.) As the public controversy raged, Funk traced the trail of evidence back to the State Department, and discovered that the Department's Bureau of Politico-Military Affairs had issued instructions to exempt Israel from the standard checks on recipients of US arms and technology that all nations, in theory, must undergo.²⁹⁰

The report recommended disciplinary action against Richard Clarke, Assistant Secretary of State for Politico-Military Affairs, but was never acted upon. Department officials were embarrassed and furious, and did their best to discredit Funk's conclusion. The review failed to affect US diplomatic action – the Administration stood adamantly by its position in support of Israel's innocence – but it did provoke considerable public debate about the nature of the relationship between the US and its Jewish ally. The State Department refused to accept the conclusions of the review, and thus Funk's work had no immediate effect on policy. In the early nineties, IG reviews lacked the stature to compel departmental acceptance in response to all instances of IG criticism (especially in such high profile incidents). Though this would change slowly over the course of the following two decades, Funk's review demonstrated that one of the collateral strengths of IG work is to provide a narrative of executive activity and present it for wider deliberation. The report provoked a vigorous public debate, bolstered with evidence from internal documents, about US foreign policy and the motivations behind it, and demanded that the State Department justify its actions publicly.

Another Funk review illustrative of the OIG's wide-ranging targets, but also the limits of an IG's influence, was his 1989 audit of elements of the War on Drugs.

²⁸⁹ 'US Investigators Clear Israel of Missile Transfer to China', *St. Louis Post-Dispatch*, 3 April 1992.

²⁹⁰ Edward T. Pound, 'U.S. Aides Said to Have Been Hindered In Monitoring Israel's Arms Transfers', *The Wall Street Journal*, 5 April 1992.

As he would later insist, the State Department's drug strategy was profoundly misguided. Not only was its use of the Drug Enforcement Agency to carry out paramilitary operations in Latin America inappropriate because of its lack of military expertise and authority, but it was also highly ineffective in achieving its goal of reducing cocaine flow. Rather than reduce coca cultivation, the International Narcotics Matters (INM) programmes merely placed American employees in danger. In the comments in the final report, the INM countered that the OIG failed to comprehend the difficulty and complexity of their task, dismissing many of Funk's allegations as already having been dealt with, or as 'currently being addressed', and agreeing only to 'take the OIG comments seriously'.²⁹¹ To Secretary of State Shultz, Funk said, 'Scrap it. It's not working, it's not going to work, and I don't see how it can work, short of giving it vastly more resources we aren't going to get'.²⁹² Shultz, though understanding, indicated that dismantling US drug policy was not a tenable political position, and the audit ended there. (State IG reviews of the War on Drugs more than a decade later would point to the same conclusion, and with the same effect.)

In his six years at State, Funk served four Secretaries: George Shultz, James Baker, Lawrence Eagleburger, and Warren Christopher. Shultz was sceptical of the IG position and disapproved of a proposed reorganisation of security duties between the IG and the Director of Central Intelligence. Security abroad had not been an IG function previously, but Shultz informed Funk that he was to take over security oversight, and provided him with an additional 350 staff from other agencies with whom to carry out the work.²⁹³ Baker and Christopher shared Shultz's scepticism, but

²⁹¹ DOS/OIG, *Report of Audit: International Narcotics Control Programs in Peru and Bolivia*, March 1989, Unclassified, p. 1-5, 33.

²⁹² Funk interview, p. 66.

²⁹³ Ibid.

took seriously his recommendations. In fact, in Funk's view, despite personality variations among them, all four Secretaries worked well with their IG and addressed his concerns.²⁹⁴

Funk resigned in 1994 after six years at State OIG. In his view, his major accomplishment was to have countered the stereotype of the regulation-bound IG. Rather than contributing to the culture of red tape (as IGs are often accused of doing), he claimed that he had worked according to a philosophy of 'easing things up' and 'd[oi]ng away with silly recommendations' that he deemed unnecessary.²⁹⁵ Funk made a first effort to bring State OIG in line with the 1978 framework by altering the composition of his staff in order to include more audit and investigative expertise, but refrained from disrupting the longstanding inspection culture that lent unity to the office.

B. The Unintended Consequences of Management Reforms: Reinventing Government

Before he resigned, Funk recommended that Ambassador Harold Geisel serve as Acting IG until the Senate could confirm a new, non-FSO candidate.²⁹⁶ Geisel was a career diplomat, sympathetic to the particularities of the Foreign Service and personally close to many in the upper ranks of the State Department. (Later, in his second, and longer, stint as Acting IG, he would recuse himself from investigations a number of times on the grounds of being too close to the accused). He steered the OIG for nearly a year until Jacqueline Williams-Bridgers arrived at State OIG on 7

²⁹⁴ Funk interview p. 66-67.

²⁹⁵ Funk interview, p. 68.

²⁹⁶ Harold Geisel, interview with Charles Stuart Kennedy, Foreign Affairs Oral History Project, 30 June 2006, The Association for Diplomatic Studies and Training, p. 106.

April 1995, after sixteen years of accountability work at GAO and the Housing and Urban Development Department (HUD) OIG. She came with considerable academic training in formal theories of Public Administration, and this, coupled with her experience at GAO, predisposed her to approach State OIG with a critical eye, suspicious of the OIG's accommodating inspection culture. When she arrived, the OIG had two, parallel Deputy IGs, with the audit, security and law enforcement functions entrusted to a non-FSO, professional auditor, and the regular FSO overseeing the inspection function and security and intelligence functions. This separation served to minimise the friction between FSOs and career civil servants, and to preserve the peace between the two internal OIG cultures, but it was managerially redundant and stifling.²⁹⁷

Williams-Bridgers countered this difficulty with a set of administratively sophisticated management reforms aimed at integrating the diverse functions, practices and managerial threads that had failed to coalesce after the transition in 1985. She brought in the use of matrices in evaluation, and switched from office-based assignments to job-based assignments.²⁹⁸ However, for the culturally divided State OIG, such deeply cutting reforms, in conjunction with the budgetary stressors on the office, created havoc. Around this time, the OIG saw a drop off in high quality applicants. This resulted both from shrinking resources, and the growing distance, encouraged by GAO and the wider IG world, between the OIG and the Department. Both the Department and the OIG had suffered from the budget crunches of the mid-nineties that followed a post-Cold War downgrade in foreign policy. Between 1996 and 2003, OIG staff plummeted by nearly ten percent; over the same period, the State

²⁹⁷ Wesley Egan, interview with Charles Stuart Kennedy, 28 October 2003, Foreign Affairs Oral History Project, The Association for Diplomatic Studies and Training, p. 131.

²⁹⁸ Steven interview, p. 164

Department's ranks swelled by twenty-five percent.²⁹⁹ Fewer inspection teams made rounds, and those tours were understaffed and under-resourced, creating frustrating working conditions for FSOs. Moreover, active-duty FSOs had previously viewed IG inspection positions as stepping-stones to further ambassadorial placements. Once the pressure to limit in-house 'recycling' of staff curbed this practice, FSOs saw fewer and fewer advantages in taking IG positions, viewed them as professional dead-ends, and ceased to bid for them.³⁰⁰

Williams-Bridgers's reforms led to an even greater drop in the body of inspectors and inspections carried out. State Department officials bristled at the 'new' OIG, and complained that it failed to respect due process rights in its investigations. After receiving multiple complaints from members of the State Department, Rep. Lee Hamilton (D-IN) proposed a bill curtailing State IG powers to conduct investigations. Lee cited numerous cases (dating back to the investigation of the Clinton passport files under Funk) in which 'individuals will appear voluntarily for an interview with the IG staff, having no indication that there is an investigation of a criminal nature against them pending'.³⁰¹ Through his proposed legislation, Hamilton responded not only to complaints about Williams-Bridgers's investigative procedures, but also to complaints about her predecessors; the fault, it seemed, lay with the office's longstanding practices, and not with any particular IG.

The IG community was irate. A battery of IGs testified before the House that such a curtailment of IG authority would prevent them from carrying out the very mandate that Congress had handed to them. The confrontation raised two serious

²⁹⁹ DOS/OIG, Program Performance Report FY 2003.

³⁰⁰ Steven interview, p.163-64.

³⁰¹ 'Oversight of Investigative Practices of Inspectors General', Hearing, Subcommittee on Government Management, Information, and Technology, US House of Representatives, Committee on Government Reform and Oversight, 24 June 1997 [Henceforth Investigative Practice Oversight Hearing]

questions regarding the rising salience of federal IGs. First, for Congress, it was no less a question than ‘watching the watchdogs’, a matter that both POGO and Congress would underline repeatedly in the next two decades. Indeed, one former IG cited the misdeeds and accountability of his own community as the most important ongoing challenge for the IG model.³⁰² Second, it was clear that the IGs were exploiting the ambiguity of their role to heighten their capacities, and this made parts of Congress and the executive branch uneasy. Rep. Lee argued that

‘Inspectors General are in a grey zone. They appear to view themselves as identical to Federal law enforcement agencies, but they are not prosecutors. They are not statutory law enforcement, although incrementally, through executive branch agreements and other means, they have gained broad investigative authority in recent years’.³⁰³

Here the debate became murkier. The IGs at the hearing protested Lee’s exclusion of the IGs from the law enforcement community, arguing that IGs took their role as law enforcers seriously. Rep. Peter Goss (R-FL) cautioned against ‘creating new rights’ for Department members, lest this weaken the system of accountability upheld, in theory, by the IGs. The bill never passed, but the question of the IGs’ role and authority stayed open. And the internal resistance at the State Department to its OIG – the original impetus for the bill – continued. Notable in this debate was the lack of partisanship at play: Williams-Bridgers was a Clinton appointee, challenged by a Democratic congressman and some Clinton-appointed diplomats, supported by both Democratic and Republican legislators, and still yet defended by IGs of both Republican and Democratic persuasions. Though lawmakers frequently used the substance of IG reviews as a partisan tool, the concept of the IG itself had begun to enjoy exceptional bipartisan support.

³⁰² Michael Bromwich, personal interview, 2 January 2013.

³⁰³ Investigative Practice Oversight Hearing.

C. Troublesome Agency Heads

One prominent Democrat with little reverence for the State IG was its Department head. Secretary of State Madeleine Albright showed only modest interest in the work issued by her OIG, and this limited the effect that Williams-Bridgers's reviews could have. Despite attempts to meet regularly with the Secretary or even the Deputy Secretary, Williams-Bridgers found that she had regular access only to the Director General of the Foreign Service, Edward William Gnehm, Jr.³⁰⁴ Indeed, Albright did not often side with her IG. After accusations that a senior diplomat, James F. Dobbins, had lied to Congress about his knowledge of a Haitian death squad, Williams-Bridgers conducted an investigation which concluded he had 'acted with reckless disregard' in testimony that was 'incomplete, misleading and possibly perjurious'.³⁰⁵ The report was not made public, and Dobbins was subsequently appointed to lead the American delegation to the Kosovo peace talks. Despite the gravity of the IG's findings, Albright refused to take disciplinary action and continued her support for Dobbins. Williams-Bridgers's attempt to have the Justice Department review the matter for prosecution was met with similar reluctance, and the matter was sent back to the State Department for internal resolution.

The lack of secretarial support frustrated Williams-Bridgers's efforts. Albright's impulse to defend her staff may not have been unusual amongst department heads, but the Secretary was similarly dismissive of less personal criticisms. OIG audits and investigations during her tenure repeatedly reported lax security protocol in embassies, as well as the alarming phenomenon of foreign spies entering the Department with press passes. They discovered that surveillance of US

³⁰⁴ Egan interview, p. 138.

³⁰⁵ Raymond Bonner, 'Investigation Suggests Envoy Lied to House', *The New York Times*, 18 March 1999.

embassies was far more common than expected. Despite repeated warnings about weak security in embassies and in the Washington bureau, from vanished laptops to negligent airport security, the Department failed to heed the IG's warnings or adopt its recommendations.

Despite the internal turmoil, Williams-Bridgers's OIG produced a number of consequential reviews with notable effects, though some were more symbolic than others. In 1996, she issued the fruits of a yearlong investigation into the conduct of the Ambassador to Ireland, Jean Kennedy Smith. The scathing report faulted Kennedy for punishing two staff members who protested the grant of a visa to Sinn Féin leader Gerry Adams.³⁰⁶ The report was challenged by Senator Christopher Dodd (D-CT), who appeared in a less than flattering light in Williams-Bridgers's account. But it resulted in a formal reprimand by Warren Christopher. Although Kennedy's 'punishment' was modest – Clinton refused to dismiss her – the review stood for a protection of free speech and dissent within the ranks of the government. Calling for a revision of the Department's guidelines for disclosures of embassy information, the review described the Ambassador's action as having 'at a minimum violated the spirit of the department's regulations'.³⁰⁷ In its framing, the review thus challenged the 'compliance monitoring' philosophy, and implicitly articulated standards for 'democratic' diplomatic behaviour. But it remained classified and garnered limited attention (a mere thirty-three media citations in four years). Because of the hostile Departmental environment in which the report was received and its classified status shielding its conclusions from the media, the accountability effected by the

³⁰⁶ Thomas W. Lippman, 'Envoy Jean Kennedy Smith Cited for Targeting Staffers', *The Washington Post*, 7 March 1996.

³⁰⁷ Phelim McAleer and Liam Clarke, 'US Embassy Kept Secrets From Smith', *The Sunday Times*, 25 January 1998.

investigation, at least in terms of direct punishment, visibility, and Departmental change, was minimal.

Table 5.2. Number of Media Citations for Selected IG Reviews

Review	Date of Issue	Citations	Date Range for Citations
Clinton passport files ³⁰⁸	November 1992	430	1 October 1992 - 1 October 1996
Israeli weapons sales ³⁰⁹	March 1992	116	01 February 1992 – 01 February 1996
Bush appointee personnel files ³¹⁰	January 1994	55	1 July 1993- 1 July 1997
Jean Kennedy Smith visa ³¹¹	March 1996	33	1 March 1996 – 1 March 2000
Ambassador Richard Holbrooke finances ³¹²	May 1999	105	01 September 1998- 01 September 2002
Chavez coup d'état ³¹³	July 2002	56	1 April 2002 – 1 April 2006
Obama passport files ³¹⁴	July 2008	224	1 January 2008-1 January 2012

Table 5.2 displays the media citations for selected reviews. Although the two passport violation reviews garnered a few hundred citations each, the others rarely surpassed one hundred; in comparison, a number of high profile Justice and Homeland Security OIG reviews surpassed one thousand citations (See Tables 7.2 and 9.2).

³⁰⁸ Search terms: inspector general AND (state department OR department of state) AND passport AND Clinton. A spate of references to this report appeared again in 2008 when the IG began to investigate the alleged breach of Obama's passport files, with another 171 citations making reference to the precedent with Clinton.

³⁰⁹ Search terms: inspector general AND (state department OR department of state) AND israel AND weapons.

³¹⁰ Search terms: state department AND inspector general AND (personnel files OR appointee files).

³¹¹ Search terms: inspector general AND (state department OR department of state) AND (jean kennedy smith OR ambassador smith OR ambassador kennedy).

³¹² Search terms: inspector general AND (state department OR department of state) AND holbrooke

³¹³ Search terms: (state department OR department of state) AND inspector general AND Chavez AND (coup OR ouster).

³¹⁴ Search terms: inspector general AND (state department OR department of state) AND passport AND Obama.

The OIG also pursued a variety of reviews that demonstrated the scope of IG accountability. Even when the direct consequences of the reviews were limited, their wider effect penetrated deeper waters: in addition to addressing the operational functionality of the Department, the reviews weighed in on the protection of free speech within the government; the role of ideology in compromising US foreign policy; the State Department's preparation for the 'Y2K' problem (i.e., the fear that outdated computer systems would shut down on 1 January 2000 and thus would provoke international technological meltdown); and the finances and conduct of Richard Holbrooke, nominee for the position of Ambassador to the UN.³¹⁵

Williams-Bridgers's legacy proved controversial. She had come under fire both from Congress and from her Department, but her office left its mark on the Department in the form of innovative structural changes, such as the invention of 'mini-embassies' with a single American with a staff of one or two, to replace large, costly embassies at risk of being shut down.³¹⁶ Though the Department was initially loathe to alter its embassy structure, the new format proved highly successful. But though she came with excellent credentials in public management, her top-down reforms seemed too radical and too rapid to many career FSOs, in part because the reforms imposed an external model of inspections antithetical to the long-standing bureaucratic culture and practices that Funk had tacitly permitted to continue. Some FSOs recognised the cultural sclerosis of their institution, and refrained from blaming Williams-Bridgers directly. Said one former inspector, '[s]he reorganised the OIG with some of the very latest management concepts [...] For whatever reason, it hasn't worked. A large part of that, of course, is just resistance'.³¹⁷ Regardless of their

³¹⁵ Carol Giacomo, 'US Diplomat Holbrooke's Nomination to UN on Hold', *Reuters News*, 11 September 1998.

³¹⁶ Egan interview, p. 136.

³¹⁷ Steven, p. 164.

success, the reforms provoked considerable internal debate about the nature and purpose of OIG work, and in particular, of inspections.³¹⁸ The struggle over the meaning of this ‘basic’ IG function translated to a definition of the very nature of accountability, and the IG’s role in preserving it: Was it rulebook conformity? Integrity? Innovation? The question remained unresolved.

Williams-Bridgers left the office in 2000 to take a job in the private sector. She was only the second, but would be the last permanent State IG to stay in the position for longer than two years; only Harold Geisel would stay longer, later having a four-year stint as Acting/Deputy IG from 2009 to 2013, much to the distress of onlookers demanding that a permanent, Senate-confirmed IG take the helm. The ensuing instability proved damaging for the OIG’s morale and reputation, and by the middle of the decade, State OIG began to receive the kinds of scathing reviews from GAO and Congress that it had not seen since the early eighties. Following Williams-Bridgers’s departure, Clark Kent Ervin was sworn in as Acting IG on 3 August 2001. A Republican and personal friend of the Bush family, Ervin was the first IG to bring legal expertise to State. However, under Powell’s direction, he focused first on IT, quickly establishing a separate IT unit within the OIG. Though respectful of his predecessor’s work, Ervin made some efforts to return to the ‘traditional’ State inspection practices, thereby partially undoing her reforms.³¹⁹

In 2002, Ervin was asked by Sen. Christopher Dodd (D-CT) to undertake a review of the Bush Administration’s role in the coup that briefly ousted Venezuelan President Hugo Chávez.³²⁰ Allegedly, the Bush Administration had met secretly with members of the Venezuelan opposition in the months preceding the ouster, and by

³¹⁸ Marshall Adair, interview with Charles Stuart Kennedy, 1 September 2011, Foreign Affairs Oral History Project, The Association for Diplomatic Studies and Training, p. 207.

³¹⁹ Steven interview, p. 164.

³²⁰ ‘U.S. to Review Diplomacy in Chávez Crisis’, *The New York Times*, 14 May 2002.

certain accounts, encouraged his overthrow. The IG review cleared the Administration of any wrongdoing. Though Ervin later called the Chávez-ousting case one of his most important achievements as State IG,³²¹ the results of the investigation left many external observers dissatisfied with its conclusion and for its methodology. Critics argued that Ervin's investigation missed the mark, and that Ervin's failure to interview any Venezuelans made its conclusions suspect.³²² Though the report asserted that the Administration had not 'planned, participated in, aided, or encouraged the brief ouster', it documented copious evidence of indirect or subtle American support for the coup. The report stated that '[i]t is clear that NED, Department of Defense (DOD), and other U.S. assistance programs provided training, institution building, and other support to individuals and organizations understood to be actively involved in the brief ouster of the Chávez government, we found no evidence that this support directly contributed, or was intended to contribute, to that event'.³²³ A parallel investigation by the *New York Times* found that Administration officials' accounts of the meetings in Venezuela were not consistent.³²⁴

But because the final conclusion exonerated the State Department, the IG review went no further. It was not released to the public until a FOIA request prompted a redacted, unclassified version four months later. The incident itself, however, proved far more difficult to play down. Subsequently, the Pentagon would begin an informal review of its own role³²⁵, and international pressure soon led the Administration to backtrack on its 'enthusiasm' following the ouster and to make

³²¹ Clark Kent Ervin, personal interview, 2 July 2014.

³²² 'Examining the Venezuela Coup – gingerly', *The Nation*, 2 September 2002.

³²³ DOS/OIG, *A Review of U.S. Policy Toward Venezuela*, (November 2001), Redacted for Public Release, April 2002.

³²⁴ 'US Denies Backing Venezuela Coup', *Agence France-Presse*, 16 April 2002.

³²⁵ Jim Mannion, 'Pentagon Gathering Facts on US Military in Venezuela, Finds No Coup Support', *Agence France-Presse*, 23 April 2002.

statements in support of the reinstated Chávez government.³²⁶ Two years later, further challenges to the report's conclusion emerged. A FOIA request by a New York attorney uncovered a host of CIA documents that demonstrated the government's knowledge of an impending coup in the weeks leading up to the ousting, a topic mentioned in only a single sentence in the IG review.³²⁷

The review's diagnosis exonerated the Administration's actions and thus brought no immediate sanctions or meaningful recommendations for departmental modification. In the IG's view, this did not necessarily mean a weak review, but rather a valuable statement of the Department's innocence; in the eyes of critics, the exoneration was the result of weak methodology resulting from a political bias. Whether or not the review effected the accountability that was warranted, Ervin's choice of topic signalled an important commitment to a particular vision of government propriety and of an IG's role. As he would later comment, he saw the Venezuela review as emblematic of the types of reviews the State IG ought to pursue, above and beyond routine audits for fraud and waste.³²⁸ This vision of accountability did indeed differ from the conception implied in the 1978 Act. Rather than solely accounting and searching for corrupt bureaucrats, Ervin saw the role of the IG – and the aim of accountability – as passing judgment on the US's adherence to democratic values. Did the Administration live up to its commitment to supporting democratic governments? Ervin used diplomatic and democratic norms, rather than performance measures, as the 'standards' by which the Department's actions should be assessed. Another Ervin review that impacted the conduct of foreign policy brought practical, rather than ideological, considerations to bear on the State Department's decision-

³²⁶ Jared Kotler, 'Venezuelan Businessman Now a Villain', *AP Online*, 2 May 2002.

³²⁷ Juan Forero, 'Documents Show CIA Knew of a Coup Plot in Venezuela', *The New York Times*, 3 December 2004.

³²⁸ Clark Kent Ervin, Personal interview, 14 July 2014.

making. After auditing the leading Iraqi opposition group, which had been receiving US funding, the IG concluded that its accounting practices were too shoddy and haphazard for the US to risk continued financial support.³²⁹ Though the opposition groups had not broken any laws, their financial accountability structure did not conform to US stipulations.

After just over a year at State, Ervin was called on by the Bush Administration to head the OIG of the newly formed Department of Homeland Security, and he accepted. After his departure, State OIG was led by a series of short-term Acting and Deputy IGs. These Acting IGs – Anne M. Sigmund, Anne W. Patterson, John E. Lange, Cameron R. Hume, all career Foreign Service – successively oversaw State OIG over a period of twenty-eight months. The office immediately garnered criticism. For instance, a review of the State Department’s democracy-promoting Arabic-language radio station, *Radio Sawa*, was originally planned for release in August 2004, but was delayed indefinitely. Officials familiar with the review reported ‘intense political pressure to make the report more palatable’, but ultimately it was never released on the grounds that the quality of the audit was too poor.³³⁰ When the eventual permanent IG, Howard Krongard took over on 2 May 2005, he found, in his words, an OIG that ‘had fallen into disrepair, and that was known to have dissension and rivalries’.³³¹ This organisational instability within the OIG occurred at arguably one of the Department’s most sensitive and precarious periods in its post-Cold War history, during the onset of the wars in Iraq and Afghanistan. In theory, the State and Defense Department OIGs might have been responsible for overseeing the US’s role in reconstructing the war-ravaged countries, but State OIG’s

³²⁹ ‘U.S. Suspends Funding for Major Iraqi Opposition Group’, *Dow Jones Business News*, 5 January 2002.

³³⁰ Kasie Hunt, ‘Are U.S. Arabic Programs Being Heard?’, *National Journal*, 16 July 2005.

³³¹ Testimony of Howard Krongard, Committee on Oversight and Government Reform, House of Representatives, 14 November 2007.

shaky reputation and its lack of audit experience encouraged onlookers to cede responsibility for Iraq and Afghanistan reconstruction to independent, ‘special’ IGs – the Special Inspector General for Iraq Reconstruction (SIGIR) and the Special Inspector General for Afghanistan Reconstruction (SIGAR), giving State OIG only a supervisory role.³³² The model of creating special webs of IGs was new – used for the first time after 9/11 – and PCIE’s experience in establishing and coordinating them was limited.

D. The Curse of Partisanship

After Hume, Bush nominated the private lawyer Howard J. ‘Cookie’ Krongard to be the Permanent State IG. With him came a series of scandals that would destroy State OIG’s already weak reputation. Like Ervin, Krongard was a registered Republican, believed to one of Bush’s many ‘political’ non-political IG appointees, although he himself denied any association with the Bush Administration.³³³ Colleagues recognised him to be intelligent, but an inept leader, and even a Republican-drafted House report meant to exonerate him conceded that his was an ‘extraordinarily abusive management style’.³³⁴ Repeatedly, according to critics, Krongard protected his partisan and personal interests to the detriment of the Department and of broader democratic considerations. Aside from his own contentious decisions, there was little doubt that Krongard had inherited an office in

³³² Gordon Adams, George Washington University, on Iraq reconstruction funds oversight, *Minnesota Public Radio: Marketplace*, 22 June 2004.

³³³ A survey conducted by Representative Henry Waxman (D-CA) found that ‘Over 60% of the IGs appointed by President Bush had prior political experience, such as service in a Republican White House or on a Republican congressional staff, while fewer than 20% had prior audit experience. In contrast, over 60% of the IGs appointed by President Clinton had prior audit experience, while fewer than 25% had prior political experience’ (‘The Politicization of Inspectors General’, Report prepared for Rep. Henry A. Waxman, 2005.)

³³⁴ Glenn Kessler, ‘House GOP Report Defends State Dept. Official’, *The Washington Post*, 14 November 2007.

disarray. Such was the dysfunction that Krongard sent to all staff, on the second anniversary of his appointment, a letter imploring them to seek reconciliation with one another.

‘I also ask you, frankly, to make an effort to reduce some of the static that interferes with the harmony we would like to achieve. We have enough challenges to focus on without spending energy in rivalries between functional offices, SA-3 [the Office of Investigation] and SA-39 [the Offices of Audits and of Inspections], and Foreign Service and Civil Service, or in rumoring, backbiting, and complaining’.³³⁵

The tensions between audit and investigative staff in OIGs had their roots in the 1978 Act’s awkward unification of the two disparate functions, and was a well-known hindrance to OIG success across the federal government. Offices with the greatest success in issuing consequential reviews were those (such as the Justice and Homeland Security Departments) that had managed to integrate the two functions formally through institutional structures designed to pool resources and expertise. Often, an OIG is faced with violations that require both audit and investigative components. OIG structures that enable collaboration within the office give ready access to investigative teams in need of multi-disciplinary skills. Such ‘refining’ institutions define and clarify the office’s goals and purpose, foster trust, and help give substance to the concepts of ‘fraud, waste and abuse’ and of accountability more generally. However, State OIG lacked any kind of formal, unifying unit or strategy, and consequently continued to be riven by internal cultural competition.

Krongard had surely walked into a bureaucratic mess, but staff accused him of exacerbating the situation with his management style and his own abuse of power. In the scandal that would ultimately be the grounds for his resignation, Krongard blocked investigations into his role in protecting corrupt contractors for political reasons. The State Department had contracted a Kuwaiti company to build its

³³⁵ Krongard testimony, 2007, p. 4.

sprawling new Embassy in Baghdad, and the company was accused of human trafficking to bring cheap, forced labour from Southeast Asia to complete the building. Other State Department officials later complained that the foreign workers' labour conditions violated American standards, and that the Embassy was so shoddily built that it was not safe for use. When the IG was brought in to investigate, Krongard allegedly performed the investigation himself, and, according to Representative Henry Waxman, he allowed the contractor to dictate the terms of the investigation and followed their suggestions regarding whom to interview.³³⁶ The IG absolved the company of any wrongdoing.

Unlike some less high-profile IG reviews, the Iraqi contracting investigation also caught the attention of the Departments of Defense and Justice. IG Krongard's 'pass' on the contractor's performance was implicitly challenged when Defense Department auditors found evidence of misconduct where Krongard had found none. The Justice Department was asked to investigate to provide a third opinion.³³⁷ But once scrutiny of Krongard's role in the matter was underway, he threateningly ordered staff not to 'cooperate' with the congressional investigators.³³⁸ Finally, CIGIE's Integrity Committee was called in to adjudicate. State Department OIG staff and other anonymous complainants submitted myriad allegations about the contracting investigation, but also about other investigations and Krongard's general management style, which included controlling investigations by withholding funds, interfering with the investigative process, or failing to report all findings, and basing his decisions on loyalty to political and family connections.³³⁹ The oversight body

³³⁶ 'Inspector General Allegedly Blocked Probe', *NPR: Day to Day*, 19 September 2007.

³³⁷ Damien McElroy, 'US Investigates Forced Labour Claims at Baghdad Embassy', *Calgary Herald*, 9 June 2007.

³³⁸ 'Whistleblowers in State IG Investigation Report Threats of Retaliation', *US Fed News*, 28 September 2007.

³³⁹ Minutes of the CIGIE Integrity Committee Meeting, 16 January 2008.

elected to conduct an administrative investigation, but was blocked by the FBI until the FBI's own criminal investigation was complete.

The Krongard controversy added fuel to the fire in a partisan dispute over the use of contractors in Iraq. In the House, Waxman crusaded against Kronberg and provoked Republicans on the House Oversight Committee with his own tactics, leading Representative Tom Davis (R-VA) to accuse Waxman of 'making "grossly exaggerated and inflammatory charges"'.³⁴⁰ However, in December 2007, before the months of political mudslinging could attain resolution, and before the FBI completed its investigation, Krongard stepped down. In his resignation letter to President Bush, Krongard cited his 'concerns regarding inherent structural and conceptual defects in the inspector general position' at the State Department, and blamed the polarised political environment for his difficulties in carrying out public service.³⁴¹ In 2007, the GAO also pointed out that the State OIG's budget had increased a mere one percent between 2001 and 2005, while its host department had seen a budget increase of fifty percent.³⁴² Moreover, because the Special IG for Iraq Reconstruction (SIGIR) could, by statute, only oversee funds for 'relief and reconstruction', State OIG was assigned responsibility for overseeing a new block of 'foreign operations' funding for Iraq authorised by Congress in 2006. Congress had offered the OIG \$1.7 million the previous year for Iraq oversight, but reduced it to \$1.3 million in this bill; by comparison, SIGIR operated with a budget of \$24 million.³⁴³ As Krongard protested,

³⁴⁰ 'Rep. Davis Blasts Tactics In Probe Of Watchdog', *Technology Daily AM*, 1 November 2007.

³⁴¹ Letter from Howard J. Krongard to President George W. Bush regarding his resignation, 7 December 2007.

³⁴² GAO, 2007.

³⁴³ Yochi J. Dreazen, 'Iraq Fund Fight Brews in U.S. – Lawmakers Battle Over Who Will Oversee Cash For Rebuilding', *The Wall Street Journal Europe*, 10 May 2006.

the OIG at the time hardly had sufficient resources for its routine duties, much less for a further project on such a scale.³⁴⁴

For all the personal and professional allegations that plagued his stint as IG, Krongard contended with major, longstanding structural and organisational obstacles to providing oversight, and these were compounded by considerable resource constraints. The attention he called to the OIG's crippling lack of resources, and the toxic political and bureaucratic environment in which he operated, may not have been the only factors behind his controversial decisions at State, but his claim that it lacked the structural conditions for successful oversight could not be gainsaid.

E. Limbo

For less than a year, William E. Todd filled Kronberg's position before Secretary of State Condoleezza Rice recruited former Acting IG and Ambassador Harold Geisel to head the office until a permanent IG could be confirmed. Bush nominated a former counterintelligence official, Thomas Betro, in June of 2008, but he was never confirmed. No more nominees were put forth until June 2013, and thus the five-year period the longest in which any OIG went without a permanent head.³⁴⁵ State Department officials themselves preferred that the disempowered leader stay in charge and did not press for a new appointee.³⁴⁶ Meanwhile, Geisel found himself without the permanent status to engage in far-reaching bureaucratic reform – sorely needed – but with the task of restoring the reputation of a badly battered office, and healing the internal rifts that had been aggravated by Krongard's tenure. Geisel had served as Acting IG between Funk and Williams-Bridger in the mid-nineties, a time

³⁴⁴ Ibid.

³⁴⁵ Letter of Representatives Ed Royce and Eliot Engel to Senator John Kerry, 4 February 2013.

³⁴⁶ 'State Dept. Inspector General Position Vacant for More Than 3 Years', AllGov.com, 01 June 2011.

when the office had still failed to integrate fully into the 1978 Act framework.

Previously, he had worked under Funk as Deputy IG and considered Funk to have been his mentor.³⁴⁷

Geisel's office produced a variety of reviews that evaluated policy by applying principles other than those of efficiency and effectiveness. Just as Ervin's 2003 audit of Iraqi opposition groups led the US to suspend their funding, Geisel's reviews of the embassies in Iraq and Afghanistan presented a sharp critique of the President's overall strategies. A routine inspection of the Embassy in Kabul found that the 'unprecedented pace and scope of the civilian build-up', in addition to a host of contextual factors, 'will constrain the ability of these new officers in the short-term to promote stability, good governance, and rule of law (ROL) in Afghanistan'.³⁴⁸ The OIG framed its judgment in terms of pursuing the 'success' demanded by the Administration, but implicit was a critique of the Administration's values. 'There is tension among the U.S. Government's lofty goals, the Embassy's ability to advance them, and the capacity and commitment of elements of the Afghan Government to implement them'.³⁴⁹ Other reviews did target efficiency, but failed to recommend rigorous solutions. A 2011 review of the US Embassy in Baghdad implied that the embassy was bloated and could be 'rightsized' by eliminating more than a third of its positions; it estimated that this mismanagement cost the department over \$100 million each year. Yet aside from this vague diagnosis, the report failed to identify any

³⁴⁷ Dan Friedman, 'State Dept. Taps Foreign Service Veteran To Be Acting IG' *CongressDaily/A.M.*, 3 June 2008.

³⁴⁸ Department of State, Office of the Inspector General, *Report of Inspection: Embassy Kabul*, Report Number ISP-I-10-32A, February 2010, p.1.

³⁴⁹ *Ibid*, p.3.

Department members with responsibility and thus provoked no individual accountability.³⁵⁰

Geisel regularly attracted criticism for the rigour of individual reviews produced by his office, and the OIG continued to receive external criticism. In April 2011, the House Foreign Affairs Committee held a hearing in which Geisel was taken to task for his personal ties to former Foreign Service colleagues. The hearing was motivated by a GAO report from 2011 that followed up on compliance with and changes resulting from its evaluation in 2007. GAO charged that State OIG's use of career Foreign Service officials 'creates at a minimum an appearance of a conflict of interest at the very top'.³⁵¹ External reviews lent credence to GAO's concerns. At the behest of CIGIE, NASA's OIG conducted a review of State OIG's Middle East Regional Office (MERO), and discovered that none of the audits performed by MERO followed the guidelines required by the government-wide Yellow Book standards. Consequently, all of the 'audits' were downgraded to inspections, meaning that MERO had failed to complete a single audit during its first year of existence. GAO's 2011 report found that in the intervening five years, the OIG had taken steps towards acting on only two of the five main recommendations.³⁵² GAO and Congress were unimpressed.

While State OIG continued to be the target of attacks from GAO and external watchdog groups such as POGO, OIG staff insisted that the lack of a permanent IG did not necessarily hamper the rigor of reviews.³⁵³ Geisel defended his office in his

³⁵⁰ Matthew Nasuti, 'Gold-plated State Department Budget Wastes Billions', Kabulpress.org, 21 February 2011.

³⁵¹ Quoted in 'POGO Questions the Independence of the State Dept's IG', Hearing of the Committee of Foreign Affairs, House of Representatives, 'Watching the Watchers: The Need for Systemic Reforms and Independence of the State Department Inspector General', 5 April 2011. [Henceforth Watching the Watchers Hearing].

³⁵² GAO, 2011.

³⁵³ Doug Welty, personal interview, 15 July 2014.

testimony, and pointed to the substantial gains the OIG had made between 2007 and 2010: it had increased its number of annual reports from 107 to 157; its open investigations, from thirty-six to 101; subpoenas issued, from zero to twenty-five; and its contractor suspension and debarment actions from zero to five.³⁵⁴ Moreover, he had expanded the OIG's staff two-fold. But Geisel received more criticism for the circumstances of his position – unconfirmed – than for his personal behaviour. This raised the perennial question of independence, what CIGIE Executive Director Phyllis Fong identified as the crux of the political debate over IGs.³⁵⁵ How important is the independence of the IG to accountability? Can an Acting IG lead an office that produces consequential reports? In essence, how important is leadership in an OIG? Throughout his term, staff and Department members would complain that his life-long career in the Department led him to be too close to senior management, and private emails demonstrating his deference to them lent credence to the staff's claims.³⁵⁶ Although the 'routine' work of the OIG continued – the mandated audits and inspections – Geisel could veto or limit larger-scale projects that would prove embarrassing or costly for the Department.

During Geisel's tenure, members of both the House and Senate joined forces to demand that President Obama move to fill the State IG position, but not until September 2013 did lawyer Steve Linick take the helm.³⁵⁷ Linick had previously served as the Federal Finance Housing Agency IG, and thus had IG experience, as well as investigative skills from legal training. Even within his first few months, Linick attempted management reforms to steer the office in a new direction, such as 'management updates', which elevate certain recurring departmental problems to

³⁵⁴ Statement of Harold Geisel, Watching the Watchers Hearing.

³⁵⁵ Phyllis Fong, CNN Q&A, 22 September 2013.

³⁵⁶ Letter of POGO to the President, 18 November 2010.

³⁵⁷ Letter of Reps Darryl Issa and Elijah Cummings to the President, 24 January 2013.

higher visibility. The OIG also developed a system of online ‘crowd-sourcing’ within its own offices to share best practices among embassies and foreign posts, and presented the model to other OIGs through CIGIE.³⁵⁸

III. Conclusion

The substance of State OIG’s reviews, even when their effects proved less than consequential, demonstrated a distinct conception of accountability far beyond that of compliance monitoring. Reviews analysing the Department’s failure to provide accurate statistics for the public – such as in the 2005 review of incorrect terrorism data released to the public – forced transparency on the Department, and though it fostered partisan wrangling, it also provoked wider public debate.³⁵⁹ As OIG staff in the nineties would complain, this type of accountability is not easily quantified – it touches directly on the difference between political and ideological commitments, on the US’s defence of human rights and its commitments to democracy, on the government’s tolerance of free speech and protection of privacy, and on the transparency of its actions and reports.

But there is a difference between defining accountability and effecting accountability. If some State IGs interpreted ‘effectiveness’ as a question of diplomacy and democratic values, they tacitly allowed the management pathologies and ineffective practices rooted in departmental culture to continue, and thus undermined the Department’s ability to defend these values. The distrust that existed between the dysfunctional OIG and the dysfunctional Department rendered the IG

³⁵⁸ Welty interview.

³⁵⁹ ‘Rep. Pelosi, Leading Democrats to State Dept: Use of Faulty Terrorism Data Must Be Investigated’, *US Fed News*, 27 April 2005.

impotent in effecting accountability, and underscored the highly relational and precarious authority wielded by the IGs.

The criticism levelled at the State OIG by Congress and GAO has been warranted, as well. Its mottled history is tied to decades-long constraints that have hampered the ability of individual IGs to produce consequential reviews. Its conversion to the 1978 framework proceeded slowly. Some IGs, such as Funk, departed from the compliance model, but in the early days lacked the political clout and legitimacy to make their reviews carry weight. Though the OIG received persistent external criticism for the lack of rigor, consistency, and impartiality of its reviews, the obstacles preventing the OIG's success were rooted deeply in the organisation's past and in its host department's recalcitrance. From the perspective of GAO, Congress, and other watchdogs, the OIG's inability to provide rigorous, consistent oversight resulted from its obdurate refusal to align itself with the 1978 framework, and could be rectified only through a full institutional transformation to the new model. The GAO-congressional model of the IG was designed to look for malfeasance, waste and inefficiency. The State IG model, in contrast, had long been a 'soft' management support tool, an arbiter of turf wars, a 'therapist', and a line of communication between the bureau in Washington and far-flung posts with disparate needs and unheeded complaints. The clash of cultures endured long after the OIG's institutional conversion in the eighties.

In 2001, Former ambassador and OIG inspector, Robert Steven reflected on State OIG's early history:

'I don't really think myself that the Inspector General's office, in the many, many years since 1980 that I've been associated, has made that much of a contribution. The Department has resisted. We were pretty good at finding the fraud, you know. If somebody's embezzling the money, you'll find that, or something really wrong or if the ambassador is pinching the behinds of the secretaries, that will get reported, but the overall ability of our Inspector

General system to influence the Department positively, I think, has been minimal. It's pretty sad'.³⁶⁰

In the decade following Steven's disillusioned reflection, the OIG endured further scandal, instability, and its own version of an 'empty chair' policy.

³⁶⁰ Steven interview, p. 119-20.

