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Inspectors General and National Security Oversight

By Shirin Sinnar

Courts and Congress are often unwilling to constrain the executive branch when it limits individual rights in pursuit of national security. For courts, restrictive standing doctrine, heightened pleading requirements, state secrets claims, and various judicial deference norms often block meaningful review. Meanwhile, congressional oversight is also limited; apart from significant informational barriers to monitoring executive conduct, lopsided political incentives frequently disfavor individual rights concerns against competing national security claims. Recognizing these constraints, a number of scholars have advocated internal checks on executive power—Neal Katyal famously proposed the development of an “internal separation of powers” as a second-best solution to the apparent failures of the classic “Madisonian” separation of powers. And yet, surprisingly little attention has been paid, at least in academic circles, to how most executive branch mechanisms actually function to protect individual rights, one of the core concerns behind the separation of powers.

I argue that one set of oversight institutions located within federal agencies—Inspectors General (“IGs”)—is sometimes playing a surprisingly significant role in monitoring and protecting individual rights. At their best, IGs ended abuses of individual rights that had completely escaped judicial review. For instance, after a Department of Justice IG review exposed the FBI’s use of a previously secret investigative practice to illegally acquire Americans’

phone records, the FBI ended that practice altogether. That IGs are playing a role in rights protection is surprising for two reasons: first, because many of us are fundamentally skeptical about internal oversight, and second, because IGs are typically seen as auditors of fraud, waste, and abuse—not as monitors of individual rights.

Yet from a rights-protection perspective, it would be unwarranted to celebrate IGs without recognizing the significant diversity in their performance and key limitations in their capacity. Indeed, the five cases of IG reviews on questions of individual rights that I analyze in this article suggest both the strengths and limitations of IG rights oversight. Ultimately, IGs are a contingent and partial solution to the problem of weak protection for individual rights in the national security context—not a replacement for robust external review.

IGs 101

IGs now exist in over 50 federal agencies, including every major agency charged with a national security mission—the Departments of Defense, Homeland Security, Justice, and State, and the CIA among them. Most of these agencies have IGs subject to the Inspector General Act of 1978, which established IGs throughout the federal government as part of a series of post-Watergate congressional reforms; the CIA IG enjoys largely comparable powers pursuant to a separate statute. The broad mandate of IGs is to promote efficiency and effectiveness in government programs and uncover fraud and abuse. Statutory IGs are appointed by the President and confirmed by the Senate; the President can remove an IG at will, though he must inform Congress in writing of reasons for a removal decision.

Among executive oversight institutions, IGs stand out in two ways. First, the design of IGs insulates them in important

ways from the executive and gives them a special relationship with Congress. IGs are required to report serious problems not just to agency heads, but also directly to Congress. In practice, this gives Congress access to precious information from within agencies and gives the IGs certain political leverage to encourage agency cooperation. The direct congressional relationship also distinguishes IGs from other oversight structures such as the President’s Intelligence Oversight Board or the Justice Department Office of Professional Responsibility, which report only to the executive. In most circumstances, agencies are prohibited from interfering with IG investigations or reports, though national security agencies can invoke special clauses to intervene, subject to congressional notification, in the interest of national security. Recent legislative changes also provide IGs access to independent counsel and require the President to include in budget submissions any statement from an IG who believes her office’s budget allocation would substantially inhibit its effectiveness. Second, IGs enjoy broad investigative powers to access information within federal agencies. That includes access to documents, witnesses, classified information, and information that would be subject to the state secrets privilege in court.

Although a primary impetus behind the Inspector General Act was concern over fraud and government waste, there was recognition even in the 1970s that IGs in intelligence agencies could also address concerns of a constitutional nature. In the post-9/11 period, many have. To determine how these reviews operated and what they achieved, I examined five IG investigations across four federal agencies: Justice, Homeland Security, Defense, and the CIA. These reviews addressed the post-9/11 detentions of hundreds of Muslim immigrants, the FBI’s use of National Security Letters

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to gather phone and email records, CIA extreme interrogations, the rendition of a Canadian citizen to Syria, and the military's monitoring of domestic protests. These investigations varied significantly and together suggest important strengths and limitations of IG reviews.

