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*Statutory Inspectors General: Legislative Developments and
Legal Issues*

Vanessa K. Burrows, American Law Division; Frederick M. Kaiser, Government and Finance Division

November 6, 2007

Abstract. Congress has long taken a leadership role in establishing and sustaining offices of inspector general (OIGs), which now exist in more than 60 federal departments and agencies. This effort began with Congress's initiation of the first contemporary statutory inspectors general (IGs) in 1976; it has continued with passage of the broadly encompassing 1978 Inspector General (IG) Act and 1988 Amendments as well as with additions and modifications in the meantime. In the 110th Congress, two bills designed to increase the IGs' independence and accountability or otherwise modify specific provisions have been introduced - H.R. 928 and S. 1723.

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Statutory Inspectors General: Legislative Developments and Legal Issues

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Summary

Congress has long taken a leadership role in establishing and sustaining offices of inspector general (OIGs), which now exist in more than 60 federal departments and agencies. This effort began with Congress's initiation of the first contemporary statutory inspectors general (IGs) in 1976; it has continued with passage of the broadly encompassing 1978 Inspector General (IG) Act and 1988 Amendments as well as with additions and modifications in the meantime.

In the 110th Congress, two bills designed to increase the IGs' independence and accountability or otherwise modify specific provisions have been introduced—H.R. 928 and S. 1723. These bills are similar, and their major provisions include a fixed term of office for IGs; removal for cause only; appraisal of the intention to remove or transfer an IG given to Congress 15 or 30 days in advance; notification of the annual IG budget request to Congress and the Office of Management and Budget (OMB) when the IG submits it to agency administration; establishment of a Council of Inspectors General on Integrity and Efficiency, replacing the two current councils operating under executive order; and creation of an Integrity Committee composed of Council members to investigate allegations of wrongdoing by an inspector general or officials in the office. The House Oversight and Government Reform Committee reported H.R. 928 with some changes on September 27, 2007. The Bush Administration has taken exception to several provisions in H.R. 928—removal for cause, transmittal of budget requests to Congress, and an independent IG Council—and, on October 1, 2007, threatened a veto of the legislation. The House passed H.R. 928, with amendments, by a vote of 404-11 on October 3, 2007.

This report, which will be updated as developments dictate, covers the main provisions of the proposals.

Contents

Overview	1
Proposed Changes	2
Removal for cause only	3
A set term of office (seven years, with possible reappointment)	7
A Council of the Inspectors General on Integrity and Efficiency	8
Integrity Committee	10
IG budgets and appropriations	11
Pay and Bonuses of IGs	12
Program evaluation information in IG semi-annual reports	12
Law enforcement authority	12
Agency Websites.....	13
Differences Between House-Passed H.R. 928 and S. 1723	13
Concluding Observations	14

Appendixes

Appendix. Select Statutes Limiting President’s Authority to Remove Officials Appointed with Advice and Consent of Senate.....	15
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Contacts

Author Contact Information	16
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Overview

The Inspector General Act, as amended, will reach its 30th anniversary in 2008, and today there are more than 60 offices of inspectors general (OIGs). This longevity and growth built on the efforts of the Committee on Oversight and Government Reform (then the Committee on Government Operations) in spearheading their origination, beginning in 1976. Substantial bipartisan and bicameral support was necessary at their creation, given the across-the-board opposition by executive agencies early on, and for their continued development.

There are two types of Inspectors General (IGs): (1) federal establishment IGs are appointed by the President with Senate confirmation, and may be removed only by the President except in the case of impeachment; and (2) designated federal entity (DFE) IGs are appointed and removed by the agency head in usually smaller agencies. The establishing mandates and statutory supports for the IGs¹ provide a useful vantage point to view the current proposals to modify the IGs, their statutory powers and political power. In combating waste, fraud, and abuse, IGs have been granted a substantial amount of independence, authority, and resources. In combination, these assets are probably greater than those held by any similar internal auditing-investigating office at any level of government, here or abroad, now or in the past. Some of these purposes and powers of the IGs include their charges to

- conduct and supervise audits and investigations within an agency;
- provide leadership and coordination for recommending policies and activities to promote the economy, efficiency, and effectiveness of programs and operations;
- have access to agency information and files and subpoena power for records and documents;
- receive complaints from agency employees whose identities are to remain confidential (with certain stated exceptions);
- implement the cash incentive award program for employee disclosures of waste, fraud, and abuse;
- hold independent law enforcement authority in offices in establishments;
- receive a separate appropriations account for offices in establishments;
- be appointed without regard to political affiliation and solely on the basis of integrity and demonstrated ability in relevant professions (for establishment IGs and the IG for the U.S. Postal Service);
- remain in office without term or tenure limits;
- report suspected violations of federal criminal law immediately and directly to the Attorney General; and

¹ Codified at 5 U.S.C. Appendix and 31 U.S.C. § 1105(a)(25). For background, see CRS Report 98-379, *Statutory Offices of Inspector General: Past and Present*, by Frederick M. Kaiser; U.S. House Subcommittee on Government Management, Organization, and Procurement, *Inspectors General: Independence and Accountability*, hearings, 110th Cong., 1st sess.; U.S. Senate Committee on Homeland Security and Governmental Affairs, *Strengthening the Unique Role of the Nation's Inspectors General*, hearings, 110th Cong., 1st sess.; and Government Accountability Office, *Inspectors General: Opportunities to Enhance Independence and Accountability*, GAO-07-108T (2007).

- operate under only the “general supervision” of the agency head, who is prohibited (with only a few express exceptions²) from preventing or prohibiting an IG from initiating or carrying out an audit or investigation.