CHAPTER 6.
A Political IG at State:
Protecting Passport Privacy, 1992-2008

*‘There’s always bureaucracy in action, that’s everywhere and God knows in the Pentagon, Commerce, and everywhere I’ve been, even in universities. But it’s done with a particular lack of thought in the State Department’.*³⁶¹

- Sherman Funk, State Department Inspector General, 1987-1994

I. Introduction

Though State OIG conducts audits and investigations that touch on many aspects of the Department’s functioning, it has consistently issued reviews that target ‘democratic’ values, reviews concerned in particular with the protection of privacy, the conduct of public officials and their political or ideological motivations, and the legal provisions in place to prevent breaches of rights from occurring. The two reviews analysed below investigate the passport violations of two presidential candidates in the months prior to an election. The first case occurred in 1992, under the IG leadership of Sherman Funk; the second, in 2008, under the newly installed Acting IG, Harold Geisel. Though these reviews cannot be taken as necessarily emblematic of all State OIG projects, they form a part of a series of similar, related reviews of privacy violations, one of them a 1993 investigation of an unauthorised search of some Bush Administration officials’ personal files. Both reviews were limited in their direct effects on the Department and on democratic integrity, in the first instance because of external pressure to produce a report, and in the second instance as a result of weak recommendations that were limited to compliance. The

³⁶¹ Sherman Funk, interview with Charles Stuart Kennedy, 14 July 1994, Foreign Affairs Oral History Project, The Association for Diplomatic Studies and Training, p. 37.

strengths of the reviews lay in the way they called attention to the violation of a democratic value and provoked parallel processes of accountability. Because their targets were so similar, addressing nearly identical breaches of privacy laws nearly sixteen years apart, their juxtaposition demonstrates the way the OIG's reviews, and the receptive environment, have evolved over time.

A. 'A Tempest in a Teapot': Clinton Passport File Violations Reviews, 1992

i. The History

In late September of 1992, George H W Bush's re-election campaign found itself floundering. In a last minute attempt to discredit his opponent, Bush's campaign stepped up its accusations of Democratic presidential candidate Bill Clinton's draft dodging during the Vietnam War and raised suspicions about his 1969 trip to Moscow as a student. In response, a number of media outlets sought information through the Freedom of Information Act about Clinton, his mother, Virginia Kelley, and Independent candidate Ross Perot.

The State Department immediately began to process the FOIA request. Someone – the investigations would later try to determine who – ordered that the requests be expedited, and Elizabeth Tamposi, the Head of Consular Affairs at the State Department, personally made calls to embassies in London and Oslo to retrieve relevant files. By early October, the press reported suspicions that Clinton's files had been tampered with. Congressional Democrats – led by Senator John Kerry (D-MA) and Representative Howard Berman (D-CA) – initially enlisted GAO to assess whether any laws had been broken and to determine who was responsible for the

lapses. Officially, within the Department, Acting Secretary of State Lawrence Eagleburger tasked Funk with the investigation. However, Funk's involvement with the affair began before Eagleburger assigned him the task; indeed, the IG's work began even before Eagleburger knew about it. The Acting Secretary demanded an expedited investigation from Funk.³⁶² In media interviews, Funk insisted that he was pursuing 'tough political questions' and not limiting the enquiry to procedural concerns.³⁶³ Funk was amongst the first, and also amongst the most vocal, IGs to declare that IG reviews should go beyond compliance monitoring in their approach. In light of the stakes riding on the outcome of the investigation – the result of the imminent Presidential election, with echoes of Watergate – he deemed the affair to be 'a matter national moment' and ceded the criminal investigation to the FBI, while he himself continued to pursue the administrative offence.³⁶⁴ Eagleburger insisted that there would be no criminal charges, only an investigation to determine what had occurred.

According to Funk's account, the investigation began when Tamposi came to see him urgently and informed him that State had received a FOIA request for Clinton's passport file. While researching it, Tamposi said, State personnel discovered a file that appeared to have been tampered with. Numerous suspicious clues pointed to tampering: a tear at the corner of the documents, suggesting that a formerly stapled paper had been removed, and an odd placement in the file cabinet, with the Clinton file standing straight up as though recently consulted. The document that remained, however, appeared to be a normal passport application from 1968. Tamposi also revealed that her staff had discovered that another Clinton file, from

³⁶² 'Inquiry is Ordered Into US Handling of Files on Clinton', Reuters News Service, *St. Louis Post-Dispatch*, 20 October 1992.

³⁶³ Robert Pear, 'Passport Inquiry Seeks Ties to Bush', *The New York Times*, 12 November 1992.

³⁶⁴ Funk interview, p. 56-57.

1976, was also curiously standing upright in its cabinet. She claimed that she was alerting Funk to the potential problem, and asked him to investigate. Tamposi had brought the situation to the attention of a number of high-ranking officials, and moreover had (without telling Funk) taken the files in question home with her before their meeting. From Funk's perspective, the situation as it could unfold was a 'win-win' for the Republicans. Whether or not it was true, the mere charge that the files had been tampered with would weaken the Clinton campaign's credibility.

In violation of its own regulations, the State Department had hastened the response to the requests. At first, the Department maintained that all procedures had been followed correctly in checking the files, but Democrats protested vociferously. Vice Presidential candidate Al Gore argued that 'this goes way beyond a freedom of information request. The White House is politically using the State Department in a blatant attempt to politicize the entire bureaucracy in a failed effort to try to discredit Bill Clinton'.³⁶⁵ After a few weeks, Department spokesman Richard Boucher conceded that staff had broken Departmental policy in expediting the searches, despite his previous statements to the contrary.³⁶⁶

Though on the surface the affair seemed to be an instance of an isolated violation of privacy, a single, politically motivated act, the story behind the scenes suggested that the Department's culture played a role in enabling the breach to occur. According to Funk and other Department members, the Consular Affairs Bureau had long suffered from dysfunction, and Tamposi's leadership was a mixed bag. Funk saw her as having great strengths in her diplomatic role – making her office 'look

³⁶⁵ Barry Schweid, 'An Assistant Secretary of State Directed at Embassies Searched Files for Clinton Material', *The Associated Press*, 14 October 1992.

³⁶⁶ Walter Pincus and Michael Isikoff, 'Eagleburger Orders Inquiry on Handling of Clinton File Requests', *The Washington Post*, 20 October 1992.

human’ – but judged her management skills to be deficient.³⁶⁷ Consular Affairs fostered a culture of blame dodging where ‘nobody wanted to be naked’ in front of Congress.³⁶⁸ (Indeed, when accused, Tamposi would shift the blame to her superior, Undersecretary of State for Management John F W Rogers). Aside from any leadership deficiencies Tamposi may have had, the vexed relationship between political appointees and the bureaucracy in the Bush Administration created an antagonistic environment especially prone to dysfunction. One of Tamposi’s staff members, FSO Elizabeth Ann Swift, recalled that under Bush’s leadership, political appointees were taught ‘don’t trust the bureaucracy’. She observed that ‘the people who came in at high levels to the State Department, with a few exceptions, tended to be exceptionally arrogant and very, very suspicious of us’.³⁶⁹ Their loyalty remained with the Administration, and so when Tamposi received a request to expedite the search from the White House, she launched an urgent search. The call came from John H. Sununu, Bush’s Chief of Staff, and a friend and neighbour of Tamposi’s back in their home state of New Hampshire.³⁷⁰ The view from below – that of the career FSOs under Tamposi’s watch in Consular Affairs – was that Tamposi’s ‘appointee attitude’ got the better of her. Knowing that she might have been challenged had she asked career bureaucrats to carry out the search, she orchestrated the entire investigation herself, including a midnight search of the files and messages and direct instructions to the embassies in London and Oslo to report on Clinton’s travels in 1969.³⁷¹ In short, the ‘wrongdoing’, from the perspective of some fellow State

³⁶⁷ Funk interview, p. 54.

³⁶⁸ Funk interview, p. 55.

³⁶⁹ Elizabeth Ann Swift, interview with Charles Stuart Kennedy, 16 December 1992, Foreign Affairs Oral History Project, The Association for Diplomatic Studies and Training, p. 82.

³⁷⁰ Michael Newlin, 29 September 2006, p. 84; and Harry Coburn, 22 July 2002, p. 73, interviews with Charles Stuart Kennedy, Foreign Affairs Oral History Project, The Association for Diplomatic Studies and Training.

³⁷¹ Swift interview, p. 83-84.

Department members, had its source not only in dubious ethics, but also in poor leadership and bad management. If the bureaucracy could, in theory, have served as a check on executive overreach, in this case it was overridden by the Administration's philosophy of keeping appointees aloof and mistrustful of their agencies.

The FBI quickly concluded that there had been no tampering by anyone.³⁷² So Eagleburger tasked Funk with new questions: how and why had the files been searched? For an unrelated project, Funk departed on a trip to the CIS countries and left the OIG to manage the next stage in the investigation without him. When he returned to Washington in early November, Eagleburger confronted him immediately. First, he asked, should Tamposi be fired? Funk considered the evidence to be insufficient at that point, but conceded that more evidence might easily be found. Second, a new wrinkle had emerged in Funk's absence: the State Department had broken its own regulations in monitoring Tamposi, potentially a criminal offence.

The Department's Operations Center, known as 'the Watch', through which intra-Departmental telephone calls were routed, had monitored calls between the main 'suspects' in the passport case. In late September and early October, Tamposi and Berry shared a number of telephone calls about the details of the case. In one of the conversations, Tamposi asked for recommendations of other Bush appointees who might assist in the file searches at the Embassies in London and Oslo.³⁷³ Unbeknownst to Tamposi and Berry, their calls were not only intercepted but also broadcast 'live' to the entire call centre, in direct violation of the Center's Manual, which stipulates that calls between officials 'should not be monitored unless they so request'.³⁷⁴ This discovery by the IG investigation opened the door to an entirely new

³⁷² 'The 1992 Campaign; F.B.I. Closes Inquiry on Clinton's Passport', *The New York Times*, 10 October 1992.

³⁷³ *Berry v. Funk*, [1998] 146 F.3d 1003.

³⁷⁴ *Ibid.*

set of concerns that extended far beyond the initial charge of violating privacy laws (an administrative misdemeanour).

ii. *The IG Review*

The OIG refused to investigate the Center's actions until it finished the passport files case. This was highly unusual, and in conflict with the OIG's standard practice of pursuing criminal misconduct before administrative misdeeds. The OIG finally released its report on the passport files, *Special Inquiry Into the Search and Retrieval of William Clinton's Passport Files*, on November 18, 1992. It was damning of Berry's role in the affair and suggested that his actions had political motives, and 'were inappropriate and probably a violation of the Hatch Act'. Accordingly, it recommended disciplinary action. Tamposi was the primary political casualty of the affair, despite the fact that she had not personally rifled through the files, and that the request to expedite the search had come from Sununu, who was above her. Her dismissal on 10 November 1992 came as a direct result of the anticipated findings of the IG report, and she claimed that she was being made the scapegoat for a much larger, White House-orchestrated incident. Her special assistant, political appointee Steven M. Moheban, resigned voluntarily in mid-November, similarly in anticipation of the IG report.³⁷⁵

Though defended by many Republican colleagues, Tamposi came under scrutiny for having involved herself personally in the file search and having directed the Embassy searches in London and Oslo.³⁷⁶ The steps Tampisi took were irregular

³⁷⁵ Robert Pear, 'State Dept. Official Who Searched Clinton's Passport Files Resigns', *The New York Times*, 18 November 1992.

³⁷⁶ 'Inquiry is Ordered Into US Handling of Files on Clinton', *St. Louis Post-Dispatch*, Reuters News Service, 20 October 1992.

for someone in her position, and her status as one of Bush's political appointees made her actions even more suspicious. Though Berry left his post, he was merely reassigned to another office within the Department, with the same salary.³⁷⁷ The IG report pinned the blame squarely on these two appointees, but exonerated the White House, suggesting that while it may have had knowledge of the probes, it was not an active player.³⁷⁸ However, the report did not satisfy Congress. For Rep. Howard Berman (D-CA), there were too many inconsistencies and unanswered questions about the White House's role in the matter. He decided to wait to hold public hearings on the matter until the GAO released the report from its parallel investigation, and refrained from pressuring it with a deadline.³⁷⁹

The IG's sparing of the White House made congressional Democrats call foul, and so the report's release prompted another round of parallel oversight. Eagleburger requested the appointment of an Independent Counsel to investigate. A Republican, Joseph diGenova, was appointed special prosecutor. Although diGenova declared the Bush Administration aides had done 'stupid, dumb and indeed partisan things' during the passport searches, he cleared them of criminal wrongdoing.³⁸⁰ He also sharply disapproved of the IG investigation, describing it as 'incompetent' and suggesting that Funk's staff had conducted their interviews poorly and misinterpreted evidence.³⁸¹ Moreover, the special prosecutor declared that Funk had pressured his investigators to submit a review too quickly and thus produced a substandard report.³⁸² The pressure, however, resulted from the hastening sunset of the Investigative Counsel Act, which

³⁷⁷ Ibid.

³⁷⁸ Robert S. Greenberger, 'No Bush Link Found in Case Over Passport', *The Wall Street Journal*, 19 November 1992.

³⁷⁹ Walter Pincus, 'Probe of Clinton Passport File Search Expanded', *Washington Post*, 25 November 1992.

³⁸⁰ Statement of Joseph diGenova, Ronald J. Ostrow, 'Clinton Passport Probe Clears Bush Aides', *Los Angeles Times*, 1 December 1995.

³⁸¹ David Johnston, 'File Search In 1992 Race Wasn't Illegal', *The New York Times*, 1 December 1995.

³⁸² David Johnston, 'No Charges to Be Filed for Search of Clinton Files', *The New York Times*, 3 December 1994.

was due to expire in early December 1992. Had the IG report not been released by then, no special counsel investigation would have been possible. In 1995, after a three-year, \$2.2 million special investigation, Tamposi and her colleagues were exonerated.³⁸³

iii. *Immediate Effects:*

The reviews had a greater impact *outside* of the Department than inside. Though two staff members were terminated (one was fired; the other resigned in anticipation of being released), no higher-level personnel were disciplined for knowledge or involvement. Because the review focused on an individual act, assumed to be politically motivated, the IG's conclusions related to the culpability of the individuals involved rather than to the procedural problems that may have enabled the transgression in the first place. Despite its inaccuracies and inadequate methodology, outside the Department the report led to considerable publicity (generating 430 media citations between October 1992 and October 1996, a larger than usual number for an IG report in the early nineties; see Table 5.2 in the previous chapter). It also led to the immediate launch of an independent counsel investigation.

iv. *The IG in the Web of Accountability:*

Despite its failure to provoke positive, long-lasting effects on either the Department or the protection of privacy, the IG review played a pivotal role in influencing the way other actors in the web of accountability conducted their own

³⁸³ 'Bush Team's Search For Clinton Passport "Dumb," Not Criminal', *Seattle Times News Services*, 1 December 1995.

business. The GAO and the Independent Counsel both shaped their respective investigations in reaction to the IG's, and the IC's conclusion would later contribute to the 'retirement' of the Independent Counsel Act in 1999.

GAO: The Senate Foreign Relations Committee, the House Foreign Affairs Committee and the House Committee on Post Office and Civil Service together requested an investigation by GAO; indeed, in the early nineties, Congress preferred this mode of investigation to the IG review. Congress's decision to ask GAO for an investigation was based on its lack of trust in Funk, a political appointee, to conduct a rigorous independent investigation. There were good reasons for Congress's suspicions of the IG. Funk was a registered Republican who had recently travelled for two weeks with one of the primary 'suspects' in the case, Under Secretary for Management John F W Rogers. But the GAO, part of the legislative branch, was cautious about following leads that took it to Rep. Gerald B.H. Solomon (R-NY), ranking member of the House Rules Committee.³⁸⁴

Even in this early period in its history, the IG already wielded more investigative authority than GAO (even though GAO was preferred by many members of Congress). Like the OIG, GAO also broadened its investigation beyond the passport file search to include the Department's eavesdropping on itself. But GAO's investigation proceeded at a much slower pace than the IG's, and was still underway when Congress appointed a special investigator under the Independent Counsel Act in December.³⁸⁵ Over a year later, when GAO had still not completed its investigation, the State Department found itself embroiled in yet another passport file

³⁸⁴ Pincus, 1992.

³⁸⁵ Sharon LaFraniere and Michael Isikoff, 'Special Counsel Probes Clinton Passport Case; diGenova Secretly Appointed to Investigate Possible Coverup by White House Aides', *The Washington Post*, 18 December 1992.

breach scandal. This time, the tables had turned: Clinton Administration officials had illegally searched the files of outgoing Bush appointees. GAO folded the old investigation into the new one, and finally released a pair of reports in July 1994, nearly two years after the initial breach. These reports surveyed the privacy controls that various agencies had over political appointees' personal files, and found them still deficient.³⁸⁶ Like most of GAO's reports, they were written from a broad perspective that focused on the government-wide problem rather than the specific manifestations of it. In the case of the second incident, GAO initiated its investigation after State OIG had begun its own. To avoid repetition and overlap in oversight, the two bodies met, and GAO discovered that twenty-one of twenty-two questions that GAO had been assigned to investigate were already being investigated by the OIG. (The final question concerned privacy controls outside of the State Department, and thus fell outside of the OIG's remit.) Rather than duplicate the OIG's work, GAO effectively ceded the authoritative narrative to the OIG, declaring that,

'Based on our review of OIG's report and supporting evidence, we concluded that OIG's work had answered almost all of the questions that had originally been posed to us by congressional requesters. We did not attempt to reinvestigate the same issues that OIG had covered'.³⁸⁷

Because GAO lacked the statutory authority to demand interviews with Department members, the main actors in State's White House Liaison Office declined to be interviewed by GAO. In short, GAO's contribution to the oversight effort consisted in little more than a partial reproduction of the IG's investigation and a summary review of its conclusions.

³⁸⁶ GAO, *Records Management: Inadequate Controls Over Various Agencies' Political Appointee Files*, GAO/NSIAD-94-155, July 1994; and GAO, *Records Management: Retrieval of State Department's Political Appointee Files*, GAO/NSIAD-94-187, July 1994.

³⁸⁷ GAO, *Retrieval of State Department's Political Appointee Files*, p. 15.

Independent counsel (IC): Special prosecutor Joseph diGenova spent three years conducting an investigation in response to the IG's conclusion. Although the IG's role in the matter was complete once his review was released in November, Funk stayed entangled in the case as the IC investigation proceeded. In February 1993, Funk took the unusual step of publicly challenging the court testimony of a senior Administration member, Frank M. Machak, saying that his testimony contradicted earlier statements he had made to the OIG interviewers.³⁸⁸ But the IC's investigation ultimately won the battle for narrative legitimacy, nullifying the claims of the IG report. In addition to discrediting the IG's authority, diGenova's report and public statements all put the role of the Independent Counsel investigation in question. He insisted that the affair should never have been referred to the Justice Department, and should never have had a Special Prosecutor assigned to it, implying that the cost of the special investigation was a waste and the investigative work redundant, in light of what should have been accomplished by the IG. DiGenova's criticism played an important role in spurring wide discontent with the Special Counsel framework, which was finally retired in 1999.³⁸⁹ Arguably, the elimination of the Independent Counsel as an instrument of accountability had the effect of encouraging Congress to resort to the IGs as their primary executive oversight tool in the next decade. Ultimately, the IG's failures may have had the paradoxical consequence of generating congressional support for the IG model in the long term.

³⁸⁸ Michael Isikoff and Walter Pincus, 'State Dept Challenges Employee's Court Testimony on Clinton Passport Search', *The Washington Post*, 2 February 1993.

³⁸⁹ David Alistair Yalof, *Prosecution Among Friends: Presidents, Attorneys General and Executive Branch Wrongdoing*, Austin: Texas A&M University Press, 2012, p. 134-35.

Other processes: The IG report and the subsequent special investigation provoked three parallel court cases.³⁹⁰ First, the disgraced former appointee, Steven Berry, refused to cooperate with the special prosecutor's subpoena for documents on the grounds that the entire special investigation was premised on information that was gathered illegally. He later brought an unsuccessful suit against the Funk for having used illegal information.³⁹¹ US District Judge Charles Richey brought a second civil suit against Administration staff for not adhering to data storage regulations; some of the unpreserved data in question was potential evidence in diGenova's investigation. Finally, on the basis of the evidence provided in the IG report, *The Nation* magazine sued the State Department for 'politically manipulating' the FOIA process. All of these cases interfered with the special investigation and delayed its outcome.

v. *Conclusion:*

Though his investigation was 'loud', reaching the ears of the media and of Congress, Funk's report had limited long-term effects on the Department, and no effect on administrative procedure, norms, or departmental infrastructure. Funk's staff still lacked highly qualified, experienced auditors and investigators, lending credence to diGenova's later assessment that the investigative team had misinterpreted their own interview notes. Its conclusion was responsible for direct accountability in the sense of sanctions, with the immediate dismissal of two public officials, but this was based on a poorly conducted analysis that proved to be in error. The IG's institutional strategy of only targeting the individual circumstances of the case rather than evaluating the existing procedures for privacy protection, coupled

³⁹⁰ Isikoff and Pincus, 2 February 1993.

³⁹¹ *Berry v. Funk*, [1998] 146 F.3d 1003.

with the time constraints imposed by the impending expiration of the Independent Counsel Act, led the IG to conduct a substandard investigation that vexed the overall process of accountability.

However, the incident proved to have unintended and indirect, but lasting effects on the web of accountability. An IG investigation as a *process* of accountability must be separated analytically from the validity of the report's results. The Clinton passport review produced an analysis later deemed to be incorrect. Despite this, it provoked, interacted with, and complemented other processes of accountability. Most important, the investigation uncovered a second, serious breach of the Fourth Amendment, a discovery that prompted a series of further inquests. It attacked the politicisation of administration and provided at least a symbolic nod towards the protection of privacy laws, and in this regard was squarely oriented towards the protection of democratic values.

B. Obama Passport Files, 2008

a. The History

In March 2008, media reports brought to light that the passport files of presidential candidate Barack Obama had been accessed three times without authorisation; the Department later discovered that the files of candidates Hilary Clinton and John McCain had been searched as well. Although the Department's automated security system alerted officials to the breaches in January 2008, they did not inform any of the candidates until 21 March, when Obama was told that his files had been searched.

Acting IG Geisel initiated the review immediately after the first news report. Simultaneously, Senators Patrick Leahy (D-VT) and Arlen Specter (R-PA) sent a letter to Attorney General Michael Mukasey requesting a Justice Department investigation, but Mukasey declined to launch one until the IG report had been released.³⁹² (During the course of its investigation, the OIG itself would refer the affair to the Criminal Division of the Justice Department.)

The passport breaches were partly enabled by two parallel phenomena: the post 9/11 movement to expand data collection and sharing within the government (the pressures of emergency governance), and the government's expanding use of contractors.³⁹³ In October 2007, President Bush implemented the 'National Strategy for Information Sharing', which encourages specific modes of expanding data collection and sharing, such as fusion centres and the Homeland Security Information Network.³⁹⁴ The plan did not, however, update or strengthen existing privacy protections. Across the board, the statutory framework for privacy protections had not evolved at the same pace as national security demands and technological innovations. To compound the loosened the problem of privacy protections, forty to forty-five percent of the State Department's visa personnel were private contractors between 2001 and 2008.³⁹⁵ Although, according to the Privacy Act, contractors must be treated as agency employees in their standards of conduct and in corresponding disciplinary actions, the IG found that the '[Consular Affairs] management does not believe it has the authority to discipline Department employees outside CA' and that

³⁹² Statement of Patrick Leahy, 'Passport Files: Privacy Protection Needed For All Americans' Hearing, US Senate Judiciary Committee, 10 July 2008 [Henceforth Passport Files Hearing].

³⁹³ Testimony of Marc Rotenberg, Passport Files Hearing, p. 2-5.

³⁹⁴ Rotenberg testimony, p. 7.

³⁹⁵ Rotenberg testimony, p. 5.

‘contract supervisors, rather than CA management, [should] discipline contract employees’.³⁹⁶

b. The State of the OIG

In 2008, State OIG’s capacity to investigate this incident was limited, and its independence acutely in question. As explained in Chapter 5, the OIG’s resources had fallen in real terms since 2001, while the Department’s staff and responsibilities had grown. Moreover, when the Passport File scandal began to unfold, Geisel had just been elevated to the position of Acting IG, following a mere six-month stint of leadership by Ambassador William Todd. Only a year earlier, GAO had issued a negative assessment of the OIG, questioning its independence and effectiveness as a result of its long-standing practice of using career FSOs to lead the office when lacking a confirmed IG.³⁹⁷ The only confirmed IG since 2002 had been Howard Krongard, from 2005 to 2007, and his tenure had been cut short by multiple allegations of impropriety. A peer review performed by the NASA OIG found other problems in Geisel’s OIG, including a lack of rigour in MERO audits.³⁹⁸ The OIG’s critics feared that it lacked the protection from political influence that organisational security affords. The OIG had suffered many years of instability, and its reputation on the Hill and in the media – and the legitimacy of its judgments – was in tatters. The independence of the Acting IG himself was equally tenuous. In addition to his lacking the blessing of the Senate, Geisel’s professional background was entirely at

³⁹⁶ *Department of State, Office of the Inspector General, Reviews of Controls and Notification for Access to Passport Records in the Department of State’s Passport Electronic Records System (PIERS) – AUD/IP-08-29 [Henceforth PIERS Controls Review], p. 29.*

³⁹⁷ GAO, ‘Inspectors General: Activities of the Department of State Office of Inspector General’, GAO-07-138, March 2007.

³⁹⁸ Letter from POGO to the President concerning the independence of the State Department’s inspector general, 18 November 2010.

the State Department; he had a degree in Finance and experience as a manager, but no credentials as an auditor or investigator.³⁹⁹ Although Geisel recused himself during specific IG investigations in which he had personal ties, his status as FSO made him suspect in the eyes of external observers. Some anonymous State Department members sent letters to watchdog groups claiming that Geisel had excessively close ties to management, and emails between Geisel and top Department officials in Iraq demonstrated Geisel's deference to departmental prerogative.⁴⁰⁰ The OIG lacked sufficient resources, reputation, cohesive bureaucratic culture, and an individual independent IG at the head of the organisation: in short, it was not poised to issue a consequential report.

c. The IG Review

The IG Report, *Reviews of Controls and Notification for Access to Passport Records in the Department of State's Passport Electronic Records System (PIERS) – AUD/IP-08-29*, was released in July 2008. However, it was heavily redacted, with only six of the twenty-two total recommendations released. Nearly the entire results section and all of the substantive appendices, which include the discussion of recommendations between the State Department subcomponents and the OIG, were redacted. In addition to the Executive Summary and occasional, isolated paragraphs throughout the report, only the broad assessment and methodology were accessible, and each of these suggested considerable systemic problems with the security system linked to PIERS, and with the associated disciplinary processes.

³⁹⁹ Biography of Harold Geisel, Department of State website archives.

⁴⁰⁰ POGO letter, 18 November 2010.

Given that the monitoring system had detected the accessing of the passports, the breach was not in question and not the subject of the IG's audit. Rather, the audit probed the context in which the violations took place to determine whether the Department's current system prevented unauthorised access, and whether the Department took appropriate action following breaches of the system.⁴⁰¹ In the review, the OIG censured the efficacy of the privacy protection framework. The review was critical of the Department's monitoring system, reporting that 'it was very limited in the number and types of individuals captured', that 'the list contained the names of 38 of about 127 million passport holders', and that no mechanisms were in place for detecting the illicit search of less famous, or ordinary, citizens. As a way of testing the frequency of searches on less prominent individuals, the OIG investigators produced a list of 150 high profile individuals not already registered in the system, and checked to see the number of times these individuals' passport records had been checked, if at all, between September 2002 and March 2008. One hundred twenty-seven, or eighty-five percent, of a total of 150 individuals' passport files had been accessed during this period. But though the report hints that these statistics might be anomalous, it refrains from declaring an unequivocal judgment, stating that '[a]lthough an [eighty-five] percent hit rate appears to be excessive, the Department currently lacks criteria to determine whether this is actually an inordinately high rate'.⁴⁰² The review also acknowledges that it relied on the State Department itself (the CA) to produce the data, and that even between two data sets produced by the CA, there were important discrepancies, factors which put the accuracy of the data in question.

⁴⁰¹ Testimony of Mark Duda, Passport Files Hearing, 10 July 2008.

⁴⁰² PIERS Controls Review, p. 45.

Moreover, although the monitoring system alerted authorities that a breach had occurred, the perpetrators had been able to access the files successfully. The review highlighted two troubling aspects of the overall system. First, the State Department could not identify either the number or the identity of government staff and contractors with access to the database; second, the system itself had no protocols to protect the information. And because the database was shared with other agencies and departments, such as the FBI, Department of Homeland Security, and Office of Personnel Management, each of them with entirely different procedures for security, State effectively lost control of the information's security.⁴⁰³

d. Effects of the Review:

The incident resulted in an apology from Secretary of State Condoleezza Rice to the three candidates whose passport files had been breached. All three demanded a congressional investigation in addition to Rice's apology, but the oversight committees were not forthcoming. As a result of the IG audit, the Department fired two contractors and disciplined a third.⁴⁰⁴ Over the course of the next eighteen months, eight further contractors were found guilty of a misdemeanor in the Justice Department's criminal investigations of personnel referred by the IG. This ongoing criminal investigation, begun at the behest of the IG in December 2008 and continued for over year, found a number of State Department employees guilty of accessing the passport files of celebrities, and the culpable persons were placed on probation.

Although the Department indicated in the immediate aftermath of the original report's release that it would implement all of the IG's recommendations, the

⁴⁰³ Leahy Statement, Passport Files Hearing, 10 July 2008.

⁴⁰⁴ Testimony of Alan Raul, Passport Files Hearing.

partially-unredacted review released in 2010 under court orders revealed that the CA had still failed to implement the suggested reforms. And because investigators feared that releasing the entire review, which described the privacy system in detail, would enable further abuse, much of it was left redacted (even after a court case by a civil liberties watchdog group). Although this in theory protected the integrity of the system, it did little to increase the transparency of the government's actions and commitment to protecting citizens' rights. The report did have the effect of prodding the Department to expand the size of the 'watch list' from thirty-eight high profile individuals to over one thousand; however, most of these people were members of Congress, the Supreme Court, and the upper echelons of the Administration, as well as some media and sports celebrities.⁴⁰⁵ The Department's response, in short, was egocentric self-protection.

e. Limits of the review:

Like many IG reviews, the Obama passport review concentrated narrowly on the case at hand, without linking it explicitly to the broader phenomenon of passport breaches and lax data security in the State Department, or to government-wide data protection more generally. And as in many IG reviews, a breach of rights was framed as the result of a procedural deficiency. The lack of procedural safeguards led to lax security, which in turn led to a violation of privacy rights. This general topic had been on the IG's agenda since the early nineties and resurfaced multiple times later in that decade when foreign spies posing as journalists were able to gain access to the Department, and again when computers with sensitive information were lost in the

⁴⁰⁵ Glenn Kessler, 'Celebrity Passport Records Popular; State Dept. Audit Finds Snooping Was Frequent', *The Washington Post*, 4 July 2008.

late nineties. However, the IG report left the wider implications to political actors, a task that Leahy took up in his congressional testimony by urging further criminal investigations and concrete legislation.

At least in the unredacted portion of the review, the IG did not address the lack of government-wide standards for privacy protection or the absence of any sort of data breach law on the federal level. Moreover, despite the White House's suggestion in 2007 that federal agencies establish notification policies after breaches occur, no such policy existed at the State Department when the candidates' files were improperly accessed.⁴⁰⁶ Of the six unredacted recommendations, the CA concurred with all but one. However, the recommendations were couched in weak language, suggesting for instance that the CA 'consider the types of controls' that other government agencies had put in place⁴⁰⁷, that it 'ensure the accuracy of its Privacy Impact Assessments (PIAs) for PIERS', and that the CA 'review its Memoranda of Agreement and Memoranda of Understanding with all other federal agencies and other entities to ensure that they are revised to adequately and specifically address issues related to PIERS and the passport data it contains'.⁴⁰⁸ Rather than propose robust reforms, the review merely urged the bureau to review its existing framework.

Not only did the review fail to provoke any kind of reckoning with privacy policy wholesale, but it also failed to make effective changes in the immediate object of investigation, the PIERS passport database. Within two years of the review, another breach occurred. In 2010, a Department employee was found improperly accessing the PIERS system to investigate the passports of certain celebrities, and was given a fourteen-day suspension. The OIG contextualised the breach by explaining

⁴⁰⁶ 'Sen. Feinstein: Americans Need Notice When Private Data Exposed', *US Fed News*, 20 April 2008.

⁴⁰⁷ PIERS Controls Review, p. 17.

⁴⁰⁸ PIERS Controls Review, p. 95.

that ‘[i]t should be noted that this employee’s improper PIERS accesses occurred after the initial PIERS inquiry began in 2008 and notice had been sent to all Department of State employees with PIERS access regarding the consequences of improper use of the PIERS system’.⁴⁰⁹ This commentary suggested that the OIG’s primary defense against privacy breaches following the 2008 affair was a single notice sent to Department staff. Long-term, the IG’s recommendations did little to stem the tide of privacy breaches; a 2014 GAO report revealed that, government-wide, the number of personal data violations had climbed steadily from 10,481 breaches in 2008 to 25,566 in 2013.⁴¹⁰ Though not limited to the State Department, these figures suggest that privacy protection frameworks had not kept pace with technological advances in data storage and access.

f. *The IG in the Web of Accountability:*

As in 1992, the IG report’s role in triggering external accountability processes was stronger than its effects in creating direct reforms and immediate accountability within the Department.

Congress: Unlike the 1992 event, the 2008 passport file breaches did not generate a series of congressional movements for further investigations (i.e., through GAO or a congressional investigation). Congress’s attitude towards the IG had shifted since 1992. Though Senators Leahy and Specter were suspicious of a purely ‘internal’ investigation conducted by the IG, they were appeased when, at their

⁴⁰⁹ DOS/OIG, Semiannual Report to Congress, April 1, 2010 – September 30, 2010.

⁴¹⁰ GAO, *Information Security: Federal Agencies Need to Enhance Responses to Data Breaches*, GAO-14-487T, 2 April 2014.

behest, DOJ agreed to assist the IG in its work.⁴¹¹ And rather than defer to GAO's judgment, the oversight committees waited for the IG to complete its report before making any decisions about further action. A spokesperson for Senator Joe Biden (D-DE), the Chairman of the Senate Foreign Relations committee, declared that the 'committee is sort of yielding to IG and the DOJ', and the DOJ itself awaited the IG's report before getting involved.⁴¹²

Senator Leahy used the report as the basis for his testimony in a hearing on the affair, and also used it as evidence for the privacy protection bill he co-authored with Specter (the Personal Data Privacy and Security Act, S.495), though it never passed. The immediate concern of Senators Leahy and Specter was that the IG urge the development and adoption of common standards for civil servants and contractors. In other words, they pushed the IG to adopt an institutional strategy that built procedural infrastructure rather than simply suggest that the Department consider reform.

GAO: While GAO was asked to produce a general review of the then-current status of privacy protection laws, a review it released in May 2008, their report made no mention of the candidates' passport breaches.⁴¹³ Rather, it surveyed possible solutions to emerging privacy protection issues and recommended appropriate congressional action; but no action was taken.

Civil Society: A FOIA request in July 2008 by a watchdog group, the Electronic Privacy Information Center (EPIC), failed to produce an unredacted

⁴¹¹ Letter of Senators Patrick Leahy and Arlen Specter to Attorney General Michael Mukasey regarding privacy violations at State Department, March 25, 2008.

⁴¹² Dan Friedman, 'Most Hill Panels Refrain From Launching Passport Probes', *CongressDaily/P.M.*, 26 March 2008.

⁴¹³ GAO, *Alternatives Exist for Enhancing Protection of Personally Identifiable Information*, GAO-08-536, 19 May 2008.

version.⁴¹⁴ The government's refusal to release the full report prompted EPIC to take the State Department to court, forcing the Department at last to issue a partly unredacted version in June 2010. It remained partly redacted on the grounds that many of the review's recommendations had yet to be implemented by the Department, two years after their issuance. The newly revealed portions of the report exposed the Department's weaknesses and provided more specific criticisms. The report faulted the Department's ability to detect unauthorised access to the database and blamed this on the design of the monitoring system, which required proactive checks by administrators (not usually forthcoming) to function properly.⁴¹⁵

C. PIERS Controls Review Conclusion:

The review produced little individual accountability in the form of sanctions, aside from a small number of low-level suspensions, and little procedural reform. In its framing of the problem, there was no reckoning with the broader legal context of privacy protection, or with the ambiguities of responsibility and challenges associated with contractors. The Department's attention to the report was dilatory and partial, with the re-released version of the report in 2010 indicating that the Bureau of Consular Affairs had yet to implement some of the recommendations even two years later. Of the recommendations unredacted, all were couched in weak language, and none provided clear, forceful guidance for building the procedural framework or for developing clear disciplinary practices. Moreover, the OIG's two stated goals of determining whether the Department's protections were 'adequate' and whether it 'responds effectively', gave the audit a narrow interpretive focus, and led the OIG to

⁴¹⁴ Letter from John A. Verdi, Director, EPIC Open Government Project, to Zipora Bullard, FOIA Office, US Department of State, 10 July 2008.

⁴¹⁵ PIERS Controls Review, p. 2.

neglect the Department's parallel efforts through its 'Working Group to Mitigate Vulnerabilities to Unauthorized Access to Passport Data' in its investigation. Finally, the review itself attracted little attention, eliciting a mere 220 media citations, half of the number of citations of Funk's 1992 review (see Table 5.2 in the previous chapter).

III. Conclusion

State OIG consistently found itself as the defender of privacy rights through the monitoring of passport searches. If the individual reviews failed in certain respects, their value orientation towards privacy protection set an important investigative agenda for the office that was signalled to the rest of the government and the public. However, neither review surveyed above was ultimately consequential in its effects on departmental policy or in refining the system in place to prevent future abuses. Whereas the Funk review was forceful in the blame it laid on the accused, its methodology, and thus ultimately its conclusions, were judged by subsequent investigators to be sloppy and incorrect.

Though the challenges faced by each were distinct, both reviews contended with contextual difficulties. Funk's review suffered from the pressure to complete a review in time to invoke the Independent Counsel Act, pressure which led him to rush and bungle a delicate operation. Like most OIGs at the time, Funk's office lacked the budgetary resources to conduct rigorous analyses. The review uncovered an unexpected additional breach of privacy by the State Department, and this both complicated and compromised the integrity of Funk's investigation. He also made strategic mistakes, privileging the administrative side of the affair over the criminal dimension (potentially for political reasons). With his characteristic zeal, he

publicised his review even before the results were complete, and kept the media abreast of developments; this stoked public ire and put pressure on the Administration to act quickly.

Geisel's challenges were different. Although the IG community as a whole enjoyed bipartisan support in 2008, with Congress actively debating the most telling amendment to the 1978 IG Act in twenty years, State OIG was the emblem of a troubled office. Observers on the Hill and beyond attested to this, in GAO assessments, congressional hearings, and complaints from watchdog groups. If IG effectiveness – or any kind of bureaucratic success – depends on reputation-based legitimacy, State OIG's credibility and latitude were at a nadir. Geisel struggled with an office in turmoil, one that was underfunded and riven by internal rivalries. Because of his unconfirmed status, he himself lacked the independence to issue a strongly critical review; this explains in part the weakness of the report's recommendations.

The differences between the two cases demonstrate the changes seen in State OIG and in the role of the IGs over time. The first review investigated the circumstances of a particular case, assigning blame to individuals; the second targeted the privacy protection framework and faulted the inadequacy of the systems in place. The difference in congressional attitudes between the earlier investigation and a similar one sixteen years later could not have been starker. Whereas in 1992, Congress did not even have sufficient confidence in the IGs to commission an investigation, by 2008 it was the IG report that sparked an urgent Senate hearing. In his testimony before the Senate Oversight Committee, Arlen Specter remarked on how unusual it was for an oversight hearing to be called only three days after an evaluative report, yet justified the decision by referring to the weight of the IG's

review.⁴¹⁶ The differences between the two cases also highlight changes in the nature of oversight: by 2008, a computerised monitoring system was in place to detect when any Department official accesses the passport files of a high profile individual. It was this automated system, rather than an individual, that instigated the investigation, creating an entirely new security framework with which to contend.

But certain processes remained the same. In both cases, the IG was responsible for provoking a second mode of accountability by referring the matter to the Criminal Division of the Justice Department for a criminal investigation. The reviews demonstrate the IG's fragility on account of its material resources and organisational capacities, as well as its reliance on a web of accountability to effect immediate, direct change in its host Department. But they also demonstrate the IG's potential role in provoking that change through alternate means – that is, by providing a narrative crucial for deliberation in both in government and in the wider public sphere.

⁴¹⁶ Passport Files Hearing.

CHAPTER 7.

Lawyers out of Court: Guarding the Guardians at Justice

'It is not what a lawyer tells me I may do; but what humanity, reason, and justice tell me I ought to do'.

-Edmund Burke, *Second Speech on Conciliation*, 1775

I. Introduction

Over its twenty-four year history, the Department of Justice Office of Inspector General developed a distinct propensity towards 'democratic' accountability. It pursued many high-profile reviews that identified executive activity violating civil and human rights, and that promulgated norms of the appropriate scope of executive behaviour beyond those codified in law. These reviews went beyond mere compliance monitoring and questioned the propriety of government action, whether through individual behaviour or through agency-wide decisions about the implementation of policy. This tendency towards democratic accountability was underpinned by a special organisational capacity oriented towards issues of misconduct, overreach and rights' violation. Discursively, this direction depended on the IG's interpretation of his role and what constitutes government wrongdoing; materially, it required a fusion of the OIG's audit and investigation functions, and led to the cultivation of a specific bureaucratic organisation and culture oriented towards investigating abuses of a constitutional nature.

