



EXECUTIVE PRIVILEGE AND INSPECTORS GENERAL— THE MIDDLE-MEN

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I. INTRODUCTION

In the relatively short history of inspectors general, inspectors general have sparked significant controversy.¹ Congress created inspectors general to bring internal accountability to executive agencies and to assist with congressional oversight.² However, inspectors general do not necessarily fit into any of the three branches of government, nor do they exist solely in the so-called fourth branch—the administrative state.³ This is because inspectors general are appointed and removable by the President; they were delegated Congress’s oversight power and routinely report to Congress;⁴ and they oversee their respective executive agency.⁵ The

¹ For example, presidential removals of inspectors general have created significant controversy. See generally CHARLES A. JOHNSON & KATHRYN E. NEWCOMER, U.S. INSPECTORS GENERAL: TRUTH TELLERS IN TURBULENT TIMES 79 (2020). In 1981, at the start of his term, President Reagan removed twelve inspectors general. *Id.*; GENERAL ACCOUNTING OFFICE, REVIEW OF CIRCUMSTANCES OF THE MASS REMOVAL OF STATUTORY INSPECTORS GENERAL (AFMD-81-86) 1 (Jul. 9, 1981). In 2009, President Obama removed one inspector general, and in 2020, President Trump removed two inspectors general. BEN WILHELM, CONG. RSCH. SERV., IF11546, REMOVAL OF INSPECTORS GENERAL: RULES, PRACTICE, AND CONSIDERATIONS FOR CONGRESS 2 (2020). Recently, these removals sparked Congress to attempt to secure inspectors general through removal protections. See *Former Inspectors General Call on Congress to Pass Overdue Reforms to the IG System*, PROJECT ON GOV’T OVERSIGHT (May 5, 2020), <https://www.pogo.org/letter/2020/05/former-inspectors-general-call-on-congress-to-pass-overdue-reforms-to-ig-system/>.

² See generally JOHNSON & NEWCOMER, *supra* note 1, at 1.

³ See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984) (referencing the administrative state as the fourth branch).

⁴ JOHNSON & NEWCOMER, *supra* note 1, at 3; JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11 105 (2012). TODD GARVEY, CONG. RSCH. SERV., R46762, CONGRESS’S AUTHORITY TO LIMIT THE REMOVAL OF INSPECTORS GENERAL 9 (2021), <https://crsreports.congress.gov/product/pdf/R/R46762>.

⁵ COUNCIL OF THE INSPECTORS GEN. ON INTEGRITY AND EFFICIENCY, THE INSPECTORS GENERAL 1 (Jul. 14, 2014),

unique structure and role of inspectors general create a major separation of powers quandary.⁶

Each inspector general is “responsible for conducting audits and investigations relating to the programs and operations of its agency . . . for the purpose of promoting economy, efficiency, and effectiveness and preventing and detecting fraud and abuse in those programs and operations.”⁷ Moreover, inspectors general must keep their respective agency head and Congress “fully and currently informed” about problems and deficiencies relating to the administration of agency programs.⁸ While inspectors general are meant to assist Congress with oversight responsibilities, inspectors general sit within the executive branch. Therefore, congressional mandates for information place the inspectors general in a separation of powers dilemma.⁹

Because of the inspectors’ general unique position in the executive branch, their congressionally mended structure, and their mandated reporting requirements, concerns over executive privilege claims for agency documents are a tense subject as they relate to separation of powers.¹⁰ There are three questions to ask. Can Congress effectively overcome an agency’s claim of executive privilege

https://www.ignet.gov/sites/default/files/files/IG_Authorities_Paper_-_Final_6-11-14.pdf; Inspector General Act of 1978, 5 U.S.C. app. § 4(a).

⁶ See, e.g., JOHNSON & NEWCOMER, *supra* note 1, at 117 (“Since IGs answer to both Congress and their own agency leadership, stress stemming from legislative and executive disagreements can affect the work OIGs [Offices of Inspectors General] undertake.”); Andrew McCanse Wright, *Executive Privilege and Inspectors General*, 97 TEX. L. REV. 1295, 1295 (2019) (Being “in the Executive Branch with a congressional-assistance mandate . . . places inspectors general on the horns of a separation-of-powers dilemma.”); Brian D. Miller, *Independence of Inspectors General Should Not Be Compromised by Congress*, THE HILL (Aug. 13, 2018, 8:00 AM), <https://thehill.com/opinion/white-house/401491-independence-of-inspectors-general-should-not-be-compromised-by-congress> (“IGs must be independent—this includes being independent of Congress. Saying no to Congress is sometimes the hardest thing an IG has to do.”).

⁷ COUNCIL OF THE INSPECTORS GEN. ON INTEGRITY AND EFFICIENCY, *supra* note 5; see also Inspector General Act of 1978, 5 U.S.C. app. § 4.

⁸ *Id.* § 4(a)(5).

⁹ Wright, *supra* note 6, at 1301.

¹⁰ See e.g., Miller, *supra* note 6 (“If a member of Congress is trying to get information covered by executive privilege, the member cannot do so by having the IG get it.”).

by requesting documents from an inspector general? When an inspector general relies on confidential, privileged information in his or her report, is Congress now able to request those documents because they were impliedly released already? Can the President legally control privileged documents once an inspector general receives them?

Some scholars claim that once an inspector general possesses privileged agency documents, the agency and the President no longer have control of the information.¹¹ Additionally, they claim that because “the President’s ability to preserve Executive Branch confidentiality interests is functional rather than legal,” the inspector general could release material to Congress—or worse, the media—over the objection of the respective executive agency.¹²

While the Executive may have functional control over confidential information held by inspectors general, this Comment proposes that the Executive also has formal legal control over inspectors general. Further, the functional control aspects, asserted by other scholars, supplement and support the legal control held by the Executive. Therefore, this Comment explores the assertion of executive privilege and the inspectors’ general congressionally mandated oversight power. In the Background section, this Comment seeks to briefly introduce the actors involved—inspectors general, Congress, and the Executive. Accordingly, the Background Section will provide an overview of the Inspector General Act of 1978 (the “IG Act”) and the independence of the inspectors general. This Section will also provide an overview of congressional oversight power and executive privilege. Next, Section II will explore the Executive’s control over privileged information in the hands of inspectors general. Section II will also discuss the legal control the Executive has over the inspectors general. Additionally, to demonstrate the Executive’s legal and functional control, Section II will review examples of executive privilege claims for agency documents where inspectors general, Congress, and the executive branch agencies had competing interests. Overall, Section II argues that based on the Vesting Clause, historical

¹¹ *E.g.*, Wright, *supra* note 6, at 1302.