Strengths and Limitations of IG Rights Oversight

The core strength of national security IGs is in increasing transparency about government conduct—and misconduct—that might otherwise evade scrutiny. IGs can access information without the procedural and substantive barriers that often block judicial review, exposing violations of the law that would otherwise go undetected. A striking example is the Justice Department IG's exposure in 2007 of the FBI's secret use of an investigative tool, known as "exigent letters," to obtain Americans' phone records. In that case, the FBI had convinced phone companies on hundreds of occasions to hand over customer phone records by falsely claiming that the agency had already requested grand jury subpoenas for the same information and that exigent circumstances demanded immediate compliance, even when no emergency existed. Before the investigation, the practice was secret: no private litigant would have had the knowledge, let alone standing, to sue. But following the IG investigation, the FBI banned the use of exigent letters. In fact, even before that point, the mere knowledge that the IG was investigating had led to a sharp drop in the practice.

In fact, IGs may be most significant in areas where secrecy is greatest, as in intelligence operations. For instance, in 2004, the CIA IG issued a report criticizing the agency's extreme interrogations of high-level suspected terrorists, which in practice had exceeded even the Justice Department Office of Legal Counsel's ("OLC's") permissive legal guidance authorizing coercive methods. The report was publicly blocked during the Bush Administration and not released (even in redacted form) until President Obama took office. But even the limited release of the report within the executive branch apparently had impact.

The report's grisly depictions of actual CIA interrogations—including a case where the CIA waterboarded a detainee 183 times, despite representing that any repetition of the practice would not be substantial—reportedly contributed to the OLC's decision to temporarily withdraw legal support for coercive interrogations. Years later, the IG report again played a role. Current Attorney General Eric Holder said that reading the report helped convince him to reopen criminal investigations into the use of unauthorized interrogation techniques.

A second strength is that IGs can challenge government restrictions on liberty where existing law is sparse or undeveloped. In the national security context, the fact that courts do not review many cases often leaves gaps in legal doctrine. But IGs can evaluate compliance with other norms—such as internal agency rules, international norms, or even broader conceptions of fairness—where enforceable law is silent. For instance, in 2003, the Justice Department IG sharply criticized the post-9/11 detentions of hundreds of immigrants who were arbitrarily deemed suspects and subjected to prolonged confinement under very harsh conditions. At the time, it was an open legal question whether the government could hold immigrants for investigative purposes beyond a certain statutory removal period; a legal challenge was pending in federal court, while the OLC had deemed the detentions lawful. But rather than treat the absence of a judicial ruling as a free pass for the executive, the IG still faulted the detention policies for profoundly harming innocent individuals—and criticized government lawyers for not vigorously questioning their legality. That critique had enormous rhetorical impact, attracting widespread media and congressional attention and even helping some former detainees secure a monetary settlement against the government.

As institutions located within executive agencies, IGs can also develop institutional expertise and legitimacy that allows them to recommend tailored structural reform. For instance, in the exigent letters and post-9/11 detentions reviews, the Justice Department

IG recommended numerous specific procedural reforms, largely adopted by the executive, that created stronger internal oversight. A court attempting to impose similar structural relief might find it difficult to acquire the institutional knowledge—or legitimacy—to patrol agencies at that level of detail.

As one might imagine, there are nonetheless important limitations to IG rights oversight. First, despite statutory protections, the President and agencies can still undermine IG independence. A prominent example of such intervention occurred after the CIA IG released his report on CIA interrogations and continued to investigate detainee abuse. In 2007, the CIA launched an unprecedented investigation into the IG office itself, leading to changes in the way the office conducted inquiries, including the adoption of an ombudsman to receive complaints against the IG and the establishment of a new "quality control" officer within the IG office. While that intervention was particularly dramatic, the executive can take more subtle steps to undermine IGs, including delaying access to information, as occurred in the DHS IG's protracted investigation of the rendition of Canadian citizen Maher Arar to Syria. Other IGs might be co-opted by agencies, such that they fail to conduct thorough reviews even in the absence of official obstruction. A further threat to IG independence stems from the long vacancies in IG positions, which leaves these institutions in the hands of acting IGs who may lack the institutional authority and incentive to conduct hard-hitting reviews. Thus, a crucial question for future research relates to the on-the-ground factors that affect IG independence, including the staffing, structure, and budget of IG offices, the susceptibility of particular IGs to capture by the agencies they are charged with overseeing, agency norms and culture, and gaps in oversight resulting from IG vacancies.