The OIG's strong reviews were made possible in part because of successive IGs' high level of independence, which in turn contributed to its reputation, and thus, its legitimacy. This independence had its source in three interlinked places: a culture (in the form of a distinctive mission); structural capacity (in the form of specific expertise); and statute. It was cultivated over time and was grounded in an OIG

identity that rested on a specific skill set (i.e., investigative legal experience embodied in the Special Investigations and Review Unit), and later, was buttressed with national security expertise. Most important, the *perception* of independence on the part of congressional and other public actors resulted from its reputation. The second IG's main institutional innovation, the creation of a special unit staffed primarily with investigative legal expertise, unified the OIG with its combined audit-investigative capacities and in so doing, overcame the audit-investigative division that hampers many OIG from issuing consequential reviews. This unit was the embodiment of a capacity whose exercise proved to be the long-term basis for the IG's strong reputation in Congress and in its host department, and led to both the perception and fact of independence.

Finally, the Justice IG's independence also resulted from a Congress eager to curb the excesses – both actual and potential – of the executive in times of emergency. Although the IG's work was not limited to executive emergency action, it was the mandate that it gained as a result of emergency-related legislation that permitted it to expand its scope and undertake the robust reviews that appeared in its second decade of existence. In short, Congress's reaction to executive emergency action, coupled with the vision and aggressive management of particular IGs, led to a broad expansion of the IG's capacities and the scope of its activity, and deepened its independence. As the OIG developed a reputation for neutrality, rigour and independence, its legitimacy grew, and the reviews were used in conjunction with other internal and external mechanisms of accountability.

A. Modest Beginnings, 1990-1994

At the time of the 1978 Inspector General Act, the Justice Department was loath to host an IG within its ranks, arguing that Congress's attempt to monitor the executive branch with IGs was an improper violation of the separation of powers.⁴¹⁷ With the help of Congressional Republicans, it successfully resisted a statutory IG on grounds of sensitive information and national security concerns, and the Reagan administration maintained this line by holding to the notion that it would be impossible to have an IG in the cabinet agency that is headed by the nation's chief law enforcement officer. In the debates leading to the 1988 Amendments to the Act, Senator John Glenn (D-OH) and Representative Jack Brooks (D-TX) successfully fought for the Act to include Justice and Treasury against a bevy of Republican congressmen reluctant to submit the national security apparatus to further internal oversight. In 1989, Congress established an IG in the DOJ.

The Justice Department IG was not identical to the other OIGs. In addition to the national security exemption with which its host agency may block its investigations, it was the only office to have its jurisdiction curtailed by a parallel body within the DOJ, the Office of Professional Responsibility (OPR). The amended 1978 Act also permitted the Attorney General to block IG investigations about any ongoing department cases.⁴¹⁸ Finally, the DOJ OIG was required to obtain Attorney General permission for any criminal case involving the FBI or DEA. When it was established, the OIG emerged as a unique patchwork of administrative centres from within the Department, fusing offices with vastly different purposes and bureaucratic cultures, including the Audit Office in the Justice Management division, the Policy Development of DEA, and the INS's Internal Affairs Office.

⁴¹⁷ Light, 1993, p. 63; Michael Bromwich, personal interview, 2 January 2013.

⁴¹⁸ Section 8D(a) of the 1978 Inspector General Act

The first Justice IG thus contended with a number of institutional and political obstacles to its oversight. In its first years, the OIG lacked critical bureaucratic unity and identity. It took over a year for the position to be filled by the Bush Administration,⁴¹⁹ but beginning in 1990, was held by Richard Hankinson, who had previously served as a secret service agent and special agent in numerous federal entities.⁴²⁰ Hankinson's first challenge was to unify the patchwork of bodies from which the OIG was culled, and he found himself intertwined in a series of resources battles that stemmed from the OPR-OIG rivalry. Some of his staff – highly qualified auditors and inspectors – were automatically transferred to the OIG from other parts of Justice, but Hankinson was able to choose his own chief counsel and executive assistant, and hired former colleagues from the secret service.⁴²¹ He also struggled with the definitional limits of his office: given the restrictions placed on it by the 1988 Act, it was unclear what *kind* of issues the OIG could and should pursue. Although he was criticised for not pursuing criminal FBI investigations, Hankinson was deterred by the law prohibiting such investigations without Attorney General approval. Although the majority of issues followed by the OIG came from requests within the department, but the IG also investigated sensitive or large programmes and congressional requests.⁴²² Despite the IG's institutional struggles, the Department proved responsive to the reports, especially the audits, which helped to streamline Department management.

⁴¹⁹ The slowness of the IG confirmation process is a pattern seen across all OIGs, and reported in multiple personal interviews; see also Paul Light, 'Our Tottering Confirmation Process', *Public Interest*, 1 April 2002.

⁴²⁰ 'Nomination of Richard J. Hankinson To Be Inspector General of the Department of Justice, George Bush Presidential Papers', Public Papers, 1990-01-26.

⁴²¹ In interviews, a number of IGs commented on the informal link between the secret service community and the IG community (Richard Hankinson, David C. Williams, and Richard Skinner, personal interviews). Hankinson suggested that the personal connection with the president, the familiarity with detail, and the law enforcement experience that came with secret service work all lent themselves to a bridge between the two communities.

⁴²² Richard Hankinson, personal interview, 16 January 2013.

B. *Building an OIG Identity, 1994-2000*

The second IG, Michael Bromwich, whose tenure lasted until the end of the decade, established a precedent for strong reports within this hostile institutional context, particularly by putting consistent pressure on a troubled FBI. Bromwich, a Clinton nominee, was originally slated to head a joint OIG-OPR, pending the resignation of Hankinson. He had been a prosecutor in the Iran-Contra investigations, and at the time had been accused of prosecutorial misconduct by Oliver North's defense attorneys, but the judge dismissed the motion for a mistrial. Bromwich came with Harvard credentials, a string of prosecutorial successes and a reputation for being 'an able and vigorous prosecutor' and a 'consummate professional'.⁴²³ And though his adversaries touted him as being 'mean' and as having a 'nasty demeanour', Senator Orrin Hatch (R-UT) noted in the press that these were ideal characteristics for an IG.⁴²⁴

Bromwich came to the job with a dubious view of the IG profession, having been unimpressed with how 'shoddy' and 'unbalanced' the IG work had been that he encountered earlier in the eighties in his capacity as a lawyer.⁴²⁵ When he asked Bromwich to take the job, Assistant Attorney General Philip Heymann promised that the Office of Professional Responsibility (OPR) would be fused with the OIG so that the IG's jurisdiction would extend to the DOJ's legal activity. From the beginning of their custody battle in 1990, the OPR and the OIG saw jurisdictional tension limit their cooperation, and the Justice Department often privileged the OPR in delegating

⁴²³ Confirmation Hearing of Federal Appointments, US Senate, 25 March 1994.

⁴²⁴ Michael Hedges, 'Justice IG nominee chastised when serving Walsh team', *The Washington Times*, 14 February 1994.

⁴²⁵ Bromwich interview.

responsibility.⁴²⁶ In addition to the jurisdictional struggle, Heymann had been highly critical of the OPR for its lack of strength and transparency in holding DOJ attorneys to account, and he advocated a new Department policy of disclosing the wrongdoing of Department attorneys in a larger number of cases.⁴²⁷ Heymann's next move (before his own resignation) was to push for the OPR-OIG merger. With some reluctance and scepticism towards the IG profession, the prospect of working with a cadre of lawyers tempted Bromwich, and Heymann's promise to merge the two bodies lured him to take the job.

But the merger never materialised. There had been early recognition that the two bodies would have overlapping jurisdictions, but OPR head Michael Shaheen resisted the proposal.⁴²⁸ Bromwich's past as a prosecutor in Iran-Contra opened him to charges of partisanship. In response to the proposed merger, in March 1994, Republicans on the Senate Judiciary Committee – with the exception of William Cohen (R-ME) – wrote a series of letters to the Attorney General to voice their opposition to the merger.⁴²⁹ In them, they suggested that the conduct of lawyers should stay out of the hands of a political appointee (the IG) and rather be entrusted to the career Justice department officials. Faced with the threat of a blocked IG nomination, potentially for months, Reno obliged.⁴³⁰

Over the better part of the next two decades, this institutional separation would significantly hamper the IG's capacity to investigate DOJ legal actions, including certain national security policies, because it precludes the IG from investigating the

⁴²⁶ Letter from Henry Wray, Senior Associate General Counsel, to Rep. Jack Brooks, 15 April 1994.

⁴²⁷ Memorandum from Deputy Attorney General Philip Heymann to Michael Shaheen, Regarding the Disclosure of the Results of Investigation of Alleged Professional Misconduct by Department Attorneys, 13 December 1993.

⁴²⁸ James Rowley, 'Head of Justice watchdog unit resigns', *Associated Press Newswires*, 24 November 1997.

⁴²⁹ Bromwich interview.

⁴³⁰ Confirmation Hearing of Federal Appointments, US Senate, 25 March 1994.

DOJ's own attorneys' actions, such as the written justification of enhanced interrogation methods;⁴³¹ the role of DOJ lawyers in the National Security Agency's warrantless surveillance programme; and the use of material witness warrants to detain immigrants after 9/11.⁴³² The arrangement creates a conflict of interest within the OPM, which is not independent of the Attorney General, yet must evaluate the AG's actions.⁴³³ It would also provide an escape clause for the Attorney General when faced with allegations embarrassing to the Department, allegations that could be steered towards the OPM, which does not publish the majority of its reviews.⁴³⁴ Heymann also tasked the new IG with building a strong internal review capacity within the department. This came on the back of two embarrassing scandals for the DOJ in the early nineties: the Ruby Ridge incident, in which the child of tax resisters was shot by an FBI swat team, and the Branch Davidian disaster in Waco, Texas. Both of these cases revealed the DOJ's lack of self-investigative capacity, and Heymann believed that the IG could serve as the solution.

Once at the helm, Bromwich pursued a two-pronged strategy for building an OIG identity: recruit investigative lawyers with good writing skills, and initiate special investigations above and beyond the semi-annual reports. Bromwich's background as lawyer gave him a bias towards legal expertise, and led him to prioritise hiring prosecutors for their investigative skills over and above candidates with auditing or criminal law backgrounds. Bromwich's recruits had a particular skill set: the ability to lead an investigation, and to write the results in a coherent narrative.

⁴³¹ 'Justice and the I.G.', Editorial, *The New York Times*, 2 February 2011.

⁴³² Dan Eggen, 'FBI Cites More Than 100 Possible Eavesdropping Violations', *The Washington Post*, 9 March 2006.

⁴³³ This conflict of interest manifested itself in 2008 when the OPM was given the responsibility of investigating a set of politicised firings of US attorneys within the Justice department.

⁴³⁴ Despite repeated attempts to close this institutional separation, it has been consistently rejected, most recently in a last-minute move by Senator John Kyl (R-AZ) during the negotiations over the 2008 IG Act.

Attracting these skills took time. At the beginning of his tenure, the IG did not have the Budget Authority to hire a large permanent staff. When he found himself short-staffed for a particular investigation, he used the strategy of asking then-US Attorney Eric Holder to ‘lend’ him prosecutors ‘on detail’.

Table 7.1. Academic and Professional Backgrounds of DOJ Inspectors General

IG	Dates	Academic background	Professional experience
Michael Horowitz	March 2012-present	Law	DOJ Criminal Division (various posts); Deputy Assistant Attorney General; AUSA (Southern District of NY) ⁴³⁵
Cynthia Schnedar (Acting)	January 2010-March 2012	Law	AUSA (Washington, DC)
Glenn Fine	December 2000-January 2010	Law	Private law; DOJ OIG Special Counsel
Glenn Fine (Acting)	August 2000-December 2000	Law	Private law; DOJ OIG Special Counsel
Robert L. Ashbaugh (Acting)	August 1999-August 2000	Law	Justice OIG; Justice Department trial lawyer
Michael R. Bromwich	June 1994-August 1999	Law	AUSA (Southern District of NY); Associate Counsel in Office of Independent Counsel for Iran-Contra
Richard J. Hankinson	June 1990-June 1994	Liberal arts	US Secret Service; Federal government investigator (multiple agencies)
Anthony C. Moscato (Acting)	April 1989-June 1990	Law	Law; Justice Department

To pursue his mandate from Heymann, Bromwich embodied his two principles in the Special Investigations and Review Unit (SIRU) office (later called the Oversight and Investigations Division), established in 1995 and unique to the Justice OIG. Like all other OIGs, the DOJ OIG was initially organised around an

⁴³⁵ Assistant United States Attorney

audit/investigative split, with auditors conducting routine audits of programmes, and investigators pursuing instances of specific wrongdoing, fraud or abuse. A third division inspected programmes for compliance (known as Inspections, and from 2001, Evaluations and Inspections). The SIRU unit was unique in the way that it bridged the methodological divides between these divisions to expand the OIG's remit. It was clearly lawyer-led, comprising half of the unit, but included teams of analysts, auditors and special agents.

He hired lawyer Glenn Fine to head the new division. This was an office that Fine would continue to cultivate when he succeeded Bromwich as IG, and that proved to be a source of strength of the OIG's work. The unit gave birth to the category of 'special investigations' (or 'specials') within the IG community; the fruits of the special investigations issued from this office became the hallmark of DOJ-IG work, and helped it establish its reputation both within the IG community and in the broader federal bureaucracy as a rigorous source of internal review. Special investigations were not meant to be given primacy over other types of IG work (audits, inspections and regular investigations), but were so named because of their length, the complication of the issue, the resources they demanded, and the public attention with which the issue was associated.⁴³⁶ For each special investigation, the IG initially assigned a team leader (usually a lawyer) as well as Special Investigative Counsel from the SIRU or Assistant US Attorney (AUSA), and senior personnel from the other component parts of the OIG (audit, inspection, and investigation).

Bromwich pushed for this particular organisational configuration and set of skills, and funnelled the OIG's limited resources into the SIRU. Despite the Unit's legal investigatory bent, it also had an audit component that worked in conjunction

⁴³⁶ Michael R. Bromwich and Glenn Fine, 'Investigating Major Scandals: Part II: Nuts and Bolts', *Journal of Public Inquiry*, Winter 1997, p. 1.

with the investigators. The process of completing special reviews in many ways bridged the longstanding divide between audit and investigative capacities, but Bromwich's bias led to a sidelining of the audit function. Other members of the OIG staff were initially reluctant to accept an influx of lawyers into the organisation: it required changing their professional patterns and overcoming a bias against the legal profession.⁴³⁷ Moreover, such investigations proved costly for the OIG because they sapped limited resources from the OIG as a whole; special investigations were often longer and more resource-intensive than other investigations. But ultimately, the SIRU grew to become the backbone of the OIG's special reviews.

C. Forging 'Democratic' Accountability

Bromwich's vision of the types of issues to pursue – special investigations that demanded complex legal judgments – led to the forging of a new category of investigation, a new methodology, and a specific bureaucratic capacity anchored in the SIRU. But his desire to pursue his two-pronged strategy had roots in a specific conception of accountability. In a 1997 article in the IG journal, *The Journal of Public Inquiry*, Bromwich distinguished between specific breaches of the law and more general wrong-doing. Describing the OIG's June 1995 review of the 'Good Ol' Boy Roundup', in which FBI officers engaged in racist and other kinds of misconduct at annual agency gatherings, he stated:

'[i]t was clear that the likelihood that any Justice Department personnel committed any crimes in connection with attending the event was slim. The primary concern of the Attorney General and the Senate Judiciary Committee [who requested the review] was whether Justice Department employees engaged in any incidents of racial and other misconduct. Our lengthy report told the story of the Good Ol' Boy Roundup over 16 years, a narrative of

⁴³⁷ Bromwich interview.

historical reconstruction that no criminal prosecution could have accomplished'.⁴³⁸

The distinction between the object of his office's attention and that of a criminal investigation underpinned a conception of government accountability as one of propriety of action: regardless of legal status or efficiency, what is the nature of proper government action? At stake, as well, was the role of IG investigations: they were, on this account, to play a distinct role, fusing quotidian oversight with the power of investigative counsels. Between 1995, when it was formed, and 2013, the SIRU completed ninety-nine special reviews. Of these reviews, seventy pursued issues of government impropriety and overreach, while the remaining twenty-nine evaluated the management and performance of various DOJ components.⁴³⁹

D. Bromwich's Reviews

Over the next seven years, Bromwich repeatedly clashed heads with the FBI chiefs, but he also struggled with a number of limitations to his work: limits on the initiation of investigations, control over his completed reports, and the protection of whistleblowers. At the behest of Congress, in 1996 he opened a review of the CIA's involvement in a crack-cocaine scandal in which a number of federal agencies channelled drug profits to the Nicaraguan Contras in the eighties.⁴⁴⁰ Senator Dianne Feinstein and Representative Maxine Walters of California initiated this review after a series of articles in the San Jose *Mercury News* appeared in August 1996; they

⁴³⁸ Michael R. Bromwich, 'Climate the Leads to IG Handling', *Journal of Public Inquiry*, Spring 1997, p. 4.

⁴³⁹ This is based on an analysis of the executive summaries, introductions, and recommendations of all special reviews 1995-2013, conducted by the author. Each review was coded as either addressing a performative (efficiency) or democratic issue.

⁴⁴⁰ Andrea Shalal-Esa, 'U.S. Justice Department launches CIA-cocaine probe', *Reuters News*, 21 September 1996.

referred the problem to Attorney General Janet Reno, and the task was then passed onto Bromwich.⁴⁴¹ But the report, once it was complete, was withheld from public release by Attorney General Janet Reno on the grounds of sensitive information, the first time the AG had invoked this privilege under the 1978 IG Act.⁴⁴² Bromwich publicly stated his opposition to Reno's decision but did not challenge it. Without Reno's blessing, he spoke with a disgruntled Maxine Waters, who protested the review's delay, and reassured her that the report would be released, delayed, but unredacted. Reno's move thus did not ultimately undermine the IG's work, but it demonstrated the latent power that an agency head could hold over an IG and threaten his independence.

Despite the need to receive Attorney General permission to investigate the FBI, Bromwich repeatedly held the agency up to the microscope of inspection. He focused on the constitutionality of the mistakes, even when this threatened to undermine the FBI's performance. Following tips from FBI scientist Frederic Whitehurst, the IG began a series of investigations that would prove to be one of its most visible, and with the most significant effects. The timing of this report was also noteworthy: it was not a post-hoc, but rather a concurrent investigation. Concurrent investigations were rare in the IG community, but Bromwich saw the investigation as a kind of pre-emptive action that would be protective of the Department's ongoing cases. Beginning in the late eighties, Whitehurst had alleged that many of his colleagues had performed sloppy forensic work and fabricated testimony that compromised hundreds of criminal investigations; Whitehurst was then sacked as a result of his complaints. In April 1997, the IG review found FBI Director Louis Freeh guilty of misleading Congress about the Whitehurst's dismissal, and suggested that

⁴⁴¹ John Diamond, 'CIA clears itself of role in crack cocaine', *Associated Press Newswires*, 18 December 1997.

⁴⁴² 'Reno withholds report on CIA, rebels, drugs', *The Las Vegas Review-Journal*, 24 January 1998.

the incident was part of a ‘damage control operation’ to cover up wider problems in the FBI.⁴⁴³ Underlying the deceit was a seriously malfunctioning crime lab that led to over fifty criminal cases being interrupted as a result of Bromwich’s investigation.⁴⁴⁴ The legacy of the reports was mixed. On the one hand, the FBI was placed under public and Congressional pressure to clean up its act, and the FBI did initiate some reforms, such as the outside accreditation of its labs. But a follow-up report a year later found only modest improvements and most important, no attempt to establish systematic reviews of FBI court testimony.⁴⁴⁵ And of the thirteen guilty parties, none was fired and only two were reprimanded.⁴⁴⁶

The limited consequences of this review – a review that would be one of Bromwich’s largest and most well known – reflected the weaknesses of the broader IG community in the nineties. Though strong in the rigour of its recommendations, it lacked consequence externally. Despite its good reputation (as reflected in Congressional statements),⁴⁴⁷ IGs did not always command the legitimacy to pressure their departments into formulating a consequential response, and the reviews were not used instrumentally by other actors to pursue greater accountability: no public or Congressional pressure to implement the recommendations resulted from it. From a legal perspective, however, the FBI review highlighted the latent power of IG reviews in addressing the propriety of executive action: this was one of the first times that

⁴⁴³ ‘FBI chief’, *The Las Vegas Review-Journal*, 18 March 1997.

⁴⁴⁴ Toni Locy, ‘Judge Rejects Release of Draft Report on FBI Lab; Inspector General's Probe Has Uncovered Possible Problems in Many Criminal Cases’, *The Washington Post*, 18 March 1997.

⁴⁴⁵ Michael J. Sniffen, ‘Inspector general finds progress, lingering problems in FBI lab’, *Associated Press Newswires*, 4 June 1998.

⁴⁴⁶ Richard A. Serran and Ronald J. Ostrow, ‘How Fair Was Justice’s FBI Crime Lab Probe?’, *Los Angeles Times*, 20 August 2000.

⁴⁴⁷ For instance, multiple statements in the ‘Legislative Proposals and Issues Relevant to the Operations of the Inspectors General’ Hearing before the Senate Committee on Governmental Affairs, July 19, 2000, suggest that the good reputation of the IG community was not at stake, and that any Congressional legislation should reinforce their independence. On the 25th anniversary of the IG Act in 2003, Congress issued a joint resolution commending the work of the Inspectors General (S.J. Res. 18-2).

Congress carried the interpretation of a review beyond the IG's stated conclusions. Significantly, the review found no evidence of overt criminal activity, but rather of mishandling of evidence, deficiencies, management failures, poor and incomplete reports and substandard performance; the errors, in other words, were at base, procedural.⁴⁴⁸ Taken together, however, the narrative suggested broader, more serious impropriety. The problem lay in the fact that the FBI's procedural sloppiness was uniformly skewed towards prosecutorial success. While Bromwich maintained the FBI's 'innocence' in his public statements (insofar as there was no obvious intent to commit perjury), Congress questioned this interpretation. In a hearing, Rep. Robert Wexler (D-FL) demanded of Bromwich, 'what is improperly supplementing reports, what are omissions, what are alterations if they do not amount to fabricating evidence?'⁴⁴⁹ The distinction between mistakes and abuse of executive power was a fine one. The report's recommendations focused on procedural reforms that would in theory prevent the FBI from repeating such abuses.

Walking the line between mistakes and wrongdoing created ambiguities in much IG work, and stemmed from the original Act's structure. From its inception, IG work – shaped by the compliance paradigm of oversight – lent itself to defining problems in terms of rule following, and thus to offering recommendations in the form of new regulations and devoting additional resources to monitoring bodies. This structure of problem definition and solution seemingly limited the immediate effect of the IG's work by leaving the systemic sources of many problems aside, and frustrated the IGs' Congressional supporters. For instance, the ambiguous nature of Bromwich's FBI investigation led to demands in the Senate for further investigation.

⁴⁴⁸ DOJ/OIG Special Report, *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases*, April 1997.

⁴⁴⁹ Michael J. Sniffen, 'Senator seeks criminal investigation of FBI lab figures', *Associated Press Newswires*, 12 June 1997.

Although Bromwich insisted that his office had searched for evidence of criminal misconduct ('a hybrid criminal-administrative investigation'), Sen. Grassley (R-IA) maintained that the investigation was only a management review and was insufficient, and despite Grassley's request for further criminal investigations of the thirteen FBI staff implicated in the report, Bromwich refused. This interpretive split was indicative of a more profound difference over the *diagnosis* of the problem. Whereas Grassley viewed the report's focus on procedural reforms as neglecting the wider 'constitutional' issue of impropriety, Bromwich's insistence that the investigation had been criminal-administrative suggests that, although it was not expressed in constitutional terms, his narrative recognised the inherent impropriety of the FBI's *modus operandi*. Bromwich's background as a lawyer led him to be sensitive of the exigencies of the law: standards for establishing intent, for instance, are higher in the courts than in common parlance. This led his team of lawyers to exercise caution in formulating their narratives.⁴⁵⁰ The review pointed at constitutional wrongdoing, but Bromwich's circumscribed understanding of the IG's authority left the conclusion of to be made by Congress.

Bromwich thus insisted on his independence from Congress. His independence from his own agency head, Attorney General Janet Reno, was less clear. His failure to investigate two Democrats involved in a campaign finance scandal in 1996 prompted conservative critic William Safire to accuse Bromwich of being part of 'Reno's see-no-evil network'.⁴⁵¹ But the IG and AG did not always see eye to eye. Unlike Bromwich, Reno placed a premium on the audit function of the OIG rather than on investigation, in part because this helped her to manage the

⁴⁵⁰ Bromwich interview.

⁴⁵¹ William Safire, 'Some Big Blob', *The New York Times*, 3 December 1997.

department.⁴⁵² Whereas investigations seek out individual wrongdoing in exceptional cases, audits and programme reviews address quotidian management challenges: two conceptions of accountability and the IG's role were at stake. The OIG did, in 1998, begin to compile a list of 'Top Ten Management Challenges', a public document that served as a kind of strategic plan and explanation of the IG's choice of issues to investigate (this became a statutory requirement of all OIGs in 2000). Nonetheless, Reno did not 'use' the IG for her own designs; she gave him the latitude to pursue the issues that he deemed the most important, issues that ultimately led him to sideline the OIG's auditing capacity. This strategic choice provided the institutional basis for its orientation towards constitutional accountability.

In addition to building the OIG's investigative capacity through the Special Investigative Unit, Bromwich spearheaded other significant institutional innovations. His experience with the FBI crime lab probe also spurred him to challenge the limits of his position, limits unique to the Justice Department OIG. In order to undertake investigations in certain sensitive units within the DOJ, such as the FBI and the DEA, the IG needed to receive approval from the Deputy Attorney General.⁴⁵³ This lack of approval had been the factor preventing Whitehurst's claims from being investigated for eleven years after the fact. After a series of hearings, Robert Wexler (D-FL) began legislation to grant the IG precisely this capacity, but not until 2001 was the IG's jurisdiction expanded to include the FBI and DEA.⁴⁵⁴

The OIG under Bromwich issued a number of hard-hitting reviews that kept the FBI in check, but there were significant limitations on the scope of the IG's activity and the effects that resulted from his reports. As with the CIA-cocaine case, many of the investigations were initiated by Congress and tacitly approved by the

⁴⁵² Bromwich interview.

⁴⁵³ Gary Fields, 'Independent Watchdog Urged for FBI Probes', *USA Today*, 19 May 1997.

⁴⁵⁴ DOJ OIG Semiannual Report to Congress, April 1, 2001 – September 30, 2001.

Attorney General. Beyond the political limits, the IG had difficulty protecting the whistleblowers that brought abuses to his attention. However, the reports were able to effect some change; for instance, Whitehurst's initial ousting provoked President Clinton to extend a whistleblowing protection law to cover the (previously exempt) FBI.⁴⁵⁵

Guided by a particular vision of accountability and the role of the IG in effecting it, Bromwich effectively cultivated the institutional prerequisites for the strong special reviews that the OIG would produce in the future, and for its growing reputation as a rigorous and independent source of internal review: a coterie of investigative lawyers and a special unit in which to organise and funnel resources towards a constitutional conception of accountability.

E. Glenn Fine and the Post-9/11 Mandate: Moving into National Security and Rights Monitoring, 2000-2011

The special reviews of Bromwich's OIG framed many of the Department's activities as improper, irrespective of the legal status of the actions, and set a precedent for the types of issues the future IGs would pursue. In July of 2000, Clinton named Glenn Fine to be Acting Inspector General to replace Bromwich, who had resigned. Also a Harvard lawyer by training, Fine had extensive experience in the OIG, having served as the Special Counsel to the Inspector General from 1995-96, and later, as the Director of the SIRU. He began by continuing the largest internal security investigation in the history of the Justice Department, and his first report – while still only the Acting IG – shocked Congress with its damning indictment of top

⁴⁵⁵ Michael J. Sniffen, 'Wider FBI Lab Probe Sought, Whistle-blowers Get New Protections', *Associated Press Newswires*, 17 April 1997.

Justice Officials. The report failed to lead to any immediate accountability in the form of sanctions: none of the accused was either prosecuted or fired. What it did provide, however, was transparency, and both the media and Congress used it as the basis for further scrutiny. The report was described as detailing ‘serious, substantial and egregious misconduct’ and ‘general moral turpitude’ within the upper ranks of the DOJ.⁴⁵⁶ The investigation, begun by Bromwich and completed by Fine, overcame numerous internal obstacles, including the efforts on the part of Justice officials to discourage cooperation with the IG and pleas with the OIG to temper its conclusions. The immediate effect of the report was to spur Congress to hold full committee hearings on the Department’s international law enforcement programs.

Like Bromwich, Fine followed a distinctive vision for his office. He operated under ‘eight principles’, the first two of which were ‘independence’ and ‘transparency’.⁴⁵⁷ ‘Transparency’ was not merely an abstract goal, but dictated the OIG’s activities and was integral to maintaining the OIG’s reputation for independence and to drawing in other actors. In testimony to Congress he emphasised that ‘we believe it is important to release publicly as much information about our activities as possible’.⁴⁵⁸ This mission of the IG complemented Bromwich’s desire to create an organisation of narrative-builders – storytellers – in order to publicise and disseminate facts. The IG’s narrative-building function placed it in a paradoxical position. On the one hand, the IG played the role of neutral arbiter and remained aloof from political processes. On the other hand, the legitimacy of the narrative stemming from the IG’s neutrality enabled the politicisation of the actions under review and invited their use by Congress and others. This simultaneously

⁴⁵⁶ Vernon Loeb and David A. Vise, ‘Security Violations at Justice Dept. Cited’, *The Washington Post*, 21 September 2000.

⁴⁵⁷ Association of Inspectors General Newsletter, Winter 2008, Vol. 4, No. 4.

⁴⁵⁸ Strengthening the Unique Role of the Nation’s Inspectors General Hearing, Senate Committee on Homeland Security and Governmental Affairs, 11 July 2007 [henceforth Strengthening Role Hearing].

apolitical and politicising role implicitly bolstered the political processes of accountability by legitimising the narratives on which they were based.

Fine also continued to build Bromwich's SIRU unit (changing its name to the Office of Oversight and Review, or O&R). His first project was to build a permanent core of OIG lawyers within it, giving lawyer and policy analyst Carol Ochoa the task. Ochoa crafted a flat body with a structure very different from the hierarchy of the other divisions within the OIG.⁴⁵⁹ The lack of permanent teams gave the SIRU flexibility in the kinds of issues it could pursue, and its interdisciplinary skills permitted analysis on multiple levels. When Bromwich left the position in 2000, the Unit had comprised six permanent staff and received many 'on detail', but Fine rearranged the OIG as a whole to concentrate more staff and resources in the office. By the time of his departure in 2011, there were over thirty permanent members of staff. O&R's flexibility ultimately gave it the leeway to define different types of issues to investigate: whereas the audit division identified much of its work from algorithms, O&R chose its investigations through conversations with the IG. If the IG identified an issue that was 'bigger than it looks', or if there was legal analysis needed (as would be the case in the office's reviews of Patriot Act or FISA-related matters), the issue was given to the O&R.⁴⁶⁰

The office that Fine inherited continued to be pitted against significant institutional obstacles. From the mid-nineties, the ranks of the DOJ had grown without a concomitant growth in OIG personnel or capacity.⁴⁶¹ As a result, the percentage of complaints that were investigated fell nationally from fourteen percent in 1996 to seven percent in 2000.⁴⁶² And within the first year of Fine's appointment,

⁴⁵⁹ Michael Horowitz and Carol Ochoa, personal interview, 26 January 2013.

⁴⁶⁰ Ibid.

⁴⁶¹ Glenn Fine, personal interview, 3 January 2013.

⁴⁶² 'Feds' ranks grow, but not probes of conduct', *The Arizona Daily Star*, 17 August 2001.

the Justice Department circumstances transformed radically. The first change was the growth of a highly politicised department that led to political hirings and firings, many instances of which would later be investigated by the OIG in a 2008 report. Second, the department sustained a deep restructuring following the 9/11 attacks, and its strategic plan began to focus first and foremost on counterterrorism.⁴⁶³

The Patriot Act of 2001 ushered in a new era for the DOJ OIG. The legal landscape changed, not only because of the effect of war (both the War on Terror, and later, in Iraq and Afghanistan), but also because of the Bush Administration's legal strategies to avoid court review for executive actions.⁴⁶⁴ In the midst of fear over the potential threats to liberties from the Act, Congress inserted Section 1001 into the Patriot Act, a clause that mandated the IG to monitor potential civil rights and liberties abuses. In addition to its regular semi-annual reviews of departmental activity, the Act stipulated that the OIG was, in addition, to produce semi-annual reports on the implementation of its Section 1001.⁴⁶⁵ Moreover, the Act created a new Deputy IG for civil rights within the Department, with requirements for an IG Oversight Plan for the FBI: supported by House Democrats such as Barney Frank, this was an attempt to 'increase the negative incentives' for leaking surveillance information.⁴⁶⁶ But support for the DOJ IG's work was not limited by partisanship; by 9/11, the IG commanded enough legitimacy to muster support from both sides of the congressional aisle. Despite their early resistance to a DOJ IG, Congressional Republicans gradually became strong champions of the IG's work over the nineties and first decade of the twenty-first century. Republicans Orrin Hatch (R-UT),

⁴⁶³ Jerry Seper, 'Justice sees top threat as terrorism', *The Washington Times*, 18 November 2003.

⁴⁶⁴ Mary Dudziak, 'A Sword and a Shield: The Uses of Law in the Bush Administration', in Julian Zelizer, ed., *The Presidency of George W. Bush*, Princeton: Princeton University Press, 2010, p. 39-40.

⁴⁶⁵ This section requires the OIG to investigate potential abuses of rights and liberties not only associated with the Patriot Act, but more generally.

⁴⁶⁶ Report of the House Committee on the Judiciary on the Patriot Act of 2001, October 11, 2001.

Charles Grassley (R-IA), and Arlen Specter (R-PA) on the Senate Judiciary Committee, and Darrell Issa (R-CA) of the House Oversight and Government Reform Committee, used IG reports as the basis for calling hearings and supported legislation strengthening the IGs' independence. For both sides of the congressional aisle, the IGs provided a crucial political instrument of investigation.⁴⁶⁷

Table 7.2. Number of Media Citations for Selected IG Reviews

Review	Review Date	Media Citations	Date Range
CIA-CONTRA-Crack Cocaine Controversy ⁴⁶⁸	December 1997	105	01/01/1996-01/01/2000
FBI Laboratory ⁴⁶⁹	April 1997	457	01/01/1996-01/01/2000 ⁴⁷⁰
Good O' Boy Roundup ⁴⁷¹	March 1996	20	01/01/1996-01/01/2000
September 11 Detainees (3 reviews) ⁴⁷²	June 2003-March 2004	1,012	01/05/2003-01/05/2007
NSLs (3 reviews) ⁴⁷³	March 2007-January 2010	945	01/01/2007-01/01/2014
Attorney Firings ⁴⁷⁴	September 2008	387	01/06/2008-01/06/2012
Fast and Furious ⁴⁷⁵	September 2012 (November 2012, partially unredacted version)	1073	01/01/2011-01/10/14

⁴⁶⁷ Tom Davis, personal interview, 18 January 2013.

⁴⁶⁸ *The CIA-CONTRA-CRACK Cocaine Controversy: A Review of the Justice Department's Investigations and Prosecutions*; Search terms: inspector general AND (justice department OR department of justice) AND CIA AND crack cocaine.

⁴⁶⁹ *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases*; Search terms: "inspector general" AND justice AND whitehurst

⁴⁷⁰ Although I have used a general parameter of four years following the final review in question to trace media hits, if the date range of the search is expanded to the present, there is a total yield of 591 media hits. The findings of the IG review were revived in 2012 when further evidence of FBI mishandling arose.

⁴⁷¹ Search terms: "inspector general" AND ("justice department" OR "department of justice") AND "good ol' boys roundup" AND ("justice department" OR "department of justice")

⁴⁷² Search terms: "inspector general" "inspector general" AND detainees AND ("justice department" OR "department of justice") AND detainees

⁴⁷³ Search terms: "inspector general" AND ("justice department" OR "department of justice") AND (NSLs OR "national security letters" OR "exigent letters")

⁴⁷⁴ *An Investigation into the Removal of Nine US Attorney's in 2006*; Search terms: "inspector general" AND ("justice department" OR "department of justice") AND ("U.S. attorneys") AND (dismissal OR fired OR firings OR scandal)

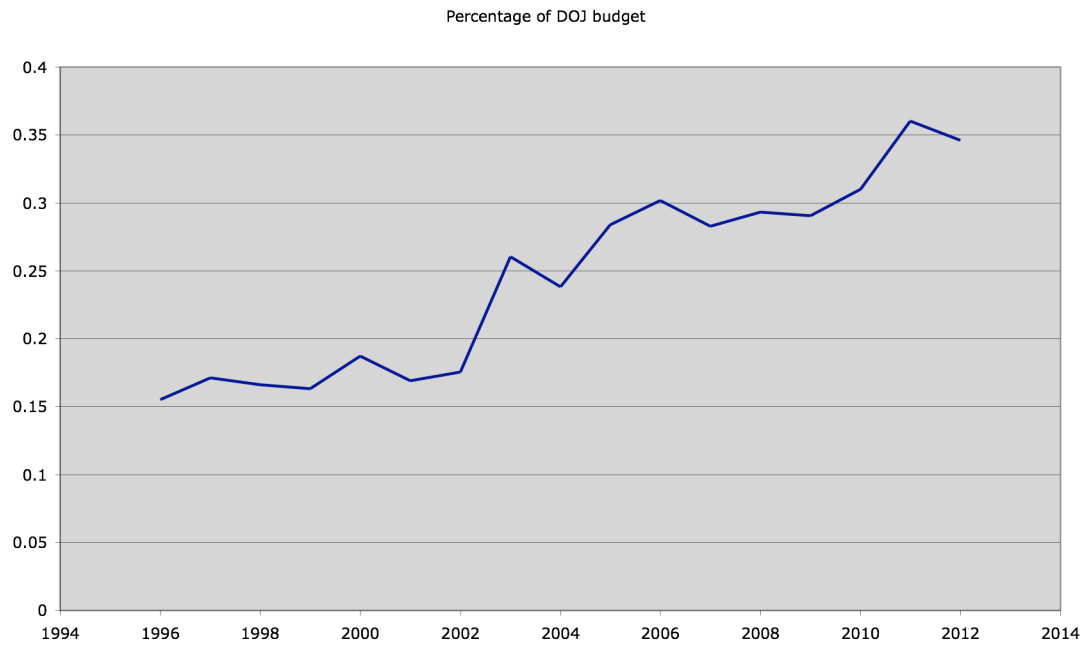
The Congress's recourse to the IG as an integral mechanism of accountability in the War on Terror reflected the IGs' wider reputation as an effective, legitimate check on executive behaviour (See Table 7.2 for an indication of the media visibility of Justice IG reviews; the number of citations significantly surpasses those of the State OIG). Despite the IGs' earlier reputation for compliance monitoring, Congress placed the IGs in positions to reframe their missions (the newly minted Department of Homeland Security would similarly receive a rights' monitoring mandate when it was established a year later). However, the Act provided no additional resources for the new responsibilities.⁴⁷⁶ Ironically, although the Patriot Act increased the IG's investigative scope specifically to include violations civil rights and liberties, it was not directly within this framework that the IG moved into the domain of rights' protection. Notably, in none of the Section 1001 reviews between 2002 and 2005 did the IG find significant abuses of civil rights and liberties.⁴⁷⁷ However, the Patriot Act Reauthorisation Act of 2005 included a mandate for the OIG to look at specific provisions of the Patriot Act, including the use of National Security Letters – it was this Congressional provision that prompted and reinforced the IG's capacity to hold the executive to account on a constitutional level.

Chart 7.1. OIG Budget as Percentage of DOJ Total Budget

⁴⁷⁵ *A Review of ATF's Operation Fast and Furious and Related Matters*; Search terms: inspector general AND (justice department OR department of justice) AND fast and furious.