¹² *Id.*

practice, and important inspector general interests, the Executive has legal control over privileged information even if it is in the control of inspectors general.

This Comment seeks to outline and describe the practical and legal balances between the congressional need for information, the valid claims of executive privilege, and the middle-men—inspectors general. In summary, this Comment rebuts the idea that the Executive cannot effectively control the privileged records after conveying the documents to an inspector general. Rather the Constitution, practice, and important inspector general objectives all weigh in favor of the Executive having consistent control over documents even if conveyed to inspectors general.

II. BACKGROUND: OVERVIEW OF THE FEDERAL WATCHDOGS

Through the IG Act, Congress established Offices of Inspectors General to identify and discourage fraud, waste, and abuse while also collectively embracing economy, efficiency, and accountability—a balance that is a challenge for most agencies.¹³ Inspectors general were created as independent and objective components within certain executive agencies to alleviate this challenge and improve financial management.¹⁴ This Section first describes the brief history leading up to the IG Act. In addition, this Section will introduce the IG Act and explain the full range of the inspectors' general powers.

¹³ JOHNSON & NEWCOMER, *supra* note 1, at 1-2; *see also* Inspector General U.S. Dep't of Agric. v. Glenn, 122 F.3d 1007, 1009 (11th Cir. 1997) ("Due to a concern that fraud and abuse in federal programs [were] reaching epidemic proportions, Congress created Offices of Inspectors General in several governmental departments . . .") (internal citations omitted).

¹⁴ Inspector General Act of 1978, 5 U.S.C. app. § 2. However, Congress, along with the motive to "improve financial management and reduce fraud in federal programs," also allegedly sought to limit executive power and assert active engagement in the administration of agencies. *See* JOHNSON & NEWCOMER, *supra* note 1, at 29.

A. *Brief History Leading to the Creation of Inspectors General*

Inspectors general in the United States can be traced back to George Washington’s Continental Army.¹⁵ After George Washington asked the Council of General Officers whether an inspector general would be effective for the army, the Continental Congress established the first inspector general by resolution.¹⁶ Specifically, the Continental Congress concluded that an inspector general was “essential to the promotion of discipline in the American Army”¹⁷ Oversight, by those like inspectors general, is also implied from the Progressive era as Woodrow Wilson emphasized that it was the proper duty of Congress to “look diligently into every affair of government and to talk much about what it sees.”¹⁸ Specifically, Congress

is meant to be the eyes of the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct.¹⁹

Jumping to the twentieth century, two scandals revealed a need for stronger oversight: the “Estes Scandal involving the U.S. Department of Agriculture (“USDA”)” and several fraudulent events involving the U.S. Department of Health, Education, Welfare (“HEW”).²⁰ In the 1950s and 1960s, through several deceptive acts to gain access to USDA programs, Billy Sol Estes, a Texas businessman,

¹⁵ See PAUL C. LIGHT, *MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY* 25 (1993).

¹⁶ *Id.*; DAVID A. CLARY & JOSEPH W. A. WHITEHORNE, *THE INSPECTORS GENERAL OF THE UNITED STATES ARMY 1777–1903* 24 (1987).

¹⁷ LIGHT, *supra* note 15, at 25.

¹⁸ Woodrow Wilson, *Congressional Government: A Study in American Politics* 303 (1885).

¹⁹ *Id.*

²⁰ JOHNSON & NEWCOMER, *supra* note 1, at 19-20.

defrauded the U.S. government of millions of dollars.²¹ Following the Estes Scandal, in 1965, the Secretary of Agriculture established an inspector general position for the USDA.²² Fourteen years after the Estes Scandal, congressional committees uncovered “substantial fraud and ineffective administrative responses in the HEW.”²³ In 1976, Congress created an inspector general for the HEW after representatives pointed to the inadequate resources within HEW to identify fraud.²⁴ The success of the inspector general appointees for the Continental Army, USDA, and HEW provided Congress positive guidance leading up to the IG Act.]

B. Reviewing the IG Act Structure, Independence, and Oversight Duties

After Congress created the first statutory inspector general in 1976,²⁵ Congress, through the IG Act, established additional statutory inspectors general.²⁶ Congress created inspectors to “combat waste, fraud, and abuse within certain federal agencies.”²⁷ The purposes of inspectors general are (1) to conduct and supervise audits and investigations relating to their respective agency’s programs; (2) to provide leadership and recommend policies for activities that promote

²¹ See *id.* at 20; Robert D. McFadden, *Billie Sol Estes, Texas Con Man Whose Fall Shook Up Washington, Dies at 88*, N.Y. TIMES (May 14, 2013), <https://www.nytimes.com/2013/05/15/us/billie-sol-estes-texas-con-man-dies-at-88.html> (“There were clandestine lease-back arrangements, phony mortgages on nonexistent fertilizer storage tanks, illegal transfers of federal-compensation rights, kickbacks for bankers and bribes for Washington.”).

²² See JOHNSON & NEWCOMER, *supra* note 1, at 20 (“The USDA’s inspector general was not created by congressional action, but instead was created under the general authority of the secretary to organize the department as he deemed appropriate.”).

²³ *Id.* at 21.

²⁴ *Id.* at 21-22.

²⁵ BEN WILHELM, CONG. RSCH. SERV., R45450, STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER 1 (2022), <https://crsreports.congress.gov/product/pdf/R/R45450> (“Congress established the first statutory IG . . . in 1976 for the Department of Health, Education, and Welfare.”).

²⁶ *Id.* at 2 (citing S. REP. NO. 95-1071, at 6-8 (1978)).

²⁷ WENDY GINSBERG & MICHAEL GREENE, CONG. RSCH. SERV., R43814, FEDERAL INSPECTORS GENERAL: HISTORY, CHARACTERISTICS, AND RECENT CONGRESSIONAL ACTIONS 1 (2016), <https://sgp.fas.org/crs/misc/R43814.pdf>.

economy and prevent and detect fraud and abuse; and (3) to keep the head of the agency and Congress fully and currently informed.²⁸

1. Independence

The defining feature of inspectors general is independence. The IG Act specifies that it creates “independent and objective units.”²⁹ Additionally, each “Office of Inspector General [is] considered to be a separate agency”³⁰ for certain employment provisions in the U.S. Code. Some inspectors general themselves feel independent from their respective agencies.³¹ When asked “whether [inspectors general] or agency leadership considered the [inspector general] to be a member of the agency leadership team,” a survey of inspectors general answered, “the issue is unresolved”; “does not feel like it”; or “simply ‘no,’ with the latter response being the most frequent.”³²

The relationships between inspectors general, their agency heads, and the President also establish a certain level of independence. Each inspector general is only “under the general supervision of the head of the establishment involved.”³³ Inspectors general maintain broad independence despite operating in the space under the heads of their responsive agencies.³⁴ There is no statutory definition of “general

²⁸ Inspector General Act of 1978, 5 U.S.C. app. § 2.