Along with these, IGs have critical reporting requirements to keep the agency head and Congress “fully and currently informed” through specified reports and otherwise (which includes testifying at hearings and meeting with Members and staff).³ The reports include semi-annual reports as well as immediate reports regarding “particularly serious or flagrant problems.”⁴ For both types, the IG reports are submitted to the agency head who transmits them unaltered, but with comments deemed necessary, to Congress within a designated period of time. The resulting connections between the IGs and Congress not only enhance legislative oversight capabilities, but also provide an avenue for potential support for IG findings, conclusions, and recommendations for corrective action.

Proposed Changes

H.R. 928 and S. 1723 attempt to address recent, and in some cases, longstanding, congressional concerns regarding OIGs. Despite their institutional arrangements and authorities, modifications to the IG Act have been seen as useful to enhance the IG’s independence and power. Along these lines is the wide range of proposed changes in these two bills. Their overarching theme is to strengthen and clarify the authority, tenure, resources, oversight, and independence of the inspectors general. The bills’ specific proposals and considerations set up additional protections for IGs, including “for cause” removal and terms of office; consolidation and codification of two existing councils established by executive order into a single Council of the Inspectors General on Integrity and Efficiency; the reporting of the IG’s initial budget and appropriations estimates to the Office of Management and Budget, the agency head, and congressional committees; program evaluation in IG semi-annual reports; and the grant of law enforcement authority to IGs in designated federal entities. Additionally, H.R. 928, as passed by the House, and S. 1723 would require that DFE IGs, like their establishment IG counterparts, be appointed “without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations.”⁵

The Bush Administration has taken exception to several provisions in H.R. 928—removal for cause, transmittal of budget requests to Congress, and an independent IG Council—and, on October 1, 2007, threatened a veto of the legislation.⁶ In the face of this threat, the House passed H.R. 928 by a veto-proof margin on October 3, 2007.

² The heads of only six agencies—the Departments of Defense, Homeland Security, Justice, and Treasury, plus the U.S. Postal Service and Federal Reserve Board—may prevent the IG from initiating, carrying out, or completing an audit or investigation, or issuing a subpoena, and then only for specified reasons: to preserve national security interests or protect ongoing criminal investigations, among others. When exercising this power, the agency head must transmit an explanatory statement for such action within 30 days to the House Committee on Oversight and Government Reform, the Senate Homeland Security and Governmental Affairs Committee, and other appropriate congressional panels. The CIA IG Act similarly allows the agency head to prohibit the IG from conducting investigations, audits, or inspections; but the director must then notify the House and Senate intelligence panels of his or her reasons, within seven days.

³ 5 U.S.C. App. § 4(a)(5).

⁴ 5 U.S.C. App. § 5(d).

⁵ H.R. 928, § 6(d); S. 1723, § 7.

⁶ Office of Mgmt. and Budget, Exec. Office of the President, Statement of Administration Policy (October 1, 2007), (continued...)

Removal for cause only

Under current law, IGs have limited protection with respect to removal from office. Presidentially appointed IGs may be removed from office for any reason by the President. The President is required to communicate the reasons for such removal to Congress; however, the reasons need not be given in writing and no time limit is set.⁷ There is no requirement that Congress be given advance notice of an IG's removal. IGs who are appointed by an agency head may be removed or transferred for any reason by the agency head, and the only limitation on such removal is that the agency head must promptly communicate to both Houses of Congress, in writing, the reasons for the IG's removal or transfer.⁸

H.R. 928 and S. 1723 propose a change in the removal provision for establishment IGs by requiring that removal by the President must be for cause on specified grounds. H.R. 928 and S. 1723 provide that an establishment

Inspector General may be removed from office prior to the expiration of his or her term only on any of the following grounds: (1) Permanent incapacity. (2) Inefficiency. (3) Neglect of duty. (4) Malfeasance. (5) Conviction of a felony or conduct involving moral turpitude. (6) Knowing violation of a law, rule, or regulation. (7) Gross mismanagement. (8) Gross waste of funds. (9) Abuse of authority.⁹

Congress has provided these specific grounds for other officials, and an appendix to this report lists other examples of statutory terms used to limit the President's authority to remove officials appointed with the advice and consent of the Senate.

S. 1723 would also change the removal provision for DFE IGs by requiring that removal of a DFE IG by the agency head be for cause on any of the first five grounds listed above. S. 1723 would require the agency head of a DFE to notify Congress, in writing, of the reasons for the DFE IG's removal or transfer by that agency head "not later than 15 days before" the agency head takes such action. An amendment to H.R. 928, while not containing a for cause removal requirement for DFE IGs, would require DFE agency heads to give both Houses of Congress and the DFE IG written notice of "the reasons for any such removal or transfer . . . at least 30 days before such removal or transfer."

The President has threatened to veto H.R. 928, in part, because of the for cause removal provision. The Bush Administration argues that limiting the President's removal authority "does not enhance the function of IGs and raises grave constitutional concerns."¹⁰ However, as explained below, this argument is without merit.

The Supreme Court has held as constitutional congressional conditions limiting the President's ability to remove appointed officers. In *Humphrey's Executor v. United States*,¹¹ the Court

(...continued)

<http://www.whitehouse.gov/omb/legislative/sap/110-1/hr928sap-r.pdf>.

⁷ 5 U.S.C. App. § 3(b).

⁸ 5 U.S.C. App. § 8G(e).

⁹ H.R. 928, § 2(a); S. 1723, § 2(a).

¹⁰ See Statement of Administration Policy, *supra* footnote 6.