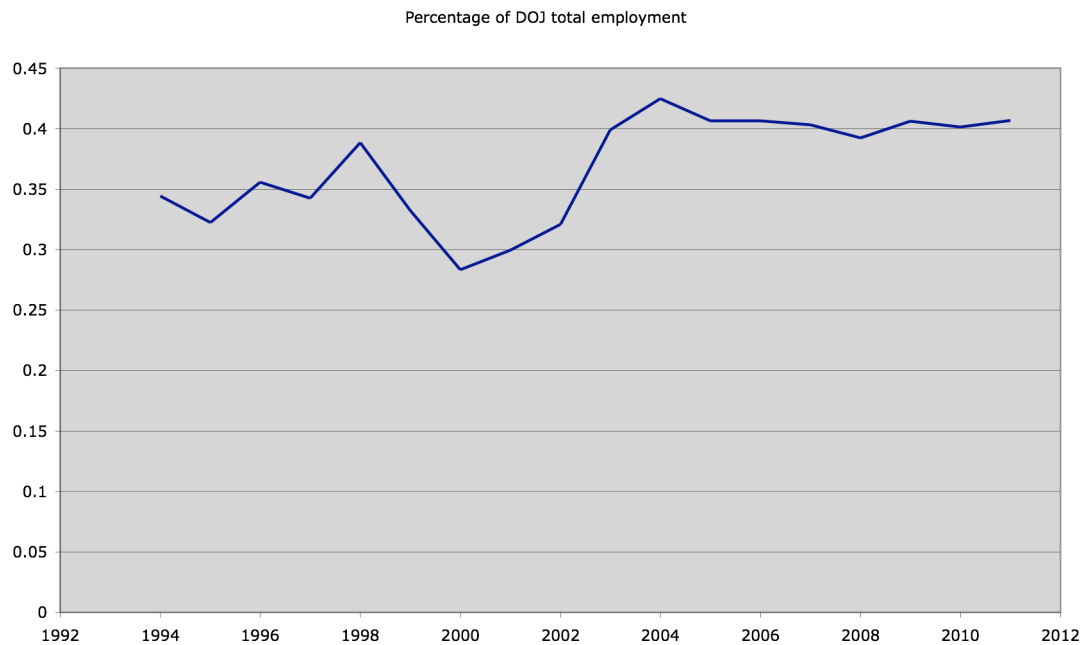
⁴⁷⁶ 'Terror Bill Civil Rights Watchdog is Now in Place', *St. Louis Post-Dispatch*, 10 January 2002.

⁴⁷⁷ 'Justice Report Finds No Complaints', *The New York Times Abstracts*, 16 August 2005.



(Sources: OIG Semi-annual Reports 1997-2012; DOJ Annual Budget, 1997-2012)

Chart 7.2 OIG Full-time Equivalent (FTE) personnel as Percentage of Total DOJ Personnel⁴⁷⁸

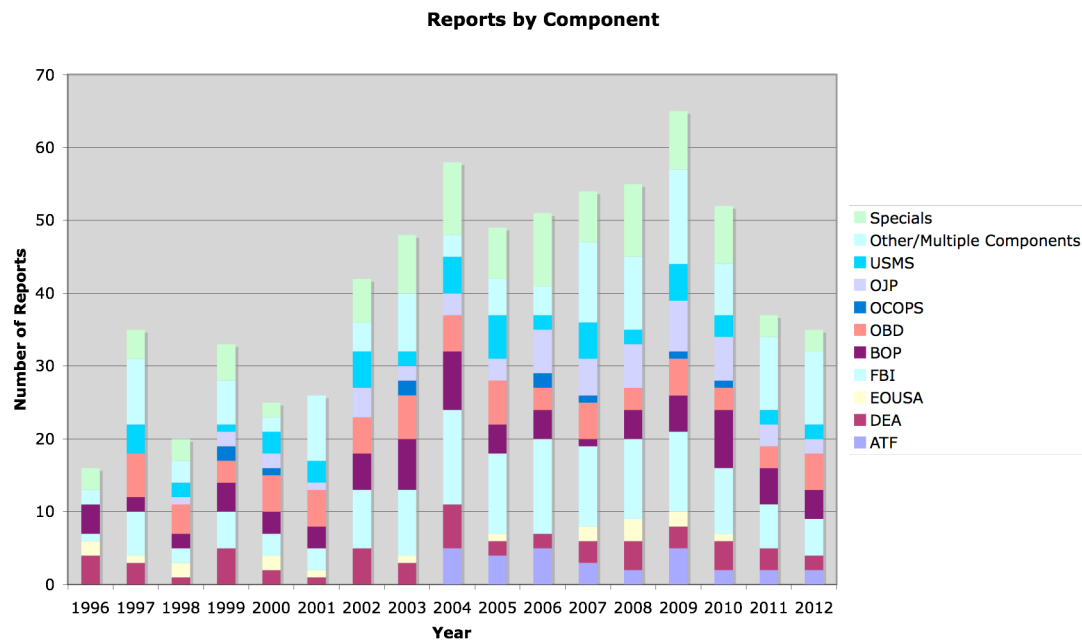


(Sources: FedScope database; US Federal Budget FY2003, Historical Tables.)

From the early 2000s, the OIG began to receive more resources, modestly increasing the ratio of its personnel to the department personnel (Charts 7.1 and 7.2). This permitted it to expand significantly the number of reports that it completed (Chart 7.3). The focus of its work remained the FBI, reflecting a longstanding tension between FBI heads and the Attorney General, but the OIG also targeted the Bureau of Prisons (BOP) and completed a large number of Special Reviews that focused on democratic accountability.

⁴⁷⁸ N.B. The drop in overall DOJ FTE between 2002 and 2003 reflects the transfer of the Immigration and Naturalization Service (INS) to the Department of Homeland Security. The number of DOJ total FTE from 1994-1997 were gathered from the US Federal Budget FY 2003, issued prior to the transfer to the DHS. Total FTE between 1998-2013 were gathered from the OPM's FedScope database. Though it risks some inconsistencies, this methodological choice was made because the number of Justice Department FTE reported in the Historical Tables published after 2004 were revised to show only the personnel in agencies in the current DOJ (i.e., not including the INS). However, this would provide an inaccurate estimation of the ratio of OIG to DOJ personnel because the OIG was responsible for overseeing a much larger staff than it would appear from the post-2003 revised numbers.

Chart 7.3 Number of DOJ-IG Reports by Component, 1996-2012



(N.B.: the combined number of reports is greater than the actual total because of overlap in the classification of reports that covered more than one DOJ component.)

The post-9/11 period also saw a protracted struggle between Attorney General John Ashcroft and the IG for the upper hand in checking the War on Terror; the Patriot Act granted both the Department and the OIG new tools. This was a dynamic that contrasted with the close relationship between Bromwich and Reno. The battle between Ashcroft and the IG also mapped onto a partisan struggle between Congressional Republicans and Democrats regarding the strength of Patriot Act tools. While Ashcroft and the Republicans pushed for stronger provisions in the war on terror, the Democrats pointed to the OIG's early reports as reason to exercise caution.⁴⁷⁹ But the IG did not directly enter the partisan fray. In fact, IG Fine

⁴⁷⁹ Susan Schmidt, 'Ashcroft Wants Stronger Patriot Act', *The Washington Post*, 6 June 2003.

maintained that, despite vocal public opposition to the IG's work from Ashcroft,⁴⁸⁰ the Attorney General refrained from interfering with OIG reviews.⁴⁸¹

As a result, the question of the IG's powers became entangled with the state's response to emergencies, and was cultivated as a primary check on executive action. Fine had a wide reputation for his even-handedness and non-partisanship, but his efforts were often used to partisan ends in shaping the War on Terror. Democrats used the reviews documenting FBI misconduct as proof of executive overreach, but partisans of Bush's counterterrorism strategy claimed that the IG's work provided a sufficient review of executive power. In testimony to Congress, Office of Management and Budget (OMB) and Council of Inspectors General on Integrity and Efficiency (CIGIE) head Clay Johnson III used the IGs' legitimacy as a way of reassuring Congress of the built-in checks in the executive branch, and thus justifying expanded executive power; in short, he used the IGs' legitimacy politically to shore up the legitimacy of executive action.⁴⁸²

The OIG disseminated its broad evaluation of the Department's performance annually through its list of 'Top Ten Management Challenges', an annual document addressed to both the Department and the public. This list, statutorily mandated for all OIGs beginning in 2000, provided a way of focusing public attention on the Department's shortcomings. Although the nature of the document led it to focus on management problems and matters of performance-based accountability, in 2006, the Justice OIG began to devote substantial discussion to violations of civil rights and liberties. The discussion reviewed the OIG's ongoing civil rights- and liberties-related reviews (including the National Security Letters (NSL) review, discussed

⁴⁸⁰ Strengthening Role Hearing.

⁴⁸¹ Fine interview.

⁴⁸² Strengthening Role Hearing.

below), but notably passed broad, pre-emptive judgment on the Patriot Act Renewal and its potential for abuse. It cautioned that,

‘investigative and intelligence authorities enacted or expanded in the Patriot Act and the Patriot Improvement and Reauthorization Act of 2005 invest broad new information-gathering powers in FBI agents and their supervisors, often permitting these tools to be approved at the field office level on a minimal evidentiary predicate’.⁴⁸³

The discussion centring on civil rights and liberties in subsequent years retained this detailed and critical stance and reflected a broad range of reviews conducted by the OIG in checking the War on Terror: reviews of the uses of Section 215 orders to obtain business records; of the ‘terrorist surveillance program’ operated with the National Security Agency; of the management of the ‘consolidated terrorist watchlist’; of the FBI’s targeting of domestic advocacy groups; of the use of material witness warrants; of its compliance with FISA regulations, in particular, the use of its pen register and ‘trap-and-trace’ authorities; and of the use of ‘new technologies’ such as drones. In each of these discussions, the OIG framed the challenge as one of balancing liberty and security, but cautioned overwhelmingly that the onus lay on the Department to develop appropriate procedures for protecting liberties; in so doing, it held the Department to a constitutional standard of accountability.

F. Continuing the Constitutional Tradition: Michael Horowitz, 2011-2014

In January 2011, Glenn Fine resigned after eleven years of service, and the post remained empty until March 2012. He left the office being billed as ‘the most powerful law enforcement agent you’ve never heard of’, having established a strong reputation within Congress for rigorous and independent reviews, though a reputation

⁴⁸³ DOJ/OIG, Top Management and Performance Challenges in the Department of Justice – 2006.

still limited in the wider public.⁴⁸⁴ The Department's temporary release from rigorous oversight made room for the FBI to push back against the limitations the OIG had previously levied on it. In June 2011, with the helm of the OIG still empty, the FBI planned to release a new field manual with relaxed standards for privacy.⁴⁸⁵ But in July, President Obama nominated Michael Horowitz, a DC-based lawyer with extensive experience in the Justice Department under both the Clinton and Bush Administrations. Like his predecessors, his nomination languished in the hands of Congress for nine months, between July 2011 and March 2012, before a confirmation hearing took place. Both as a lawyer and a bureaucrat, he specialised in white-collar crime, and was esteemed by both Senate Republicans and Democrats.⁴⁸⁶ Horowitz inherited a large investigation begun by Fine's OIG on the Justice Department gun running programme known as Fast and Furious. The programme, run by the Arizona field office of the DOJ's Bureau of Alcohol, Tobacco, Firearms and Explosives between 2009 and 2010, was designed to track gun smugglers by selling suspected smugglers firearms. The untracked guns were later discovered at crime scenes and were connected with the death of at least one US Border Patrol agent.⁴⁸⁷

On the one hand, the ATF's actions were the actions of an agency in over its head, one that made missteps and misjudgements with fatal consequences. But on the other hand, the mistakes came in part because of a relaxed oversight – an expansion of executive power and wide discretion in getting wiretaps. At stake in the IG report was not only the cause of the fatality, but the use of executive privilege, contempt of Congress, and the violation of Fourth amendment protections in illegal wiretaps. The

⁴⁸⁴ Carrie Johnson, 'Justice Watchdog Looks Back on Ten Years in Post', *National Public Radio*, January 28, 2011.

⁴⁸⁵ 'Backward at the F.B.I.: Overreaching new rules for surveillance threaten Americans' basic rights' *The New York Times*, 19 June 2011.

⁴⁸⁶ David Ingram, 'Horowitz cruising toward DOJ IG post', *The National Law Journal*, 24 October 2011.

⁴⁸⁷ Evan Perez, 'Sides Dig In Over Gun Documents', *The Wall Street Journal Online*, 20 June 2012.

IG found itself faced with administrative ‘mistakes’ that went far beyond ‘limited and necessary invasions of privacy’, and amounted to significant breaches of the constitutional limits of executive action.⁴⁸⁸ As with previous IG investigations, there was a fine line between mistakes and oversights, on the one hand, and executive overreach through the violation of rights, on the other. Although he noted that the mistakes were oversights, Horowitz was adamant that the unchecked authorisations of electronic wiretapping by the ATF were a violation of Fourth Amendment rights.

In its report, the OIG recommended the standardisation of law enforcement policies and procedures across the DOJ, and the systematic comparison of the various law enforcement units ‘to ensure broad uniformity’.⁴⁸⁹ Beyond its interaction with a host of parallel accountability mechanisms, what was significant about the IG’s recommendations was the attempt to standardise national security state procedures on the micro, law enforcement level – that is, it reflected the recognition that the origin of executive overreach is often located in micro-level administrative discretion rather than macro claims of executive privilege. The *Fast and Furious* review also had institutional consequences within the OIG. Because the whistleblowers responsible for sparking the investigation had faced retaliation from federal prosecutors, the OIG established a new ombudsperson in July 2012 to protect and inform all DOJ employees of their right to report misdeeds.⁴⁹⁰ The establishment of this post was strongly supported by Grassley, who championed such a position in all federal OIGs.⁴⁹¹

⁴⁸⁸ ‘IG Report: The Department of Justice’s Office of the Inspector General Examines the Failures of Operation Fast and Furious’, Hearing before the House Committee on Oversight and Government Reform, September 20, 2012, 50-51 [henceforth *Fast and Furious* Hearing].

⁴⁸⁹ DOJ/OIG, *A Review of ATF’s Operation Fast and Furious and Related Matters*, September 2012, 428-29.

⁴⁹⁰ ‘WSJ BLOG/Law: Justice Department Watchdog Creates Whistleblower Post’, *Dow Jones News Service*, 8 August 2012.

⁴⁹¹ Terry Frieden, ‘Justice Inspector General Promises an Ear for Whistleblowers’, *CNN Wire*, 8 August 2012.

Like his predecessors, Horowitz took on reviews whose subject matter scraped against highly partisan and ideologically charged issues. And like his predecessors, he stopped just short of making his reviews political. A 2014 review of the FBI's use of forensic evidence – the topic of some of Bromwich's reviews nearly twenty years earlier – unveiled that the evidence on which sixty-four death row cases had been decided rested on 'flawed forensic evidence and overstated testimony'.⁴⁹² Yet the IG's monitoring over time had tangible effects. The Department set up a task force between 1996 and 2004 to review previous FBI cases and to inform the relevant parties. The task force itself, however, provided little accountability, excluding many categories of cases and not reporting findings that incriminated the FBI. But when the IG released a review of the task force's findings in 2014, it discovered evidence that three men had been sentenced using faulty work, and led to the exoneration of all three men.⁴⁹³ From a broader perspective, the reviews provided significant data to support anti-death penalty advocates, and was quickly cited in national news outlets.

II. Shaping the IG's Role: The Nature of IG Investigations

The limits of the IG – as they were conceived by individual IGs in the DOJ – also played a role in shaping the bureaucratic contours of the OIG and in nature of the reviews' effects. In a 1997 article published in the *Georgetown Law Journal*, Bromwich laid out a distinctive conception of the IG:

‘We conduct investigations primarily to determine what happened rather than to bring prosecutions. [...] Because of the impetus behind special [IG] investigations – the interest in finding out what happened – this explanatory purpose may, in many cases, rival, or even exceed, the imperative to hold

⁴⁹² ‘FBI Malfeasance Undercuts Death Penalty’, *The Charlotte Observer*, 22 July 2014.

⁴⁹³ Spencer S. Hsu, ‘Report: “Irreversible Harm” When FBI Didn’t Reveal Flawed Lab Work in Death-Row Cases’, *The Washington Post*, 16 July 2014.

individuals accountable, either through the criminal process or through administrative discipline'.⁴⁹⁴

Although Bromwich contrasted this narrative-building vision with accountability (understood in the vernacular sense of sanctions), he in fact described a key moment in the broader process of accountability: the gathering of information and the subsequent construction of an explanatory narrative. This narrative-building function of the DOJ IG, explicitly cultivated by Bromwich and his successors, was the focal point of the OIG's identity, but also what permitted its broad use by external actors.

It was a precedent followed by subsequent Justice IGs. In Congress's interrogation of Glenn Fine following the first September 11 detainees review, Senator Arlen Specter raised the issue of the IG's scope of responsibility, and stressed the ambiguity of its role.

Specter: 'Does your department, the Inspector General, get involved at all with a case like Padilla on raising a question as to whether there is a justifiable basis for denying access to court-appointed counsel?'

Fine: 'No, we have not and we do not. I believe that it is a Presidential decision to make the determination that someone is an enemy combatant and that they are held by the Department of Defense.'

Specter: Well, there is a pretty fine line as to where the Department of Justice ends and the Department of Defense begins [...] You have the case of Yasir Hamdi where the District Court for the Eastern District of Virginia questioned the Government's affidavit as to whether there was a justification for designating Hamdi as an enemy combatant. The court said it fell far short, and that case is now on appeal. Does your role as Inspector General have anything to do with that?

Fine: No, it really does not. We do not get involved with court processes or the litigation decision. [...]

Specter: Well, Mr Fine, the Department of Justice is the entity which is fighting to preserve the President's enemy combatant regime, that is, including the denial of access to counsel. Doesn't that implicate the Inspector General where the Department of Justice is taking that position?

⁴⁹⁴ Michael R. Bromwich, 'Running Special Investigations: The Inspector General Model', *Georgetown Law Review*, Vol. 86, 1998, p. 2037, 2043.

Fine: [...] I do note that litigation decisions by Department attorneys are actually not subject to the Inspector General's authority. They are subject to the authority of the Office of Professional Responsibility.'

Fine's reluctance to adopt a more expansive vision was again countered by Specter:

Specter: 'It also seems to me, Mr Fine, that you ought to take a close look at where the Department of Justice is acting, and the internal decision to make it to the Office of Professional Responsibility I would suggest does not bind you, that you have very broad powers as Inspector General. And the Congress has been very active in giving those broad powers [...] I would urge you to move into those gray areas and to cross those dotted lines'.

In responding to these questions, Fine articulated a circumscribed conception of the IG's role, and in particular, the scope of the Justice Department's IG. Not only was the court's activity outside the IG's remit, but also legal matters more generally, matters he deemed the responsibility of the OPR. Yet Fine's restrained conception of his role did not limit the thrust of the review in question; this particular review implicitly challenged the law by simultaneously finding serious fault with actions that were technically within the boundaries of the law. He also ceded a role to other mechanisms of accountability. When pressed as to why the OIG had not taken up a review of 9/11 detainees under the Material Witness Statute, he noted that he did not 'want to interfere with the ongoing criminal investigations' and that 'many of these are subject to oversight by courts and we try not to interfere with the courts' processes'.⁴⁹⁵

Michael Horowitz encountered similar congressional pressure in the hearing on *Fast and Furious*. Once again, Congress pushed the limits of the IG's position. In his questioning, Representative Darrell Issa (R-CA) demanded of the IG: 'will you be looking into or doing any potential criminal referrals, which is within your authority?' In his response to Issa's questioning, Horowitz echoed Bromwich's statement of ten

⁴⁹⁵ Testimony of Glenn Fine, Lessons Learned Hearing, p. 15.

years earlier in asserting that the IG's task was to lay out the facts in a narrative, and to leave the interpretation of that narrative to the Congress. Horowitz explained the IG's role thus:

‘In doing this review, our standard was whether we could draw a decision, a judgment based on the evidence [...] and what we decided was we needed to put out the facts of what we found; others can draw conclusions [...] I didn't speculate as to what I might do as a prosecutor’.⁴⁹⁶

Fine and Horowitz's self-distancing from judicial processes highlighted the different natures of the two mechanisms of accountability. Whereas courts take as authoritative judicial precedent or legislative history, the IG measured the agency's actions against a range of internal policies and statutes.⁴⁹⁷ Moreover, even when a review addressed an issue of democratic import, the IG did not use constitutional language of rights or separation of powers – its diagnoses were often framed in terms of procedural mistakes and wider ‘problems’; yet by choosing problems that led to rights’ abuses or executive overreach, the IGs were able to address such issues without adopting the terms as such, and pursued violations of a constitutional nature. Paradoxically, the IG's differences from the courts afforded it certain comparative advantages that contributed to the overall strength of many of its reviews. Its proximity to the Department permitted it to provide specific recommendations of a highly technical nature, and to enter into a discussion with the Department about the precise contours of the reforms. And by refusing to offer a political interpretation of the topic, the narratives drew legitimacy from their neutrality and thus invited their further use in political processes of accountability.

The DOJ IG's work also differed from independent counsel investigations, another congressional tool of accountability that issued from the Ethics in

⁴⁹⁶ Fast and Furious Hearing, p. 49.

⁴⁹⁷ Shirin Sinnar, ‘Protecting Rights From Within? Inspectors General and National Security Oversight’, 65 *Stanford Law Review*, 2013, p. 43-45.

Government Act of 1978. The remit of the IG is more expansive than that of a special counsel, which is limited to circumstances in which specific allegations are levied against certain members of the government, and when the Justice Department cannot investigate such allegations because of conflict of interest. The presence of an IG in the Justice Department thus filled a gap in the fabric of the national security state accountability. IGs, however, are fundamentally limited in their inability to prosecute; they must refer their cases to US Attorney's Offices or to the Department of Justice's Criminal Division or Civil Rights Division.⁴⁹⁸

III. Conclusion

The DOJ IG grew from a glaring omission in the first class of 1978 IGs to an OIG of tremendous repute. All of the DOJ IGs adhered to a philosophy of 'laying out the facts' and building narratives rather than passing direct judgment. Yet this 'restrained' vision of the IG's role permitted wide-ranging reckoning with the propriety of the department's behaviour, and the legitimacy that such a conception afforded invited external actors to use the narratives to hold the executive to account on multiple fronts. The reviews often detailed procedural infractions, but the force of many of the reviews lay in their implicit challenge to the scope of executive action through standards, administrative reform, and legal challenges. Without an overt judgment about the propriety of a given action, the diagnosis that a wrong had been committed – albeit without recourse to the language of rights or executive abuse – was often enough to prompt congressional interpretations of executive misdeeds, attract media attention, and influence concurrent litigation. Through a much wider

⁴⁹⁸ Michael R. Bromwich, 'Climate the Leads to IG Handling', *Journal of Public Inquiry*, Spring 1997.

form of ‘compliance monitoring’ – that is, compliance with IG standards for agency propriety – the IGs were able to effect reforms that shaped the norms and the institutional framework in which accountability structures operate. The process of accountability relied on a mutually reinforcing set of actors who used the legitimacy of the IG’s narratives as the basis for congressional oversight and independent litigation.

CHAPTER 8.
A Constitutional IG at Justice:
Forging Democratic Norms in the War on Terror, 2002-2010

*'What man art thou that, thus bescreened in night,
So stumblest on my counsel?'*

-William Shakespeare, *Romeo and Juliet*, Act II, Scene ii

I. Introduction

The Justice IG produced a number of reviews that monitored various aspects of the War on Terror, partly stemming from the office's mandate to assess compliance with Section 1001 of the Patriot Act, which protects civil rights and liberties in relation to Patriot Act activity. Alongside these reviews, many standard audits and investigations took place to patrol the Department's management challenges and evaluated its efficiency and effectiveness. However, the reviews analysed below demonstrate the Justice OIG's consistent pursuit of democratic accountability. They highlight how the IG can shape legal and administrative norms and implicate a broader set of actors in the process of accountability.

Individual reviews did not always lead to direct accountability, understood in the vernacular sense of punishment or compensation for victims. The force of the reviews lay in their broader effect on *law*, *standards*, and *administrative procedure*, all of which comprise the institutional framework for delimiting executive action, and finally in the way these reviews were used by a broader 'web' of political actors. Moreover, these reviews pulled in and reinforced the actions of a variety of other actors in Congress and civil society in bringing the executive's behaviour under scrutiny. In this sense, the IG contributed directly to a broader web of accountability

by shaping the norms of accountability on the one hand, and providing a narrative link between the internal workings of government and the broader public.

*II. The War on Terror Reviews*⁴⁹⁹

A. The September 11 Detainees Reviews

In response to a number of allegations of abuse, including an Amnesty International report that alleged the denial of human rights under international law, the OIG undertook an investigation of the treatment of September 11 detainees.⁵⁰⁰ This series of investigative reports and subsequent follow-up analyses – a body of work that Fine later claimed was his office’s most significant achievement – documented significant ‘problems’ in the FBI and INS’s handling of aliens detained after September 11.⁵⁰¹

Four reviews between June 2003 and March 2004 evaluated the treatment of September 11 detainees. The first report, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks*, retains neutral language, avoiding the term ‘abuse’ and preferring ‘problems’.⁵⁰² Nonetheless, it was damning in what it unveiled. Crucially, the report distinguished between the letter of the law and spirit of the law. Senator Orrin Hatch (who would later criticise the FBI) initially commended

⁴⁹⁹ The two reviews under analysis in this chapter have also been discussed in Shirin Sinnar’s excellent (2103) article, ‘Protecting Rights From Within?’. I chose to focus on these two reviews, with the risk of some redundancy, because they are two of relatively few DOJ OIG reviews that address rights concerns directly and explicitly, and they are illustrative of the potential for an IG to provide an effective check on the executive in a period of emergency governance.

⁵⁰⁰ Steve Fainaru, ‘Justice Department to Examine Treatment of Detainees at 2 Jails’, *The Washington Post*, 3 April 2002.

⁵⁰¹ Marcia Coyle, ‘Walking a Fine Line’, *The National Law Journal*, 24 January 2011.

⁵⁰² See also Sinnar, 1066.

the FBI's actions by citing the report: 'Like the recent court decisions upholding actions by the Department of Justice, the inspector general's report validates that despite partisan attacks, the department is fully within the law in seeking to protect the American people'.⁵⁰³ But the OIG's conception of accountability extended beyond this and emphasised the 'significant problems' with the implementation of the law.

The report cited infractions in multiple areas.⁵⁰⁴ First, the FBI failed to differentiate between terrorist suspects, and aliens found incidentally to the investigation of terrorism. Second, the INS failed to issue a 'Notice to Appear' (the document with the notice of charges) for over a month, which then stymied the detainees' capacity to seek legal counsel. Third, the FBI maintained an informal 'hold until cleared' policy, based on the flawed assumption of a speedy clearance process. This resulted in a host of detainees being confined over a period of months (average of eighty days) without a simultaneous clearance investigation. Fourth, the Justice Department followed a 'no bond' policy to hold detainees for the duration of the clearance investigations, despite concerns raised by the INS about the legality of this policy, a conflict of interpretation unaddressed by the Department. The Department, moreover, altered its own policy with respect to the INS's detention authority in January 2002, when it began to permit the INS to remove aliens without FBI permission. Finally, the report disclosed numerous instances of substandard conditions of confinement, including differential treatment between prisons, patterns of physical and verbal abuse, and inability to access legal counsel. The report issued twenty-one recommendations that focused on the need for clear and consistent

⁵⁰³ Quoted in Christopher Smith, 'Hatch OKs Hearing on Detentions', *The Salt Lake Tribune*, 4 June 2003.

⁵⁰⁴ DOJ/OIG, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks*, June 2003, [Henceforth September 11 Review].

policies, information sharing, streamlining the clearance procedures, and improving the confinement conditions of aliens.

The initial report became ‘the talk of the law enforcement and civil rights communities’, partly because so many groups had failed obtain information about the immigrants detained after 9/11.⁵⁰⁵ The report – and the subsequent reviews of the Department’s implementation of its recommendations – garnered tremendous public attention, a fact that Fine himself attributed to the OIG’s unparalleled legal access to DOJ information (See Table 7.2). The Attorney General refused to admit wrongdoing in response, stating that ‘we make no apologies’ for detaining the illegal immigrants after September 11⁵⁰⁶ and also requested that Fine make modest alterations to the report (Fine declined).⁵⁰⁷

Three months after the first report was issued, the OIG issued a second report analysing the steps the DOJ and DHS had taken to implement the reforms. While it acknowledged the steps the departments had taken, this follow-up report was similarly critical of the Justice Department’s handling of the emergency. The vast majority of the twenty-one recommendations were left open by the OIG, indicating that the DOJ’s response did not fulfil the OIG’s criteria for successful resolution (and thus, for accountability). In response to the DOJ’s efforts to create objective criteria in alien classification decisions, the OIG argued:

‘while we agree with the statement in the DOJ response that the specific criteria to be used during an emergency will depend, to some extent, on the nature of the emergency, we continue to believe that the FBI should develop general criteria and guidance to assist its field offices in making more consistent and uniform assessments’.⁵⁰⁸

⁵⁰⁵ Eric Lichtblau, ‘Report on Detainees Shines a Brighter Spotlight on an Inspector General’, *The New York Times*, 5 July 2003.

⁵⁰⁶ Eric Lichtblau, ‘Ashcroft Seeks More Power To Pursue Terror Suspects’, *The New York Times*, 6 June 2003.

⁵⁰⁷ Lichtblau, ‘Report on Detainees’, 5 July 2003.

⁵⁰⁸ *Analysis of Department of Justice and Department of Homeland Security Responses to The September 11 Detainees Report*, September 5, 2003 [Henceforth Second September 11 Review]

This rebuttal to the DOJ's response negated the notion that the executive branch is entitled to free reign in times of emergencies, and articulated a conception of how the Justice Department should act in times of emergency by stressing the need for clear and uniform guidelines.

In December of 2003, the OIG issued its *Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York*, an in-depth analysis of the prison with the worst record of the detainee abuses, and similarly followed this with an analysis of the implementation of its recommendations in March 2004. The OIG's analysis in January 2004, *Analysis of the Second Response by the Department of Justice to Recommendations in the Office of the Inspector General's June 2003 Report on the Treatment of September 11 Detainees*, continued to point to the need for specific policies to reign in executive behaviour in times of emergencies. The OIG analysis stated that '[w]e continue to believe that the DOJ should develop a process – outside its normal processes – that would require a rigorous re-evaluation of policies and operations implemented during a national crisis'.⁵⁰⁹ In response, the DOJ countered that such reforms were 'not necessary and that it might be counterproductive to establish a new and separate bureaucratic process to evaluate policy decisions during a period of national crisis'.⁵¹⁰ The report documents a written conversation between the Department and the OIG regarding the specific development of such procedures and information sharing systems (including the Terrorist Threat Integration Center, Terrorist Screening Center, and the National Name Check Unit).

⁵⁰⁹ Ibid.

⁵¹⁰ Ibid.

i. Effects:

By 2006, all of the twenty-eight recommendations had been resolved with one exception. This outstanding recommendation called for a memorandum of understanding (MOU) to be finalised between DOJ and DHS regarding the system for managing emergencies that involve alien detainees.⁵¹¹ The OIG's continuing oversight of the FBI's implementation of its recommendations, detailed in its follow-up reports and semi-annual reviews, pressured the FBI into compliance. The review detailed the FBI and BOP's failure to comply with existing regulations for prisoner treatment, but also highlighted the *lack* of uniform procedure that had given rise to abuses. For example, the review 'encountered a significant variance of opinion among MDC staff members regarding what restraint and escorting techniques were appropriate for compliant and noncompliant inmates' – in short, it criticised not only the use of administrative discretion but the very existence of it.⁵¹² But the review's primary diagnosis was one that identified a series of rights abuses. Many of the recommendations pointed to abuses such as the illegal recording of detainees' conversations with their attorneys, the use of abusive language and behaviour towards the detainees, and the excessive and inappropriate use of strip searches. Through the construction of the narrative, it contributed both to traditional compliance monitoring, but also to a deeper and more wide-ranging form of constitutional accountability that evaluated the FBI and BOP's actions against a measure of rights abuse.

ii. Standards:

⁵¹¹ 'Top Management and Performance Challenges in the Department of Justice – 2006', Department of Justice Office of the Inspector General.

⁵¹² DOJ/OIG, *Analysis of the Response by the Federal Bureau of Prisons to Recommendations in the OIG's December 2003 Report on the Abuse of September 11 Detainees at the Metropolitan Detention Center in Brooklyn, New York*, March 2004.

The reviews articulated a set of standards for the confinement conditions of aliens and their treatment. Although the effect of the September 11 Detainee review was to advance a standard of rights' protection, it did so without using the language of rights as such, but rather by establishing an administrative framework limiting agency discretion. Many of the recommendations demanded the creation of specific definitions. These included the establishment of a detainee classification system, the definition of 'what constitutes extraordinary circumstances and the reasonable period of time when circumstances prevent the charging determination from being made within 48 hours', and the formalisation of a national emergency management system.⁵¹³ The import of such a recommendation should not be understated. The injunction to create a separate, legally bounded emergency regime to curtail administrative discretion maps onto the theoretical debate over the best way for liberal democracies to prevent, or circumscribe, 'constitutional dictatorships' in times of perpetual emergency. This standard, as articulated by the IG review, directly supports a vision of emergency governance as needing to be inscribed and limited in law (a view described by legal scholars Eric Posner and Adrian Vermuele as the 'liberal legalist' stance).

The reviews also prompted the FBI to define a "subject of interest" who would meet the criteria for detention' as 'those individuals whose name and identifying information appear in the Terrorist Screening Center (Identities Tracking Database), or the circumstances surrounding the subject's detention would indicate a

⁵¹³ Testimony of Glenn Fine, 'Lessons Learned – The Inspector General's Report on the 9/11 Detainees' Hearing, Senate Committee on the Judiciary, June 25, 2003 [henceforth Lessons Learned Hearing].

pending act of terrorism’.⁵¹⁴ A further definitional recommendation was for the creation of a ‘unique Special Management Category’ for ‘aliens arrested on immigration charges who are suspected of having ties to terrorism’ and attendant procedures to process and handle such detainees; this led the Bureau of Prisons to develop a new policy that both institutionalised this category and developed procedures and training guidelines.⁵¹⁵ In short, the reviews spurred numerous definitional innovations that contributed to the legal fabric of the War on Terror: the development of new categories and criteria to correct the ambiguities that gave rise to rights abuses seen in the detainees (and in similarly underspecified categories such as ‘illegal enemy combatant’).

While recognising both the extraordinary circumstances in which, and pressures under which, the FBI operated, the reviews interpreted the violations in much wider terms, stating that ‘the FBI’s initial classification decisions and the untimely clearance process had enormous ramifications for the September 11 detainees’ and that ‘the classification of the detainees and the slow clearance process also had important ramifications on their conditions of confinement’.⁵¹⁶ In this way, the reviews held the Department’s agencies to an implicit standard of rights without needing to use the term as such; the IG’s overall diagnosis of wrongdoing went above and beyond the systemic problems and procedural violations that comprised the bulk of the report.

iii. Procedural Reform and Administrative Law:

⁵¹⁴ DOJ/OIG, *Analysis of the Second Response by the Department of Justice to Recommendations in the Office of the Inspector General’s June 2003 Report on the Treatment of September 11 Detainees*, 4 [henceforth *Analysis of Second Response*].

⁵¹⁵ *Analysis of Second Response*, January 2004, p. 16.

⁵¹⁶ September 11 Review, Chapter 10.

Given that many of the egregious ‘problems’ stemmed from a failure to follow procedure, or from a lack of procedural guidelines, procedural reform formed the backbone of the IG’s recommendations. They led to reforms regarding information sharing, clearance procedures, and formulating clear and consistent policies. The BOP also developed a policy of a two-day time frame in which a detainee’s detention conditions must be normalised.⁵¹⁷ And in response to the OIG’s recommendations that the FBI devote appropriate resources to conduct timely clearance investigations and to develop clearer classification guidelines, the FBI developed priority criteria for investigations. The procedural reforms suggested by the reviews were not merely isolated reforms: together, they represented a coherent vision of an emergency response framework embedded in agency policy. For instance, the reviews documented a protracted conversation between the Bureau of Prisons and the OIG regarding its procedures for high security inmates.⁵¹⁸ Once again, this reinforced the OIG’s insistence on developing an emergency-specific regime of policies despite the FBI’s reluctance.

iv. Legal implications:

Most significant in the September 11 reviews were the implicit challenge to existing law and the pre-emptive challenges to future legal justifications. As Fine stated in a hearing,

‘we did not find that anyone intentionally violated the law or the legal rights of detainees. We did find – and we point out – that there was some concern and some dispute within the Department about the legality of holding detainees for more than ninety days beyond the removal period. The Office of

⁵¹⁷ Analysis of Second Response, Recommendation 12.

⁵¹⁸ *Analysis of the Response by the Federal Bureau of Prisons to Recommendations in the OIG's December 2003 Report on the Abuse of September 11 Detainees at the Metropolitan Detention Center in Brooklyn, New York*, Recommendation 4; see also Sinnar, p. 1071.

Legal Counsel subsequently opined that this was permissible. I note that that is still an ongoing legal issue in the courts.⁵¹⁹

In this way, Fine recognised the continuing legal ambiguity of the issue. But the OIG's 2003 analysis of the INS's corrective actions not only condemned the INS and the department for failing to address the issue of prolonged detention without review, but also implicitly challenged the concurrent OLC opinion clearing the INS of some responsibility:

In the aftermath of the September 11 attacks, whether the INS legally could hold September 11 detainees after they had received final orders of removal or voluntary departure orders to conduct FBI clearance investigations was the subject of differing opinions. A February 2003 OLC opinion concludes, however, that the INS can do so if the delay is related to the proper implementation of immigration laws, including investigating whether the alien has terrorist or criminal connections. A pending lawsuit also is addressing this issue. *Regardless of the outcome of that lawsuit*, our review found that the INS and the Department did not address this issue in a timely or considered fashion.⁵²⁰

The IG verdict suggested that the INS and the department had engaged in wrongdoing *despite* post-hoc legal justification by the OLC and (possible) clearance by the courts.

v. *The IG Reviews in the Web of Accountability:*

The force of the reviews was extended by their instrumental use by other actors. Congress called three separate hearings based directly on the reviews.⁵²¹ In these hearings, Congress adopted the IG's analysis of the main problems, and supported the IG's solution. Taking the IG's recommendations as the starting point for his own proposal, Sen. Orrin Hatch (R-UT) argued that '[t]he DOJ and DHS need

⁵¹⁹ Testimony of Glenn Fine, Lessons Learned Hearing.

⁵²⁰ September 11 Review, Chapter 6, emphasis added.

⁵²¹ U.S. Department of Justice, Hearing before the House Committee on the Judiciary, 108th Congress, June 5, 2003; Lessons Learned – The Inspector General's Report on the 9/11 Detainees, Hearing before the Senate Judiciary Committee, 108th Congress, June 25, 2003; Oversight Hearing: Law Enforcement and Terrorism, Hearing before the Senate Judiciary Committee, 108th Congress, July 23, 2005.

to develop a crisis management plan that clearly identifies their respective duties should another national emergency occur. Specific standards should be adopted [...] to classify subjects of terrorism investigations appropriately, and to process and complete clearance investigations expeditiously'.⁵²² The authority of the IG review was thus used as the basis for drafting legislation that aimed to institute an emergency governance regime, despite the FBI's resistance to developing such a regime.⁵²³

Concurrently to the IG investigation, a number of the detainees filed lawsuits to challenge their status. In *Turkmen v. Ashcroft*,⁵²⁴ filed by the Center for Constitutional Rights (CCR) in April 2002, seven detainees in the Metropolitan Detention Center challenged then Attorney General John Ashcroft on the grounds that their First, Fourth, and Fifth Amendment rights had been violated in their detention. Although the defendants initially moved to dismiss the claims, the information in the IG reviews was subsequently used as the basis for two amendments to the original claims.⁵²⁵ Ultimately, five of the seven were awarded a \$1.26 million settlement.

vi. Limits of the reviews

As consequential as the September 11 reviews were in forging norms of accountability, there remained important limitations to the accountability they were able to effect. The narrative function of the reviews prevented it from passing direct judgment on a variety of related concerns. As stated in the reviews themselves, their scope was limited: they addressed the very particular circumstances of the detainees

⁵²² Lesson Learned Hearing, Sen. Orrin Hatch (R-UT).

⁵²³ Congress also referred to the IG narratives when drafting the Civil Liberties Restoration Act bill, which ultimately died. H.R. 4591 (108th).

⁵²⁴ *Turkmen v. Ashcroft*, 02-civ-2307 (E.D.N.Y. filed April 17, 2002).

⁵²⁵ Center for Constitutional Rights Cases, *Turkmen v. Ashcroft*, <http://ccrjustice.org/Turkmen-v-Ashcroft>

held in two detention centres, and left aside the broader phenomenon of detainees in the War on Terror (i.e., those held under the Material Witness statute, those held for non-terror related charges within a terror investigation, and those held in facilities outside the US). They also only lightly challenged the legality of some of the policies in place, such as the ‘hold until cleared’ policy that is arguably at odds with the principle of ‘innocent until proven guilty’.⁵²⁶ Finally, the recommendations did not curtail executive authority to detain aliens, and some of the definitional recommendations suggested by the reviews, such as defining the ‘extraordinary circumstances’ led to the agencies adopting standards ‘so broad as to permit future mass detentions with delayed notice under circumstances even less exceptional than the September 11 attacks’.⁵²⁷

vii. Conclusion

The narrative provided in the September 11 Review formed the basis of various processes of accountability on multiple fronts, by multiple actors. The reviews had many direct effects on the Department and contributed to the development of an emergency regime as well as a set of categories specific to the conduct of the War on Terror. But just as important was its interactive role in other processes of accountability: its instrumental use by Congress, in parallel litigation, and as a source of public information.

B. The National Security Letters Reviews

⁵²⁶ Analysis of Second Response, Recommendation 6.

⁵²⁷ Sinnar, p. 1077-78.