²⁹ *Id.*; see also GINSBERG & GREENE, *supra* note 27, at 1; *Are IGs Independent?*, COUNCIL OF THE INSPECTORS GEN. ON INTEGRITY AND EFFICIENCY, <https://www.ignet.gov/content/frequently-asked-questions> (last visited Feb. 14, 2023).

³⁰ 5 U.S.C. app. § 6(e)(1)(A)(i), (g)(1).

³¹ See CHARLES A. JOHNSON, KATHRYN E. NEWCOMER & ANGELA ALLISON, *BALANCING INDEPENDENCE AND POSITIVE ENGAGEMENT: HOW INSPECTORS GENERAL WORK WITH AGENCIES AND CONGRESS*, IBM CTR. FOR THE BUS. OF GOV'T 14 (2015).

³² *Id.*

³³ 5 U.S.C. app. § 3(a); GINSBERG & GREENE, *supra* note 27, at 6; see also *U.S. Nuclear Regul. Comm'n v. Fed. Labor Rel. Auth.*, 25 F.3d 229, 235 (4th Cir. 1994) (describing general supervision as “nominal”). In fact, the Inspector General Act prohibits agency management from supervising inspectors general. See 5 U.S.C. app. § 3(a) (“Each Inspector General shall report to and be under the general supervision of the head of the establishment involved . . . but shall not report to, or be subject to supervision by, any other officer of such establishment.”).

³⁴ *Nat'l R.R. Passenger Corp. v. Fraternal Order of Police*, 142 F. Supp. 3d 82, 86 (D.D.C. 2015).

supervision,” and the IG Act specifies that “[n]either the head of the establishment nor the officer next in rank below such head shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation.”³⁵ The Fourth Circuit has reviewed the legislative history of the IG Act and found that the “general supervision” entrusted to an agency head is only “nominal.”³⁶ For example, after explaining one inspector general explained his role, the Attorney General responded, “[s]o you are telling me that I can order around everyone else in this building, but I can’t tell you what to audit or investigate.”³⁷ The inspector general responded, “[y]es, that is what the IG Act requires.”³⁸ Furthermore, when inspectors general send their semi-annual reports to Congress, albeit through the agency head first, “the report must remain unaltered, but it can include additional comments from the agency head.”³⁹

In addition to operational independence, inspectors general receive budgetary independence from their agency heads and the President. Inspectors general develop annual budget estimates separate from their affiliated agencies.⁴⁰ In practice, an inspector general submits the budget to the agency head.⁴¹ Next, the agency head submits the aggregated agency budget to the President, including any comments from the inspector general regarding the budget.⁴² The annual budget submitted by the President to Congress must include (1) the inspector general’s original budget that was given to the agency head; (2) “the President’s requested amount for the [inspector general]”; and (3) any comments from the inspector general if the

³⁵ 5 U.S.C. app. § 3; Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027, 1034 (2013).

³⁶ *U.S. Nuclear Regul. Comm’n*, 25 F.3d at 235.

³⁷ Glenn Fine, *Seven Principles of Highly Effective Inspectors General*, CTR. FOR THE ADVANCEMENT OF PUB. INTEGRITY, COLUM. 1-2 (2017).

³⁸ *Id.*

³⁹ WILHELM, *supra* note 25, at 17.

⁴⁰ 5 U.S.C. app. § 6(g)(1); WILHELM, *supra* note 25, at 14; Robin Kempf & Jessica Cabrera, *The De Facto Independence of Federal Offices of Inspector General*, 49 AM. REV. PUB. ADMIN. 65, 67 (2019).

⁴¹ WILHELM, *supra* note 25, at 14.

⁴² *Id.*

President's amount would "substantially inhibit" the inspector general.⁴³ This budget process allows Congress to review differences between the perspectives of inspectors general, the agency, and the President.⁴⁴

Finally, inspectors' general relationship with Congress also forecasts their independence. Despite their location in the executive branch, inspectors general have a statutory mandate to "assist Congress in its oversight duties."⁴⁵ Congress, in effect, has delegated its initial oversight function to inspectors general, "who can quickly gather a much more complete understanding of executive branch activity than Congress itself could have."⁴⁶ Additionally, inspectors general must keep Congress and their agency head "fully and currently informed" about deficiencies relating to the administration of agency programs.⁴⁷ This reporting requirement enables an inspector general to be the "only executive branch Presidential appointee who speaks directly to Congress without clearance from the Office of Management and Budget."⁴⁸ Thus, the structural relationship between inspectors general, agencies, the President, and Congress enables inspectors general to operate as separate units without considerable supervision.

2. Oversight Powers

To balance the placement of inspectors general in the executive branch with their oversight role, Congress granted inspectors general broad authority and responsibility to allow inspectors general to "pursue their work independent of direction from or interference by any executive official."⁴⁹ For example, inspectors general have broad authority to conduct audits and investigations,⁵⁰ access records and information,⁵¹ ask other federal,

⁴³ *Id.* at 14-15.

⁴⁴ *Id.*

⁴⁵ GINSBERG & GREENE, *supra* note 27, at 1.

⁴⁶ GOLDSMITH, *supra* note 4, at 105.

⁴⁷ Inspector General Act of 1978, 5 U.S.C. app. § 4(a)(5); COUNCIL OF THE INSPECTORS GEN. ON INTEGRITY AND EFFICIENCY, *supra* note 5.

⁴⁸ TERRY COOPER, HANDBOOK OF ADMINISTRATIVE ETHICS 389 (2d ed. 2019).

⁴⁹ JOHNSON & NEWCOMER, *supra* note 1, at 39.

⁵⁰ 5 U.S.C. app. § 6(a)(2).