¹¹ 295 U.S. 602 (1935).

determined that appointed officers, other than officers performing “purely executive” functions, could not be removed during their terms of office “except for one or more of the causes named in the applicable statute,”¹² such as “inefficiency, neglect of duty, or malfeasance in office.”¹³ The Court reasoned that “the fixing of a definite term [of office] subject to removal for cause ... is enough to establish legislative intent that the term not be curtailed in the absence of such cause.”¹⁴ Congressional restraints on the President’s power of removal fall within the principle of separation of powers, according to the Court, which recognized the “fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others.”¹⁵

Subsequently, in *Morrison v. Olson*,¹⁶ the Supreme Court expanded the congressional authority established in *Humphrey’s Executor*. The Court removed the limitations with respect to inapplicability to officers performing “purely executive” functions, holding that now Congress has the authority to provide “for cause” removal protection to any advice and consent officer. The Court established a two-step balancing test for such separation of powers situations. First, the President must establish that the congressional action interferes with a core power. If so, Congress must show a necessity for its action to overcome the interference. In *Morrison*, the Supreme Court held that congressional restrictions on the Attorney General’s ability to remove an executive officer did not violate the constitutional principle of separation of powers.¹⁷ In analyzing the issue, the Court reasoned that the “good cause” standard for removal did not impermissibly interfere with the functions of the executive branch because Congress had not tried “to gain a role in the removal of executive officials” beyond its current powers.¹⁸ Additionally, even with its limitations, removal power remained within the executive branch,¹⁹ thus enabling the executive branch to perform its constitutional duty to “take care that the laws be faithfully executed.”²⁰ In the IG context, the executive branch would “retain[] ample authority to assure that the [IG] is competently performing his or her statutory responsibilities” according to the IG Act.²¹ The Court also noted that Congress’s limitation on the executive’s removal power “was essential, in the view of Congress, to establish the necessary independence of the office.”²²

In sum, Congress has the authority to limit removal of individuals by the President or an agency head, and can determine for which reasons that individuals should be removed. Under this

¹² *Id.* at 632.

¹³ *Id.* at 621; 15 U.S.C. § 41.

¹⁴ *Humphrey’s Executor*, 295 U.S. at 623.

¹⁵ *Id.* at 629-30.

¹⁶ 487 U.S. 654 (1988).

¹⁷ The now-lapsed independent counsel provision in the Ethics in Government Act prohibited the Attorney General’s removal of an independent counsel except for “good cause, physical or mental disability (if not prohibited by law protecting persons from discrimination on the basis of such a disability), or any other condition that substantially impairs the performance of such independent counsel’s duties.” 28 U.S.C. § 596(a)(1).

¹⁸ *Morrison*, 487 U.S. at 686; *see also id.* at 694-95.

¹⁹ *Id.* at 686; *see also id.* at 694, 696.

²⁰ U.S. CONST. art. II, § 3.

²¹ *Morrison*, 487 U.S. at 692.

²² *Id.* at 693. In *Humphrey’s Executor v. United States*, which addressed the removal of a Commissioner of the Federal Trade Commission, the Supreme Court viewed the President’s power of removal as a “coercive influence that threatens the independence” of independent agencies. 295 U.S. 602, 630 (1935); *see also Morrison*, 487 U.S. at 688; *Mistretta v. United States*, 488 U.S. 361, 411 (1989).

authority, Congress has granted “for cause” removal protection to officers at all levels of departments and agencies for reasons varying from general “cause” to discrete, limited reasons such as inefficiency, neglect of duty, and malfeasance in office. For example, the Commissioner of Social Security “may be removed from office only pursuant to a finding by the President of neglect of duty or malfeasance in office.”²³ Yet the Chief Actuary of the same agency²⁴ and the Chief Actuary of the Centers for Medicare and Medicaid Services²⁵ “may be removed only for cause.” During the Clinton Administration, Congress provided temporary protection from the President’s authority to remove appointed officials for the Under Secretary for Nuclear Security of the Department of Energy.²⁶

Precedents also exist for limiting the removal of an individual with an analogous position to an IG to “for cause” reasons. The Special Counsel, who heads an independent agency dedicated to protecting federal employees and applicants from prohibited personnel practices, may be removed for cause, which the relevant statute defines as “inefficiency, neglect of duty, or malfeasance in office.”²⁷ In the cases of the Comptroller General, who heads the Government Accountability Office, and Deputy Comptroller General, the grounds for removal for cause extend to permanent disability, inefficiency, neglect of duty, malfeasance, or a felony or conduct involving moral turpitude.²⁸ H.R. 928, as passed by the House, outlines the same and additional removal provisions for establishment IGs. S. 1723 outlines the same removal provisions for both establishment and DFE IGs as the for cause requirements for the Comptroller General and Deputy Comptroller General, except that it, like H.R. 928, would clarify that a *conviction* of a felony or conduct involving moral turpitude is necessary for removal.

In the IG context, one IG has “for cause” removal protection. The IG for the United States Postal Service (USPS) may be removed “upon the written concurrence of at least 7 [of 9] Governors [of the USPS Board of Governors], but only for cause.”²⁹ What constitutes cause for removal is not defined in the USPS IG statute.

Unlike the USPS IG provision, H.R. 928 and S. 1723 specify particular grounds for removal of, respectively, an establishment IG and both an establishment IG and a DFE IG, and thus make clear that those reasons are the only reasons the President or an agency head can remove an IG.

²³ 42 U.S.C. § 902(a)(3).

²⁴ 42 U.S.C. § 902(c)(1).

²⁵ 42 U.S.C. § 1317(b)(1).

²⁶ P.L. 106-398, App. § 3151, 114 Stat. 1654A-464. The first Under Secretary for Nuclear Security of the Department of Energy, after its reorganization incorporating the National Nuclear Security Administration, was given a term of office of three years and “the exclusive reasons for removal from office ... shall be inefficiency, neglect of duty, or malfeasance in office.” *Id.*

²⁷ 5 U.S.C. § 1211. Regarding grounds for removal, it should be noted that there is no clear standard clarifying the statutory terms “inefficiency, neglect of duty or malfeasance in office.” See Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1144-45 (2000). Congress has stated, however, that a removal for good cause must be based on “some type of misconduct,” as opposed to the refusal to carry out a presidential order. See INDEPENDENT COUNSEL REAUTHORIZATION ACT of 1987, S. REP. NO. 100-123, at 1-3 (1st Sess. 1987). Regarding the question of congressional removal, “Congress may typically remove such officers only for impeachable offenses.” *S.E.C. v. Davis*, 689 F. Supp. 767, 770 (S.D. Ohio 1988). For a discussion of conduct that may give rise to an impeachment, see CRS Report 98-186, *Impeachment: An Overview of Constitutional Provisions, Procedure, and Practice*, by Elizabeth B. Bazan.