A second limitation on the capacity of IGs to protect individual rights stems from the type of legal interpretation that IGs conduct. In the case studies I examined, IGs did not evaluate questions

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of constitutional rights compliance. Rather, IGs assessed compliance with sub-constitutional rules contained in statutes, regulations, or internal guidelines, or evaluated the propriety of national security conduct, irrespective of legality. As noted earlier, the ability of IGs to evaluate the propriety of government conduct—where courts only assess compliance with justiciable law—is an important strength. On the other hand, IGs may refrain from evaluating violations of constitutional rights, at least in the great many cases where the scope of such rights is highly contested. IGs might view independent analyses of constitutional questions as outside their core expertise, or might view such a function as blurring jurisdictional lines with the OLC. Whether or not such hesitation is institutionally prudent, it does suggest that IGs cannot simply compensate for the scarcity of judicial review; if one believes that constitutional law ought to constrain executive national security conduct, IGs are likely not filling the gap in constitutional compliance.

A third limitation is that lacking the power to enforce recommendations, IGs rely on political actors to implement reforms. But these political actors—agencies and Congress—may be particularly unwilling to implement reforms or enforce rights where the costs of national security policies are borne by unpopular and politically weak minorities—such as immigrants, foreigners, or Muslims. In addition, IGs, as internal actors, might themselves refrain from proposing the strongest reforms in order to preserve their working relationships with agencies or agency leadership.

Even the strongest IG reviews described here did not lead to accountability for high-level agency officials or to significant constraints on agency discretion. While IGs facilitated accountability for lower-level agency employees, they generally did not recommend discipline for senior agency leadership, even when faulting them for serious mismanagement, as in the review of exigent letters. Moreover, even the most critical IG reviews did not lead agencies or Congress to significantly constrain agency legal discretion: IG investigations did not lead to new policies prohibiting extreme interrogation methods, limiting immigration detention powers, or curbing the FBI's power to seek new voluntary disclosures of phone records. In the CIA case, the OLC temporarily rescinded legal support for coercive interrogations, but under new leadership once again sanctioned harsh interrogations at the CIA's behest. In the FBI case, while the agency banned exigent letters in response to the IG investigation, the FBI then asserted a new legal basis for asking phone companies to hand over customer phone records, and Congress has not yet followed through on the IG's request to control that legal authority.

Of course, the optimal liberty-security balance on each of these issues is sharply contested, and there is further disagreement on the specific remedial measures that ought to result from even an acknowledged rights violation. But whether or not one views the outcome in any of these particular cases as appropriate, the broader point is that the reliance of IG rights enforcement on political processes may limit their ability to protect individual rights, particularly

those of stigmatized or politically unpopular communities.

Strengthening IGs

While IGs will remain a partial solution to the problem of inadequate rights enforcement in the national security context, modest reforms can buttress their capacity to protect rights. First, Congress could further institutionalize the rights-monitoring role of national security IGs, explicitly requiring IGs to examine additional controversial policies implicating rights. Second, Congress could amend the IG Act to require greater disclosure of IG reports, subject to legitimate secrecy concerns. Third, Congress could strengthen IGs' investigative authority by empowering them to issue subpoenas for the testimony of former government officials related to their time in government. Fourth, Congress could expand the jurisdiction of the DOJ IG, which currently must refer allegations relating to attorney misconduct to the less independent DOJ Office of Professional Responsibility. While such reforms would support IG rights oversight, we should tread carefully in increasing IG powers—not just to ensure that the IGs themselves remain accountable, but also to preserve their ability to do what they now do well. For instance, the existing restriction on IG remedial power—the fact that IGs cannot directly enforce the recommendations they issue—almost certainly contributes to the IGs' relative freedom to issue strong critiques. Ultimately, carefully calibrated rather than dramatic expansions in IG power may make them most effective as monitors of individual rights. ○

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