⁵¹ *Id.* § 6(a)(1).

state, and local agencies for assistance;⁵² subpoena information;⁵³ administer oaths;⁵⁴ independently hire staff;⁵⁵ and “receive and respond to complaints of waste, fraud, and abuse.”⁵⁶

Inspectors general wield a vast amount of power to investigate suspected wrongdoing and are vested substantial accusatory duties. First, under their subpoena power, inspectors general are entrusted with the power to subpoena all information necessary to perform their functions assigned under the IG Act.⁵⁷ Courts have held that Congress intended for courts to accept inspectors’ general interpretations of what information is necessary to carry out duties under the IG Act.⁵⁸ In addition, some inspectors general have the power to subpoena testimony from witnesses who are not federal employees.⁵⁹ Second, a component with such investigative duties can investigate merely on the suspicion that the law is being violated, or even to be sure that the law is not being violated.⁶⁰ Moreover, inspectors general have investigative authority that may lead to criminal prosecution.⁶¹ In the fiscal year 2020, there were 3,467 successful criminal prosecutions initiated by inspectors general and 3,613 successful criminal prosecutions in the fiscal year 2021.⁶²

⁵² *Id.* § 6(a)(3).

⁵³ *Id.* § 6(a)(4).

⁵⁴ *Id.* § 6(a)(5).

⁵⁵ *Id.* § 6(a)(7).

⁵⁶ WILHELM, *supra* note 25, at 10.

⁵⁷ Inspector General Act of 1978, 5 U.S.C. app. § 6(a)(4).

⁵⁸ *United States v. Westing Elec. Corp.*, 788 F.2d 164, 171 (3d Cir. 1986).

⁵⁹ 5 U.S.C. app. § 8(i).

⁶⁰ *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950).

⁶¹ JOHNSON & NEWCOMER, *supra* note 1, at 43; Sinnar, *supra* note 35, at 1035. Some inspectors general also have law enforcement authorization with agents having the authority to carry weapons. JOHNSON & NEWCOMER, *supra* note 1, at 43, 99; 5 U.S.C. app. § 6(e).

⁶² COUNCIL OF THE INSPECTORS GEN. ON INTEGRITY & EFFICIENCY, ANNUAL REPORT TO THE PRESIDENT AND CONGRESS: FISCAL YEAR 2021 25 (2022) (“Successful Criminal Prosecutions are included . . . when the subjects were convicted in Federal, State, local, or foreign courts or under the Uniform Code of Military Justice or were accepted for pretrial diversion agreements by the Department of Justice or other equivalents within State or local governments.”).

However, this broad investigatory power is also limited in a sense. First, inspectors general transfer prosecution evidence to the Department of Justice (“DOJ”) or to state and local prosecutors.⁶³ Second, inspectors general are limited by their stakeholders: Congress and their respective agency.⁶⁴ For example, inspectors general may have to unofficially tailor their investigations or audits to Congress’s or an agency’s recommendations.⁶⁵ This tailoring arguably removes some of the independence intended by Congress. Finally, inspectors general usually only have an advisory role within their respective agency.⁶⁶ Inspectors general “may identify problems and recommend changes, however,” they have “no authority to take corrective action or to implement the policy changes it recommends.”⁶⁷ Even with limitations, inspectors general remain only nominally supervised.

C. *Review of the Executive Privilege*

“The notion of executive privilege is ‘inextricably rooted in the separation of powers under the Constitution.’”⁶⁸ Modern presidents must act on the “track of secrecy” with “unilateral action, energy, commitment, decisiveness, where time is always of the essence.”⁶⁹ Therefore, confidentiality is of significant constitutional value.⁷⁰ In Federalist 64, John Jay espoused the “perfect *secrecy* and immediate *despatch*” of the president.⁷¹ Moreover, in 1974, the Supreme Court

⁶³ JOHNSON & NEWCOMER, *supra* note 1, at 99. However, unlike investigations, audits are initiated and conducted without involvement from other federal agencies. *Id.* at 100.

⁶⁴ *See id.* at 114-15.

⁶⁵ *Id.*

⁶⁶ *See generally* Inspector General Act of 1978, 5 U.S.C. app. § 4.

⁶⁷ Amy Gaudion, *Recognizing the Role of Inspectors General in the U.S. Government’s Cybersecurity Restructuring Task*, 9 BELMONT L. REV. 180, 207 (2021); *see* 5 U.S.C. app. § 4.

⁶⁸ *Trump v. Thompson*, 573 F. Supp. 3d 1, 14 (D.D.C. 2021) (citing *United States v. Nixon*, 418 U.S. 683, 708 (1974)).

⁶⁹ Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 8 (1993).

⁷⁰ *See* Jennifer Mascott, *Oversight and Executive Privilege in the Context of Separated Powers* 6 (George Mason Univ. Legal St. Rsch. Paper Series No. 22-12, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3902970.

⁷¹ THE FEDERALIST NO. 64 (John Jay) (emphasizing secrecy in the context of treaty-making).

identified that executive privilege is an implied power from the Constitution.⁷² Executive privilege “safeguards the public interest in candid, confidential deliberations within the Executive Branch.”⁷³ Moreover, because executive privilege is “fundamental to the operation of Government,” “information subject to [the] privilege deserves ‘the greatest protection consistent with the fair administration of justice.’”⁷⁴

The executive privilege encompasses five components: “national security and foreign affairs, law enforcement, deliberative process, attorney-client communications and attorney work product, and presidential communications.”⁷⁵ Either a sitting or former president may claim the privilege because the privilege survives the tenure of the president.⁷⁶ The executive branch views the executive privilege as encompassing a broad scope of materials and communications.⁷⁷ However, presidents have stated that they will not block congressional investigations of illegal or unethical conduct, including but not limited to fraud and corruption, in the executive branch by claiming executive privilege.⁷⁸ For example, the Reagan Administration took the view that the executive “privilege should not be invoked to conceal evidence of wrongdoing or criminality on the

⁷² *Nixon*, 418 U.S. at 705-06 (“[T]he privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.”).

⁷³ *Mazars*, 140 S. Ct. at 2032 (internal citations omitted) (quoting *Nixon*, 418 U.S. at 708).

⁷⁴ *Id.* (internal citations omitted) (quoting *Nixon*, 418 U.S. at 708, 715).

⁷⁵ Congressional Oversight of the White House, *supra* note 71, at 30.

⁷⁶ *Nixon v. Adm’r Gen. Serv.*, 433 U.S. 425, 449 (1977); PAUL F. ROTHSTEIN, FEDERAL TESTIMONIAL PRIVILEGES § 6:3 (2d ed. 2021) (“[T]he privilege may also be asserted by a former president with respect to his communications and correspondence.”). *But see Thompson*, 573 F. Supp. 3d at 9 (holding that former President Trump’s “assertion of privilege is outweighed by President Biden’s decision not to uphold the privilege”).