The second major assault on the Administration's handling of the War on Terror by the OIG came with Fine's investigation into the use of National Security Letters (NSLs). Between 2007 and 2010, the OIG produced a series of three reports on the use of NSLs since the September 11 attacks. NSLs are requests for three different types of business records: subscriber and transactional information for phone and internet usage; full credit reports; and financial records.⁵²⁸ They were invented in the nineteen-seventies for terrorism and espionage investigations, but under the Patriot Act were expanded to cover individuals not directly linked to either of these categories.⁵²⁹ Sections 358 and 505 of the Patriot Act widely expanded the FBI's capacity to issue them by removing the previous requirement of a court approval for the issuance of an order, but it did stipulate that it must be signed by a supervisory official. Moreover, the Act relaxed the standards of issuance from the materials of individuals *suspected* of terrorist activities, to those records that are "sought for" or "relevant to" an authorized intelligence investigation".⁵³⁰ The OIG had a mandate to evaluate the proper implementation of the Patriot Act, but it was not required to investigate specific tools. By 2007, there were five years of semi-annual IG reports asserting the DOJ's responsible use of Patriot Act provisions.

Fine's office, like most OIGs, usually depended on external complaints to launch an investigation. In the case of National Security Letters, however, this was an impossible situation: people whose phone records had been requested by the FBI would have no way of knowing that they were the subject of an FBI search, and thus would have no way of challenging such an action. Fine was aware of this, but even as of 2005 had not begun an independent investigation of the use of NSLs (or of any

⁵²⁸ Senate, NSL Inspector General Report, Congressional Record, 28 March 2007.

⁵²⁹ Barton Gellman, 'The FBI's Secret Scrutiny; In Hunt for Terrorists, Bureau Examines Records of Ordinary Americans' *The Washington Post*, 6 November 2005.

⁵³⁰ NSL Report, March 2007.

specific provisions of the Patriot Act).⁵³¹ Nor did calls from the media for an IG review of the practice, including a number of investigative pieces⁵³² and a subsequent editorial⁵³³ in the *Washington Post*, prompt Fine and Deputy IG Paul K. Martin to undertake a special investigation. However, Congress caught wind of the media storm and, in the renewed Patriot Act, included new requirements for the Justice IG to report specifically on NSLs.⁵³⁴

The use of NSLs was initially difficult to track, from the perspective of the IG. The Patriot Act permitted their use and had widened the criteria with which they could be legally issued from an individual under suspicion to anyone ‘relevant’ to a terrorist investigation.⁵³⁵ Their use was thus legal and, in the semi-annual reports on the implementation of the Patriot Act, the IG initially found no violations resulting specifically from internally generated complaints. However, the first mandated review of NSLs unearthed a slew of breaches of the law, both in their use and in the parallel record keeping. The review suggested that the FBI lacked effective controls on their use and that it vastly underreported to Congress the number of NSLs it had issued. Its criticisms were also levelled at the failure of the FBI to report a number of possible violations to the Intelligence Oversight Board (IOB); the failure to ‘cross check the approval ECs [electronic communications] with the text of the proposed NSLs; [...] to issue comprehensive guidance describing the types of NSL-related infractions that needed to be reported’; and at the general confusion regarding the extent of available authority within the NSL statutes.⁵³⁶ According to the review, the violations were not, strictly speaking, criminal misconduct, or of illegal intent, but

⁵³¹ Gellman, ‘The FBI’s Secret Scrutiny’, 6 November 2005.

⁵³² ‘Senators Question Terrorism Inquiries’, *The Washington Post*, 7 November 2005.

⁵³³ ‘Checking FBI Spying’, Editorial, *The Washington Post*, 10 November 2005.

⁵³⁴ ‘Tailor the Patriot Act’, Editorial, *The Washington Post*, 19 November 2005.

⁵³⁵ ‘Senators Question Terrorism Inquiries’.

⁵³⁶ DOJ/OIG, *A Review of the Federal Bureau of Investigation’s Use of National Security Letters*, March 2007 [henceforth NSL Review], p. xxxiii.

rather questions of procedure, clarity, reporting, and conformity with existing statutes and policies.⁵³⁷ They were, essentially, mistakes. The DOJ emphasised this conclusion repeatedly in its Press Releases.

But this was not how the actions were interpreted by Congress. Senator Patrick Leahy's response was that '[t]he point is that it was not honest [...] The FBI], of all people, have to follow the law [...] So I want to make clear that it is not a matter of technical violation'.⁵³⁸ This conclusion, shared by many of Leahy's Democratic colleagues, raised the question of the proper remedy: better guidelines, or statutory reform? The issue came into sharper focus with the most contentious violation revealed by the IG report: the Communications Analysis Unit's (CAU) use of so-called 'exigent letters', which can be signed by Counterterrorism personnel not authorised to grant NSLs. The IG Report concluded that the use of exigent letters 'without first issuing NSLs or grand jury subpoenas [...] circumvented the requirements of the [...] NSL statute and violated the NSI [National Security Investigation] Guidelines and internal FBI policies'.⁵³⁹

The report offered ten recommendations, ranging from the specific and targeted (specifying the type of guidance that should be issued to field offices regarding NSL use) to the vague ('[t]ake steps to ensure that the FBI does not improperly issue exigent letters').⁵⁴⁰ The DOJ response was to announce a series of actions for increasing accountability that included further internal review; new procedures for handling NSL records; coordinating bodies within the DOJ to implement accountability procedures; initiating ongoing audits and reviews of the

⁵³⁷ NSL Review, p. xxxiii.

⁵³⁸ 'Misuse of Patriot Act Powers: The Inspector General's Findings of Improper Use of the National Security Letters by the FBI' Hearing, Senate Committee on the Judiciary, 21 March 2007 [henceforth Misuse of Patriot Act Hearing]

⁵³⁹ NSL Review, p. xxxviii.

⁵⁴⁰ NSL Review, p. xlix.

practice of using NSLs; publicising the IG's report;⁵⁴¹ and established the Integrity and Compliance Program (ICP) 'to identify and mitigate legal compliance risks within the FBI'.⁵⁴² Finally, the FBI's use of 'exigent letters' was formally terminated in a directive from March 5, 2007.⁵⁴³

Congress responded strongly to the report, and held multiple hearings.⁵⁴⁴ In addition to prodding the FBI to undertake internal reforms, it spurred Congress to revisit the question of the scope of the Patriot Act, including the National Security Letter Reform bill of 2007, introduced by Senator Russell Feingold (D-WI), which proposed limiting the scope of information that could be acquired by NSLs and tighten the standards for granting them.⁵⁴⁵ Although the bill died, it prompted even Republican senators to challenge the extent of executive overreach in the context of the War on Terror. Senator Charles Grassley (R-IA) was also concerned with how FBI officials would be held to account, and suggested that an independent review of the letters was necessary. Fine countered that the FBI's accountability was an internal matter, and argued that 'as a result of the report, the Attorney General has asked the Department to look at the conduct of attorneys, as well as the FBI is looking at the conduct and the performance of its employees to determine accountability'.⁵⁴⁶ He further suggested that the FBI conduct an internal review first, that it 'should look at what happened, and we ought to see what the results are and then see whether it was

⁵⁴¹ 'Department of Justice Actions on FBI Use of National Security Letters', Justice Department Press Releases, 9 March 2007.

⁵⁴² DOJ/OIG, *Federal Bureau of Investigation's Integrity and Compliance Program*, I-2012-001, November 2011.

⁵⁴³ 'Department Of Justice Corrective Actions on the FBI's Use of National Security Letters', Justice Department Press Release, 20 March 2007,.

⁵⁴⁴ In addition to the aforementioned hearings, see also Senate Judiciary Committee, Subcommittee on Constitution, 'Responding to the IG's findings of improper use of NSLs by the FBI', April 11, 2007.

⁵⁴⁵ 'National Security Letters: The Need for Greater Accountability and Oversight', Hearing, Committee on the Judiciary, US Senate, 23 April 2008 [henceforth Greater Accountability hearing].

⁵⁴⁶ Statement of Glen Fine, Misuse of Patriot Act Hearing.

aggressive and thorough or not'.⁵⁴⁷ Despite scepticism that the FBI could effectively self-monitor, Grassley conceded that, nonetheless, the FBI had responded to the report almost immediately by releasing new guidelines for the use of emergency letters and ensuring an 'audit trail' for each letter.

The conclusion that no intentional wrong had been committed brought to the surface the underlying question of whether the real problem lay with the Patriot Act, or merely with compliance with its procedures. Aside from noting that 'it was a lack of guidance, a lack of training, a lack of oversight, [and] inadequate internal controls', Fine was agnostic on this question, stating later only that 'the problem was the implementation over time'.⁵⁴⁸ And when pressed on Congress's role in amending legislation, Fine insisted that he was 'not prepared to recommend a specific legislative piece'.⁵⁴⁹

Yet the OIG ultimately provided greater accountability than the numerous parallel bodies established to check civil liberties violations. Significantly, the OIG measured the FBI's compliance with federal regulation, Department policy, ECPA NSL statute, the Attorney General's NSI Guidelines, and FBI policy.⁵⁵⁰ Whereas in the related investigation into the warrantless wiretap programme, the OPR was denied the security clearances necessary to carry out the investigation, Fine's office was granted access. In addition, part of the review's success stemmed from the willing cooperation of the FBI and the Justice Department, who did not, according to the Report, impede access to documents and databases. The Privacy and Civil Liberties Oversight Board was ignorant of the NSL abuses until it was briefed by the OIG

⁵⁴⁷ Ibid.

⁵⁴⁸ Ibid.

⁵⁴⁹ Ibid.

⁵⁵⁰ Exigent Letters Report, p. 274, 276.

itself, but took the findings into account.⁵⁵¹ Moreover, the review was ‘thorough and careful’ and rigorous in its methodology, using interviews with more than 100 members of the FBI staff, including top-level officials.⁵⁵² And importantly, the report put previously unknown information within the reach of Congress and the public.

In March 2008 the OIG released its second National Security Letters report, *A Review of the FBI's Use of National Security Letters: Assessment of Corrective Actions and Examination of NSL Usage in 2006*. As with the first report, the methodology was rigorous, including analysis of the FBI’s memoranda, top level interviews, field office inspections, and reviewing random samples of most of the NSLs issued in 2006.⁵⁵³ It detailed the steps taken by the FBI to correct its behaviour, such as issuing guidance, training, introducing a new data system, and creating a new Office of Integrity and Compliance (OIC) to check compliance with existing laws and regulations. Despite finding commitment on the part of the FBI to address the problems found in the first report, the second OIG report remained cautious in lauding the bureau and issued seventeen further recommendations (such as staffing the new OIC with more permanent members, and requirements to submit reports of intelligence violations).

The third National Security Letters Report, issued in January 2010, focused directly on the exigent letters, one of the most controversial elements of the two preceding reports. Moreover, it assessed the measures taken by the FBI to hold its own staff to account and provided a long-term view of the FBI’s use of NSLs. The final report uncovered not only a set of individual abuses, but also a wider culture of casual requests for information without the appropriate authorisation, that included

⁵⁵¹ Misuse of Patriot Act Hearing.

⁵⁵² Statement of Sen. Russell Feingold to the President, NSL Inspector General Report, Congressional Record, 28 March 2007.

⁵⁵³ DOJ/OIG, *A Review of the FBI's Use of National Security Letters: Assessment of Corrective Actions and Examination of NSL Usage in 2006*, March 2008 [henceforth NSL Review 2008], p. 3-4.

‘sneak peeks’ at communications services’ databases. The FBI developed a cosy relationship with the communications services, which led to the OIG’s finding that ‘the FBI’s use of exigent letters became so casual, routine, and unsupervised that employees of all three communications service providers sometimes generated exigent letters for the FBI personnel to sign and return to them’.⁵⁵⁴ The violations were not limited to exigent letters, but extended to a host of informal methods for requesting information, and Fine testified that ‘the scope and variety of these informal requests was startling’.⁵⁵⁵

Fine also raised the issue of an undisclosed (classified) legal authority with which the FBI could have secured certain telephone records without the use of exigent letters. It was this authority that the FBI claimed when first confronted with the 2007 NSL Report, and in response, they sought an opinion from the DOJ Office of Legal Counsel (OLC), who supported the FBI’s claims. Fine asserted in his testimony:

‘The OIG Report noted that the FBI’s possible use of this authority had important legal and policy implications, and that the FBI, the Department, and Congress should consider how the FBI would use this legal authority when seeking telephone records. We further recommend that the Department inform Congress of the FBI’s potential use of this legal authority and of the OLC opinion interpreting the scope of this authority’.⁵⁵⁶

In this review, Fine was willing to challenge both the FBI’s and the OLC’s opinions, and prod congressional action by appealing to the contentious legal implications of the FBI’s legal authority. At stake in both the immigrant detention and NSL cases was whether and how the DOJ should establish a parallel emergency regime to control administrative discretion and thus reign in the possibility of executive abuse of power.

⁵⁵⁴ Testimony of Glenn Fine, *The Report by the Office of the Inspector General of the Department of Justice on the FBI’s Use of Exigent Letters and Other Informal Requests for Telephone Records*, Hearing [henceforth Exigent Letters Hearing] before the House Judiciary Subcommittee on Constitution, Civil Rights, and Civil Liberties, 14 April 2010.

⁵⁵⁵ Ibid.

⁵⁵⁶ Ibid.

i. Effects:

The immediate effect of the reviews was the termination of the use of NSLs after the first report.⁵⁵⁷ The first review also spurred the creation of an Office of Integrity and Compliance (OIC) with the FBI, an internal review body to check compliance with laws and regulations.⁵⁵⁸ It provided an unprecedented level of transparency. Prior to the release of the IG review, the ACLU had attempted to sue the Justice Department for failing to disclose the extent of the government's use of surveillance tools.⁵⁵⁹ Like the FOIA requests on which the suit was based, their efforts were unsuccessful. The IG review, however, placed this information in the public sphere and led to renewed and more specific FOIA requests by the ACLU, many of which were granted.⁵⁶⁰ The publicity also led to public action on the part of the FBI. Beyond public apologies to newspapers by the FBI, the review also led to numerous Bureau officials resigning.⁵⁶¹ And in the investigation leading to the third review (Exigent Letters), the OIG discovered that the FBI deleted some of the records from the databases that had been illegally gathered (but retained many on national security grounds).⁵⁶²

The OIG continued to monitor the FBI's compliance in implementing the reforms. In August 2014, it issued a review of the FBI's progress and revealed that, of the total forty-one recommendations, the FBI had only implemented thirty-one. In the new report, the OIG issued ten additional recommendations that addressed

⁵⁵⁷ Exigent Letters Review, p. 214.

⁵⁵⁸ NSL Review 2008, p. 157.

⁵⁵⁹ American Civil Liberties Union v. Department of Justice, 265 F. Supp. 2d20 (D.D.C 2003).

⁵⁶⁰ 'National Security Letter Gag Order FOIA', Press Release, American Civil Liberties Union, 9 May 2012.

⁵⁶¹ Exigent Letters Review, p. 256.

⁵⁶² Exigent Letters Review, p. 276.

problems found during the periodic compliance reviews.⁵⁶³ Amongst other issues raised, the report underscored the vagueness of relevant legislation and the potential for this to lead to abuses of NSLs. Assessing the parameters of the Electronic Communication Privacy Act (ECPA) NSL statute, the report cautions that ‘[t]he term is undefined, and our review found that it is unclear whether all of the information the FBI receives in response to NSL requests for toll billing records falls within the scope of the statute’, and recommended that the Department propose legislation to clarify the ambiguity.⁵⁶⁴

ii. *Standards:*

As with the September 11 reviews, the NSL reports’ recommendations contributed toward the definition of ‘emergency’ and emergency regimes. The ambiguous and imprecise use of ‘emergency’ and the lack of procedure governing data collection had, on the diagnosis of the IG, led to the improper use of NSLs. After its first review, the FBI responded to the IG’s recommendations by clarifying the circumstances under which the FBI could demand ECPA (Electronic Communications Act)-protected documents or emergency voluntary disclosures; the definition of these circumstances hinged on the definition of ‘emergency’.⁵⁶⁵ The reviews also uncovered inconsistencies in reporting standards to the Intelligence Oversight Board (IOB), and recommended that such standards be specified and issued to all personnel.⁵⁶⁶ More generally, the reviews held the FBI to a standard of

⁵⁶³ DOJ/OIG, *A Review of the FBI's Use of National Security Letters: Assessment of Progress in Implementing Recommendations and Examination of Use in 2007 through 2009*, August 2014 [Henceforth NSL Compliance Review]

⁵⁶⁴ Summary of Findings, NSL Compliance Review, p. 2.

⁵⁶⁵ Exigent Letters Review, p. 275.

⁵⁶⁶ NSL Review 2008, p. 149.

appropriate behaviour beyond that expressed by law. The reviews diagnosed the FBI's practice as wrong 'even if the letters are approved by management, sanctioned by FBI attorneys, part of an established practice, or accepted by the recipients'.⁵⁶⁷

iii. Administrative procedure:

One of the primary contributions of the reviews was to instigate the agency's creation of procedures for the use of data collection under the Patriot Act. In the first instance, they suggested instituting a system for tracking use of NSLs, and recommended a series of reviews checking compliance with procedure by the Office of General Counsel.⁵⁶⁸ But many passages in the reviews' recommendations were redacted, so precise analysis of the provisions in question is impossible. Nonetheless, the IG's intention to specify such procedures in administrative policy was clear.

Although the specific action was redacted, one of the IG's recommendations concerned the policies dictating FBI-media relations; the reports found the NSLs issued in media-leak cases to contain the most egregious abuses.⁵⁶⁹ It recommended that the FBI coordinate with the National Security Division (NSD) and other parts of the Department to develop policies and procedures regarding this relationship, defining the circumstances under which the redacted provision might be used, and 'specifically whether approval by senior FBI officials at the level of an Assistant Director or higher should be required', thus curtailing administrative discretion at the lowest rungs. The review also addressed circumstantial factors. The convenience of the fact that communications providers had been on FBI premises had facilitated the

⁵⁶⁷ Exigent Letters Review, p. 284.

⁵⁶⁸ Exigent Letters Review, p. 282-286.

⁵⁶⁹ Exigent Letters Review, p. 288-89.

issuance of NSLs through methods as informal as ‘post-it notes’. The OIG demanded of the FBI that it develop procedures with this specific contingency written in.⁵⁷⁰

iv. Legal effects:

The NSL reviews challenged the legal structure surrounding the Patriot Act and the FBI’s information gathering procedures. First, the IG reviews identified illegality where courts could not have been involved for lack of knowledge of the exigent letters. Second, the reviews went far beyond mere compliance monitoring by offering judgment on the validity of existing law. In the 2007 NSL review, the FBI General Counsel defended its actions by claiming that voluntary disclosure of records by telecommunications companies in emergencies provided sufficient support for the use of exigent letters; this assertion was based on a provision in the Electronic Communications Privacy Act.⁵⁷¹ However, the IG rejected this argument on the grounds that the FBI had not used the provision at the time of its actions.⁵⁷² Once the FBI received the IG’s admonishment in the first review, it formulated an alternative, retroactive legal justification for their issuance, and asked the Department’s OLC to offer an opinion about the new provision (the specific legal provisions were redacted in the third review).

As in the September 11 Reviews, the OIG challenged the OLC’s opinion by questioning the legality regarding the FBI’s prospective argument for ‘voluntary disclosure’.⁵⁷³ A further unnamed legal provision regarding data collection (seeking telephone records) prompted the IG to recommend that the

⁵⁷⁰ Exigent Letters Review, p. 287.

⁵⁷¹ Exigent Letters Review, p. 262-64.

⁵⁷² Sinnar, p. 1069.

⁵⁷³ Exigent Letters Review, p. 263-64; see also Sinnar, p. 43-45.

‘Department notify Congress of this issue and of the OLC opinion interpreting the scope of the FBI’s authority under it, so that Congress can consider the [Redacted provision] and the implications of its potential use’.⁵⁷⁴

The IG also stressed that the FBI advanced the unspecified provision only after the OIG found repeated misuses of its statutory authority to obtain telephone records through NSLs or the ECPA’s emergency voluntary disclosure provisions’ and recommended that both the Department and Congress formulate controls over the new provision.⁵⁷⁵ The reviews not only contributed to the construction of a data collection regime, but also challenged its proposed legal underpinnings and referred the matter to Congress.

v. *The IG Reviews in the Web of Accountability:*

One of the reviews’ greatest strengths was the transparency it brought to national security instruments. Multiple public interest organisations had attempted to access information relating the FBI’s information gathering, but numerous legal obstacles, such as the ‘gag order’ on recipients of NSLs, made these attempts unsuccessful. The OIG had been privy to documents and information that had been denied and misrepresented to Congress. By placing this information in narrative form, the OIG provided the raw material for further challenges, and was cited as evidence in multiple court cases. On the back of the IG review, a federal appellate court declared the gag order provisions related to NSLs unconstitutional in a case brought against the FBI by the American Civil Liberties Association.⁵⁷⁶ On 14 March

⁵⁷⁴ Exigent Letters Review, p. 288.

⁵⁷⁵ Exigent Letters Review, p. 268.

⁵⁷⁶ *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008).

2013, a district court declared the underlying NSL statute unconstitutional;⁵⁷⁷ Justice Susan Illston cited the IG reviews in her opinion as evidence of the extent of the problem in comparison with the evidence provided in previous court cases.⁵⁷⁸

vi. Limits to the Reviews

In testimony, Fine held to the limits of his position in holding officials to account. When asked about the role of the IG in the oversight process and whether the statutory requirements regarding NSLs needed to be tightened, Fine replied, ‘that is a question for Congress and the administration, and my job here is to provide the facts and to show what happened and show the problems and to let the process work itself out’.⁵⁷⁹ Thus, despite the rigour of the investigation in terms of methodology, the first report’s conclusion was in some ways limited by Fine’s discretion in interpreting his role. Not only was the review mandated by Congress rather than initiated by the OIG, but Fine also restricted the scope of the report to providing a description of the problems that it found, limiting recommendations to non-partisan, procedural reforms that fit within the confines of existing law.

Although the reviews recommended that the FBI adopt more definitional standards, they did not suggest more rigorous constraints to prevent future abuses. The IG also refrained from passing final judgment on the liberty v. security trade-off: despite the constitutional accountability pursued in the reviews, the IG wavered in its first review between condemning the FBI for its illegal practices and recognising the exigencies of national security that led to the breaches. And as with all of the

⁵⁷⁷ Matt Zimmerman, ‘In Depth: The Court’s Remarkable Order Striking Down the NSL Statute’, Electronic Frontier Foundation, 18 March 2013.

⁵⁷⁸ Order Granting Motion to Set Aside NSL Letter, US District Court for Northern California, No. C 11-02173 SI, 14 March 2013.

⁵⁷⁹ Testimony of Glenn Fine, Exigent Letters Hearing, 14 April 2010.

reviews, one of the main limitations on its effects was its reliance on external actors to implement its reforms. While the FBI itself largely adhered to the OIG's recommendations, Congress did not take up the recommendation to regulate the FBI's voluntary disclosure policy.⁵⁸⁰

III. Conclusion

Fine's skill in extracting and synthesising sensitive documents from the Justice Department under Ashcroft was remarkable in an administration known for stonewalling congressional requests for information; members of Congress on both sides of the political spectrum joined forces in condemning Ashcroft's secrecy regarding antiterrorism activity.⁵⁸¹ But more than his doggedness in finagling information, the 'restrained' criticism he levied on the Department attracted visibility without elevating the position of the IG to one of 'bureaucratic dictator'. The guidance provided by his recommendations ultimately provided a concrete set of standards for appropriate action in times of emergency to which other political actors could hold the FBI to account. His strategy was both constructive, in contributing to the legal and procedural framework, and enabling, in providing the external mechanism of accountability with the synthesised information necessary to pursue parallel processes of accountability.

⁵⁸⁰ Exigent Letter Review, p. 263-68.

⁵⁸¹ David H. Rosenbloom, 'The Separation of Powers' in David H. Rosenbloom and Howard E. McCurdy, Eds., *Revisiting Waldo's Administrative State: Constancy and Change in Public Administration*, Washington, DC: Georgetown University Press, 2006, p. 99-100.

CHAPTER 9

From Terror to Hurricanes: Crafting Emergency Governance at Homeland Security

‘The more destruction there is everywhere, the more it shows the activity of town authorities’.

–Nikolai Gogol, *The Inspector General*, Act I, Scene v

I. Introduction

In its first decade, the DHS OIG issued a number of visible and consequential reviews, other robust reviews ignored by the Department and Congress, and weak reviews with few effects beyond immediate compliance monitoring. But its strongest hallmark reviews reflected a conception of accountability that concentrated on performance enhancement and capacity building, and also proposed novel institutional solutions in response to the demands of emergency. Like those of the Justice OIG, the robust reviews were grounded in a well-defined office mission, organised skills, and an independent IG. Many of these reviews were conducted with the support of newly established units within the OIG that concentrated resources and expertise around particular areas, or with the much broader institutional support of the IG community at large. Some of the successful reviews – in the Gulf Coast Recovery oversight – were conducted within the framework of a pioneering model of IG designed for emergency, led in part by the DHS IG himself. The weakest reviews were produced in the absence of a permanent IG, under ineffectual (temporary) leadership and in the tight budget environment following sequestration. The strong, ‘performative’ reviews reflected a distinctive conception of accountability that stemmed from the first two IGs’ ideological preferences and professional backgrounds. The first IG defined his outlook through the ‘lens’ of the aftermath of

9/11: he freely acknowledged his political and ideological commitment to the War on Terror. The second IG expanded the office's focus from counter-terror oversight to include natural disasters (a result of his prior experience at FEMA), but he continued his predecessor's emphasis on performance. The third IG's mismanagement and corruption led the office into disarray. The history of the DHS OIG demonstrates how individual IGs' visions of accountability and strategies can affect the shape of a department. It also reveals how tenuous the capacity of an OIG can be in the absence of strong and permanent leadership.

The birth of the DHS out of the ashes of the September 11 attacks permanently institutionalised emergency governance as a governing paradigm. The guiding principle behind this paradigm, 'homeland security', was sufficiently novel and ill- or loosely-defined to permit wide and differing interpretations of its scope. Most of all, the breadth of this concept permitted any number of policies, strategies and government actions to fall under its umbrella. The DHS OIG was both a product of this ambiguity and a driver in shaping the malleable and rapidly evolving form and focus of its host department. On the one hand, its IGs reacted to the circumstances of its birth by making counter-terrorism the dominant theme in its first years – that is, by interpreting homeland security as primarily relating to terrorism. On the other hand, the exigencies of a diverse succession of emergencies over its first decade contributed to the expansion of this concept to encompass an 'all-hazards' approach to emergency; under these pressures the IGs evolved into a web of overseers who themselves were part of a broader architecture of accountability. Emergency governance thus provoked the erosion of longstanding institutional and conceptual boundaries related to the proper distribution of governmental authority. It challenged a compartmentalised, domain-specific approach to accountability, and forged a

network of oversight between OIGs of different departments, among the branches of government, and with watchdog groups in the wider public. The DHS found itself at the centre of this emerging web.

Although the establishment of DHS was reactive in nature (insofar as it was a direct response to the terrorist attacks), the near consensus in Congress and in the Bush administration favoured a proactive and preventative approach to homeland security policy. The OIG's evolution was heavily influenced by the practical consequences of this shift to 'emergency governance': the office contended with a bureaucratic reordering, and a switch from a purely reactive to a largely preventative action that required planning, prediction, and calculation. This dual reactive and proactive tendency was mirrored in the DHS OIG's own twofold approach to its audits and investigations, which combined a mixture of 'fire alarm' and 'police patrol' methods of accountability.⁵⁸² This provoked exigencies with institutional consequences in the form of permanent sub-offices within the OIG and in the cultivation of a web of oversight with other OIGs.

The DHS OIG's development over the course of its first decade was characterised by experimentation with a network of oversight, on the one hand, and a commitment to efficiency and departmental performance, on the other. Congress crafted the Patriot Act with the DHS IG's role as a protector of civil rights keenly in mind. Yet the DHS OIG focused on developing strong capacities to evaluate and improve the performance of its host department, rather than assessing its adherence to constitutional norms. Because of this bias, the IG's relationship with Congress waxed and waned, and its success in delivering consequential reviews varied over time.

⁵⁸² Mathew D. McCubbins and Thomas Schwartz, 'Congressional Oversight Overlooked: Police Patrols versus Fire Alarms', *American Journal of Political Science*, Vol. 28, No. 1, Feb., 1984.

II. The Institutional Context: A New Department for a Novel Concept

The DHS-OIG's distinctive configuration of capacities grew out of the novel structure of its host department, a structure that, in turn, reflected the nebulous and still developing concept of 'homeland security'. DHS was an umbrella department whose loosely defined mission was to manage the state's response to disaster, whether international or domestic. Although its broader mission was not singularly defined as counter-terrorism, in practice, its birth in the September 11 attacks reframed many of the components' missions in such terms. This led to the unlikely combination of natural disaster management (historically covered by FEMA) with national security-related agencies and immigration.

Uniting these disparate functions was the notion that the state has a central role in emergency governance. Though superficially a mere bureaucratic reorganisation (and an extensive one at that), DHS's creation helped to entrench 'emergency' as a governing paradigm. In this model of bureaucratic organisation, 'emergency' as a mode of governmental operation trumped a functional distribution of authority and capacity. The concept of homeland security, as vaguely defined as it was, served as a new paradigm through which to comprehend state activity, and altered the terms on which government funds were disbursed. IG Clark Kent Ervin later commented,

'it's critical, it seems to me, that we increase markedly our overall homeland security spending. You know, one of the things I was struck by earlier was there was a bipartisan consensus earlier, Senator Biden and Senator Kyl saying -- both ends of the political spectrum -- we've really underfunded homeland security. And I think Katrina shows the importance of greatly

increasing our spending. And I say that as a conservative who understands that government spending by itself isn't always the answer'.⁵⁸³

In short, 'emergency governance' (in its particularly American iteration of anti-terrorism), overrode the traditional conservative-progressive split over government size and spending.

Similarly, not only was the partisan spending divide complicated by the homeland security concept, but so also was the question of the scope of executive power (as wielded by DHS). DHS's very creation placed liberals and conservatives on unfamiliar sides of the size-of-government debate. In congressional debates (as well as in the wider public), the question of executive power was reframed in terms of the liberty/security balance. Proponents of the hypothetical DHS within the administration argued that the need for security and the 'emergency' orientation of the new bureaucracy justified the suspension of usual checks and balances. Sen Patrick Leahy (D-VT) described the debate thus:

'In writing the charter for this new department, we must be careful not to generate new management problems and accountability issues. Yet the Administration's proposal would have exempted the new department from many legal requirements that apply to other agencies. The Freedom of Information Act would not apply; the conflicts of interest and accountability rules for agency advisors would not apply. The new Department head would have the power to suspend the Whistleblower Protection Act, the normal procurement rules, and to intervene in Inspector General investigations. In these respects, the Administration asked us to put this new Department above the law and outside the checks and balances these laws are put there to ensure.'⁵⁸⁴

Far more than a 'mere' bureaucratic reorganisation, the creation of the DHS afforded its designers the opportunity to circumvent the checks and balances common to most (even national security) departments in the federal government. Senator Daniel

⁵⁸³ Quote of Clark Kent Ervin, CNN Late Edition with Wolf Blitzer, 'State of Emergency: Interview with Thad Allen and Clark Kent Ervin', 18 September 2005, Transcript available: <http://edition.cnn.com/TRANSCRIPTS/0509/18/le.01.html>, Accessed 4 April 2014.

⁵⁸⁴ Statement of Patrick Leahy, 'Protecting the Homeland: The President's Proposal for Reorganizing Our Homeland Defense Infrastructure', Hearing, Senate Committee on the Judiciary, 26 June 2002.

Akaka (D-HI) cautioned that ‘[t]he threat of a “Big Brother” new department cannot be overemphasized’.⁵⁸⁵ In opposing the creation of the DHS, Akaka was in the minority amongst Democrats, but he voiced the primary concern on both sides of the partisan spectrum. Congressional discussions around the construction of the DHS focused on the precise form, specification, and measurement of its internal checks and accountability mechanisms. The President pushed repeatedly for a department secretary with unprecedented power, but a series of corrective amendments in both the House and the Senate provided for a parallel Civil Rights Officer and Privacy Officer. The debate culminated in a unique constellation of checks within DHS in the final Act.⁵⁸⁶ The OIG fell rubric similar to that of other national security departments and had an exemption through which the Department head can prevent investigations on national security grounds. Moreover, OIG agents were given the authority to ‘carry a firearm, make arrests without warrants, and seek and execute warrants’,⁵⁸⁷ a privilege given only to select OIGs.

The DHS OIG was shaped by a distinctive configuration of institutional features, inheriting staff and responsibilities from the OIGs of FEMA, Treasury, Justice and Transportation Departments, as well as twenty-two field installations. Like the Defense, Justice and Treasury OIGs, it was subject to the exemption with which the department head could prevent a review from being completed on national security grounds. Because the DHS was not yet in existence at the time of the Patriot Act, the Justice Department OIG had been given responsibility for Civil Rights abuses relating to the Patriot Act; this clouded the new OIG’s jurisdiction and its focus. To further complicate the lines of responsibility, the DHS OIG also contended with an

⁵⁸⁵ Congressional Record, V. 148, PT. 16, November 12, 2002 to November 14, 2002.

⁵⁸⁶ The establishment of the OIG was based on the following authorities: IG Act 1978; Homeland Security Act 2002, Title 6, USC Section 103.

⁵⁸⁷ Homeland Security Act of 2002, Public Law 107-296.

overlap with the DHS's *own* Civil Rights Unit. Similarly, the jurisdictional lines between the OIG and the DHS Privacy Officer were imprecise and proved to be a source of friction over the OIG's first decade in the allocation of investigative resources.

The priorities of the new OIG were also uncertain. IGs should, in theory, focus on the priorities of the host Department. In the case of the DHS, however, the Department's own *raison d'être* was fuzzy at best; defining the object of 'homeland security' was proving as difficult as hastily cobbling together the Department's constituent agencies. This meant that the OIG's focus was largely up to the IG's own interpretation. It also meant that management and organisation and basic competencies presented an obvious initial focus, above and beyond questions of rights. Before the IG could consider the actions of its host department, it contended with integrating four payroll systems, travel management, accounting systems, budget processes, and procurement processes.⁵⁸⁸ While the establishment of any OIG involves bringing diverse offices together, the DHS OIG contended with the additional challenge of monitoring its host department's own rocky birth by patchwork. Moreover, the new OIG inherited a number of pre-existing IG investigations from its legacy departments, including a Justice IG report on Border Patrol fraud, and consequently found itself with the administratively complex task of tracking the implementation of previous recommendations issued by the prior OIG. And before it could even address management and reporting concerns, it tasked itself with basic operational matters; in its first year, it only managed to complete timely audit and inspection reports (completed within six months of the project start date)

⁵⁸⁸ Pre-Hearing Questionnaire for the Nomination of Richard L. Skinner to be DHS Inspector General, US Senate Committee on Homeland Security and Governmental Affairs, p. 32.

only forty-four percent of the time. In the first two years of its existence, the OIG saw the number of its open investigations rise by 209%.⁵⁸⁹

The DHS IG had an effect on the organisation and direction of its host department in a way that few IGs have been able to achieve in more established departments. The ambiguity and breadth of the DHS's mission lent it malleability, and the first two IGs, Clark Kent Ervin and Richard Skinner, targeted this uncertainty in their reviews. Because of 9/11 and, in particular, the manner in which the hijackers carried out their deadly objective, the OIG's first years were spent concentrating on border and transportation security, and terrorist watch lists. Despite his broad support for Bush Administration policies, Ervin regularly issued harsh condemnations of how the DHS enacted its policies.⁵⁹⁰ A December 2003 report attacked the entire organisation of the counter-terror intelligence system and suggested that the Bush administration's establishment of parallel anti-terror organisations, such as the Terrorist Threat Integration Center, merely confused the DHS's mission and created inefficient functional overlap between many centres of authority.⁵⁹¹ Indeed, one of the IGs' primary *de facto* roles was in clarifying the lines of authority muddled by the *ad hoc* nature of the DHS's construction.

⁵⁸⁹ Skinner, Pre-Hearing Questionnaire, p. 39.

⁵⁹⁰ See Ervin's memoir, *Open Target: Where America is Vulnerable to Attack*, New York: Palgrave Macmillan, 2006.

⁵⁹¹ 'Kerry-Edwards 2004 Releases Fact Sheet on Bush-Cheney Ad', *U.S. Newswire*, 11 August 2004.

Table 9.1. Academic and Professional Backgrounds of DHS Inspectors General

IG	Dates	Academic background	Professional experience
Clark Kent Ervin (Acting)	March 2003-December 2004	Law	Law (private practice and state attorney general); inspector general of State Department
Richard Skinner	August 2005 - January 2011	Public and Business Administration	Federal administration and multiple OIGs (FEMA, and Agriculture, Justice, Commerce, and State Departments)
Charles K. Edwards (Acting)	February 2011-December 2013	Electrical engineering	Federal administration (USPS, USPS OIG, and TSA)
Carleton Mann	December 2013-March 2014		
John Roth	March 2014-present	Law	Law (public practice, as US Attorney and Department of Justice Section Chief)

III. The IGs and Their Strategies

A. Steering Counter-terror Policy: Clark Kent Ervin, 2003-2004

In March 2003, Clark Kent Ervin, a former Rhodes scholar at Oxford and lawyer by training, was plucked from the State Department OIG and placed at the helm of the newly-minted DHS OIG. His first appointment was as Acting IG until he was to be confirmed. However, Senators Joseph Lieberman (D-CT) and Susan Collins (R-ME) of the Governmental Affairs Committee both objected to his confirmation on the grounds that he had failed to undertake an important investigation during his time as State Department IG. During his tenure at State, Ervin had refused to investigate a sexual harassment claim. On Ervin's account, he had refused because

the alleged harassment took place outside of the State Department proper. Frustrated after a series of briefings and interrogations by the Committee, Ervin sought support from President Bush, who gave him a recess appointment as DHS IG in December 2003.

A Republican and friend of President Bush's from his days working as Deputy Attorney General of Texas, Ervin had served as State Department IG under Colin Powell since April 2001. Ervin understood his 'mission' at DHS to be inspired by the attacks of 9/11. Indeed, his Republican orientation led him to believe in and support the Bush Administration's counter-terror strategy. His priority was thus to ensure the successful performance of the Department as a part of the overall strategy of protecting the homeland (and, especially, preventing terrorist attacks). Ervin brought with him a number of members of the State Department OIG, but the largest staff 'inheritance' came from FEMA's OIG, who donated 200 staff members to the new OIG's total of 459.⁵⁹²

Ervin's guiding aim was to define the 'mission' of the department – and of the definition of homeland security – as counter-terrorism.⁵⁹³ At State OIG, he had followed Secretary Colin Powell's attention to IT matters, and duly established a separate IT evaluation unit within the OIG. Realising that one of DHS's first tasks as a new department would be to coordinate, evaluate, and 'prune' the hundreds of information systems it inherited made him designate IT as the OIG's first object of oversight. After IT, Ervin's OIG devoted much of its energies to airport security, an area that would be the focus of one of his office's most provocative sets of reviews. This choice was a direct result of 9/11, and meant that the newly-minted Transportation Security Administration (TSA) would receive well-deserved scrutiny.

⁵⁹² Ervin, 2006, p. 8. These inherited staff did not all arrive until FY2004; the OIG operated with only 390 personnel in its first year.

⁵⁹³ 'ABC News Exclusive: The Inspector', *ABC News: World News Tonight*, 9 December 2004.

The reports uncovered systemic failure in airport security screening, and this resulted in to widely publicised statistics about TSA performance. Undercover OIG staff successfully smuggled a host of forbidden items onto flights and suggested a detection failure rate as low as in similar tests performed prior to September 11.⁵⁹⁴ The project not only unearthed the failures of the moment, but also condemned the Department for ignoring long-standing recommendations for reform: the weak passenger screening procedures had been criticised by the IG since the late nineties, but the recommendations remained unheeded.

Beyond the performance focus of this investigation, the airport screening tests afforded the IG the occasion to provide evidence for a partisan ideological battle over the use of the private sector in federal programmes. The specific purpose of the review was to see whether the TSA's pilot programme using private contractors yielded better performances. Though Bush had pushed to allow airports to hire private screeners rather than federal ones on the basis that the private sector was more efficient, the OIG's report implicitly undermined this rationale by demonstrating that the contractors were no more efficient than federal employees. However, Ervin levelled his criticism at waste rather than the ideological implications. An illegal contract with the Boeing Company to install detection machines in airports led to nearly \$50 million in excess payment.⁵⁹⁵ Though the report itself was critical of the waste, it did not directly address the broader ideological point. It did, however, provide fodder for the opposite ideological camp of the administration, and did nothing to enhance Ervin's standing with the Administration.

The long-term effect of these reviews was also limited, and the TSA's efficacy in screening passengers continued to concern Congress, GAO and the IG over the

⁵⁹⁴ DHS/OIG, *Transportation Security Administration Review of the TSA Passenger and Baggage Screening Pilot Program*, OIG-04-47, September 2004.