²⁸ 31 U.S.C. § 703. However, the Comptroller General and Deputy Comptroller General are legislative branch officials, and they can only be removed by joint resolution of Congress. See *Bowsher v. Synar*, 478 U.S. 714 (1986).

²⁹ 39 U.S.C. § 202(e)(3).

The addition of the restriction of removal only for cause, with or without delineating the causes for which individuals could be removed, would protect IGs from being removed by the President or an agency head based on policy reasons or because of a disagreement with an IG's determination. Furthermore, different written formulations of the removal for cause provision—for example, “neglect of duty or malfeasance” as opposed to “inefficiency, neglect of duty, or malfeasance”—do not diminish the purpose of giving IGs a degree of independence if Congress deems it proper.

“For cause” removal, however, does recognize that some minimal due process procedures are required. This was implicit in *Humphrey's Executor*. President Franklin D. Roosevelt removed Federal Trade Commissioner William E. Humphrey, noting “I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission.”³⁰ Humphrey, and later his estate, contested his removal in court and succeeded. It does not appear that any “for cause” removal officer has been fired by the President since Humphrey, and therefore there has been no establishment of a mechanism to determine the appropriateness of presidential removal. However, there is one recorded instance of an advice and consent officer who demanded and was offered a minimal hearing.³¹

The removal for cause requirement is viewed by its proponents as a way to strengthen and preserve the independence of the IGs, whose ability to investigate allegations of waste, fraud, and abuse within their respective agencies would be enhanced by prohibiting their firing without cause.³² Requiring “for cause” removal could potentially prevent the removal of an IG whose investigations were proving embarrassing to the agency. However, requiring removal only for cause would meaningfully restrict the President's and agency heads' discretion, and may make it difficult to remove a poor-performing IG. An alternative approach, seen in the amended version of H.R. 928 reported out of committee and passed by the House,³³ is the requirement that the DFE agency head notify the IG and Congress 30 days in advance about the prospect of a dismissal or transfer and the reasons for it. This would allow an opportunity before the removal occurs for the IG to challenge the specific concerns or allegations, for Congress to inquire into them, and, possibly, for a resolution of the dispute. This notification requirement is also present in S. 1723, which provides “for cause” removal for DFE IGs, although with a shorter time frame of 15 days.

The Council of the IGs on Integrity and Efficiency proposed by H.R. 928 and S. 1723, discussed in greater detail below, would not have enforcement authority to remove an IG after investigating and reporting on allegations. The current presidentially established IG councils—the President's Council on Integrity and Efficiency (PCIE), which consists of the presidentially appointed IGs, and the Executive Council on Integrity and Efficiency (ECIE), which consists of agency head appointed IGs—also lack such authority. Presidents and agency heads may be reluctant to adopt

³⁰ *Humphrey's Executor v. United States*, 295 U.S. 602, 619 (1935).

³¹ The White House delineated charges of improprieties justifying the removal of Civil Aeronautics Board member Robert D. Timm in a letter to him in 1975. He alleged that the White House wanted to remove him based on policy differences. Presidential advisors created an informal hearing process and set a date for the hearing, in which Timm refused to participate, instead demanding “a full hearing before an independent hearing officer, with the right to judicial review.” The Administration next detailed the charges against Timm and again offered the hearing. Timm then resigned. S. COMM. ON GOVERNMENTAL AFFAIRS, STUDY ON FEDERAL REGULATION, VOL. V: REGULATORY ORGANIZATION, S. DOC. NO. 95-91, at 37-38 (2d Sess. 1977).

³² See *Humphrey's Executor*, 295 U.S. at 630; see also *Morrison v. Olson*, 487 U.S. 654, 688 (1988); *Mistretta v. United States*, 488 U.S. 361, 411 (1989).

³³ H.Rept. 110-354, at 2 (September 27, 2007).

recommendations for disciplinary action from such oversight councils, and statutory “for cause” removal may not increase the likelihood of action on such recommendations. Some questions may be raised as to whether the current system of independence, which falls short of protection and tenure, has provided an overall satisfactory result. Apparent failures may be attributable to the effectiveness of current oversight mechanisms to monitor the appropriateness of IG activities.

A set term of office (seven years, with possible reappointment)

H.R. 928 and S. 1723 would institute fixed terms of office for all establishment and designated federal entity IGs. The new provision is designed to encourage IGs to remain in office for at least seven years, as it appears that many leave before then.³⁴

The grant of a fixed term of office does not run contrary to precedent and has been viewed as providing the incumbent with the chance to gain expertise,³⁵ as well as independence.³⁶ However, only one IG, the USPS IG, has a fixed term of office; it is a seven-year term and is renewable. All other IGs have no fixed terms. Several other executive branch positions also have fixed terms of office, such as the Director of the Office of Personnel Management (four years),³⁷ the Director of the Office of Government Ethics (five years),³⁸ and the Special Counsel (five years).³⁹ The Director of the Office of Government Ethics and the Special Counsel are similar to IGs in that they perform investigative functions. The Comptroller General of the Government Accountability Office, a legislative branch position, serves for fifteen years, and like IGs, conducts audits and investigations.⁴⁰ Similar to the provisions regarding the USPS IG, H.R. 928 and S. 1723 would establish the seven-year, renewable fixed term of office for all other IGs.