⁷⁷ TODD GARVEY, CONG. RSCH. SERV., R42670, PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE, AND RECENT DEVELOPMENTS 18 (2014).

⁷⁸ *Id.* at 21.

part of executive officers.”⁷⁹ Despite this, the executive branch retains the power to assert executive privilege and can stand in the way of other actors’ requests for information, including congressional committees and inspectors general.

III. EXPLORING EXECUTIVE CONTROL

While inspectors general are independent, nonpartisan components of the executive branch,⁸⁰ the President maintains control over privileged documents that make their way into the hands of inspectors general. This control is backed by the Constitution;⁸¹ consistent practice and the relationship between inspectors general and head agencies;⁸² and the inspectors’ general goal for continued open communication between them and their respective agency.⁸³

A. *The Executive’s Legal Control through the Vesting Clause, Take Care Clause, and Removal Power*

Through the executive power, the President has absolute legal control over privileged information held by executive officers.⁸⁴ The Constitution provides that “[t]he executive Power shall be vested in a President of the United States.”⁸⁵ This means “*all* of the executive power.”⁸⁶ The Vesting and Take Care Clauses further demonstrate “that all discretion imparted to executive branch officers is ultimately subject to the control of the centralized office of the President.”⁸⁷ Additionally, the President “shall take Care that the Laws be faithfully

⁷⁹ *Id.* (citing Congressional Subpoenas of Department of Justice Investigative Files, 8 Op. O.L.C. 315 (1984); Assertion of Executive Privilege in Response to Congressional Demands for Law Enforcement Files, 6 Op. O.L.C. 31, 36 (1982)). In another example, the Clinton Administration announced that “[i]n circumstances involving communications relating to investigations of personal wrongdoing by government officials, it is our practice not to assert executive privilege, either in judicial proceedings or in congressional investigations and hearings.” *Id.*

⁸⁰ See Inspector General Act of 1978, 5 U.S.C. app. § 3(a).

⁸¹ See discussion *infra* Section III.A.

⁸² See discussion *infra* Section III.B.

⁸³ See discussion *infra* Section III.C.

⁸⁴ See generally U.S. CONST. art. II, § 1, cl. 1.

⁸⁵ *Id.*

⁸⁶ *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting).

⁸⁷ *McCONNELL*, *supra* note 68, at 114.

executed . . . ”⁸⁸ By granting the “executive power,” Article II of the Constitution “marks the president as the supreme executive magistrate of the federal government,” which includes a set of active powers.⁸⁹ Among these active powers are executing federal law, managing foreign affairs, and directing executive officers.⁹⁰ Moreover, as the protector of the Constitution, the President has the duty to safeguard the Constitution’s separation of powers feature.⁹¹ In Federalist 70, Alexander Hamilton explains that one executive was chosen because it “is conducive to energy.”⁹² Similar to John Jay in Federalist No. 64, Hamilton listed “[d]ecision, activity, secrecy, and despatch” as characteristics of the Executive.⁹³

After considering the powers the Founders envisioned the Executive to vest, it is within the Executive’s power to exercise discretion over the inspectors general in matters of interest to the President. These matters include the control and the dissemination of confidential and privileged communications and documents.⁹⁴ Because the original understandings of the Vesting Clause and the Take Care Clause include the power and discretion to control executive officers,⁹⁵ the President generally has control over inspectors general.⁹⁶ Therefore, the President can legally control the privileged executive documents even in the hands of the inspector general.

The Executive’s legal control is further evidenced by the President’s removal power, specifically removal powers over

⁸⁸ U.S. CONST. art. II, § 3.

⁸⁹ SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* 63 (2015).

⁹⁰ *Id.*

⁹¹ *Id.* at 299.

⁹² THE FEDERALIST NO. 70 (Alexander Hamilton).

⁹³ *Id.*; THE FEDERALIST NO. 64 (John Jay).

⁹⁴ See generally *Establishment of Offices of Inspector General: Hearing on H.R. 2819 Before the Subcomm. of the Comm. on Gov’t Operations, 95th Cong.* 117 (1977); Congressional Oversight of the White House, *supra* note 71, at 30-31.

⁹⁵ See PRAKASH, *supra* note 99, at 63; see also MCCONNELL, *supra* note 68, at 114 (“The power of the President to direct an executive officer to exercise that officer’s statutory discretion in a particular manner comes from the Executive Power Vesting Clause, the Take Care Clause, or both.”).

⁹⁶ COUNCIL OF THE INSPECTORS GEN. ON INTEGRITY AND EFFICIENCY, *supra* note 5, at 3 (“IGs generally serve at the pleasure of the President.”).

inspectors general. Through the Vesting Clause, the President was granted all the executive power and is charged with taking care that the laws be faithfully executed.⁹⁷ To do so, the President is able to select those who will aid the President in executing the law.⁹⁸ Therefore, the power of removal must also vest solely in the President because the removal power is incident to the power of appointment.⁹⁹

While the President's removal power may be limited, the President has the sole authority to remove those she appoints.¹⁰⁰ An inspector general can be removed only by the President, and the President must communicate the reasons for removal to both Houses of Congress thirty days prior to removal.¹⁰¹ However, this requirement is not an absolute burden against the President's removal power.¹⁰²

If a President feels she lacks control over privileged executive information within an inspector's general office, she would most likely be able to remove that inspector general.¹⁰³ In *Walpin v. Corporation for National & Community Services*, Gerald Walpin, the former Inspector General of the Corporation for National and Community Services ("CNCS"), challenged his removal.¹⁰⁴ Walpin claimed that CNCS should restore him as inspector general because the President did not comply with the procedural removal requirements of the IG

⁹⁷ *Myers v. United States*, 272 U.S. 52, 117 (1926).

⁹⁸ *Id.*

⁹⁹ *Id.* at 119.

¹⁰⁰ See, e.g., *Humphrey's Ex'r v. United States*, 295 U.S. 602, 630-31 (1935).

¹⁰¹ Inspector General Act of 1978, 5 U.S.C. app. § 3(b).

¹⁰² See, e.g., *Walpin v. Corp. for Nat'l & Cmty. Servs.*, 630 F.3d 184, 187 (D.C. Cir. 2011).