⁵⁹⁵ ABC News, 9 December 2004.

next decade. Ervin, who had conducted the first review in 2004, testified to Congress that ‘[t]he sad fact is that for all the dollars and attention that has been focused on screener performance since 9/11, study after study [...] shows that it is just as easy today to sneak these deadly weapons past screeners [as] it was on 9/11’.⁵⁹⁶ Although his original reviews did not have immediate impact on the TSA’s performance, the Bush Administration and Congress both based their subsequent recommendations and legislative proposals on Ervin’s recommendations.⁵⁹⁷

Though Ervin’s focus rested largely on systemic weaknesses, such as the airport screening procedures, his office also investigated a number of single instances of waste, as in a review entitled *Assessment of Expenditures Related to the First Annual Transportation Security Administration Awards Program and Executive Performance Awards* (September 2004). Triggered by a news article, this review exposed a \$461,745 event (excluding bonuses, which totalled nearly \$1.5 million), much of this money not having been secured through competitive bids.⁵⁹⁸ The IG report judged the TSA’s expenditures to be ‘excessive’ (citing, amongst many undue costs, \$1,486 for three balloon arches and \$64 for each gallon of coffee), and linked them to the TSA’s poor overall performance. Yet later, Ervin judged his most important work to be not the single instances of fraud or waste, but rather the sets of reviews that uncovered larger, systemic problems.⁵⁹⁹ Amongst such reviews, he counted the airport screenings and his earlier State Department OIG review of the Bush Administration’s potential involvement in Hugo Chavez’s temporary ousting, as

⁵⁹⁶ Statement of Clark Kent Ervin, ‘Cover Blown: Did TSA Tip Off Airport Screeners About Covert Testing?’ Committee on Homeland Security, House of Representatives, November 14, 2007; quoted in Bart Elias, *Airport Passenger Screening: Background and Issues for Congress*, CRS Report R40543, 23 April 2009.

⁵⁹⁷ Elias, 2009.

⁵⁹⁸ DHS/OIG, *Assessment of Expenditures Related to the First Annual Transportation Security Administration Awards Program and Executive Performance Awards*, OIG-04-46, September 2004.

⁵⁹⁹ Clark Kent Ervin, personal interview, 2 July 2014.

his most consequential efforts, above and beyond the ‘flashy’, media-friendly reports of lavish agency parties.

Ervin also believed that his role as IG required him to hold the Department to its legal responsibilities as specified in the Homeland Security Act of 2002. Determining what these legal responsibilities were, it turned out, was less than straightforward, and created further friction between Ervin and the Department. He identified ‘no fewer than six responsibilities spelled out in the Homeland Security Act for the Information Analysis unit [that] strongly implied that the DHS was to take the lead on consolidating the different federal watch lists’.⁶⁰⁰ In practice, the DHS had yielded its turf in this domain to the FBI when the White House created a Terrorist Screening Centre (TSC) directed primarily by the FBI. Ervin’s role also thrust him into the position of interpreting ambiguous mandates. Here, his background as a lawyer drove the manner in which he pushed for departmental reform. Two sources of law seemed to conflict: the Homeland Security Act, which (in Ervin’s eyes) gave the DHS the responsibility for consolidating federal watch lists; and the Presidential Directive establishing the TSC and thus redirecting this task to the FBI.⁶⁰¹ But in his report, Ervin insisted that there was no such contradiction.

Ervin sharply criticised the DHS for its failure to insist on responsibility for the federal watch lists. The Department stated, in its response, that ‘we strongly disagree with the report’s premise that either DHS or IAIP [Information Analysis and Infrastructure Protection] has the lead responsibility within the federal government for consolidating terrorist watch lists [...] Given the constraints [of starting up the Department], it was determined at the highest levels of government that DOJ was in a better position to take on the responsibility for coordinating the federal government’s

⁶⁰⁰ Ervin, 2006, p. 165.

⁶⁰¹ Homeland Security Presidential Directive-6, ‘Integration and Use of Screening Information’, 16 September 2003.

effort in watch list consolidation'.⁶⁰² Here the limits of the IG came to bear: while Ervin pushed the scope of the IG's authorities and weighed in on the appropriate jurisdiction of the Department and its agencies, his fractious relationship with Ridge and lack of credibility with Congress undermined any power of persuasion or enforcement that he may otherwise have had. Ervin's challenge to DHS policy and the scope of its responsibility pointed to the possibility of considerable departmental reform. However, he needed cooperation from within the institution, and in particular the cooperation of his direct superior. The structure of the IG Act makes a successful IG largely dependent on the Department head. Despite a promising start, Ervin's relationship with DHS Secretary Tom Ridge quickly deteriorated as his term went on. Ridge objected to the tone of the IG reviews, and in Ervin's view, preferred a sugar-coated version of events. From Ridge's perspective, Ervin released the reports too quickly to the press, at times before they were shown either to Congress or to Ridge himself. Moreover, Ridge objected to Ervin's conclusions. When Ervin issued a report damning the creation of the Terrorist Threat Integration Centre, which made the Homeland Security's intelligence-analysis capacity redundant, Ridge protested that Ervin lacked an intimate understanding of the department's activities.⁶⁰³ Unlike the monthly meetings that many IGs have with their Department heads, Ervin had only two during his two-year tenure at DHS. However, Ridge refrained from preventing any of Ervin's reviews from being published.⁶⁰⁴ But the antagonistic relationship between the two took its toll, and the Bush administration's support ultimately fell with Ridge.

⁶⁰² Ervin, 2006, p. 165-66.

⁶⁰³ 'Homeland Security Watchdog Makes Politically Risky Moves', *The Asian Wall Street Journal*, 16 November 2004.

⁶⁰⁴ Robert Draper, 'Truth, Justice and the (Un)American Way', *Texas Monthly*, April 2005.

Given their position ‘straddling a barbed-wire fence’, IGs find themselves torn between loyalty to Congress and loyalty to their Departments (of which they are members). But further vexing the matter is the source of the IG’s position, their political appointment by a particular administration, which may waver in its support even of its own Department head. In the case of conflict between an IG and Department head (a frequent occurrence with an aggressive IG), the administration must often take sides. And dismissal of an IG occasions far less political damage than public ire at a Department head.

Despite his doggedness, Ervin’s ‘sins’ mounted, from the perspective of many around him. Congress had shown scepticism towards him beginning with his nomination, and his tendency to privilege the media as a preferred audience alienated him further. The Administration, initially his primary supporter, found that his reports did them no favours. Ervin also provoked the ire of Congress by releasing his reports to the media before showing them to Congress, though he praised ‘the bright light of congressional attention and the press’ in making his reviews carry weight.⁶⁰⁵ According to the staff of Senator Collins, the decision not to renew Ervin’s term in 2004 ‘was purely a White House decision’.⁶⁰⁶

Ervin’s appointment was political – and this may have contributed to the suspicion with which Senators Collins and Lieberman viewed his nomination – but he ultimately remained committed to the IG mandate of non-partisan oversight of his host department, as evident in his frequently devastating critiques of the Department’s programmes. Despite his close ties to the Bush family and his commitment to the Republican Party, Ervin’s resolutely critical stance, coupled with his failure to build a network of support, led to his own dismissal. But his truncated tenure underscored

⁶⁰⁵ Robert Block, ‘Homeland Security Watchdog Makes Politically Risky Moves’, *The Asian Wall Street Journal*, 16 November 2004.

⁶⁰⁶ Michael Scherer, ‘Not Mild-Mannered Enough’, *Mother Jones*, March/April 2005.

how fragile the IG's authority can be, especially when and IG is unconfirmed, and how dependent it is on the IG's relationship with the department head and with Congress. IG authority depends on leverage, persuasion and reputation; it is a relational authority, not an absolute one, and relies on the relationships and networks forged beyond the confines of its own office.

As an IG, Ervin brought a focused political vision and, in particular, a clear definition of the concept of homeland security. Ervin's strategy focused squarely on the functionality and performance of the DHS in support of his pursuit of the DHS's counter-terrorism mission, and he was outspoken about being 'of the school of thought that maintains that, if anything, the threat of terrorism here at home is not taken seriously enough [...] and, as a result, we are doing far less than we should be doing to combat it'.⁶⁰⁷ But because of his brief tenure and lack of confirmation, Ervin did not have the professional security to make a lasting institutional mark on the DHS OIG in the form of building sub-offices or networks.

B. *Expanding the 'Homeland Security' Concept: Richard Skinner, 2004-2011*

With Ervin out of the job in December of 2004, the nomination fell to Richard Skinner, who had extensive experience in the IG community. He had served in various capacities in the OIG of FEMA since the early nineties, and became the Deputy IG of DHS beginning in March 2003. He assumed the position of Acting IG when Ervin left, and was confirmed on 28 July 2005. Whereas Ervin's outlook had been shaped primarily by the 9/11 attacks, Skinner's background at FEMA and in other parts of the IG community contributed to his adoption of a broader conception

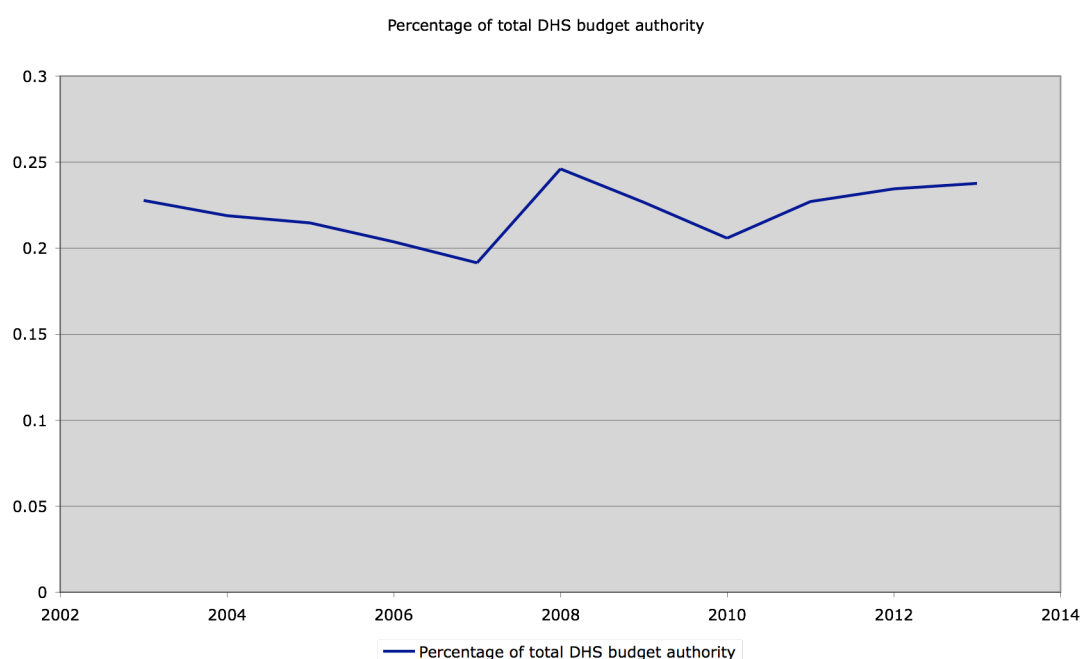
⁶⁰⁷ Clark Kent Ervin, 'I'd Rather Err on the Side of the Believers', *Cato Unbound*, 12 September 2006.

of ‘homeland security’ that included natural disaster. Ervin’s training in law made him attuned to the legal dimensions of DHS policy, and pushed him to focus on jurisdictional matters as well as ‘routine’ fraud and waste; Skinner, in contrast, brought an appreciation of administrative complexity and its effect on departmental performance. Instead of focusing primarily on counter-terror capacity, Skinner reoriented the OIG’s energies toward the DHS’s more domestic (natural disaster management) and quotidian functions (such as the Coast Guard). But like Ervin, he interpreted the IG’s mission to be one of maximising performance. Despite the many critical reports he oversaw, Skinner’s tenure would prove to be longer, more stable, and more effective than Ervin’s. Skinner cultivated relationships with the Department Secretary, with Congress (especially the Appropriations Committee), and tempered the OIG’s relationship with the press. As much as the institutional reorganisation he spearheaded, it was these relationships that contributed to his reviews being consequential.

Unlike many other OIGs, DHS OIG was faced with a department still in the process of carving out a coherent identity for itself. Only two years old, it still faced the practical challenges of integrating the myriad practices and information technology systems of its component parts. Its oversight was not only of ongoing departmental performance, but also the continuous process of departmental construction. The office that Skinner inherited was still a young one, and its difficulties reflected those of its host department. Even while Acting IG, he began a reorganisation of the Audit Division, and transferred fifty staff from the Audit to the Investigations Division in 2005. Just as the DHS was composed of multiple agencies, the OIG had been formed through the merger of seven different OIGs, and took staff from each of them (not always the staff members with the best credentials or records).

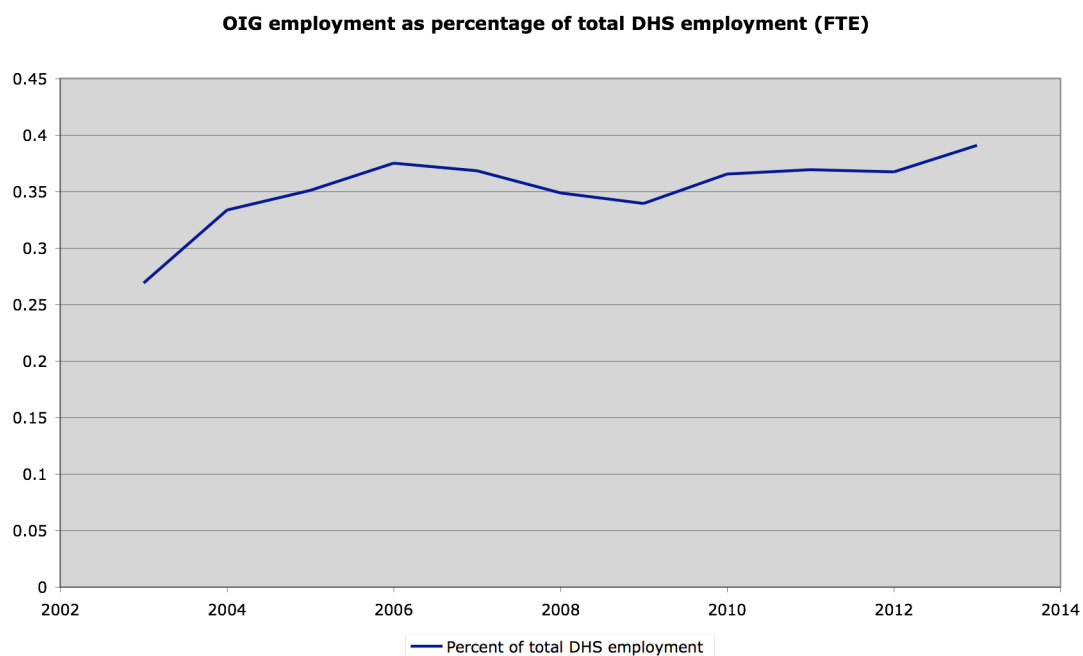
But this posed the problem of creating a cohesive culture. Even after two years, Skinner found this problem unresolved. Moreover, the constituent parts of the OIG were not, at first, housed in the same building: the audit office was across town from the investigative office, and the two staffs were unacquainted with one another. However, Congress did not starve the new office of resources; on Skinner's account, and unlike the experiences of many other IGs, the Appropriations Committee responded adequately to Skinner's requests. The DHS OIG's budget (See Chart 9.1), as a percentage of the Department's budget was never greater than 0.25%; the State OIG, in contrast, suffered resource deficiencies even when its budget comprised greater than 0.3% of its host Department's budget. This indicates that the sources of departmental dysfunction and corruption are not entirely functions of a department's own size and resources, and that the challenges of finding problems might be much greater in some departments rather than others.

Chart 9.1. OIG Budget as Percentage of Total DHS Budget Authority



In terms of personnel, DHS OIG grew steadily in its first decade (Chart 9.2), but in the absence of strong leadership after 2011, even this greater capacity failed to bring about strong reviews.

Chart 9.2. OIG Employment as Percentage of Total DHS Employment



a. *Skinner's Innovations: Building Infrastructure for Performance*

While still only Acting IG, Skinner enacted certain immediate policy reforms. His first modification was to ameliorate the OIG's relationship with the press. Indeed, this relationship was of keen interest to Skinner's congressional interrogators during his confirmation hearing. Ervin's practice had been to notify the media of upcoming reports through email and telephone, a practice that created a number of administrative burdens. (This practice was unusual among OIGs, and a source of

irritation to members of Congress and the Department, who felt that the reports should be released to them first.) He replaced the practice with the policy that all OIG reports be posted on the website five days after they had been sent to the relevant DHS oversight committee.⁶⁰⁸ In so doing, Skinner shifted the OIG's primary audience and gained the trust and favour of Congress, building a crucial dimension of trust with the Hill that would serve the IG later.

Skinner pursued a three-pronged strategy for the development of the Office. First, he focused on management relationships. Second, he planned to 'concentrate resources on critical management control system, financial systems, and information management systems', with the aim of shoring up the integrity of DHS programmes. Finally, he sought to emphasise quality control reviews.⁶⁰⁹ His vision of the IG was firmly a post-NPR product, conceived as a proactive, collaborative, and advisory role. To that end, he arranged meetings with the DHS's Chief Procurement Officer and Chief Financial Officer to refine the Department's procurement procedures even prior to the occurrence of fraud. (In his previous capacities at the Commerce and State OIGs, he had similarly promoted the IG's advisory role, especially in the development of IT security systems).

Unlike his predecessor, Skinner enjoyed unfettered access to the Homeland Security Secretary, Michael Chertoff, and met, even as Acting IG, with him and other senior members of the Department regularly.⁶¹⁰ Rather, the threats to his office's authority resulted from the still-ambiguous institutional setup of the OIG. The Intelligence Reform and Terrorism Prevention Act of 2004 elevated the Privacy Officer, authorising it to report directly to the Secretary and thus giving it overlapping jurisdiction with the IG. The Privacy Officer was short-staffed and repeatedly tried to

⁶⁰⁸ Skinner Pre-Hearing Questionnaire, p. 26.

⁶⁰⁹ Skinner Pre-Hearing Questionnaire, p. 28.

⁶¹⁰ Skinner Pre-Hearing Questionnaire, p. 8.

use the OIG's resources by mandating OIG investigations, but Skinner declined. Similarly, the Civil Rights Office interpreted their mandate as overlapping with the OIG's. Neither of these jurisdictional overlaps was resolved formally, but through conversation and informal policy the two offices arrived at a *modus vivendi* that largely preserved the OIG's standing jurisdiction.⁶¹¹

In addition to the ambiguity of the OIG's domain, Skinner felt pressure from Congress to pursue particular reviews. While some IGs react to highly political matters, and some obey all congressional requests, he settled on a particular formula for obeying them: if a committee chair signed a request for an investigation or audit, he would automatically accept; if the ranking member signed the request, he would do background work, but frequently accept.⁶¹² He also laid out very specific criteria for determining the allocation of the OIG's limited resources. These included relevant statutory and regulatory requirements; the newness or sensitivity of the programme under review; dollar magnitude; management and congressional needs to be met; prior investigative attention; nature of reviews performed by other oversight bodies (e.g., GAO); and availability of audit resources.⁶¹³ But Skinner also struggled with a Congress increasingly inclined to include unfunded mandates for IG oversight in legislation, and thus compromised the IG's ability to choose priorities; the DHS OIG was particularly affected by this trend; for instance, the oversight of the 287(g) provision (immigration) and of drug controls were mandated by congressional legislation. Congress doubled the number between 2003 and 2005. By 2012, these mandates totalled more than two-dozen.

b. Circumventing Rights

⁶¹¹ Richard Skinner, personal interview, 11 January 2013.

⁶¹² Ibid.

⁶¹³ Skinner Pre-Hearing Questionnaire, p. 31.

Many of Skinner's major early reviews were long-term investigations inherited from Ervin. One of the most widely publicised and controversial reviews investigated the alleged unlawful treatment of terrorist detainee Maher Arar (initially this investigation was the result of a congressional request by Rep. John Conyers, Jr (D-MI)). A Syrian-born Canadian citizen, Arar was detained by US officials in New York on suspicion of involvement with terrorists, and soon deported to Syria. There, Arar claimed, he was tortured by the Syrian police for a year before being returned to Canada. The IG investigation set out to determine whether US officials had acted wrongly or illegally by deporting Arar. The enquiry was widely supported by human rights groups, such as Human Rights First and the ACLU, and many expressed faith that Ervin's record of critical reports boded well. The case proved to be a test of the Administration's ability to uphold its stated commitment to civil rights and its capacity for self-criticism. The ACLU applauded Ervin's decision to 'focus not only on the specific case of Mr. Arar, but more generally on cases involving the removal of alleged terrorist suspects to a country where they may risk being subjected to torture', and thus to pass judgment on the phenomenon of extraordinary renditions as a concept without legal status.⁶¹⁴

The investigation was still underway when Ervin's tenure expired, and it was left to Acting IG Skinner to take over. The switchover proved to be a source of worry for observers. A lawyer for Human Rights First, Priti Patel, voiced concern that the enquiries would be 'shelved' once Ervin left.⁶¹⁵ This fear reflected the knowledge that IG reviews, though written by teams of lawyers and investigators, depend heavily on

⁶¹⁴ Coalition Sign-On Letter to Clark Kent Ervin at the Department of Homeland Security Expressing Concerns About the Case of Maher Arar, *American Civil Liberties Union*, 16 July 2004.

⁶¹⁵ Jim Bronskill, 'Departure of U.S. Watchdog Raises Concerns About Future of Arar Review', 16 December 2004.

the direction of the IG itself. However, Skinner continued with the review and in 2008 released a classified report for Congress and a one-page summary for the public. The review came under considerable criticism by watchdog groups, civil rights groups, and academics for the weakness of its judgments regarding government wrongdoing, the small number of recommendations, and the slowness and incompleteness of the final report released to the public (released only after additional congressional pressure). In later questioning by Congress, Skinner defended the Department's refusal to provide documents in a timely fashion on the grounds that exposing such information would void the Department's legal privileges in parallel litigation, but he ultimately deemed the matter resolved as a result of a memorandum of understanding.⁶¹⁶ But, as the Committee on Governmental Affairs was quick to point out, Skinner did not invoke the IG's statutory right to demand assistance from the Secretary (under subsection 6(b)(2) of the IG Act) when he was initially denied access. Though both Ervin and Skinner encountered serious external hurdles to the investigation, hurdles set by members of the Administration, Ervin himself condemned the OIG investigators for failing to fight against the resistance they encountered.⁶¹⁷ An academic assessment of the review noted that the OIG's two recommendations neglected to establish any form of compliance monitoring, and that the OIG had failed to interview many key actors in the controversy, such as the Acting Attorney General.⁶¹⁸

Given the many rigorous reviews issued by the same IG, the weakness of the *Maher Arar* review was puzzling. Skinner had not shown himself to be reluctant to criticise the Administration in previous investigations, so the weakness of the review

⁶¹⁶ Skinner, Pre-Hearing questionnaire, p. 45.

⁶¹⁷ Letter from Clark Kent Ervin to Representative John Conyers, Jr., 14 July 2004, reprinted in Maher Arar Report.

⁶¹⁸ Sinnar, Shirin, 'Protecting Rights From Within? Inspectors General and National Security Oversight', 65 *Stanford Law Review*, 2013, p. 1052.

could not be attributed to hierarchical deference. In part, the unorthodox and unprecedented circumstances of the review – the parallel civil litigation, the documents’ security classification issued by other departments, the DHS’s lack of familiarity with the protocols of the intelligence community, and a department staff unfamiliar with IG authorities – made Skinner cautious and uneasy about asserting his authorities. But the OIG’s failure to evaluate the INS’s ‘morality’ also revealed a reluctance to criticise the Administration’s counter-terror policy more broadly, as well as a distinctive conception of accountability that privileged performance concerns over constitutionality. The IG’s potential influence here, based on a subjective framing of a problem, was considerable. A clear statement of government wrongdoing by the OIG in the *Maher Arar* case would have had ideological ramifications: were the Administration’s claims about the legality of its counter-terror practices bogus, or were they legitimate and necessary components of its strategy? Skinner shied away from making this judgment. Moreover, the OIG’s failure to find fault with the government’s actions rested on a particular interpretation of what the government *should* be doing, and the IG avoided wading into nebulous legal and moral territory. Similarly, one of Skinner’s more rigorous reviews, criticising the REAL ID programme of 2009, did so on administrative grounds rather than the civil rights grounds advocated by the ACLU.⁶¹⁹

Skinner’s vision of accountability was thus performance-based, and he steered his efforts towards improving the DHS’s efficiency and outcomes. Despite his lack of overt partisanship, the performance-based accountability pursued by his OIG was thus rooted in prior partisan and even ideological commitments, but it also reflected his training and experience. Even as Acting IG, he had helped to bring the office in line

⁶¹⁹ DHS/OIG, *Potential High Costs and Insufficient Grant Funds Pose a Challenge to REAL ID Implementation*, OIG-09-36, March 2009.

with the NPR-era Government Performance Results Act standards by steering and implementing the OIG's first two annual Performance Plans, and by defining the criteria and evaluation methods for office performance.

Although the DHS was a direct response to 9/11, it was not a terrorist attack, but rather a natural disaster, Hurricane Katrina, that offered the DHS its first national crisis to manage, and the OIG's orientation shifted to address this. Whereas Ervin had channelled the office's capacities towards counterterrorism, Skinner showed sensitivity to the need to create institutional structures directed towards the reactive nature of the Department's activity, and inaugurated the Office of Inspections and Special Reviews, 'specially structured and staffed to meet exigent deadlines for the conduct of non-traditional examinations into DHS operations'.⁶²⁰ In theory, this sub-office provided a springboard for pursuing the urgent reviews needed in the context of DHS's management of emergency. Using a similar rationale, he set up a special oversight group in response to Katrina, the Emergency Management Unit (EMU, later the Emergency Management Oversight, or EMO), as a permanent institutional response to the often-unpredictable nature of emergency that is a central target of DHS operations. Beyond this innovation, the Katrina reviews offered a particular model of IG investigations, which involved ongoing reviews rather than one-off investigations. In this way, the dominant institutional features of the DHS OIG grew out of contingency and the expectation of permanent emergency.

The Gulf Coast Recovery was not the only major review the OIG undertook at this time. Beginning in 2006, the office assumed a series of audits and investigations of the Coast Guard's troubled, decade-long modernisation project, the Deepwater programme. The bureaucratic reorganisation of the nation's defense structures

⁶²⁰ Skinner Pre-Hearing Questionnaire, p. 25.

through the establishment of the DHS affected and confused the missions of its constituent parts, and this proved to be a fertile territory for IG commentary and intervention. Senator Olympia Snowe (R-ME) argued that the Coast Guard's resources needed to be rethought in light of its homeland security mission. 'As the Homeland Security Inspector General's recent report makes clear, the sheer scope of the Coast Guard's mission is taking a toll on their ships and aircraft and ultimately on their personnel'.⁶²¹ While Coast Guard modernisation had been on the military's agenda since a 1995 review of its requirements, 9/11 and Katrina expanded its missions (for instance, by adding the sea marshals programme) and strained its resources. In 2002, the Coast Guard was granted \$1.8 billion to overhaul and modernise its fleet, and this was used to procure assets and services from the private contractor, Integrated Coast Guard Systems (ICGS).

The IG's reports on the Deepwater programme served as a direct instrument of congressional oversight. They also revealed the perils of the military's reliance on contractors, both for the physical integrity of assets and for the potential for financial waste. Two reviews, the first in 2006, and the second in 2009, tracked the Coast Guard's efforts to rebuild its fleet and its disastrous choice of contractors. The IG reviews found that ICGS failed to meet the requirements of many of the contracts, leaving much of the Coast Guard's fleet cracked and unusable. In 2009, the IG reviewed the Coast Guard's efforts to recoup their funds from the unsatisfactory earlier contracts. An article later published by the Coast Guard itself reflected that '[i]n the end, the general consensus is that we ceded too much responsibility to the contractor, including some functions that should have been reserved for government

⁶²¹ 'Homeland Security Inspector General Report Reaffirms Sen. Snowe's Call for Accelerated Deepwater Program' *US Fed News*, 13 October 2004.

employees'.⁶²² The Deepwater programme was finally laid to rest in 2012, much to the satisfaction of critics on both sides of the partisan spectrum. A later, independent analysis deemed it to be the rigorous oversight, spearheaded by the DHS IG, that largely contributed to the programme's demise.⁶²³

Part of the OIG's efficacy resulted from the visibility its reviews attracted (See Table 9.2).

Table 9.2. Number of Media Citations for Selected DHS OIG Reviews

Review(s)	Review Date	Media Citations	Date Range
TSA Airport Screening ⁶²⁴	September 2004 ⁶²⁵	127	01/06/04-01/06/08
Gulf Coast Recovery ⁶²⁶	August 2005-December 2008	2113	01/08/05-31/12/12 ⁶²⁷
Maher Arar ⁶²⁸	March 2008	74	01/01/03-01/01/11 ⁶²⁹
Deepwater Horizons ⁶³⁰	August 2006	295	01/01/04-31/12/10
Secure Communities ⁶³¹	April 2012	100	01/03/10-01/03/14

C. A Hurricane Hits the OIG: Charles K. Edwards as Acting IG, 2011-2014

⁶²² Jake Korn, 'Deepwater RIP - A Leadership Perspective', *Servicelines*, US Coast Guard, 8 December 2011.

⁶²³ Trevor L. Brown, Matthew Potoski, and David M. Van Slyke, *Complex Contracting: Government Purchasing in the Wake of the US Coast Guard's Deepwater Program*, Cambridge: Cambridge University Press, 2013.

⁶²⁴ Search terms: (department of homeland security OR DHS) AND inspector general AND TSA AND screening AND weapons

⁶²⁵ The two primary reviews were: *Evaluation of TSA's Contract for the Installation and Maintenance of Explosive Detection Equipment at United States Airports* (September 2004); *An Evaluation of the Transportation Security Administration's Screener Training and Methods of Testing* (September 2004).

⁶²⁶ Search terms: (department of homeland security OR DHS) AND inspector general AND (gulf coast recovery OR katrina)

⁶²⁷ The date range reflected the time from the landing of the first hurricane to four years after the final report was released.

⁶²⁸ Search terms: (department of homeland security OR DHS) AND inspector general AND maher arar

⁶²⁹ This date range was extended because the investigation was ongoing and not released till 2008, yet was discussed in the media as the investigation proceeded.

⁶³⁰ Search terms: (department of homeland security OR DHS) AND inspector general AND deepwater AND coast guard

⁶³¹ Search terms: (Department of homeland security OR DHS) AND inspector general AND secure communities

Skinner's retirement on 12 January 2011 gave way to a three-year absence nominally filled by Deputy (and later Acting) IG Charles K. Edwards. Edwards had worked in the office as Deputy IG under Skinner, and prior to that had experience in the Post Office OIG. Though an engineer by training, he had spent his professional life in government service. The Obama Administration quickly nominated Justice Department OIG member, Roslyn A. Mazer, to the position in July 2011, but Susan Collins, the same senator who had objected to Ervin's appointment nearly a decade earlier, blocked Mazer's confirmation.⁶³² After her rejection by the Senate, Obama neglected to nominate a new IG candidate until mid-2013, leaving Edwards to head the office.

Within the first few months of Edwards's leadership, the House approached the OIG with a civil rights-related project. In April 2011, Representative Zoe Lofgren (D-CA) requested that the OIG investigate the Secure Communities programme, a deportation programme administered by a network of federal, state and local officials and organised by the Immigration and Customs Enforcement (ICE) arm of DHS. Secure Communities proved to be controversial on a number of grounds. Critics argued that its statistics often distorted who was apprehended, and that its guidelines were so vague as to lead to wide variation in its implementation. The programme relied on networks of actors and databases to pool information, and targeted criminal aliens for deportation. Secure Communities was created administratively and not by congressional mandate. For this reason, it lacked regulations and guidelines for its operation and development, and also proved to be a source of conflict.

⁶³² Jake Weins, 'All Along the Watchtower: One Year Anniversary of DHS Inspector General Vacancy', POGO blog, 27 February 2012, <http://pogoblog.typepad.com/pogo/2012/02/all-along-the-watchtower-one-year-anniversary-of-dhs-inspector-general-vacancy.html>, Accessed 15 February 2014.

The programme's principal defect, in the eyes of watchdog groups, was the potential for racial profiling and the possibility of unlawful detention.⁶³³ But its administrative vagueness was precisely what Lofgren hoped the IG would target and reform. After reading the OIG reports, Lofgren commented:

‘[t]he OIG found Secure Communities effective in finding and removing immigrants with criminal convictions. That wasn't the question. Does the program also ensnare victims and others with no criminal history? Is it susceptible to racial profiling? Does it ultimately undermine community policing efforts—leaving us all less safe?’⁶³⁴

The OIG evaluated the programme's performance while neglecting the question of rights violations, which had been the essence of the opposition to the programme. The rigor of an IG's review can have as much to do with the framing of the problem as with the methodology. In this case, the first review's narrow aim – ‘to see if Secure Communities was effective in identifying criminal aliens and if Immigration and Customs Enforcement appropriately prioritized cases for removal action’ – permitted the IG to evade the question of rights violations entirely.⁶³⁵

On the inside, in the absence of a permanent IG, the office began to stumble into trouble. An external audit at the end of 2011 found fault with a number of the OIG's policies, and determined that the OIG's auditors lacked a thorough understanding of information systems controls. It also stated that OIG auditors needed a subtler analysis of testimony and needed to refrain from interfering in parallel legal proceedings when carrying out their work.⁶³⁶ In Congress, complaints about the work conditions of the OIG began to surface, eventually leading the Senate Committee on Homeland Security and Government Oversight to begin an

⁶³³ ACLU Statement on Secure Communities, 10 November 2010, Available: <https://www.aclu.org/immigrants-rights/aclu-statement-secure-communities>, Accessed 15 February 2014.

⁶³⁴ Michele Waslin, ‘DHS Inspector General Issues Disappointing Reports on ICE's Secure Communities’, *Immigration Impact*, American Immigration Council, 9 April 2012.

⁶³⁵ DHS/OIG, *Operations of United States Immigration and Customs Enforcement's Secure Communities*, OIG-12-64, April 2012, p. 1.

⁶³⁶ USPS/OIG, *External Peer Review of DHS OIG - System Review Report for the Fiscal Year Ended September 30, 2011*, 28 June 2012.

investigation into Edwards's management practices. Moreover, the turf wars within the Department that Skinner had kept under control began to rear their head again, with the DHS's internal affairs office claiming the authority to conduct criminal investigations of DHS employees. Edwards insisted that while the internal affairs office should conduct pre-employment investigations, the OIG had legal authority over corruption cases of Department staff.⁶³⁷

It was not long before Edwards found himself at the centre of just such an investigation.⁶³⁸ The complaints from OIG staff to the Senate Committee ranged from harsh and incompetent mismanagement to nepotism and waste. The fruits of the Senate's investigation, launched in June 2013, revealed an office with 'a "toxic, totally dysfunctional and oppressive" work environment characterized by low morale, paranoia, and fear'. In addition to evidence of nepotism and improper use of agency resources, they found that 'Mr. Edwards did not understand the importance of independence' and that, 'unlike most IGs, [he] does not have experience conducting audits, investigations, or inspections'. Amidst a host of other allegations, the Committee also reported that 'nearly all the officials interviewed by the Subcommittee share the belief that Mr. Edwards is reading their e-mail'.⁶³⁹ The Subcommittee found evidence to substantiate a large number (though not all) of the allegations, and scheduled a hearing. The week before he was called to testify in December 2013, Edwards resigned and the hearing was cancelled. Although the Subcommittee had substantiated a number of the serious allegations in their

⁶³⁷ Joe Davidson, 'Drug Cartels Corrupting U.S. Law Enforcement', *The Washington Post*, 9 June 2011.

⁶³⁸ 'Unresolved Internal Investigations at DHS: Oversight of Investigation Management in the Office of the DHS IG', Hearing, House of Representatives Committee on Oversight and Government Reform, 1 August 2012.

⁶³⁹ *Investigation into Allegations of Misconduct by the Former Acting and Deputy Inspector General of the Department of Homeland Security*, Subcommittee on Financial and Contracting Oversight, Committee on Homeland Security and Government Oversight, Staff Report, 24 April 2014.

investigation, Edwards asked to be transferred to the DHS's office of science and technology, and was reassigned without repercussions. This move prompted observers of the IG community, ranging from POGO and Congress to members of the community itself, to place the question of the IGs' own accountability on the legislative reform agenda.

However, even in the absence of a permanent IG, the subcomponents of the DHS OIG worked on. Rapidly evolving IT demands, especially those related to security, were a growing concern of all IGs⁶⁴⁰, but especially so for the DHS, which commands multiple, unintegrated information systems with highly sensitive data. The challenge, from an oversight perspective, was not only to develop expertise, but also to keep up with the *scale* of oversight required for the security of multiple databases and IT systems. IGs Ervin and Skinner had both placed special emphasis on developing IT systems to make their oversight more comprehensive. Exploiting new technology made the routinisation of oversight possible. During the Katrina recovery, the OIG used data mining techniques to uncover unorthodox spending patterns to track the vast number of purchase card transactions (a significant source of fraud). The OIG's use of such methods would later intensify in response to the Obama Administration's demands for ever-faster agency responses to cyber threats. The Administration's permanent anxiety over cybersecurity led it to issue ever-more demanding metrics for reviewing and reporting on each agency's IT assets for security weaknesses. Shortly after the resignation of the disgraced Edwards, the DHS OIG Chief IT security officer, Jaime Vargas, pushed for and designed a continuous monitoring programme that increased the OIG's coverage from an average of twenty

⁶⁴⁰ *Annual Inspector General Survey 2013: Effective Oversight in a Changing Environment*, Association of Government Accountants (AGA), Kearney and Company, September 2013.

percent of the Department's IT assets in summer 2013, to between eighty and ninety percent by summer 2014.⁶⁴¹

IV. Conclusion

In its first decade, the DHS IG contributed more towards the procedural/institutional values (responsiveness, rule of law) than towards the 'substantive' (freedom, equality). The vision of the first two IGs regarding the proper role of the IG and the meaning of accountability – primarily as a performance-maximising, management consultancy role – set the tenor for the office's first decade. Both Ervin and Skinner issued multiple rigorous, critical reviews, but Skinner's greater success in effecting departmental change depended on the diplomatic network he formed with the Secretary and with the Congressional committees capable of pressuring DHS to reform. Skinner also bolstered the quality of his office's work by reorganising the OIG to hone expertise in emergency management and to reflect the heavy investigative load the office acquired in its first few years.

By some obvious measures, the OIG was effective. The Department accepted nearly all (at least ninety percent) of the OIG's recommendations during its first decade.⁶⁴² Yet numbers alone fail to convey the IG's positive and negative impacts. These figures suggest success – they are much higher than the self-determined goal of a seventy-five percent annual acceptance rate – but they say nothing of the rigor of the recommendations, or of the recommendations' long-term effect on bureaucratic behaviour. (One IG suggested that a high departmental acceptance rate is less of an

⁶⁴¹ Nicole Blake Johnson, 'DHS Inspector General Embraces Continuous Monitoring', *FedTech Magazine*, 10 July 2014.

⁶⁴² DHS/OIG, *Annual Performance Plan*, FY 2004-2013.

indication of success than of weak recommendations).⁶⁴³ A more indicative figure – the percentage of recommendations implemented – was only statutorily required to be tracked according to 2007 legislation, and was not collected by the DHS OIG until 2012; that year, seventy-seven percent of recommendations were implemented one year after issue. As the IG’s experience with FEMA reform and recovery of hurricane relief-related funds the will demonstrate (in Chapter 10), the IG’s effectiveness depends crucially on the open ears of the Department, and on the support of Congress and the White House in opening the Department’s ears, if necessary. One indication of the efficacy of the Katrina-inspired FEMA reforms lies in the agency’s more competent performance following Hurricane Ike in 2008.

Quantitative measures also fail to impart the significance of building a legal and procedural framework of emergency governance to constrain the executive, a topic of tremendous import to legal scholars. Many of the DHS OIG’s investigations contended with situations governed by the contingency of laws under a ‘state of emergency’. As with previous disasters, the Katrina emergency prompted lawmakers to suspend the normal safeguards in place to control spending, a suspension justified by the urgency of delivering aid to the victims of the disaster. The numbers also fail to convey the larger institutional developments spearheaded by the IGs. The Gulf Coast Recovery project was an exercise in ‘web building’, and brought a new emphasis on network-building, resource pooling, and coordination to the different branches of government and levels of vertical federalism, both within agencies and in the structure of accountability.

⁶⁴³ Project on Government Oversight, *Inspectors General: Accountability is a Balancing Act* (2009), 20 March 2009, available: <http://www.pogo.org/our-work/reports/2009/go-igi-20090320.html>, accessed 30 September 2014.

The OIG's efficacy also varied by value orientation. Where the DHS OIG excelled in performance-based accountability, it fell short regarding questions of constitutional rights. On multiple occasions, both Congress and rights groups such as the ACLU criticised the rigour of the OIG's reports (for instance, the *Maheer Arar* and *Secure Communities* reviews). As Shirin Sinnar notes, the DHS OIG completed few reviews directly addressing rights abuses as such. The *Maheer Arar* review did evaluate DHS's behaviour with respect to rights, but was largely redacted on national security grounds. The *Traveller Redress Inquiry* review also dealt with rights abuses indirectly by evaluating the programme's effectiveness. Sinnar assessed the *Maheer Arar* review as being less than consequential partly on the grounds that it failed to recognise the moral and legal ambiguity of the overall phenomenon of extraordinary rendition when its authors were in a position to do so. And when confronted with a disaster recovery widely alleged to be 'racist', the IG team focused on the organisational and financial aspects of the project.