Questions might arise over whether seven years is sufficient, since it does not extend across a two-term presidency. On the other hand, such a term would likely extend the IG’s tenure beyond that of most agency heads, arguably providing greater continuity, stability, and independence for IGs and their offices. At a day-long session on IG independence which took its guidance, in part, from Representative Cooper’s bill in the 109th Congress, H.R. 2489, panelists including “current and past administration officials, current PCIE and ECIE leadership, former IGs, participants from research organizations and academia, and congressional staff” discussed this issue.⁴¹ It appears that a majority of panelists participating did not favor statutory IG terms of office, but it is not clear why they opposed the issue.

³⁴ However, there is no systematic survey of IG tenure in office. It may be possible for the PCIE and the ECIE, which already have a database covering each IG’s length of service, to conduct a study of this matter.

³⁵ *Humphrey’s Executor*, 295 U.S. at 624.

³⁶ “The authority of Congress ... cannot well be doubted, and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime.” *Id.* at 629.

³⁷ 5 U.S.C. § 1102.

³⁸ 5 U.S.C. App. § 401.

³⁹ 5 U.S.C. § 1211(a).

⁴⁰ 31 U.S.C. § 703.

⁴¹ Government Accountability Office, *Highlights of the Comptroller General’s Panel on Federal Oversight and the Inspectors General*, GAO-06-931SP, at 2, 5-6 (2006). The concerns of the panelists expressed in the GAO report do not appear to focus on the length of the term limit, but rather discuss term limits in conjunction with “for cause” removal provisions. *Id.*

Allowing for reappointment, which would extend the incumbent's tenure, might impinge on the IG's independence; he or she would be reappointed by an official who (or whose political allies) might be subject to an IG audit or investigation at the time. Term limits, even if renewable, would also allow for a lame-duck IG, if it becomes evident that he or she will not be reappointed. And such limits would still permit a vacancy awaiting a full-fledged inspector general until a replacement arrives (with the position being filled by an acting IG). These characteristics both affect the stability of the office and continuity of its operations, projects, orientation, and priorities. Some may suggest a single but longer term (10 or 15 years without the possibility of reappointment), as currently applied to the Comptroller General.

The term of office section of H.R. 928 and S. 1723 may necessitate additional clarification. Though the bills specify that an establishment (presidentially appointed) IG could serve more than one term of office, the bills also state that such an IG may only "holdover" for no more than an additional year after the expiration of his or her seven-year term:

An individual may continue to serve as Inspector General beyond the expiration of the term for which the individual is appointed until a successor is appointed and confirmed, except that such individual may not continue to serve for more than 1 year after the date on which the term would otherwise expire.⁴²

Since H.R. 928 and S. 1723 state that IGs may serve for more than one term, reappointment and confirmation would be required before the IG could serve another full seven-year term due to the holdover language for establishment IGs in § 2(b) of the bills. This would also be true for designated federal entity IGs (appointed by agency heads), for whom there is no holdover provision.

Finally, the seven-year term limit in H.R. 928, as passed by the House, would apply "to any Inspector General appointed *on or after* the date of the enactment of this Act"⁴³ (emphasis added). The House Committee on Oversight and Government Reform's amendment eliminating the bill's application to IGs appointed *before* the date of enactment appears to address a technical issue—that remains in S. 1723—with the term of office for the Peace Corps IG.⁴⁴ The Peace Corps IG's tenure limit ranges from five to eight and a half years, due to employment time-limits for all Peace Corps personnel. The Peace Corps IG currently has a five-year term of office that is indirectly fixed by 22 U.S.C. § 2506, which states that the Director of the Peace Corps may grant a one-year extension to an individual employee, plus a two-and-a-half year addition with the agency. This additional two-and-a-half year extension would only appear to be granted to an IG in the case the IG's extension would "promote the continuity of functions in administering the Peace Corps."⁴⁵ However, it appears that no Peace Corps IG has served more than five years since the creation of the IG position.

A Council of the Inspectors General on Integrity and Efficiency

H.R. 928 and S. 1723 would statutorily establish a Council of IGs on Integrity and Efficiency (CIGIE) in which all of the federal government IGs who are currently part of PCIE and ECIE

⁴² H.R. 928, § 2(b)(1); S. 1723, § 2(b)(1).

⁴³ H.R. 928, § 2(c).

⁴⁴ S. 1723, § 2(d).

⁴⁵ 22 U.S.C. § 2506(a)(5) and (6).

would participate. The PCIE and ECIE were established by executive order in 1992.⁴⁶ The merger of the two councils would combine their forces and arguably reduce overlap and duplication. One concern, however, might be the size of the new collective and whether it would prove unwieldy. It appears that the proposed CIGIE would be an interagency council of the kind widely seen throughout the federal government.

The CIGIE would include other relevant executive agencies and officials, as the PCIE and ECIE do now. The new council's membership would also extend to two other IGs not included in the existing councils; these offices (i.e., at the Central Intelligence Agency and at the Government Printing Office, a legislative branch agency) do not operate directly under the IG Act but instead under their own separate statutory authority. A question might arise as to whether it would be appropriate for a legislative branch IG to be a member of an interagency council which is chaired by an executive official (now, and as proposed, the Office of Management and Budget's Deputy Director for Management). However, the CIGIE would have a secondary chairperson who would serve a two-year term—an IG selected from the council's membership.⁴⁷ A similar problem arises under S. 1723, which, unlike H.R. 928, would require the CIGIE to "submit recommendations of 3 individuals to the appropriate appointing authority for any appointment" to an office of an establishment IG, a designated federal entity IG, the Central Intelligence Agency IG, and the Government Printing Office IG.⁴⁸ Such a provision would allow mostly executive branch officials to submit recommendations for positions in a legislative branch IG office—that of the Government Printing Office IG. Additionally, the phrase "appropriate appointing authority" implies that IGs and executive branch officials on the CIGIE would be able to submit their three recommendations to the President, agency head, or IG for "any appointment," including that of the IG or any member of the IG's staff. Once again, executive branch officials could potentially influence the internal composition of the IG office of a legislative branch agency.