¹⁰³ This dynamic was discussed in the legislative history of the IG Act. *Establishment of Offices of Inspector General: Hearings on H.R. 2819 Before the Subcomm. of the Committee on Government Operations, supra* note 104. For example, if an inspector general received a request for privileged information from a congressional committee, the inspector general would consult with both the agency head and the President. *Id.* Within the legislative history, it was proposed that the inspector general would write back to Congress and say, "I am not going to produce this at the direction of the President." *Id.* Further, it was imagined that if the inspector general refused to assert the privilege on behalf of the President, the President could remove the inspector general. *Id.*

¹⁰⁴ *Walpin*, 630 F.3d at 184.

Act.¹⁰⁵ The IG Act states “[i]f an Inspector General is removed from office . . . , the President shall communicate in writing the reasons for any such removal or transfer to both Houses of Congress, not later than 30 days before the removal”¹⁰⁶ Upon removing Walpin, President Obama communicated to Congress that he “no longer” had “the fullest confidence” in Walpin.¹⁰⁷ The D.C. Circuit Court explained that the IG Act imposed no clear duty to explain reasons in greater detail and held that President Obama’s simple statement of reasons met the minimal requirement of the IG Act.¹⁰⁸ Therefore, the procedural requirements of removal for an inspector general do not stand in the way of the Executive exhibiting legal control.

Based on the meaning of executive power and the removal power over inspectors general, the President actively maintains control over privileged documents that make their way into the hands of inspectors general. This control is not merely functional and is based in the legal principles of the Constitution. If, in the alternative, the Executive lost control over the privileged documents and over the inspectors general, generally, the President would no longer be accountable for the potential dissemination of confidential information.¹⁰⁹ Because the Constitution’s text vests the executive power in one person,¹¹⁰ that individual is the protector of the Constitution, and therefore, the separation of powers. Thus, the President has the constitutional authority to direct and control the inspectors general concerning information subject to executive

¹⁰⁵ *Id.*

¹⁰⁶ Inspector General Act of 1978, 5 U.S.C. app. § 3(b).

¹⁰⁷ *Walpin*, 630 F.3d at 187.

¹⁰⁸ *Id.*

¹⁰⁹ *See generally* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 480 (2010) (“A key ‘constitutional means’ vested in the President”—perhaps *the* key means—“was ‘the power of appointing, overseeing, and controlling those who execute the laws.’”). If the executive branch power “has ‘slip[ped] from the Executive’s control,’ it has also slipped ‘from that of the people.’ This not only defeats the design of the Constitution but also undermines the premises of a republican form of government—rule by ‘we the people’ rather than by an unaccountable ‘body of experts.’” Joel S. Nolette, *The Take Care Act*, THE FEDERALIST SOC’Y (Jun. 6, 2019), <https://fedsoc.org/commentary/fedsoc-blog/the-take-care-act> (citing *id.* at 499).

¹¹⁰ U.S. CONST. art. II, § 1, cl. 1.

privilege. Finally, the President’s legal control is supplemented by the President’s functional use of removal.

B. *Examples of Inspectors General Navigating Executive Privilege*

Just as “history, more than any other evidence, casts a light on constitutional meaning,”¹¹¹ examples from recent practice reveal today’s common understanding of the role of the inspectors general in the realm of executive privilege. The IG Act does not require inspectors general to turn over confidential information from the agency.¹¹² In practice, when the agency head gives the inspector general confidential, privileged information, the inspector general does not turn it over.¹¹³ Rather, inspectors general follow the direction of the agency head and the President.¹¹⁴ The following examples show that the Executive remains in active control over privileged communications and documents even if the information is shared with an inspector general.

1. Inspectors General are Under No Legal Obligation to Produce to Congress Privileged Information

One first aspect of practice and statutory construction is that the IG Act does not force an inspector general to release confidential or privileged information. In a 1989 memorandum, the DOJ, Office of Legal Counsel (“OLC”) concluded that Congress did not intend the IG Act to require the production of confidential information.¹¹⁵ Therefore, the IG Act does not obligate inspectors general “to disseminate confidential law enforcement information.”¹¹⁶ After reviewing the relevant IG Act sections,¹¹⁷ OLC determined that the reporting requirements within that IG Act “merely envision[ed] that the periodic reports from each [inspector general] to Congress will be

¹¹¹ PRAKASH, *supra* note 99, at 11.

¹¹² Congressional Requests for Information from IGs, *supra* note 69, at 77-78.

¹¹³ See *Establishment of Offices of Inspector General: Hearing on H.R. 2819 Before the Subcomm. of the Comm. on Gov’t Operations*, *supra* note 104.

¹¹⁴ See *id.*

¹¹⁵ Congressional Requests for Information from IGs, *supra* note 69, at 77-78.

¹¹⁶ *Id.* at 78.

¹¹⁷ *Id.* at 84 (citing Inspector General Act of 1978, 5 U.S.C. app. §§ 4(a), 5(a)-(b), (d)-(e)).

a general ‘description’ and ‘summary’ of the work of the [inspector general].”¹¹⁸

In coming to its decision, OLC analyzed the Senate committee notes that accompanied the proposals for the congressional reporting requirements in the IG Act.¹¹⁹ The Senate committee had confirmed that the requirement for semi-annual reports “contemplates that the [inspector general]’s reports will ordinarily be transmitted to Congress by the agency head *without alteration or deletion*.”¹²⁰ However, the notes also clarified that the requirement was not intended to prohibit an agency head from deleting certain materials where disclosure would be improper under the law.¹²¹ This established policy indicates “an [inspector general] must decline to provide confidential information about an open criminal investigation”—a recognized executive privilege¹²²— “in response to a request pursuant to Congress’s oversight authority.”¹²³

This established legal construction recognizes that while the inspectors general are meant to be independent, it would be improper under the law to require the inspector general to release privileged information to Congress, especially without the proper authority from the agency head or the Executive. This example reveals that Congress did not intend to take away legal control from the Executive. Instead, the IG Act conserves the Executive’s vested powers explained in Section II.A and maintains that the Executive has legal control of privileged information.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 84-85.

¹²⁰ Congressional Requests for Information from IGs, *supra* note 69, at 85 (citing S. REP. NO. 1071, at 31).

¹²¹ *Id.* at 85-86 (citing S. REP. NO. 1071, at 31-32).

¹²² *Id.* at 87.

¹²³ *Id.*

2. When the Inspectors General and the Executive Have Competing Interests, the Executive Still Remains in Control

While the agency head or the Executive cannot prevent an inspector general from carrying out an investigation,¹²⁴ a second aspect of practice reveals that the agency head and the Executive may direct the use of privileged information.¹²⁵ The following summary of the Department of Defense (“DoD”), Office of Inspector General’s (“OIG”) investigation into executive branch employees show that when the Executive and inspectors general have competing interests regarding privileged information, the inspectors general must follow the Executive’s direction. However, the inspectors general are always free to receive their information elsewhere, where executive privilege obstacles do not restrict them.