The nature of IG-inspired reforms also points to the role of IGs in effecting slow, gradual change. Skinner often emphasised the broader context of the problems at hand, and tailored his analysis and recommendations accordingly. For instance, his critique of FEMA's performance, and his later insistence that FEMA remain inside DHS, were based on an acknowledgement of the tremendous changes that FEMA and the other component parts of DHS had undergone since 9/11. Given that any large-scale bureaucratic reorganisation is likely to take many years, if not decades, to complete, expectations for agency performance and capacity must be realistically modest in the first years following a change. Skinner cautioned that much of the administrative dysfunction seen in the aftermath of Katrina resulted simply from significant ongoing reforms, the redefinition of FEMA's mission, and the agency's

attendant reorganisation, and was to be expected until the dust of the DHS's creation finally settled. Bearing this in mind, the expectation that a set of IG recommendations would quickly and completely solve deep and longstanding problems, be they FEMA's efficiency or the success of airport screenings in deterring terrorists, would be quixotic. Rather, by their very nature IGs' recommendations lend themselves to slow, incremental change.

The history of the DHS OIG underscores the institutional fragility of the IG position, which can result in unheeded recommendations, or of inaction on the part of the OIG *tout court*. Congress can co-opt it by swamping the OIG with unfunded mandates, and its credibility can be undermined when Senate obstructionism prevents a permanent IG from being confirmed. The post-Skinner era demonstrated the vulnerability of any OIG without a confirmed IG to provide leadership and stability.

CHAPTER 10.
A Performative IG at Homeland Security:
A Web of Accountability In the Gulf Coast Recovery Project, 2005-2009

‘When spider webs unite, they can tie up a lion’.
-Ethiopian Proverb

I. Introduction

Rather than concentrate on two single reviews by the DHS OIG, I have taken the ensemble of reviews investigating various aspects of the Gulf Coast Recovery oversight effort, and placed them in the context of wider oversight activity by Congress and government watchdog groups. In so doing, I locate the IG’s role in a quickly mobilised ‘web’ of accountability, while still identifying the OIG’s specific contributions (institutional, legal, administrative) to the maintenance of executive accountability. The immediate and deliberate ‘web’ comprised the coordinated IGs themselves – the twenty-two OIGs who pooled resources and expertise to divide the task of disaster oversight. The instrumental use of IG reviews by a greater web of external actors – the media accounts that depended on the IGs’ reviews as the basis for their critique, and the congressional critics who used IG reviews as the prompts for legislation – led the IGs’ work to effect accountability indirectly where alone, it would have made less of an impact.

II. History

Hurricane Katrina was one of the most destructive natural disasters in American history. The government’s response was widely derided as an unparalleled failure, attracting international headlines for its inadequacy. Katrina occasioned the

creation of a bureaucratic world unto itself, one that bridged federal, state and local capacities, brought the public and private sectors into partnership, and brought together multiple federal agencies to mobilise an unprecedented disaster response. That the first major challenge to the DHS was a natural domestic disaster rather than a terrorist attack forced both the department and the OIG to modify the scope of their efforts. Whereas Ervin had clearly defined the DHS's mission as one of counterterrorism, the experience of Katrina, coupled with Skinner's own long-term IG experience and at FEMA, forced the OIG to reconceptualise its approach to disaster management more generally. Hurricane Katrina proved to be the first major test of DHS competence and capacity, and thus a major project for the OIG. Evidence of departmental ineptitude flooded the press within days of the hurricane's arrival, and former IG Ervin had no reluctance to weigh in publicly on the Department's performance: '[i]t obviously raises very serious, troubling questions about whether the government would be prepared if this were a terrorist attack. It's a devastating indictment of this department's performance four years after 9/11'.⁶⁴⁴ The scale and speed of the disaster required that the OIG begin its investigations even before the extent of the DHS's difficulties became apparent. Rather than one single report, Katrina oversight came in dozens of small audits and inspections over the following year that focused on individual field offices and contracts. This, too, differed from the traditional IG approach of single indictments and exposures of bureaucratic wrongdoing. Skinner's strategy established a mode of operation that routinised the continuous monitoring of departmental activity.

Katrina also prompted the IG community as a whole to develop its collective capacity for oversight. After the Katrina Relief bill reserved \$15 million of the

⁶⁴⁴ 'Secretary Chertoff Awol as Katrina Strikes', *Fed News*, 19 September 2005.

original \$51.8 billion post-Katrina relief package for individual IGs for oversight purposes,⁶⁴⁵ Senators Max Baucus (D-WI) and Chuck Grassley (R-IA) of the Senate Finance Committee addressed a separate letter to the PCIE/ECIE to ask for advice on developing an overall *model* of collective oversight. At least ten different proposals floated in Congress regarding the appropriate approach to Katrina recovery oversight. These varied, from ‘creating an independent inspector general...to creating a stand-alone government agency modelled after New Deal programs’ to appointing a chief financial officer (CFO) to monitor recovery spending.⁶⁴⁶ Adopting a ‘web-like’ approach to the Katrina recovery followed from the IG community’s reaction to 9/11, during which it had formed a working group and similarly pooled resources amongst multiple IGs in overseeing the recovery process. PCIE president Greg Friedman and ECIE president Barry Snyder asserted their commitment to using the Federal IG structure but requested additional resources.⁶⁴⁷ Friedman and Snyder’s response also underscored how the concept of homeland security had been instrumental in overcoming the boundaries between individual OIGs and IG initiatives. Even prior to Katrina, the PCIE and ECIE had established a Homeland Security working group to coordinate the Federal IG community’s approach to all such investigations and audits.⁶⁴⁸ Homeland security was not merely a department, but also a paradigm that played an increasingly important role in the IG community’s self-definition.

⁶⁴⁵ Humberto Sanchez, ‘Hurricane Relief: Bush Signs \$51.8B Emergency Funding Bill’, *The Bond Buyer*, 12 September 2005.

⁶⁴⁶ ‘Grassley Releases Recommendations on Accounting for Katrina Dollars’, Press Release, US Senate Committee on Finance, 4 October 2005.

⁶⁴⁷ Letter of Barry Snyder, ECIE Chair and Gregory Friedman, PCIE Chair, to Senator Charles Grassley, Chairman, Senate Committee on Finance, 29 September 2005.

⁶⁴⁸ This included the Department of Homeland Security; Department of Defense; Department of Transportation; Environmental Protection Agency; Department of Health and Human Services; General Services Administration; Department of Justice; Department of Agriculture; United States Postal Service; Department of Housing and Urban Development; Department of Commerce; and the Department of the Interior.

Representatives Waxman, Pelosi and other Democrats in the House repeatedly called for a variety of oversight measures, including regular hearings,⁶⁴⁹ and attempted to pass legislation establishing a formal oversight framework⁶⁵⁰ and to create an independent commission for oversight.⁶⁵¹ (Waxman argued for an independent commission instead of a Republican-led commission, one modelled after the 9/11 investigation panel, citing a lack of rigor in previous Republican oversight). Much of the congressional critique centred on the lack of preparation and the failure of the response to disburse aid in a timely and effective manner, but later, it also touched on the fraud, waste and abuse that plagued the use of the recovery funds. Congress pointed to FEMA Director Michael Brown's failure to address the IG criticisms of FEMA's preparedness months before Katrina (June 2005).⁶⁵² In this context, the IG's investigations and audits were merely one source of criticism and analysis. The focus of the IG investigation was at Skinner's discretion, and he steered the OIG's attention to the fraud surrounding the recovery funds.

⁶⁴⁹ Letter of Representative Henry Waxman to Representative Tom Davis regarding hearings about Katrina-related contracting waste, 20 March 2006.

⁶⁵⁰ Representatives Nancy Pelosi and Henry Waxman, 'Hurricane Katrina Accountability and Clean Contracting Bill' (H.R. 3838)

⁶⁵¹ Statement of Representative Henry Waxman on the Hurricane Katrina Accountability and Clean Contracting Bill, 20 September 2005.

⁶⁵² 'DHS IG Found FEMA Systems for Deploying Personnel and Supplies to Disaster Zones Inadequate', Fact Sheet of Minority Staff, Committee on Government Reform, US House of Representatives, 28 September 2005.

Chart 10.1. Scale of Gulf Coast Recovery Joint OIG Resources, September 2006

Object of oversight		
	Cost of recovery	\$87.75 billion
	Number of contracts	8,408 (over \$12 billion)
IG Inputs		
	Number of IG audits or reviews of contracts	835 (monitoring \$8.5 billion)
	IG hotline complaints	22,647
	IG personnel, of which, <ul style="list-style-type: none">• Auditors/inspectors:• Criminal investigators:• Support personnel:	<div>337</div> <div>88</div> <div>55</div>
IG Outputs		
	Indictments	439
	Arrests	407
	Convictions	225

Within the DHS OIG itself, on 19 September 2005, Skinner announced the creation of the Office for Hurricane Katrina Oversight. He intended the office to be proactive and preventative in its oversight, with an aim to pre-empting problems ‘through a proactive program of internal control reviews and contract audits’ by safeguarding disaster assistance funds.⁶⁵³ The creation of the office was in part a response to a congressional call for Katrina funding to be spent properly; in the Senate, Senators Collins and Lieberman introduced a bill to create a special IG for Katrina oversight in the manner of the SIGIR (Special IG for Iraq Reconstruction), and in the House, House Government Reform Committee Chairman Representative

⁶⁵³ ‘DHS Inspector General Initiates Special Office for Hurricane Katrina Oversight’, Department of Homeland Security Documents, 19 September 2005.

Tom Davis (R-VA) and Representative Todd Platts (R-PA) concurrently introduced a bill to create a Council of IGs involved in Katrina recovery.⁶⁵⁴

Congress was not the only source of deliberation about the organisation of Katrina IG oversight. The IG community itself met to plan its response, and developed a coherent strategy to guide the audits and investigations. The Katrina strategy ‘focuse[d] heavily on prevention, including reviewing controls; monitoring and advising department officials on contracts, grants and purchase transactions before they are approved; and meeting with applicants, contractors and grantees to advise them of the requirements and assess their capability to account for the funds’.⁶⁵⁵ Katrina thus offered a novel opportunity: the chance for diverse OIGs to pool resources and provide a comprehensive oversight team above and beyond the contribution of each office.

Initially, a total of thirteen departmental and agency OIGs devoted resources to the oversight effort.⁶⁵⁶ This broad institutional base enabled the oversight project to expand beyond fraud investigations and evaluate the efficacy of FEMA’s disaster response and recovery strategy, and its execution in the cases of Hurricanes Katrina and Rita. FEMA’s programmes were largely directed through grants and contracts, making rife the opportunity for financial fraud, waste and abuse. The structure of these contracts contributed to the permanence of ‘the state of emergency’ as a mode of governance, and placed the private sector as a key player in this governing arrangement. ‘[Government watchdogs and congressional critics] say FEMA’s no-bid

⁶⁵⁴ Paul Hoversten, ‘DHS Creates Special Oversight Office to Monitor Post-Katrina Contracts, Grants’, *Homeland Security and Defense*, 21 September 2005.

⁶⁵⁵ DHS/OIG, *Overview of OIG Plans for Katrina Oversight*, Department of Homeland Security Documents, 21 September 2005.

⁶⁵⁶ In addition to DHS, these included the Department of Commerce, Department of Defense, Department of Energy, Department of Interior, Department of Justice, Department of Labor, Department of Transportation, Department of Health and Human Services, Department of Housing and Urban Development, Environmental Protection Agency, General Services Administration, and NASA.

and limited-bid contracts are of such magnitude that they will give prime contractors an advantage that will last far beyond the initial emergency phase'.⁶⁵⁷ In the first three months of recovery alone, FEMA entered into more than \$1.6 billion of contracts with private entities.⁶⁵⁸ The IG adapted its own response to the government's reliance on the private sphere. In effect, it legitimated the use of a public accountability mechanism to investigate the private sector. Although the broader movement during the Bush administration years steered towards privatisation (and the 'hybridisation' of public-private partnerships), the elevation of the IG's role meant that the mechanisms of accountability in place to check private sector behaviour were not purely market mechanisms.

If the hurricanes themselves were one disaster, FEMA, 'a Cold War relic', was another.⁶⁵⁹ FEMA's transfer to DHS in 2003 had weakened its bonds with state and local governments because a number of grant programmes had been scattered within the DHS and were no longer coordinated.⁶⁶⁰ The OIG issued its Gulf Coast reports in the context of a long series of critical reviews of the DHS and FEMA's capacities that preceded Katrina, by both the IG and in Congressional investigations, many of which focused on FEMA's capacities and plans. Although it judged FEMA's performance in 'garden variety' disasters favourably, it cautioned that FEMA was ill-equipped to face a truly catastrophic event, both because it lacked sufficient resources and because it had failed to develop any of the necessary contingency plans for orchestrating a large-scale disaster recovery. Well before Katrina, Skinner (and GAO and Congress)

⁶⁵⁷ Charlie Cray, 'Disaster Profiteering: The Flood of Crony Contracting Following Hurricane Katrina', *Multinational Monitor*, 1 September 2005.

⁶⁵⁸ PCIE Homeland Security Roundtable, *Compendium of Hurricane Oversight in the Gulf States*, 12 December 2005, p. 3.

⁶⁵⁹ Testimony of Barbara A. Mikulski (D-MD), 'Hurricane Katrina: Recommendations for Reform', Hearing, Senate Committee on Homeland Security and Governmental Affairs, 8 March 2006.

⁶⁶⁰ 'Hurricane Katrina: A Nation Still Unprepared', Special Report of the Senate Committee on Homeland Security and Governmental Affairs, (109-322), 2006.

had already warned of FEMA's lack of preparedness. An IG report only three months before Katrina charged that FEMA lacked critical capacities, including balancing three, poorly integrated information systems, and maintaining no systems to track commodities and personnel; these deficiencies left the agency singularly unable to assess continuing need or monitor progress. But the problem was not just of recent vintage; an OIG report on FEMA's performance after Hurricane Andrew in 1992 produced similar criticisms.⁶⁶¹ The IG reports in 1992 and 2004 both failed to have an impact.

Katrina exposed FEMA's many weaknesses. The agency overrode many of its financial safeguards in awarding contracts (especially in granting sole source contracts) to meet the exigencies of the emergency, and according to GAO estimates, wasted roughly \$1 million on improper disaster aid.⁶⁶² In continuing to administer housing programmes for 44 months, it violated Stafford Act regulations that stipulate an 18-month maximum.⁶⁶³ More broadly, FEMA was charged with poor leadership and capacity and insufficient communication systems.

III. The Oversight Context

Three main sources of oversight covered Katrina and the related disasters (including Hurricanes Rita and Wilma): Congress; the Government Accountability Office (GAO); and a network of what would ultimately be twenty-two OIGs.

Alongside these broad units, the Justice Department also steered the Hurricane

⁶⁶¹ FEMA/OIG, *FEMA's Disaster Management Program: A Performance Audit After Hurricane Andrew* (H-01-93), 14 January 1993.

⁶⁶² 'Katrina Fraud Swamps System', Water Mark: Tracking Recovery on the Gulf Coast, *USA Today*, 7 June 2007.

⁶⁶³ Testimony of Richard Skinner, Hearing of the Committee on Homeland Security, US House of Representatives, 8 July 2009.

Katrina Fraud Task Force, established on 8 September 2005 by Attorney General Alberto Gonzalez; the Task Force fielded roughly 6000 tips regarding fraud and waste in the first year.⁶⁶⁴ Each of these sources of accountability provided distinctive forms of oversight, with some overlap, and considerable coordination and communication amongst them. The three sources varied slightly in methodology, audience, the nature of their recommendations, and their short- and long-term effects on policy and procedure.

A. Congress

Congress held twenty-two hearings on various aspects of the response and recovery between September 2005 and February 2006.⁶⁶⁵ The House established the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina, chaired by Rep. Tom Davis (R-VA), whose work culminated in a final report entitled *A Failure of Initiative*, in February 2006.⁶⁶⁶ This report demanded not only a revised National Response Plan, but a ‘National Action Plan’ that would require federal action in the event of a future emergency. In the Senate, the bipartisan committee released a comprehensive report and set of recommendations, *Hurricane Katrina: A Nation Still Unprepared*, in May 2006, and a follow-up hearing a year later monitoring changes made in response to oversight.⁶⁶⁷ The Senate report recommended consolidating the nation’s emergency coordination bodies, and dissolving FEMA completely and replacing it with an independent body, the National

⁶⁶⁴ PCIE/ECIE Oversight Report, October 2006, p. 4.

⁶⁶⁵ For a list of twenty related hearings, see: http://www.agiweb.org/gap/legis109/katrina_hearings.html

⁶⁶⁶ *A Failure of Initiative: The Final Report of the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina* (Report 109-377), US House of Representatives, 15 February 2006.

⁶⁶⁷ ‘One Year Later: Are We Prepared?’ Hearing of the Senate Committee on Government Affairs and Homeland Security, 7 September 2006.

Preparedness and Response Authority (NPRA) within DHS; this was a position that the DHS IG strongly opposed. Both the House and Senate reports honed in on the lack of communication and coordination between federal, state and local actors and between different federal entities. In response to Katrina, and as part of its oversight, Congress also enacted the Post-Katrina Emergency Management Act of 2006, part of the National Emergency Management of the DHS Appropriations Act of 2007.⁶⁶⁸ This Act, one of many attempts at statutory reform of emergency governance following Katrina, called for FEMA's complete reorganisation, a new mission, heightened responsibility in the Department and more autonomy.⁶⁶⁹ Skinner's reviews from 2007 onward included observations of FEMA's success in managing this organisational transformation.

However, broadly speaking, Congress's oversight was as inadequate as the Administration's. In 1992, following Hurricane Andrew, the GAO determined that the sheer number of congressional oversight committees had hindered the recovery process and issued recommendations for reform. However, with the post-9/11 incorporation of FEMA into DHS, the number of committee with emergency oversight authority increased manifold, with nearly all committees having some say in the process.⁶⁷⁰ The dispersed authority made effective and coordinated oversight nearly impossible.

B. GAO

⁶⁶⁸ Title VI of Public Law 109-295 (H.R. 5441).

⁶⁶⁹ Keith Bea, 'Federal Emergency Management Policy Changes After Hurricane Katrina: A Summary of Statutory Provisions', Congressional Research Service, RL33729, 6 March 2007.

⁶⁷⁰ Jason Mycoff, 'Congress and Katrina: A Failure of Oversight', *State and Local Government Review*, Vol. 39, No. 1, 2007, p. 27.

For some reports, GAO used a similar methodology as the IGs, conducting interviews, performing data reliability assessments of FEMA databases, and comparing National Emergency Management Information System (NEMIS) data with FEMA data, but it could access fewer agency internal documents than the IGs.⁶⁷¹ For other reviews, GAO relied on on-site visits, interviews, informal discussions on the ground with governmental officials, the House Select Committee report, and the White House report on lessons learned.⁶⁷² Their analyses resulted in a full report presented to the Senate Homeland Security and Governmental Affairs Committee, as well as testimony in Katrina oversight hearings. In contrast to the IGs, who targeted Congress, their department heads, and the public, the GAO's primary audience was the congressional committees. GAO issued further reports, but did not have a system in place to monitor compliance with their previous recommendations.

C. Joint Federal OIGs

From September 2005 to January 2006, the coordinated Federal IG team reported biweekly to Congress about the state of the recovery; from February onwards, they issued semiannual reports on the oversight through March 2008. The OIG oversight plan relied first and foremost on the work of the Office of Management and Budget (OMB) and the DHS OIG, who together identified the major potential problem areas for IG review.⁶⁷³ The group (originally thirteen, but later expanded to twenty-two OIGs), mirrored the bureaucratic web that FEMA itself had assembled to

⁶⁷¹ GAO, *Hurricanes Katrina and Rita Disaster Relief: Continued Findings of Fraud, Waste, and Abuse*, GAO-07-252T, 6 December 2006.

⁶⁷² GAO, *Hurricane Katrina: GAO's Preliminary Observations Regarding Preparedness, Response, and Recovery*, Testimony before the Senate Homeland Security and Governmental Affairs Committee, 8 March 2006, p. 2-3.

⁶⁷³ PCIE/ECIE *Oversight of Gulf Coast Hurricane Recovery: A 90-Day Report to Congress*, 30 December 2005, p. 7.

carry out the recovery. After the hurricane, FEMA outsourced its responsibilities by delegating \$7 billion through ‘Mission Assignments’ to other departments, six-billion dollars alone of which went to the Department of Defense and Army Corps of Engineers.⁶⁷⁴ The OIG network built on an existing IG structure, the Homeland Security Roundtable subgroup of PCIE and ECIE, which had been formed in June 2005 with the emergency oversight demands of 9/11 in mind. PCIE and ECIE hosted the Roundtable as a body to share information and practices as well as to enable coordination with bodies outside of the IG community.⁶⁷⁵ Even before Katrina, the group had adopted the government’s overall strategy of ‘prevention’, and the hurricane gave it the opportunity to implement the strategy. Less than a month after the disaster, the joint OIGs issued an overview of its oversight plans, with the intention not only of focusing on continuing audits and investigations, but also of reviewing the existing controls; monitoring contracts and advising department official on appropriate procedures before contracts were issued; and assessing and informing relief fund applicants of their responsibilities as recipients of government support.⁶⁷⁶ It anticipated a high degree of fraud in the recovery, and established protocols for preventing it rather than taking a reactive, ‘gotcha’ approach.

The three sources of oversight also used one another as sources of information and as forums for disseminating their analyses and recommendations. The IG network cooperated closely with the GAO to steer the oversight, employing such novel modes of coordination as a joint forensic audit of DHS’s purchase card

⁶⁷⁴ DHS/OIG, *Overview of OIG Plans for Hurricane Katrina Oversight*, Department of Homeland Security Documents, 21 September 2005.

⁶⁷⁵ Mission Statement of the PCIE/ECIE Homeland Security Roundtable, 2005, available <http://www.ignet.gov/pande/hsr1.html#mission>, accessed 30 May 2014.

⁶⁷⁶ DHS/OIG ‘Overview of Katrina Oversight’.

programme.⁶⁷⁷ Moreover, the IGs appeared regularly as witnesses in more than a dozen Katrina-related congressional hearings. In designing the oversight efforts, the PCIE/ECIE stated a desire to reduce redundancy in oversight as much as possible.⁶⁷⁸ In this way, they triangulated to form a network of accountability. The IG web stood at the helm of the overall oversight effort, with the DHS IG at the centre. The web extended not only to other OIGs and Departments, but also created links with state and local audit organisations in Louisiana, Mississippi, and Alabama.

IV. DHS OIG Reviews

Within this broad web of oversight – unfolding alongside and in reaction to the recovery, and not always with clear lines of responsibility – the DHS OIG focused on the role carved out for it by PCIE. Skinner appointed a Special Inspector General (SIG) for Gulf Coast Hurricane Recovery, Matt Jadacki (originally the Deputy IG for Disaster Assistance), to lead the oversight. Its work consisted of multiple reviews that targeted recovery fund fraud, waste and abuse, and FEMA’s performance (especially the adequacy of the National Disaster Medical System and disaster response plan). The Gulf Coast Recovery group not only monitored the funds themselves, but also the overall relief effort’s coordination as well (i.e., the process by which FEMA delegated tasks and funds to other federal bodies). In the initial oversight plan, DHS OIG was delegated responsibility for FEMA’s performance; Joint Field Office (JFO) operations; public assistance projects; reviewing documentation for mission

⁶⁷⁷ This programme, which issued purchase cards with a limit of up to \$250,000 for both micro-purchases and payment of other purchases relating to recovery, was instituted to provide immediate relief for victim (See *90-Day Report to Congress*, p. 9).

⁶⁷⁸ Ibid, p. 8.

assignments; ongoing monitoring of financial controls; and reviewing major contracts and expanded micro-purchase authority.⁶⁷⁹

The DHS OIG issued its first major review of FEMA's performance seven months after Katrina's landfall.⁶⁸⁰ Its analysis was scathing, and it presented FEMA with thirty-eight recommendations with which to contend. The recommendations were wide-ranging and demanding of both FEMA and DHS as a whole. A first set of recommendations suggested that FEMA set measurable, reasonable goals, determine the necessary resources to achieve them, and then allocate these resources to the appropriate subcomponents of the agency. A second set provided specific suggestions on how to implement the National Response Plan, the national emergency plan codified in December 2004. When Katrina struck, the DHS and FEMA had only partially transitioned to this new plan, which included guidelines for coordination between state, local and federal actors. A third set focused on increasing capacities, from training opportunities to formalising work plans. A fourth attacked FEMA's management practices, especially with regards to disaster assistance, and demanded that the agency revise its method of testing pilot programmes. Having eviscerated its mission, resources, management, practices, and organisation, few areas of FEMA's performance went untouched by the IG's critique.

Nearly four years after the hurricanes, Skinner still testified regularly on DHS's – and especially FEMA's – progress in implementing IG recommendations and the statutory demands of the Post-Katrina Act of 2006. His criticism continued to target FEMA's approach, its planning strategies, its mode of coordination and communication (both internally and with other actors), and the potential for innovation in its practices. The focus of his assessments encompassed much more

⁶⁷⁹ PCIE, Compendium, December 2005, p. 9.

⁶⁸⁰ DHS/OIG, *A Performance Review of FEMA's Disaster Management Activities in Response to Hurricane Katrina*, OIG-06-32, 31 March 2006.

than compliance monitoring, and bore witness to his belief in a collaborative, constructive IG, with a role akin to that of a management consultant. Most striking was his contextualisation of FEMA's incompetence, which challenged the demands for better government action evident in much public outcry. Skinner distinguished 'legitimate' criticism of FEMA's performance – of which he issued plenty – from the criticism that stemmed from unclear or unrealistic expectations on the part of state and local officials and the public about what the federal government could, or should, achieve. His overall diagnosis, while highly critical of FEMA's overall performance, cautioned that setting 'achievable' goals and communicating its aims more clearly to state and local officials would limit future confusion. He also took Congress to task for failing to provide FEMA with adequate funds and, more important, legislative authorities with which to manage its operations.⁶⁸¹

Despite the 'contextualisation', Skinner's censure did not spare FEMA. He faulted the agency for failing, when asked by Congress, even to *identify* the additional authorities it would need to carry out its responsibilities. Per the requirements of the Post-Katrina Act, FEMA drafted a National Disaster Housing Strategy. Skinner eviscerated the final product, insisting that FEMA specify precise goals, a definition of 'success', and criteria by which to evaluate those goals.⁶⁸² His analyses hardly used existing regulations as the basis of critique. Instead, his testimony relied on an independent assertion of what FEMA *should* be doing, identifying the systemic sources of failure, and offering specific recommendations to these ends. A previous DHS OIG audit in 2008 had demonstrated that many failures in FEMA's housing programmes stemmed more from a lack of communication and coordination between

⁶⁸¹ Skinner testimony, 8 July 2009.

⁶⁸² Ibid.

FEMA and local authorities than from a misuse of resources.⁶⁸³ By identifying the nature of the problem, Skinner called attention to the need for FEMA to focus energies on clarifying the lines of authority and responsibility and communicating expectations to other actors. Similarly, in a September 2008 review, the OIG encouraged FEMA to experiment with ‘innovative’ solutions to its perennially plagued Disaster Housing programme, and offered a number of OIG-generated ideas as possibilities.⁶⁸⁴ Moreover, it reviewed current FEMA pilot programmes and judged their viability, suggesting, for instance, that ‘[a]lthough FEMA’s Individuals and Households Pilot Program shows promise, it is uncertain whether the program is sufficiently scalable and flexible to be effective following a catastrophic disaster’.⁶⁸⁵

These periodic reviews not only offered specific management reform ideas, but also dealt with the status of previous recommendations. A June 2009 OIG review of FEMA’s reaction to Hurricane Ike compared the agency’s activity favourably to its Katrina performance, indicating that in terms of sheer numbers – registering victims, inspecting houses, installing temporary housing, disbursing funds – FEMA’s management reforms had improved performance.⁶⁸⁶ However, by October 2009, the OIG’s Semiannual Report indicated that the recommendations of twelve FEMA-related financial assistance disaster audits still remained unresolved.⁶⁸⁷

The oversight project’s most immediate goal was to recover the funds lost through fraudulent contracts, poorly designed programmes, and dishonest individuals and groups exploiting government relief programmes. This was, in some ways, the ‘easiest’ part of the recovery effort to quantify and evaluate, and the numbers issued

⁶⁸³ DHS/OIG, *FEMA’s Preparedness for the Next Catastrophic Disaster*, OIG-08-34, March 2008.

⁶⁸⁴ DHS/OIG, *FEMA’s Sheltering and Transitional Housing Activities After Hurricane Katrina*, OIG-08-93, September 2008.

⁶⁸⁵ Skinner Testimony, 8 July 2009.

⁶⁸⁶ DHS/OIG, *Management Advisory Report: FEMA’s Response to Hurricane Ike*, OIG-09-78, June 2009.

⁶⁸⁷ DHS/OIG, *Semiannual Report to Congress*, 1 April 2009-30 September 2009.

by the OIG and the GAO unveiled steady fraud throughout. One GAO review of FEMA's disaster assistance funds in June 2006 estimated (with ninety-five percent confidence) a range of \$600 million to \$1.4 billion in improper or fraudulent payments between September 2005 and May 2006 alone.⁶⁸⁸ Despite the rigour with which this oversight had taken place, its concrete consequences, in terms of recovering lost taxpayer money, remained dubious. Six years later, Skinner continued to report the government's failure to recoup much of the lost funds that could have been recovered. In 2008, partly because of the IG and GAO reviews, a federal court ordered FEMA to revamp its procedures for recovering funds. But because FEMA, three years later, had yet to finalise the process, it had not even attempted to recover \$643 million in Katrina aid funds (nearly the entirety of its estimated improper payments to individuals).⁶⁸⁹ A 2013 IG review at HUD revealed similar patterns of fraud in housing assistance, citing \$700 million in as-yet-unaccounted-for funds, eight years after the disaster.⁶⁹⁰ At best, much of the IGs' financial oversight resulted not in restoration of the funds, but only in public awareness of governmental waste, and in organisational and procedural change.

However, by continuing the oversight of the Katrina recovery, Skinner opened an ongoing dialogue with FEMA, pushing and guiding it through agency-wide reforms well past the Katrina 'era'. The IG's role also extended well beyond the original compliance model to an advisory role in Congress, and thus permitted the IG to weigh in on matters far wider and more consequential (in the long term) than an agency's immediate performance. In February 2009, the OIG issued a report

⁶⁸⁸ GAO, *Hurricanes Katrina and Rita Disaster Relief: Improper and Potentially Fraudulent Individual Assistance Payments Estimated to Be Between \$600 Million and \$1.4 Billion*, GAO-06-844T, 14 June 2006.

⁶⁸⁹ Mike M. Ahlers, 'Inspector: Millions in Improper Katrina, Rita Aid Not Yet Recovered', *CNN US Edition*, 4 January 2011.

⁶⁹⁰ Jeff Zeleny, '\$700 Million in Katrina Relief Missing, Report Shows', *ABC News*, 3 April 2013.

assessing the relative merits of returning FEMA to its pre-DHS autonomy, but ultimately arguing strongly in favour of keeping FEMA within the folds of DHS.⁶⁹¹ On the basis of this report, Skinner was later called to make a statement in a House Homeland Security committee hearing on the fate of FEMA.⁶⁹² The debate over the agency's placement and autonomy had both concrete institutional and definitional consequences.⁶⁹³ Ervin described the political situation thus:

‘In the immediate aftermath of the [Katrina] disaster a bipartisan consensus quickly began to form around the notion that the problem was essentially structural – the Federal Emergency Management Agency (FEMA) was no longer an independent agency reporting directly to the President. If only, certain political leaders in both parties and FEMA insiders argued, the Homeland Security bureaucracy were reorganised yet again to take FEMA out of the department, all would automatically be well’.⁶⁹⁴

Yet with his insistence on keeping FEMA within DHS, the IG – the primary institutional voice arguing against an independent FEMA – ultimately helped to win the battle. The topic was shelved until Mitt Romney, 2012 Republican presidential candidate, questioned FEMA's very existence again three years later.

V. Effects of the Katrina Reviews

The Katrina reviews, and the parallel work of the IG, made their mark institutionally and administratively, and by formalising the procedures of emergency governance, including specifying the legal scope of executive action. Institutionally, the IG pioneered an event-based, community-wide IG network of accountability that pooled resources and expertise. It also occasioned the establishment of the Emergency

⁶⁹¹ DHS/OIG, *FEMA: In or Out?* OIG-09-25, February 2009.

⁶⁹² Statement of Richard Skinner, Hearing, Subcommittee on Emergency Communications, Preparedness and Response, Committee on Homeland Security, US House of Representatives, 17 March 2009.

⁶⁹³ DHS/OIG, *FEMA: In or Out?*

⁶⁹⁴ Ervin, 2006, p. 179.

Management Unit (later Emergency Management Office), a permanent unit within the DHS OIG that honed and channelled disaster management expertise.

Administratively, the reviews recommended a host of procedural reforms, all of which were ultimately implemented and resolved to the IG's satisfaction by 2010. For instance, although the original draft manual for the DHS's Post-Katrina Purchase Card programme had included control procedures for the management of the programme, infighting over the specifics of the controls resulted in the control procedures being omitted from the final manual entirely. After the first year, the Katrina IG team insisted on the implementation of new control procedures.⁶⁹⁵

Unlike some Justice OIG reviews, the DHS Gulf Coast reviews did not fundamentally challenge existing law. However, they contributed to the institutionalisation of emergency governance through the standardisation of governing procedures in emergencies. The reviews had the effect of creating new concepts and evaluative categories as part of a comprehensive national disaster management plan:

‘with regard to the National Response Plan, the use of incident designations, the role of the principal Federal official, and responsibilities of emergency support coordinators were not always well understood, causing confusion on the ground, which, in turn, impeded FEMA's initial response efforts’.⁶⁹⁶

In testimony, Skinner pushed these plans not only for emergencies, but also as guiding principles with which to restructure the relationships between different levels of government. ‘Both NIMS and the National Response Plan are watershed planning concepts that restructure how Federal, State, and local emergency responders conduct disaster response and recovery activities’.⁶⁹⁷ Moreover, Skinner's recommendations pointed to a web of coordination in the management of the response plans:

‘DHS needs to develop operating procedures under both NIMS and the National Response Plan, and it needs to offer training on those procedures to

⁶⁹⁵ PCIE/ECIE, Semiannual Report, October 2006, p. 4.

⁶⁹⁶ Skinner testimony, 8 March 2006.

⁶⁹⁷ Ibid.

all levels of government, including DOD. DOD participation is essential so that it may solidify its role and responsibilities under the National Response Plan to facilitate an enhanced understanding among the Federal, State, local, and non-profit organizations that participate after a disaster'.⁶⁹⁸

The recommendations also targeted emergency plans on the micro level. For instance, a review of nursing homes in the hurricanes showed that many homes lacked substantive emergency plans and information for coordinating with state and local services in the event of an emergency. The group recommended stricter federal certification standards.⁶⁹⁹

Despite its strengths, the overall Katrina oversight project also suffered from the birthing pangs of a novel approach to coordinated oversight. One participant, a long time member of the IG community, chastened the IG audit community for its 'untimely and not very effective [reaction], especially as respects fast reaction to and reporting of problems' and suggested that '[t]he overall result was widely varying actions as respects the timeliness, results and depth of Hurricane Katrina reviews'.⁷⁰⁰ This perspective on the Katrina project was not unique within the community, but the potential shown by the 'web' approach prompted CIGIE to refine the coordinated model in 2008 when it designed the Recovery Board task force in response to the economic emergency of 2008.

VI. Conclusion:

The Katrina reviews had noticeable influence on DHS (especially FEMA) reforms and internal improvements, through dialogue between the OIG and the Department, and through the continuous monitoring of open OIG recommendations.

⁶⁹⁸ Ibid.

⁶⁹⁹ PCIE/ECIE, Semiannual Report, October 2006, p. 4.

⁷⁰⁰ Statement of Hubert Sparks, quoted in POGO, *Accountability is a Balancing Act*, 2009.

Yet, the mere word of the IG was not enough to spur Departmental action, and the IG's earlier, similar criticism had fallen on deaf ears. It took the political pressure of a national disaster, coupled with a disapproving public and a watchful Congress, to encourage FEMA and the DHS to heed the recommendations of its IG. Only once the Department was shamed by public failure could the IG perform its 'management consultancy' role, and thus underscored both the power of the IG (to design and spearhead reform) and its weakness (its reliance on political actors to implement its reforms and heed its warnings). However, the IG web was less successful pursuing material recoveries. The Joint OIGs' financial monitoring proved successful in uncovering and publicising fraud and waste, but far less so in recouping funds and holding perpetrators to account.

PART III: THE DEMOCRATIC PERSPECTIVE

The final section of this dissertation relates the narratives of Part II to the broad theoretical questions posed in Part I.

CHAPTER 11: Cometh the Hour, Cometh the Inspector: Contributions to Democracy

In addition to their widely touted contributions to curbing government fraud and waste, IG work has contributed, sometimes indirectly, to multiple processes and core principles of democracy. However, their respective contributions, and thus their effects on democratic integrity, have varied widely according to their values and strategies, and are dependent on the instrumental use of their work by a broader web of actors.

i. Rule of law

Especially in the reviews analysed above, the State Department OIG made few substantial contributions to the rule of law. In his 1992 passport privacy breach review, Funk framed the incident as a single instance of a politically motivated lack of integrity. This interpretation may have been warranted, but it failed to address the procedural factors that enabled the breach to occur, and recommended individual sanctions rather than systemic or procedural reforms. Similarly, in the 2008 case, the reviews did not offer clear suggestions and forceful recommendations to change the legal administrative structure or overall security framework. The OIG ‘tested’ the privacy protection system, and thus came to the conclusion that the faults were indeed systemic, but it relied on the data provided by the Department – data in which the OIG had already noted inconsistencies. The thrust of the report’s recommendation was simply to ‘review’ the existing framework, rather than offer concrete suggestions or strategies for developing a comprehensive procedural framework.

In contrast to State's privacy reviews, Justice's War on Terror reviews made a strong contribution to the rule of law by issuing recommendations to strengthen administrative procedure and in pointing out underspecified law. These reviews also contributed to the standardisation of procedures and definitions relating to the confinement of aliens, as well as to the clarification of vague policies regarding the length of detainment and the treatment of detainees. This implicitly addressed concerns of civil and human rights, but did so without using the language of rights. This choice had both advantages and disadvantages for future rights' claims: on the one hand, it did not set a precedent for making purely rights-based claims, but on the other hand, it provided defendants with an alternative language and strategy with which to fight rights' abuses. Also significant was the IG's willingness to pursue the 'spirit' of the law rather than the 'letter' in making a diagnosis of wrongdoing in cases where no law had been broken, and to set a precedent that the FBI and INS would be held to such a standard in the future. Finally, the reviews called attention to the need for, and to the construction of, constraints on executive emergency governance.

Like the Justice reviews, the DHS's Gulf Coast Recovery reviews strengthened the rule of law, especially by focusing on the frameworks for emergency governance. This involved pushing the Department to formalise and elaborate on national emergency plans, including defining the scope and limits of federal action in times of emergency. In this way, the OIG shaped administrative procedure by pointing out underspecified law and regulations, not only for predictive ease and efficiency, but also to guide and constrain the executive's future actions. The distinctive challenge of the DHS OIG, especially in the Katrina case, was to become the watchdog of wrongdoing when the law was suspended during emergency. For instance, in order to expedite the recovery process, the government suspended its

commitment to competitive contracts in the direct aftermath of the hurricane, and in many cases awarded contracts on a sole source or limited competition basis. In the first three months of the disaster, 58.8% of the contracts awarded were sole source contracts; a year later, 44.5% were still being awarded without competition.⁷⁰¹ In some ways, this pattern bolstered the government's responsiveness and allowed it to provide services to victims of the hurricane, but it also violated the established regulations for emergency action. However, the IGs' insistence that the Department rewrite and specify its procedures was ultimately heeded, and enhanced the legal framework underpinning the state's emergency governance.

ii. Accountability

Overall, the IG reviews effected little immediate individual accountability, especially at the higher levels of governance. This was in part a result of the IGs' bias towards compliance monitoring and towards investigating specific incidents rather than system-wide problems; this bias worked to the advantage of senior administrators, thus enabling them to engage in a form of blame avoidance.

In each of the State OIG cases, accountability in the sense of sanctions or punishment for individuals yielded minimal discipline. In the 1992 passport case, one person was fired and another resigned; both were subsequently exonerated and offered formal apologies by an independent special investigator. Sixteen years later, two personnel were terminated and a third admonished, and the IG review provoked an ongoing criminal investigation of contractors that ultimately found nearly a dozen of them guilty of privacy breaches. Yet these prosecutions often resulted only in

⁷⁰¹ DHS/OIG Semiannual Report to Congress, October 2006, p. 10.

suspensions of a few weeks or short terms of community service. In all of the cases, the individuals charged were low-level contractors or administrators, and no one responsible for oversight or for procedural reform was implicated.

Justice's reviews, even the rigorous ones, similarly targeted the individuals most immediately in violation of the breached rules. Top ranking officials were spared at the expense of low-level bureaucrats and prison staff: whereas the high-ranking officials knew of the violations committed by correctional guards, only the individual staff members who committed physical abuse were identified for discipline and ultimately dismissed.⁷⁰² Moreover, the IG did not target the Departmental staff responsible for writing the treatment policies for discipline, even when acknowledged by the reviews to hold responsibility on various levels for the abuses.

Despite not always affecting direct accountability, Justice's War on Terror reviews contributed to a number of parallel processes of accountability, partly as a result of their high visibility (see Table 7.2, with 1,012 citations for the September 11 Detainees reviews and 945 for the NSL reviews). Congress held three hearings for the first set of reviews, and its conclusions were cited by at least two parallel processes of litigation. The information the NSL reviews brought to light had been unsuccessfully sought after by many public interest organisations, and once released, was used as evidence in parallel cases.