The bills' proposals would modify the existing arrangements, which have grown under executive orders issued by Presidents Ronald W. Reagan, George H. W. Bush, and William J. Clinton. The statutory structure, although incorporating some notable changes, would more strongly institutionalize the current structure, endorsed by successive Presidents, giving it greater stability as well as legislative approval. This change could also add opportunities for congressional oversight of the inspectors general as well as of the coordinative arrangements among themselves and between the IGs and other relevant executive entities. Additionally, the legislation would provide "a separate appropriation account" for CIGIE appropriations.⁴⁹ The CIGIE would also provide for an Integrity Committee (which already exists under executive order) to handle allegations of wrongdoing by IGs and top officials in their offices.

The Bush Administration has objected to the codification of the two existing councils, PCIE and ECIE, as the CIGIE, alleging that codification "would impede the President's ability to react swiftly and effectively to problems with IGs or with the Council itself."⁵⁰ The Administration also

⁴⁶ Exec. Order No. 12805, 57 FR 20627 (May 14, 1992). The PCIE was originally established in 1981 by Executive Order 12301 and amended in 1988 by Executive Order 12625, but both of these orders were replaced when the ECIE was established.

⁴⁷ H.R. 928, § 4(a); S. 1723, § 4(a) (would establish IG Act § 11(b)(2)(B)).

⁴⁸ See S. 1723, § 4(a) (would establish IG Act § 11(c)(1)(F)).

⁴⁹ H.R. 928, § 4(c)(2); S. 1723, § 4(c)(2).

⁵⁰ Office of Mgmt. and Budget, Exec. Office of the President, Statement of Administration Policy (October 1, 2007), <http://www.whitehouse.gov/omb/legislative/sap/110-1/hr928sap-r.pdf>.

alleges that “the council provisions in H.R. 928 raise constitutional questions because they restrict the President’s authority to nominate individuals to serve on the Council and contain ambiguous definitions of offices and their respective roles and responsibilities.”⁵¹ In the past, Congress has established similar commission structures and imposed additional germane duties on executive officers, which have been upheld by the Supreme Court.⁵²

Integrity Committee

As mentioned above, H.R. 928 and S. 1723 propose adding § 11(d) to the IG Act, which would establish the Integrity Committee of the CIGIE. This statutory construct would codify, with certain changes, the Integrity Committee, which now operates under E.O. 12993, issued by President Clinton in 1996.⁵³ Such committee “shall receive, review, and refer for investigation allegations of wrongdoing that are made against Inspectors General and certain staff members of the various Offices of Inspector General.”⁵⁴ This section does not appear to specify how allegations of wrongdoing that are made against an IG would be referred to the Integrity Committee. This may raise also the question of who could refer an allegation of an IG’s wrongdoing to the committee: For example, would another IG be able to allege wrongdoing by an IG? However, § 11(d)(5)(A) states that the Integrity Committee shall “review *all* allegations of wrongdoing it receives against an Inspector General” (emphasis added), so clarification as to who may make such allegations may not be necessary.⁵⁵ The use of the term “all” in § 11(d)(5)(A) seems to indicate that the Integrity Committee would be required to review every allegation of wrongdoing, including allegations by Members of Congress or by the general public.

After the proposed Integrity Committee reviews allegations of wrongdoing, it must refer to the Chairperson of the Integrity Committee any allegation of wrongdoing that the Integrity Committee determined is “meritorious that cannot be referred to an agency of the executive branch with appropriate jurisdiction over the matter.”⁵⁶ Next, the Chairperson of the Integrity Committee must thoroughly and timely investigate such allegations according to investigative

⁵¹ *Id.*

⁵² In *Shoemaker v. United States*, 147 U.S. 282 (1893), the Supreme Court distinguished between congressional creation of, and adding to the duties of, an office and appointment to an office. Congress had provided for a commission to acquire, through condemnation, land for a park in the District of Columbia and to appraise it for compensation. The commission was composed of “the Chief of Engineers of the United States Army, the Engineer Commissioner of the District of Columbia, and three citizens to be appointed by the President with the advice and consent of the Senate.” *Id.* at 284. The designation of two officers as members of the commission was challenged on the ground that the provision represented an appointment of them, which only the President could make. The Supreme Court rejected the contention that

because additional duties, germane to the offices already held by them, were devolved upon them by the act, it was necessary that they should be again appointed by the President and confirmed by the Senate. It cannot be doubted, and it has frequently been the case, that Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should again be nominated and appointed.

Id. at 300-01. In essence, the *Shoemaker* Court upheld the legislation as a result of its determination that the new duties assigned to the engineers “cannot fairly be said to have been dissimilar to, or outside the sphere of,” their existing responsibilities. *Id.*

⁵³ 61 FR 13043-45 (March 26, 1996).

⁵⁴ See H.R. 928, § 4(a); S. 1723, § 4(a) (would establish IG Act § 11(d)(1)).

⁵⁵ See William J. Esposito, Chairman of the Integrity Committee of the PCIE, *Policy and Procedures for Exercising Authority of the Integrity Committee of the President’s Council on Integrity and Efficiency*, at 5-6 (April 24, 1997).