In the DoD OIG Investigation of Rear Admiral Ronny Lynn Jackson, the DoD OIG investigated allegations regarding Jackson’s conduct as Director of the White House Medical Unit (“WHMU”).¹²⁶ During its investigation, the DoD OIG alleged it could not thoroughly review the allegations at issue because the Office of the White House Counsel insisted on being present at interviews with current WHMU employees who had interacted with Jackson.¹²⁷ The DoD OIG decided that White House Counsel’s presence at the interviews would have a “chilling effect” and prevent it from receiving accurate testimony.¹²⁸ Therefore, DoD OIG did not go forward with the interviews of the present employees and received its information elsewhere.¹²⁹

¹²⁴ See Inspector General Act of 1978, 5 U.S.C. app. § 3.

¹²⁵ See generally DEP’T OF DEF., OFF. OF INSPECTOR GEN., REPORT OF INVESTIGATION REAR ADMIRAL (LOWER HALF) RONNY LYNN JACKSON, M.D. U.S. NAVY, RETIRED 1 (Mar. 3, 2021), <https://www.oversight.gov/sites/default/files/oig-reports/DoD/DODIG-2021-057.PDF> [hereinafter REPORT OF REAR ADMIRAL].

¹²⁶ See *id.*

¹²⁷ See *id.* at 2.

¹²⁸ See *id.*

¹²⁹ See *id.* (noting that the DoD OIG interviewed past White House employees and reviewed unprivileged documents).

The DoD OIG provided a draft report of the investigation to White House Counsel prior to public release.¹³⁰ Following review of the draft report, Counsel did not identify any information to withhold, but it “rejected ‘any suggestion [that their presence] at interviews may have had a potential chilling effect that would prevent the [DoD OIG] from receiving accurate testimony.’”¹³¹ Rather, White House Counsel asserted that they must be present at interviews because it is “important for preserving Executive Privilege, especially when employees who work in the White House complex are interviewed.”¹³² However, after reviewing the draft report, Counsel only objected to two sentences in the report’s conclusion, but did not identify any information to withhold.¹³³ Even with what it considered limited information, the DoD OIG determined it still had sufficient evidence from other sources to conclude whether certain allegations were met.¹³⁴

While DoD OIG does not allege that it was necessarily mandated to allow the White House Counsel to be present at the interview, its actions after Counsel’s requirement for interviews imply that it might have no room to negotiate. While an inspector’s general acquiescence is not generally enough to conclude that the Executive has legal control, this example paired with the Vesting Clause and Take Care Clause demonstrates the Executive remains in legal control of privileged information.

3. A Formal Claim of Privilege is Not Required for the Executive to Control Documents Inspectors General Have

Agency heads and the Executive have the authority to direct inspectors general not to disclose privileged information, even if the Executive has not established a formal claim of privilege. For example, in its Review of the Department of State’s Role in Arms Transfers to the Kingdom of Saudi Arabia and the United Arab Emirates, the

¹³⁰ *Id.* at 2 n.3.

¹³¹ REPORT OF REAR ADMIRAL, *supra* note 135, at 2 n.3.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *See id.* at 2.

Department of State (“DOS”), OIG indicated potential executive privilege concerns within its opening letter.¹³⁵ Before finalizing the report, the DOS OIG worked with the agency to understand the nature of executive privilege claims and minimize the number of redactions within its final report.¹³⁶ In its report, the DOS OIG identified that the DOS’s position was that it “has the authority to direct the OIG not to disclose privileged information, and the Department may do so without any final assertion of executive privilege.”¹³⁷ This assertion is consistent with the Executive’s power to control the discretion of executive officers.

In another example, the General Services Administration (“GSA”) OIG, in its Semi-Annual Report to Congress for April through September 2018, reported an initial claim of executive privilege during its review of GSA’s Revised Plan for the Federal Bureau of Investigation Headquarters Consolidation Project.¹³⁸ As required by the IG Act § 5(a)(21)(B), the GSA OIG alleged that during its review, “the Agency significantly delayed and restricted access to information.”¹³⁹ IG Act § 5(a)(21)(B) requires inspectors general to include in their semi-annual reports

a detailed description of any attempt by the establishment to interfere with the independence of the Office, including . . . incidents where the establishment has resisted or objected to oversight activities of the Office or restricted or significantly

¹³⁵ DEP’T OF STATE, OFF. OF INSPECTOR GEN., REVIEW OF THE DEP’T OF STATE’S ROLE IN ARMS TRANSFERS TO THE KINGDOM OF SAUDI ARABIA AND THE UNITED ARAB EMIRATES (2020), https://www.stateoig.gov/uploads/report/report_pdf_file/isp-i-20-19.pdf.

¹³⁶ *Id.* (“Consistent with OIG’s commitment to transparency and accountability, OIG worked with the Department in an attempt to maximize the information to be released.”).

¹³⁷ *Id.*

¹³⁸ GEN. SERV. ADMIN., OFF. OF INSPECTOR GEN., REVIEW OF GSA’S REVISED PLAN FOR THE FEDERAL BUREAU OF INVESTIGATION HEADQUARTERS CONSOLIDATION PROJECT, SEMI-ANNUAL REPORT TO CONGRESS APRIL 1, 2018 - SEPTEMBER 30, 2018, 42-43 (Aug. 27, 2018), <https://www.oversight.gov/sites/default/files/oig-sa-reports/archive/17464/GSA-OIG-SAR-11-2018.pdf> [hereinafter REVIEW OF GSA’S REVISED PLAN].

¹³⁹ *Id.* at 43.

delayed access to information, including the justification of the establishment for such action.¹⁴⁰

During its review, the GSA OIG's objective "was to review GSA's decision-making process for the revised FBI headquarters project plan, including an analysis of whether the revised plan properly accounts for the full costs and security requirements of the project."¹⁴¹ In the course of its review GSA OIG discovered that GSA Administrator Emily Murphy met with the President on January 24, 2018 to discuss the project.¹⁴² According to its reports, when GSA OIG asked Administrator Murphy and other GSA witnesses for more information regarding the meeting, GSA OIG received inconsistent information.¹⁴³ Eventually, Administrator Murphy claimed executive privilege after being instructed by GSA's then-Acting General Counsel.¹⁴⁴

GSA OIG stated in its report that it "sought to determine whether GSA took the position that executive privilege precluded sharing information with the OIG, which is part of GSA and within the Executive Branch."¹⁴⁵ Months passed following GSA OIG's initial inquiry regarding the meeting with the President before GSA's Acting General Counsel provided additional information.¹⁴⁶ At which point, pursuant to White House Counsel's direction, GSA's Acting General Counsel conveyed that "GSA employees were authorized to disclose the existence of White House meetings, the names of attendees, and any high-level agreements that resulted from the meetings; but not to disclose any statements made by the President."¹⁴⁷ GSA stated that the

¹⁴⁰ Inspector General Act of 1978, 5 U.S.C. app. § 5(a)(21)(B).