At DHS, after Hurricane Katrina, the Administration was criticised and forced to reconsider its performance and overall emergency management structure, on many fronts, through public, Congressional and even international scrutiny. By March 2008, the OIGs had cumulatively achieved 1,186 arrests, 1,362 indictments, and 874

⁷⁰² DOJ/OIG, Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act, March 2006.

convictions related to disaster assistance fraud.⁷⁰³ Yet, as was evident from the quantity of unrecovered funds eight years later, this accountability did not necessarily result in repercussions for the perpetrators, or redress for victims (including the government itself). Its success in the immediate task of recouping funds was limited, in part because the host agencies failed to implement the procedures needed to recoup the vast majority of fraudulent payments.

However, a second component of accountability – visibility – was better served by the IGs. Table 11.1 illustrates the total number of media citations attracted by each of the three OIGs since their establishment.

Table 11.1. Total Media Citations for State, Justice and Homeland Security OIGs

OIG	Media citations	Date Range
State ⁷⁰⁴	2663	01/01/86-31/12/13
Justice ⁷⁰⁵	7556	01/01/90-31/12/13
Homeland Security ⁷⁰⁶	2082	01/01/03-31/12/13

The differences between the three OIGs are striking. Despite having existed for four years longer than the Justice OIG, State OIG's work was cited only a third as frequently as Justice's over time. Proportionally (given its relative youth), Homeland Security also lagged behind Justice, but had nearly as many citations as State in less than half the amount of time. Such popularity does not necessarily indicate the quality of the reviews, or their immediate consequences in terms of individual punishment or administrative reform. Moreover, the political sensitivity of a review can influence its media popularity and does not necessarily indicate the strength of its

⁷⁰³ PCIE/ECIE, *Semiannual Report to Congress*, March 2008.

⁷⁰⁴ Search terms: department of state inspector general OR state department inspector general OR state department's inspector general OR inspector general of the state department

⁷⁰⁵ Search terms: department of justice inspector general OR justice department inspector general OR justice department's inspector general OR inspector general of the justice department

⁷⁰⁶ Search terms: department of homeland security inspector general OR DHS inspector general OR DHS's inspector general OR inspector general of the department of homeland security

effects or the rigour of its analysis. A review initiating management reforms, for instance, might not receive substantial media attention, but might be an important and consequential for the department; inversely, a review (such as Funk's passport review in 1992) might be of poor quality, but garner a tremendous amount of media attention because of the visibility of the issue itself. Nonetheless, these figures suggest the strength of each OIG as a political actor and contributor to public debate. It is clear that external actors used State OIG's reviews far less frequently than the reviews of some other OIGs, and consequently, that State did not enjoy a reputation as an authoritative source of information, or even as an actor worth engaging in debate. In contrast, even when external actors challenged Justice's reviews, they brought the OIG into the debates as a legitimate voice with which to contend.

State OIG's visibility in the media spiked in 1992 and 1993 as a result of the Clinton passport files, but Funk's contribution to the visibility of government wrongdoing was an ambiguous one. The review captured attention because of the definitive blame it placed on two political appointees, and because it led to the appointment of a parallel process of accountability (the Independent Counsel). Thus, it arguably aided the process of accountability more than the outcome – the punishment it recommended was wrongfully bestowed. Fundamentally, its diagnosis was deemed to be incorrect, and this led to the public sanction and dismissal of an appointee who was not directly responsible for the breach (both accused parties were later exonerated publicly by the government at the behest of the Independent Counsel). The Special Prosecutor himself showed frustration at what he perceived to be the wastefulness and redundancy of his own investigation.

iii. Freedom

Freedom requires the protection of rights and a safeguarding of the public sphere to make public deliberation possible; the three IGs contributed far more to the latter than to the former. Though both Justice and Homeland Security IGs have had the specific mandate to monitor civil rights abuses since 2002 (in conjunction with the Patriot Act), the IGs' original bias towards compliance monitoring has historically pushed rights monitoring out of the IGs' standard purview. Of the three cases, only Justice successfully contributed significantly to the protection of rights. Yet, all three OIGs, at times, brought government wrongdoing (including rights violations) to the attention of the public (and because the 'public-ness' of the public sphere is also related to accountability, the discussion of the IGs' visibility in the previous section is relevant, here, as well).

State OIG was prompted with the opportunity to weigh in on rights violations with the passport file violations, but in its reviews, the OIG was circumspect about the rights-related implications, preferring to frame the matter in terms of procedural infractions. Because the 2008 review was so heavily redacted, its results did little to contribute to public knowledge about privacy security or about the specific facts of the case at hand. Similarly, the DHS OIG shied away from rights judgments as well, producing a weak review on Maher Arar, and then failing to address the civil rights dimension of the Secure Communities programme, despite an explicit congressional request to do so. Moreover, in many ways the Katrina disaster did not lend itself to evaluation in the domain of constitutionality or rights, whether political, civil or social. And aside from some acknowledgement that the Katrina disaster disproportionately affected underprivileged populations (the poor, elderly, and disabled), the reviews made no mention of rights concerns. On the surface, the fraud

and mismanagement that the IGs were tasked with monitoring did not obviously spark questions of rights as such, perhaps making the performance-oriented focus adopted by the OIGs the ‘logical’ strategy. Yet the alleged racial disparities in service provision (discussed further below), and the related concerns of social and economic rights, went unaddressed in the IG reviews. Beyond the Gulf Coast reviews, though the OIG issued a number of rigorous and critical reviews of the TSA’s passenger screening procedures (and continuing matter of controversy and object of public and Congressional criticism), the OIG’s reviews in its first decade focused squarely on the performance of the TSA rather than on oft-cited potential rights’ violations and sexual harassment claims by passengers.⁷⁰⁷ (The IG did periodically investigate individual claims of harassment within TSA itself, but not rights violation as a result of the screening procedures themselves.) However, the DHS IG reviews did contribute to another dimension of freedom: healthy deliberation in the public sphere. The narratives and reports provided regular fodder for media outlets and watchdog groups, who often used and even disseminated the public IG reports. The research and government watchdog group, POGO, created an online compendium of Katrina-related IG and GAO reviews, tracking the overall oversight effort, with regular analysis of the IGs’ findings that were then used as the basis for POGO’s own testimony and lobbying on the Hill.

The Justice OIG appeared to be the most willing to address rights concerns directly. The FBI forensic lab reviews (both by Bromwich in the nineties and by Horowitz two decades later) both directly addressed the rights of defendants, and provoked wider debate about the death penalty by attesting to the frequency of faulty FBI analyses and their consequences. Both the September 11 Detainee and NSL

⁷⁰⁷ See, for instance, American Civil Liberties Union, *TSA Pat-down Search Abuse*, 21 December 2004.

reviews clearly addressed rights concerns, though without using the language of rights as such. In some ways, the lack of recourse to ‘rights language’ strengthened the reviews’ potential long-term impact: by building a precedent for arguing for ‘rights’ without accruing the sometimes-controversial ideological baggage that accompanies rights’ claims, the IG reviews neutralised (and strengthened) their arguments. But in other ways, the unwillingness to invoke rights claims was symptomatic of the IGs’ broader inability address abstract principles as standards for evaluation or compliance.

iv. Equality

One of the sturdiest safeguards of equality lies in providing all citizens with equal access to information. The IGs’ contribution to transparency – that is, to providing all citizens and political actors the opportunity to make judgments about government action – varied amongst the three cases. The 2008 State OIG passport review was so heavily redacted that no new information reached citizens or the media; even a lawsuit against the State Department to release an unredacted version, filed by the watchdog group, EPIC, failed to bring to light new information. However, in the Justice OIG, transparency proved to be one of the strongest features of the September 11 and NSL reviews, as well as many of the other reviews discussed. The information published and disseminated by the IG in these reviews was gathered from sources to which citizens and media groups did not have access, leading to significant disclosures about the workings of hitherto secret national security programmes. Not only was the information on which the reviews were based unreleased, but also consisted of complex data culled from many documents that would have been difficult for observers without extensive legal knowledge to parse. The reviews

publicised information that had been denied by the FBI when unsuccessfully sued by the ACLU for the data.⁷⁰⁸ The reviews also reinforced standards for the equal treatment of persons regardless of their legal immigration status.

In the DHS, the Gulf Coast Recovery reviews analysed the material recoveries, and the structural and procedural vulnerabilities in the agencies performing the recovery. The question of the fair and equal distribution of resources, however, did not appear on the IG agenda. In the wider public, the Katrina recovery became the poster child for entrenched racism in America, famously leading rap artist Kanye West to proclaim, 'President Bush doesn't care about Black people'.⁷⁰⁹ In fact, public debate about the disaster, both domestically and abroad, was concerned as much with the racial dimensions of the disaster as with the bureaucratic incompetence of the recovery effort, and the significance of the disaster for the African American community was profound. Sociologist Darnell M. Hunt declared that '[y]ou'd have to go back to slavery, or the burning of Black towns, to find a comparable event that has affected Black people this way'.⁷¹⁰ While monitoring institutional racism is arguably outside the purview of a single IG review, other (private) investigations of the Gulf Coast recovery uncovered evidence of a racial disparity in service provision that could have been the focus of IG attention. For instance, one study, conducted by students at the University of Connecticut, discovered that FEMA supplied sixty-three percent of a predominantly white neighbourhood with trailers, but only covered

⁷⁰⁸ Shirin Sinnar, 'Protecting Rights From Within? Inspectors General and National Security Oversight', 65 *Stanford Law Review*, 2013, p. 38.

⁷⁰⁹ David A. Love, 'Pardon Me Bush, But Kanye Never Called You Racist', *The Grio*, 10 November 2010, available at <http://thegrio.com/2010/11/10/pardon-me-bush-but-kanye-never-called-you-racist/>, accessed 10 July 2014.

⁷¹⁰ Quoted in Kristen Henkel, John Dovidio, and Samuel Gaertner, 'Institutional Discrimination, Individual Racism and Hurricane Katrina', *Analyses of Social Issues and Public Policy*, Vol. 6, No. 1, 2006, pp. 99-124.

thirteen percent of a mostly African-American neighbourhood.⁷¹¹ In contrast, the IGs couched the disaster in terms of performance and efficiency, eliminating the potential for questions about racial parity.

v. Responsiveness

The IGs' effect on democratic processes is highly dependent on external actors who make use of their work by implementing recommendations or by using their conclusions in parallel processes of accountability. This is especially true of the IGs' effects on government responsiveness to citizen preferences through effective programme delivery. In theory, the IGs' regular performance evaluations appraise the efficiency and effectiveness of programmes, and in departments with high programmatic costs, the potential savings are high – a report by the House Committee on Oversight revealed that the number of unheeded IG recommendations rose from 10,894 in 2009 to 16,906 in 2012, entailing an estimated \$67 billion in savings.⁷¹² But to be implemented, these recommendations require the political will and authority to implement, neither of which is part of the IGs' arsenal of tools.

Although a number of State IGs attempted to evaluate the efficacy of the State Department's programmes and policies – in other words, to pass judgment on United States foreign policy – their opinions often fell on deaf ears. In the late eighties, Sherman Funk indicated dissatisfaction with the entire 'War on Drugs' but was informed that, for political reasons, such a position could not be maintained. Similarly, after inspecting the State Department's embassies in Southwest Asia,

⁷¹¹ Thomas Craemer, 'Investigating Racial Inequalities in Hurricane Katrina Relief by Counting FEMA Trailers', *United States Federal Emergency Management Agency*, 1 January 2008.

⁷¹² *Open and Unimplemented IG Recommendations Could Save Taxpayers \$67 Billion*, Staff Report, US House of Representatives, Committee on Oversight and Government Reform, 5 March 2013, p. 2.

Harold Geisel questioned the realism of the first Obama Administration's strategy in Afghanistan on the basis that its goals were unattainable with the available resources.

The DOJ IG reviews under analysis did little to address the Department's responsiveness to citizen preferences or its capacity to administer effective programmes. Routine audits run by the Justice OIG do regularly check compliance with existing regulations, encourage efficiency, and identify waste. For instance, a March 2014 DOJ OIG Seminannual Report identified \$6,966,872 of Questioned Costs to be accounted for by the Department. While these types of audits, when heeded, can indeed improve the Department's efficiency, most of the Justice OIG's flagship special reviews focused on wrongdoing with implications for constitutional or rights-based concerns.

However, because of the DHS IGs' orientation towards performative accountability, enhancing the government's responsiveness – in short, its performance in delivering the programmes desired by the citizenry – was the paramount goal of and contribution to democratic integrity. The reviews and their recommendations were framed specifically to evaluate and promote efficient and accountable administration of government programmes. But while the reviews were rigorous and critical, and provided Congress with the information and proposals with which to undertake reform, the agencies themselves were at times unresponsive to the very recommendations offered to improve their performance. Where agencies did implement IG recommendations, they improved the quality of activity in the future (as with FEMA's enhanced performance at the time of Hurricane Ike), but because this was dependent on compliance with IG recommendations, the IGs' effect was limited. The IG network's wider effect, however, was to supply the narrative, data and recommendations that were then used as the basis for legislative overhaul of the

national emergency management system, as well as the continuous specification of DHS's mission.

vi. Participation

Two elements of IG work can enhance citizen participation: fielding citizens' complaints (the 'input'), and inviting wider use of the work by disseminating the results (the 'output'). They IGs serve as a direct point of access (the input) for individual citizens, including those employed by the government, to make formal and anonymous complaints through the OIG hotlines. These are advertised on all agency and departmental websites, though this comes with its own drawback: some IGs are reluctant to treat hotline complaints with as much gravity as requests from Congress or scandals reported in the media. Second, the release of their reports (the output) provides an authoritative narrative whose authority is not frequently challenged (unlike some challenges from civil society). When an individual IG develops a good reputation, its authority as an interlocutor in the public sphere derives its legitimacy from its neutrality (non-partisanship); its legal access to knowledge; and its expertise (in audits, investigation, and law).

Participation – in the sense of direct involvement by citizens in launching critique or contributing to it – was little affected by the State and Justice IGs' reviews. State OIG's longstanding troubles, both organisational and related to individual IGs, prevented it from gaining the kind of reputation that would encourage external actors to trust its work. The two War on Terror reviews at Justice analysed above were processes removed from citizen input and deliberation, with much conducted behind closed doors and covered by secrecy classifications. The final reviews were heavily

redacted when released to the public. Indirectly, however, the Justice Department's reviews consistently supported whistleblowers' allegations (especially in the various FBI lab reviews). In 2012, a Whistleblower Ombudsman began to assist the IG in educating department members about whistleblower rights (though it is yet to be known if this position is effective in encouraging and protecting whistleblowers). Insofar as the review was later widely cited and used instrumentally by other actors, the IG's work might have inspired other forms of citizen involvement, but the process itself was largely closed and did not admit for external input.

However, the widely advertised IG Gulf Coast Recovery hotlines and websites provided a first point of contact and an invitation for public participation in the oversight process. The PCIE/ECIE Roundtable created a single Katrina hotline to avoid redundancy amongst the multiple OIGs fielding complaints, and each OIG's website invited reports of fraud. In the Katrina project, the hotlines provided one of the most visible links between the citizenry and the IGs. In the twelve months following the hurricane, the Hurricane Fraud Hotline received 22,467 complaints.⁷¹³ However, the role of such a citizen participant is merely one of informant, and not discussant. IGs rely on the citizenry for input that forms the basis for their narratives, but then create their own recommendations and policy-shaping proposals.

vii. *Conclusion*

Ultimately, the IGs' most meaningful contributions were realised only in conjunction with the efforts of a broader set of actors. Their authority was relational rather than absolute; it was dependent on the power of persuasion associated with

⁷¹³ By way of comparison, the DHS OIG received 9,868 hotline complaints over a twelve-month period from October 2009-October 2010 (See DHS/OIG *Semiannual Reports*, March 2010 and October 2010).

their narratives, the legitimacy stemming from their reputation, and their place in a broader web of accountability that included other OIGs and government bodies, Congress, the media, the courts and groups in civil society.

CHAPTER 12.

Conclusion:

*Quis custodiet custodem ipsum custodum?*⁷¹⁴

In a fully developed bureaucracy there is nobody left with whom one could argue, to whom one could present grievances, on whom the pressures of power could be exerted. Bureaucracy is the form of government in which everybody is deprived of political freedom, of the power to act; for the rule by Nobody is not no-rule, and where all are equally powerless we have a tyranny without a tyrant.

-Hannah Arendt, 'Reflections on Violence',⁷¹⁵

Juvenal's classic question about the locus of power – who will watch the guardians? – returns us to the paradox of the administrative state's anti-democratic impulses. Since 1978, American federal inspectors general have served as the guardian's guard by watching the state to ensure that it conforms to the standards of integrity appropriate to the exercise of legitimate power. But who watches the IGs themselves, the guardians of the guardians? How do we assess the IGs' own effects on the state and on democracy? In the modern administrative state, these standards of integrity have acquired an economic valence measured by efficiency, at times in tension with the classic democratic values of impartiality, justice and rights. Our assessment tools need to take into account the value judgment inherent in the quest for efficiency – 'efficiency to *what end?*', as Dwight Waldo often queried – and the way that these values produce democracies of different kinds. The IGs' ambiguous foundational mandate to root out fraud and abuse and restore integrity to the executive branch has permitted these two values to play off of each other through the continuous process of accountability. The IGs do not resolve the tension between administrative and democratic values, but they do walk the line between the two, and in so doing, set the stage for the political confrontation between them. Through their

⁷¹⁴ Who will watch the *guardian himself* of the guardians?

⁷¹⁵ Hannah Arendt, 'Reflections on Violence', *New York Review of Books*, Vol. 12, No. 4, 27 February 1969.

continuous critique of bureaucratic behaviour, the IGs have helped to make administration a site of contestation over fundamental political values.

The experiences of the three OIGs presented in this dissertation – in the Departments of State, Justice and Homeland Security – demonstrate how this ‘apolitical’ administrative setting has given birth to political battles over the meaning of accountability and over its consequences for the shape of American democracy. The three histories also imply responses to the institutional question of how the IGs have risen to their role as an arbiter of political values, and to the theoretical question of their democratic significance.

State, Justice and Homeland Security: Three Approaches to Accountability

The IGs’ arrival was the momentous consequence of a political battle over the control of the executive branch. Since 1978, the fruits of that battle have spawned a bevy of inspectors general across the federal government. In terms of sheer numbers, their ranks have swelled, as have their budgets and congressional mandates. Institutionally, the coordination amongst them and with other political actors has grown into a web that mirrors the broader trends of horizontal governance seen in recent decades. Substantively, they have pursued distinct conceptions of accountability that have pushed their work into the realms of performance maximisation, ‘management consulting’, and rights protection, amplifying the political role that they play. I address the puzzle of how this has occurred, both institutionally and discursively, by returning to the propositions laid out in Chapter 2.

The first proposition, that some IGs have transcended their structural bias towards compliance monitoring and intensified the effect they have on democratic

integrity, was true of two OIGs in different ways. Successive Justice IGs regularly issued reviews that assessed government behaviour using not only existing rules, but also self-generated standards of integrity and ‘appropriate’ government action; these reviews paid attention to the ‘spirit’ of the law in addition to the letter, and suggested procedural reforms that addressed the systemic sources of breaches of integrity. When their analyses did not provoke direct or immediate accountability, the Justice IGs often prompted external actors to take up the pursuit of accountability. The longest serving Homeland Security IG, Richard Skinner, also chose strategies beyond compliance monitoring. His reviews not only criticised his department for its performance failures, but also demanded that it generate clear and rigorous goals, accompanied by standards with which to evaluate its progress. In the absence of satisfactory existing regulations, he demanded the creation of new rules with which to comply and new institutional structures with which to buttress the reforms.

In contrast, many State Department OIG reviews effected little direct accountability, made few marks on the host department, attracted little attention, and were rarely taken up by external actors in parallel political processes. State OIG lacked a sufficient cadre of qualified staff, with many of its members deficient in auditing and investigative skills, and its budget diminished as the Department’s outlays grew. It also balanced expensive congressional mandates to continue its biannual consular inspections with a poorly managed bureau in Washington, and thus found its resources spread too thin to redesign the department’s faulty institutional and procedural architecture. The shift away from simple compliance monitoring seen in the Justice and Homeland Security OIGs was thus not uniform, and moreover was not a rule across time even within single OIGs. The absence of a permanent IG in

DHS after 2011 brought the office into disarray and led it to issue a number of weak reviews.

The success of the DOJ and DHS IGs in going beyond compliance monitoring was based in concrete institutional strategies and organisations. In both offices, IGs created specific units designed to address particular problems, bodies that channelled expertise and overcame longstanding cultural divides between audit and investigative staff. Whereas the DHS OIG's institutional innovations were thematic and focused on emergency management, the DOJ IG's innovations were capacity- and skill-based (insofar as they privileged particular skills and expertise rather than a topical focus). In Justice, successive IGs built the SIRU (later the O&R) with a specific staff profile that combined mostly legal investigative expertise with audit and inspection expertise. Moreover, the narrative skills cultivated by the Justice IGs provided a counter to the periodic external criticism that IG reviews, especially semiannual reports, are excessively long and incomprehensible. The office invented the 'special review' – a new tool to improve visibility and coordinate skills – as vehicle for pursuing matters above and beyond compliance. The unit became the backbone of the OIG's high profile and often consequential reviews. Similarly, the first two DHS IGs altered its initial staff ratio to develop its investigative skill base and created the EMU to house the interdisciplinary teams devoted the immediate oversight of emergency. The DHS OIG also forged links with other OIGs to share resources and import expertise that it lacked on its own. State OIG, in contrast to the other two OIGs, failed to develop a coherent and robust skill base, and instead relied on the 'experiential' expertise of its temporary, rotating inspectors. It had no intermediary body with which to combine the interdisciplinary skills often required for complex investigations, and as a result,

struggled with internal cultural divisions between audit, investigation, and inspection sections that stymied office productivity and capacity.

Though related to its heightened institutional reach, the diversification of the IGs' value orientation proceeded separately from its institutional evolution. Over its first three decades, the IG community's early focus on immediate departmental fraud, waste and abuse migrated into the domains of performance improvement, politically- and ideologically-related wrongdoing, and rights monitoring. This expansion was effected both through congressional fiat (dictating that IGs act as policy-generating 'consultants' and to monitor compliance with civil rights and liberties) and by individual IGs' exploitation of their interpretative latitude. The discursive construction of accountability – its value orientation – differed by IG and reflected personal experience and bias, as well as the focus of the department. The three cases thus partially supported the second proposition, that personal background and professional experience affect value orientation. The lawyers at Justice concentrated heavily on democratic accountability, and channelled the office's resources into a unit that primarily investigated breaches of democratic values. In contrast, the primary IG at DHS, a long-time federal manager with business and public administration training, framed his enquiries in terms of maximising performance. Of the IGs surveyed in the cases, Richard Skinner (at DHS) was the IG perhaps most influenced by the performance themes of the 'reinventing government' movement in the preceding decade, and pushed the IG model decidedly into the direction of 'management consulting'; given his training in both Public and Business Management, and his placement in various OIGs when the movement began in the early nineties, his choice of strategy was not surprising.

However, not all IGs conformed to this tendency for lawyers to favour democratic values, and for managers and accountants to favour efficiency. While at State OIG (prior to 9/11), lawyer Clark Kent Ervin led reviews that investigated such political and ideological matters as the Bush Administration's alleged involvement in the 2002 Chávez ousting in Venezuela. Like his fellow lawyers at Justice, he deemed this review to be emblematic of the type of problem that IGs 'ought' to be reviewing – that is, they should produce reviews targeting democratic values. Yet once at Homeland Security, he moved his focus to the department's performance problems. Here, his personal reaction to the events of 9/11, and his consequent ideological commitment to the War on Terror, pushed him to change from a democratic value orientation to an efficiency- or performance-based one. This shift, however, demonstrated not so much a commitment to the value of 'efficiency' as an administrative virtue in itself, as to a commitment to a particular political programme. (This view is born out in his memoir, in which he laments the DHS's ineptitude because of the practical and ideological import of its primary mission, to prevent a terrorist attack).

State OIG's orientation towards political and democratic values was not based in the professional background of any single IG. Many of its IGs, such as Funk, Geisel and Williams-Bridgers, had management backgrounds of various sorts (some academic, some 'experiential'), yet their respective approaches to OIG work varied considerably. In part because of the diplomatic nature of State Department work, State IGs paid attention to politically sensitive matters, though without always addressing the underlying democratic or performance-based problems that underpinned them. Also relevant to the value orientation seen in many reviews was the fact that State OIG did not have the kind of intermediary body within the office to

channel resources; the SIRU (O&R) in Justice and the EMU in Homeland Security served the function not only of concentrating resources, but also of focusing these resources on particular kinds of issues, and this predisposed each of the OIGs to review problems related to a particular value orientation.

The three cases also partially supported the third proposition, that material resources and independence condition the ability of an IG to adopt the more involved institutional strategy of building legal and institutional infrastructure. Material resources were most effective when channelled into long-standing organisational structures that focused on multidisciplinary coordination. The cases also revealed that an indirect factor in the success of IG reviews was the length of IG tenure. IGs who instituted the internal OIG reforms that underpinned their consequential reviews stood at the helm of their respective offices for a minimum of six years. In contrast, no single State Department IG even approached this length of tenure after Sherman Funk retired in 1994 at the end of a six-year term. Here, the need for coherent visions of accountability to guide an OIG and a corresponding set of institutional strategies became clear. It was this extended tenure that afforded IGs the stability and time to build the crucial internal structures and external networks which magnified their existing capacities and resources.

IG independence varied on two dimensions: the subjective and the objective. To produce consequential reviews, IGs needed both objective independence (having sufficient resources and a cooperative, responsive department head) and subjective independence (being free of personal political ties). The State Department OIG's inadequate performance and compromised reviews in the mid-2000s were duly criticised by GAO, Congress and POGO; however, during that time the OIG had suffered deep budget and personnel cuts that left it to struggle simply to fulfil its

congressional mandates and perform its routine consular inspections, not to mention to investigate further instances of departmental dysfunction. Subjective independence also mattered. Clark Kent Ervin, who supervised many strong and critical reviews at both State and Homeland Security, was criticised for conducting a methodologically weak review that exonerated the Bush Administration for its alleged role in the 2002 attempted Venezuelan coup d'état. Critics argued that his political ties to the Bush family compromised his subjective independence for this particular review and undermined its potential effects.

Though difficult to measure aside from subjective accounts, the constructive or mutually respectful relationship between each IG and its department head played an important role in enabling the IGs to conduct rigorous reviews. According to a number of IGs, the most consequential reviews were those that were highly critical of the department, and even challenged by department heads, but that were nonetheless permitted to be released to Congress without significant amendment. Both of the War on Terror reviews conducted by Glenn Fine were challenged publicly by the respective Attorneys General at the time, but in both cases the AG ultimately refrained from interfering with the IG's work, and willingly engaged in long-term conversation with the IG over the implementation of his recommendations. In contrast, at the State Department, AG Madeleine Albright often dismissed IG Williams-Bridgers's acerbic reviews and ignored her recommendations for Departmental reforms or individual accountability.

The success of each OIG in marking democracy above and beyond its host department depended not only on its value orientation and institutional strategy, but also on its ability to make reviews relevant to external actors and to publicise its conclusions. It was in the framing of the problems and their diagnoses that IGs

attracted the attention of external observers. And it was here that the import of the ‘web of accountability’ came to light. The IGs struggled to bring direct accountability consistently on their own, and their inability to require host departments to implement recommendations left them without the formal authority to take the lead in spearheading reform or accountability. However, their work was crucial in sparking parallel processes of accountability, and indeed, in providing those processes with a legitimising narrative and interpretation of the evidence available only from within the executive. The value of the IG thus lay in its *enabling* function for a broader web of accountability, rather than its position as the sole source of absolute and direct accountability.

Navigating Challenges to Democracy

These institutional developments form part of the story of the IGs. The three cases intimate when and how IGs can issue specific reviews with immediate consequences for accountability and bureaucratic efficiency. The IGs’ frequent failures suggest that they may also, at times, simply perpetuate the ‘bureaupathology’ they were designed to eliminate. But the institutional dimension of the cases alone does not fully convey the import of the IG phenomenon for the workings of American democracy.

At first blush, it might seem that IGs undermine representative democracy by taking on an accountability-holding function held in previous generations by representatives, the courts, and the citizenry. With their focus on management reform and procedural solutions, the IGs pose the threat of fostering a managerial conception of democracy (especially after their ‘post-reinventing government turn’), which could

weaken civic responsibility, political engagement, and political equality.⁷¹⁶ ‘Agonist’ democratic theorists, such as Sheldon Wolin and Bonnie Honig, might object to the IGs as an institution on the grounds that the ‘corrective’ to executive wrongdoing that they provide relies too heavily ‘on rules and procedures to the virtual exclusion of the art of politics’ (a charge Wolin levied at constitutionalism more generally).⁷¹⁷ Bonnie Honig similarly faults liberal and democratic theorists for resorting to ‘proceduralism’ – a dependence on procedural checks to safeguard democracy – in place of political engagement.⁷¹⁸ If IGs attempt to correct administrative wrongdoing through law and procedure, they dislocate the ‘site of struggle’ away from citizen politics. These concerns also echo the specific criticisms of legal theorists Eric Posner and Adrian Vermeule, who describe the IGs as having ‘created a large apparatus of compliance monitoring and bureaucratic reporting, and [...having] used a great deal of paper’, but having effected little accountability.⁷¹⁹ (Unfortunately, they fail to provide any evidence for their claims). Their opposition to ‘liberal legalism’ (a form of proceduralism) stems from the same objection voiced by Wolin and Honig: that procedural or legal infrastructure is not sufficient to curtail the abuse of power in any form, and may even facilitate its perpetuation. If the IGs’ work merely falls under the banner of proceduralism, then their direct work arguably does little to enhance democratic practices in the administrative state.

Paradoxically, given their roots in statute and their commitment to procedural reform, IGs may contribute less to the legal constraints on the executive than to the

⁷¹⁶ Tom Christensen and Per Lægreid, ‘New Public Management: Puzzles of Democracy and the Influence of Citizens’, *Journal of Political Philosophy*, Vol. 10, p. 267-96.

⁷¹⁷ Sheldon Wolin, *Politics and Vision: Continuity and Innovation in Western Political Thought*, Princeton: Princeton University Press, 2004, p. 349.

⁷¹⁸ Bonnie Honig, *Emergency Politics: Paradox, Law and Democracy*, Princeton: Princeton University Press, 2009.

⁷¹⁹ Eric Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic*, Oxford: Oxford University Press, 2010, p. 87.

political constraints. They access, interpret, and disseminate information to the media, to Congress, and to the public, and in their strongest reviews create legitimate counter-narratives that can be used by other political actors. In the modern world, political checks on state power depend crucially on the media and groups within civil society. In a reflection on the rapidly changing environment of the news media, journalist Michael Schudson details the increasing reliance of the media on ‘public observatories’, of which the IGs are a chief example: journalists now need assistance penetrating thick government apparatuses for data, much of which is protected by law.⁷²⁰ Such observatories, which also include think tanks, research organisations, and government bodies such as GAO, began to multiply and flourish in the seventies, and have emerged as a prominent feature of the contemporary media landscape, crucial for informed journalism. The traditional oversight function of civil society is, moreover, challenged by the intensifying claims of national security and emergency politics seen in the past century, as well as the technological developments, such as the use of databases, that complicate the process of information interpretation. In such cases, IGs may provide the primary, or even only, informational conduit between the executive and the media, or the citizenry as a whole. Through their work, IGs render complex legal and technical information intelligible and present it to be judged by the public. If, as political theorist Russell Hardin argues, ‘[t]he central epistemological concern of representative democracy is what the typical citizen knows about the actions of public officials’, then the IGs’ narrative function responds to the heart of the legitimisation crisis of the administrative and emergency states.⁷²¹

⁷²⁰ Michael Schudson, ‘Political observatories, databases & news in the emerging ecology of public information’, *Daedalus*, Spring 2010.

⁷²¹ Russell Hardin, ‘Democratic Epistemology and Accountability’, in Ellen Frankel Paul, Fred Miller, and Jeffrey Paul (Eds), *Democracy*, Cambridge: Cambridge University Press, 2000, p. 111.

The new bodies to which Schudson refers not only furnish the media with the information it needs to enter into the process of public accountability, but also provide the foundations of a new democratic legitimacy. Political philosopher Pierre Rosanvallon locates contemporary democratic legitimacy in precisely such independent authorities and extra-governmental watchdog organisations, which he similarly notes have expanded rapidly in many Western democracies. These bodies are not elected, nor are they ‘delegates in any legal or practical sense’, nor are they ‘incarnations of the community in a sociological or cultural sense’, and thus in no traditional understanding democratic.⁷²² Yet on Rosanvallon’s account, such forms of governance provide alternative forms of representation through their impartiality, which serves to ‘represent’, albeit indirectly, the perspectives of all groups by incorporating the views of all. The bodies thus protect the values of impartiality and reflexivity and deserve a place in contemporary theories of democracy and democratic legitimacy. John Keane’s concept of ‘monitory democracy’ similarly captures the stakes of this widespread institutional development in democracies.⁷²³ In such a democracy, ‘power-scrutinising mechanisms’ such as oversight bodies, public integrity committees, judicial activism, think tanks and transnational regulatory bodies all serve to shift the locus of power from the core of the state to parallel processes that bridge across state and society, and across national borders, all centred on the continuous process of accountability. In Waldron’s vision, too (discussed in the introduction), the ritual self-justification of public accountability has become the

⁷²² Pierre Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity*, Trans. Art Goldhammer, 2011, p. 88.

⁷²³ John Keane, *The Life and Death of Democracy*, London: Simon and Schuster, 2009.

duty of the state rather than that of the citizenry, and the state's legitimacy depends crucially upon it.

What is clear from these accounts of the rise of extra-parliamentary oversight mechanisms is that self-justification through continuous, overlapping processes of accountability is a prominent feature of the contemporary democratic state, and is integral to its legitimacy. As the three cases demonstrate, the IGs' direct impact on government accountability, whether in the form of individual sanctions or improved performance, does not always include the immediate consequences hoped for by their champions. But in their role as narrators, or account-givers, the IGs increasingly enter into the process of shoring up state legitimacy by providing an authoritative source of information and forcing the state to provide regular accounts of its actions. The IG is both a primary example of and contributor to the construction of the 'new' legitimacy, and thus marks a durable shift in the locus of governing authority.

The Future of the IG and the Future of IG Research

What of the future of the IGs? Congressional debates over the IGs, from the seventies until the proposed Inspector General Empowerment Act of 2014, have focused on the extent of IGs' power. Will they serve the government better with more or less authority? While some observers suggest making IG recommendations legally binding, this would create the danger of diminishing the role of public participation and agitation in the political sphere.⁷²⁴ On the one hand, as Representative Darrell Issa (R-CA) and others in Congress have argued, this would bring many important, or much-needed structural changes to the bureaucracy and

⁷²⁴ Representative Darrell Issa (R-CA) and POGO, amongst others, have championed this position.

would most likely save the government a great deal of money; Issa's support of building the IG bureaucracy is notable given his staunchly conservative, anti-government agenda. On the other hand, giving the IGs the power of force would diminish their narrative role and its implicit power of persuasion. Without binding recommendations, it is up to representatives, the public, and civil society to battle over the proper response to governmental abuse of power, or over the proper way to structure government policies. And by refraining from giving IGs the authority to require agency action, Congress keeps the 'activity' of democracy out of the hands of yet another set of unelected bureaucrats, and relocates this responsibility in the realm of politics.

It is also up to the IGs to determine the reach of their authority. A philosophy of 'narrative restraint' in service of the political process was adopted implicitly by successive Justice IGs, who limited their own role to providing narratives and leaving the use of those narratives to the political branches of government and to the public. The case of the Justice OIG demonstrates that one of the 'weaknesses' of the IGs – their non-judicial capacity and their unwillingness to make judgements 'as a prosecutor would' – is also their one of their strengths. In maintaining political neutrality, their narratives gain legitimacy, but more important, preserve political judgement for political actors rather than unelected bureaucrats. Such a strategy, when it is adopted, leads IGs to provide a resource for political actors rather than to usurp the authority of legislative or judicial bodies.

Other questions loom about the IGs' prospects for defending democratic values. In their organisation and purpose, the IGs were partly moulded by the NPM-inspired reforms of the nineties, but they have also begun to counter some of the anti-democratic effects of these reforms. The drive towards privatization, and in

particular, the contracting out of public services to private companies, have nullified much of Congress's oversight capacity by removing Congress's ability to monitor performance and shifting government activity to spheres outside the remit of FOIA laws.⁷²⁵ Yet IGs have increasingly demanded the inclusion of information extraction clauses in contracts with private service providers.⁷²⁶ If the IGs are to retain their narrative giving function, the authorities granted to them by Congress to gather data must be regularly adapted to the shifting sands of privatisation, executive privilege and national security exemptions.

There is also a downside to the IGs' growing capacity and coordination. As members of the law enforcement community with wide access to information and the authority with which to disseminate it, IGs constitute a risk of heightening the state's surveillance apparatus and becoming part of it. Recognising the advantages of the IGs' access to information, other officials, such as the FBI, have started to use IGs instrumentally as an entry point for task forces and for the sharing of data between agencies, state and local law enforcement units. This trend could lead to the IGs' envelopment by a greater 'police state' turned towards citizens rather than towards the state. The potential for abuse has not been lost on Congress; even staunch defenders of the IGs, such as Representative Elijah Cummings (D-MD), have cautioned that expanding the IGs' law enforcement powers 'would give to the IGs powers that even the FBI does not have, and the use of that authority could, in some circumstances, impede criminal investigations and raise significant civil liberties concerns'.⁷²⁷ The IGs surely represent a case of American state building, but to what kind of state do

⁷²⁵ David H. Rosenbloom, 'The Separation of Powers' in David H. Rosenbloom and Howard E. McCurdy, Eds., *Revisiting Waldo's Administrative State: Constancy and Change in Public Administration*, Washington, DC: Georgetown University Press, 2006, p. 100.

⁷²⁶ David Gross, personal interview, 28 July 2014.

⁷²⁷ Charles S. Clark, 'Agency Watchdogs Could Get More Freedom to Roam', *Government Executive*, 16 January 2014.

they contribute: a democratic state or a police state? The perennial political question of balance in apportioning governing authority continues to vex the IGs' institutional development.

The chameleon-like character of the IGs – at times overseers, law enforcement officials, innovators, policy makers, judges, and management consultants – has been both championed and lamented, but the overwhelming trend has been for Congress to push the IGs further in these various directions. To understand better the differential mutations in their role across the state, the variations in their effects, and the possibilities for their future development, future research needs to link the material specifics – budgets, staff, and organisational shape – to the substantive outcomes of IG work. These outcomes include not only concrete procedural reforms, material recoveries, and criminal prosecutions, but also the political dynamics set in motion by IGs' work. As many observers of the IGs, and as the IGs themselves, claim, the numerical data does not suffice to intimate the extent of their effects on the political process. More qualitative and narrative studies could illuminate the political pressures that condition IG strategies, OIG capacity, and the reception and use of IG reviews. Given that IG recommendations are not legally binding and rely on external actors to achieve an effect, further research that emphasises the IGs as political, rather than as bureaucratic, actors promises to shed much light on the broad effects of IG work.

IGs embody a host of paradoxes: they are bureaucrats who act with discretion, but who exist to limit the discretionary excesses of administration. Their existence adds a layer of bureaucracy in an effort to streamline an already unwieldy bureaucratic machine. They exist to check and limit government power, yet they introduce a 'panopticon' into the state's own governing arsenal. And just as they

‘straddle the barbed wire fence’ of the executive and legislative branches, they also straddle administrative and democratic values. But like many paradoxes, these have proven to be generative: as one crucial node in a broader web of accountability, IGs have exploited these ambiguities to adapt to the exigencies of democracy in an age of administration and perpetual emergency. In doing this, they have played a role in the emergence of a new democratic legitimacy.

Appendix: List of Interviews

Michael Bromwich, Former Inspector General, Department of Justice, 2 January 2013.

Tom Caulfield, Executive Director, CIGIE Training Institute, 4 January 2013 and 24 July 2014.

Charles S. Clark, Journalist, 3 July 2014.

Tom Davis, Representative, United States House of Representatives (Republican, Virginia 11th District), 18 January 2013.

Clark Kent Ervin, Former Inspector General, Departments of State and Homeland Security, 2 July 2014.

Glenn Fine, Former Inspector General, Department of Justice, 3 January 2013.

Phyllis Fong, Inspector General, United States Department of Agriculture and CIGIE Chair, 24 July 2014.

David Gross, Chief Strategic Planning and External Affairs, Office of the Inspector General, Department of Defense, 28 July 2014.

Crystal Hamling, Instructional Program Manager, CIGIE, 4 January 2013.

Richard Hankinson, Former Inspector General, Department of Justice, 16 January 2013

Henry B. Hogue, Analyst in American National Government, Congressional Research Service, 17 July 2012.

Michael Horowitz, Inspector General, Department of Justice, 26 January 2013.

Lynne McFarland, Inspector General, Federal Elections Commission, and CIGIE Vice Chair, 24 July 2014.

Charles Johnson, CIGIE Training Institute, 4 January 2013.

Mark Jones, Executive Director, CIGIE, 24 July 2014.

Carol Ochoa, Assistant Inspector General, Department of Justice, 26 January 2013.

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Calvin Scovel III, Inspector General, Department of Transportation, 17 January 2013.

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