⁵⁶ See H.R. 928, § 4(a); S. 1723, § 4(a) (would establish IG Act § 11(d)(5)).

standards issued by the CIGIE or the PCIE and ECIE. In the version of H.R. 928 passed by the House, the Chairperson must report the results of the investigation to the Integrity Committee, which then evaluates the report, adds its recommendations, and forwards the report to the Executive Chairperson and the President or DFE agency head within 180 days after the investigation is completed.⁵⁷ Reports of investigations by the Integrity Committee would also be required to be submitted to Congress within 30 days of their submission to the Executive Chairperson of the CIGIE.⁵⁸ The relevant section of S. 1723 does not similarly guarantee that the President, agency head, or Congress would receive access to the Integrity Committee's findings and conclusions. In H.R. 928, the Chairperson must then report to the Integrity Committee any action taken by the President or agency head.⁵⁹ A finding by the Integrity Committee, after a complete investigation that substantiates any allegation, could be presumptively deemed a finding of cause under the statute that the President or agency head could use in deciding whether to remove an IG. Such a finding would not be binding on the President or the agency head, but could serve as a prima facie basis for removal if the President or agency head agreed with the finding.

IG budgets and appropriations

The IG legislation, H.R. 928, as passed by the House, and S. 1723 would require reporting establishment IGs' initial budget estimates directly to the Office of Management and Budget (OMB), the agency head, and appropriate congressional committees. This would ensure that all three units were aware of the initial estimate and, thus, enable each to calculate any decreases or adjustments made afterwards by agency officials or OMB. In addition to finding any such alterations, the change in budget reporting could also contribute to congressional oversight of the establishment IG offices and their projected spending as well as OMB and agency leadership.

The President has objected to H.R. 928's budgetary provisions, claiming that they "would authorize IGs to circumvent the President's longstanding, and constitutionally based, control over executive branch budget requests by allowing IGs to submit their budget requests directly to Congress."⁶⁰ Historically, "for a significant period in our early history, the President did not see departmental budget estimates before the Treasury Department transmitted them to Congress."⁶¹ Prior to the Budget and Accounting Act of 1921, agencies negotiated "their annual appropriations directly with Congress."⁶² Moreover, Congress previously required the Interstate Commerce Commission to "submit copies of budget estimates, requests, and information (including personnel needs)" to Congress "at the same time they are sent to the President or the Office of Management and Budget."⁶³ Additionally, the statute detailing the preparation and submission of appropriations requests to the President specifies that "an officer or employee of an agency . . .

⁵⁷ H.R. 928, § 4(a) (would establish IG Act § 11(e)(8)-(9)).

⁵⁸ H.R. 928, § 4(a) (would establish IG Act § 11(e)(9)(A)(iii)).

⁵⁹ H.R. 928, § 4(a) (would establish IG Act § 11(e)(9)).

⁶⁰ Office of Mgmt. and Budget, Exec. Office of the President, Statement of Administration Policy (October 1, 2007), <http://www.whitehouse.gov/omb/legislative/sap/110-1/hr928sap-r.pdf>.

⁶¹ Morton Rosenberg, *Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 Geo. Wash. L. Rev. 627, 654 (1989).

⁶² *Id.*

⁶³ 31 U.S.C. § 1105(f).

may submit to Congress or a committee of Congress an appropriations estimate or request . . . only when requested by either House of Congress.”⁶⁴

The Bush Administration also objects to “requiring the President to include each IG’s request as a separate line item in the President’s annual budget request.”⁶⁵ The U.S. Code currently contains several examples of similar line item requests, such as separate statements of the amount of appropriations requested for (1) “the Office of National Drug Control Policy and each program of the National Drug Control Program,”⁶⁶ (2) the Office of Federal Financial Management,⁶⁷ and (3) the Chief Financial Officer in the Executive Office of the President.⁶⁸

Pay and Bonuses of IGs

The House-passed version of H.R. 928 and the Senate version would prohibit cash bonuses and awards for both establishment and DFE IGs, such as incentive awards for superior accomplishments or cost savings disclosures.⁶⁹ Establishment IGs would receive a basic pay rate set at three percent higher than level III of the Executive Schedule. DFE IGs would be paid at a rate of three percent above “the annual rate of basic pay for senior staff members classified at a comparable grade, level, or rank designation.”⁷⁰ S. 1723 would move mostly establishment IGs, but also some DFE IGs, from a Level IV to a Level III position on the Executive Schedule, which amounts to a pay raise.⁷¹

Program evaluation information in IG semi-annual reports

Inspectors general now issue semi-annual reports on their activities and operations, with specific information and data about their investigations and audits. H.R. 928 and S. 1723 would add information about their program evaluations and inspections, which, in the IG community, refer to short-term evaluations of specific, narrow projects, whose findings and conclusions might be used to promote better management practices, among other things. Such inspections apparently reflect a growing field of endeavor for the IGs; periodically updated information about these arguably would benefit the users of the semi-annual reports in Congress, other executive agencies, and the public.

Law enforcement authority

Qualified law enforcement authority (e.g., to carry firearms and execute warrants) has been granted to IGs in federal establishments, that is, the cabinet departments and larger federal agencies. H.R. 928 and S. 1723 would extend this coverage, under the same controls, to IGs in designated federal entities, the usually smaller boards, commissions, foundations, and

⁶⁴ 31 U.S.C. § 1105(e).

⁶⁵ *Id.*

⁶⁶ 31 U.S.C. § 1105(a)(26).

⁶⁷ 31 U.S.C. § 1105(a)(27).

⁶⁸ 31 U.S.C. § 1105(a)(31).

⁶⁹ H.R. 928, § 5; S. 1723, § 5.

⁷⁰ H.R. 928, § 5(c).

⁷¹ S. 1723, § 6.

government corporations. A rationale for expanding the scope of this authority to the OIGs of the designated federal entities is that this would increase the capabilities of their criminal investigators, who currently may need to rely on piecemeal statutory authorizations or on special deputation by the U.S. Marshals Service, which is limited in time and location. The additional authority, however, would mean that IGs would need to be vigilant in approving and monitoring the conduct of OIG staff in this regard, ensuring that they receive necessary training, meet relevant qualifications, and use the powers appropriately.

Agency Websites

H.R. 928 and S. 1723 would increase the visibility of IG webpages on agency websites, as well as require IG offices to post reports and audits online and create a place for individuals to report fraud, waste, and abuse.⁷²

Differences Between House-Passed H.R. 928 and S. 1723

While the version of H.R. 928 passed by the House and S. 1723 are identical in most respects, other than those provisions discussed above, S. 1723 adds several provisions. First, S. 1723 would require both establishment and designated federal entity IGs “to appoint a Counsel to the Inspector General who shall report to the Inspector General.”⁷³ Second, S. 1723 states the mission of the CIGIE differently from the one stated in H.R. 928. Previously, both bills called on the CIGIE to “increase the professionalism and effectiveness of personnel by developing policies, standards, and approaches to aid in the establishment of a well-trained and highly skilled workforce in the offices of the Inspectors General.”⁷⁴ However, the version of H.R. 928 passed by the House eliminated this language. S. 1723 includes the above language and would expand the Council’s mission to “address integrity, economy, and effectiveness issues that transcend individual Government agencies.”⁷⁵ Currently, the mission of the CIGIE as expressed in the version of H.R. 928 passed by the House is “to coordinate and enhance governmental efforts to promote integrity and efficiency and to detect and prevent fraud, waste, and abuse in Federal programs.” Finally, the House-passed H.R. 928 addresses a concern raised in the Bush Administration’s veto threat: “that disclosure protections regarding the Witness Security Program apply to the Department of Justice’s Inspector General’s internal investigative procedures and release of information.”⁷⁶ The Administration argued that the release of specific program information could put the safety of witnesses at risk, in addition to endangering program personnel and the program itself. The House-passed bill would eliminate a referral of “allegations of misconduct involving Department attorneys, investigators, or law enforcement personnel, where the allegations relate to the exercise of the authority of an attorney to investigate, litigate, or provide legal advice” by the DOJ IG to the Counsel, Office of Professional Responsibility of DOJ.⁷⁷ S. 1723 does not include this provision.

⁷² H.R. 928, § 9; S. 1723, § 12.

⁷³ S. 1723, § 2(c).

⁷⁴ See H.R. 928, § 4(a); S. 1723, § 4(a) (would establish IG Act § 11(a)).

⁷⁵ S. 1723, § 4(a) (would establish IG Act § 11(a)(2)(A)).

⁷⁶ Office of Mgmt. and Budget, Exec. Office of the President, Statement of Administration Policy (October 1, 2007), <http://www.whitehouse.gov/omb/legislative/sap/110-1/hr928sap-r.pdf>.

⁷⁷ 5 U.S.C. App. § 8E(b)(3).

Concluding Observations

These two bills—H.R. 928 and S. 1723—are designed to provide broad-based, across-the-board initiatives to enhance the independence and accountability of the inspectors general operating under the Inspector General Act of 1978, as amended. This would occur through changes in the removal of IGs, notification of the OIG budget requests to Congress, fixing a term of office for the IGs, and establishing a Council on Integrity and Efficiency as well as an Integrity Committee, replacing counterparts created by executive order. In the 110th Congress, the House has passed H.R. 928, while the Senate Committee on Homeland Security and Governmental Affairs has held hearings on proposals along these same lines.

Appendix. Select Statutes Limiting President's Authority to Remove Officials Appointed with Advice and Consent of Senate

A. Positions Where Statutes Stipulate that the President May Remove an Official Only for the Cause or Causes Cited

Only for inefficiency, neglect of duty, or malfeasance in office:

- Federal Energy Regulatory Commission, Commissioners, 42 U.S.C. § 7171(b)
- Federal Labor Relations Authority, Members, 5 U.S.C. § 7104(b)
- Merit Systems Protection Board, Members, 5 U.S.C. § 1202(d)
- Merit Systems Protection Board, Chairman of Special Panel, 5 U.S.C. § 7702(d)(6)(A)
- Office of Special Counsel, Special Counsel, 5 U.S.C. § 1211(b)

Only for inefficiency, neglect of duty, malfeasance in office, or ineligibility:

- National Mediation Board, Members, 45 U.S.C. § 154, First

Only for neglect of duty or malfeasance in office:

- Consumer Product Safety Commission, Commissioners, 15 U.S.C. § 2053(a)
- National Labor Relations Board, Members, 29 U.S.C. § 153(a)
- Social Security Administration, Commissioner, 42 U.S.C. § 902(a)(3)

Only for general cause:

- Postal Rate Commission, Commissioners, 39 U.S.C. § 3601(a)

B. Positions Where Statutes Omit the Term "Only" Before the Cause or Causes Cited for Removal

Inefficiency, neglect of duty, or malfeasance in office:

- Federal Mine Safety and Health Review Commission, Commissioners, 30 U.S.C. § 823(b)(1)
- Federal Trade Commission, Commissioners, 15 U.S.C. § 41
- National Transportation Safety Board, Members, 49 U.S.C. § 1111(c)
- Nuclear Regulatory Commission, Commissioners, 42 U.S.C. § 5841(e)
- Occupational Safety and Health Review Commission, Commissioners, 29 U.S.C. § 661(b)

- Surface Transportation Board, Members, 49 U.S.C. § 701(b)(3)

For cause:

- Federal Reserve System, Board of Governors, 12 U.S.C. § 242

C. Positions Where President Need Only Communicate Reasons for Removal to the Senate or to Both Houses of Congress

- Archivist of the United States, 44 U.S.C. § 2103
- Chief Benefits Officer, Department of Veterans Affairs, 38 U.S.C. § 306(c)
- Chief Medical Officer, Department of Veterans Affairs, 38 U.S.C. § 305(c)
- Comptroller of the Currency, 12 U.S.C. § 2
- Director of the Mint, 31 U.S.C. § 304(b)(1)

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