¹⁴¹ REVIEW OF GSA'S REVISED PLAN, *supra* note 148, at 42.

¹⁴² *Id.*

¹⁴³ *Id.* at 42-43.

¹⁴⁴ *Id.* at 43.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ REVIEW OF GSA'S REVISED PLAN, *supra* note 148, at 43. This is consistent with the federal courts' interpretation of the presidential communications privilege. *See, e.g.,* Citizens for Resp. and Ethics in Wash. v. Dep't of Homeland Sec., 592 F. Supp. 2d 111, 118-19 (D.D.C. 2009) (explaining that because the privilege only extends to communications, visit records, including the visitor's name, date and time of visit, and, in some cases, the name of the person visited, are not covered because "[s]uch

exemption of additional information about the meetings was justified because “the White House exercised its authority to control the dissemination of information about confidential meetings with the President and his senior advisors” and that a “formal assertion of executive privilege, therefore, was not necessary”¹⁴⁸ Ultimately, Administrator Murphy provided GSA OIG only with “descriptions of the meetings with the President and other White House officials.”¹⁴⁹

These examples establish that the Executive, through its agencies, can control the dissemination of privileged information even without a formal claim of privilege. While the inspectors general in these cases distinguish themselves as within the executive branch—presumably allowing access to privileged information—the Executive can legally control all the officers within the executive branch. Because the Executive legally can direct the actions of the officers, she can also direct the information allowed to agencies within the executive branch without a formal claim of privilege.

C. Inspectors General are Incentivized to Follow the Executive’s Lead—Practical Justifications for the Executive’s Control

If inspectors general acquiesce to congressional requests for executive privileged information, the inspectors general risk losing the trust and compliance of their head agencies. By protecting the claimed executive privilege while allowing Congress to resolve the case directly with the agency head, inspectors general remain neutral in executive privilege disputes and will heighten the chances of receiving privileged information in the future. A 2014 dispute over Department of Interior (“DOI”) documents held by the DOI OIG illustrates the important practical implications that functionally supplement the Executive’s consistent legal control over documents that fit under the executive privilege.¹⁵⁰

information sheds no light on the content of communications between the visitor and the President or his advisors”).

¹⁴⁸ REVIEW OF GSA’S REVISED PLAN, *supra* note 148, at 43.

¹⁴⁹ *Id.*

¹⁵⁰ *The Office of Inspector General and Its Ongoing Failure to Comply with a Subpoena For Documents About A Recent Investigation: Hearing Before the H.*

In this case, the House Committee on Natural Resources subpoenaed documents from the DOI OIG, and the DOI OIG would not release the documents.¹⁵¹ Rather, the DOI OIG reported that the Committee subpoenaed information from its report that the DOI claimed as privileged.¹⁵² Instead of engaging with the DOI—the privilege owner—the Committee pressured the DOI OIG to release the information.¹⁵³ The DOI OIG warned that releasing such documents would (1) “jeopardize the OIG’s ability to obtain privileged information from [the agency] in the future,” and (2) worsen the widespread problem among inspectors general to have “timely access to information from their agencies.”¹⁵⁴

In furtherance of its first point, the DOI OIG explained that its practice and understanding with DOI was that the DOI would provide privileged documents as long as the DOI OIG gave DOI the opportunity to identify applicable privileges.¹⁵⁵ Releasing the information to Congress, therefore, risks the OIG’s future of obtaining similar privileged information, which is necessary for its investigations.¹⁵⁶ Second, the DOI OIG alluded to a 2014 letter to Congress from forty-seven inspectors general.¹⁵⁷ The letter pointed the Committee to the well-recognized problem among inspectors general with head agencies refusing to share information with their respective inspectors general.¹⁵⁸

Comm. on Nat. Res., 113th Cong. 6-9 (Sept. 11, 2014) (testimony of Mary L. Kendall, Deputy Inspector General for the Department of the Interior), <https://www.congress.gov/113/chrg/CHRG-113hhr89835/CHRG-113hhr89835.pdf> [hereinafter Testimony of Deputy IG Kendall].

¹⁵¹ *Id.* at 7-8.

¹⁵² *Id.* at 8.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 6, 8.

¹⁵⁵ *Id.* at 8.

¹⁵⁶ Testimony of Deputy IG Kendall, *supra* note 160, at 8.

¹⁵⁷ *Id.* at 9.

¹⁵⁸ *Obstructing Oversight: Concerns From Inspectors General: Hearing Before the H. Comm. on Oversight and Government Reform*, 113th Cong. 27, 61 (2014), <https://www.govinfo.gov/content/pkg/CHRG-113hhr91650/pdf/CHRG-113hhr91650.pdf> (“Aug. 5, 2014, Letter to Reps. Issa, Cummings, Carper, and Coburn from 47 IGs, submitted by Rep. Chaffetz”).

The 2014 letter indicates the widespread problem that inspectors have obtaining access to all records available to the agency.¹⁵⁹ In September 2014, the House Committee on Oversight and Government Reform held a hearing regarding Obstructing Oversight: Concerns from Inspectors General.¹⁶⁰ At the hearing, several inspectors general testified and made clear that the IG Act § 6(a)(1), which requires full and timely access to agency records, does not alone assure access to such records.¹⁶¹ For example, in one view, inspectors general believe they are entitled to materials they request because the language in the IG Act § 6(a) is clear that inspectors general are “entitled to that by law.”¹⁶² However, for example, in DOJ OLC’s view, “it wasn’t sure the IG Act meant what it said, and as a result it required an order of the Attorney General or the Deputy Attorney General to the component” to evaluate and decide whether to give the inspector general certain material.¹⁶³ With this view in mind, if inspectors general easily hand over privileged information to Congress, they risk losing the compliance of their head agencies, which is already difficult to gain based on the testimony to Congress.

The DOI OIG also argued that the “OIG cannot usurp the President’s power to assert executive privilege if other efforts to resolve the dispute fail.”¹⁶⁴ While the Committee alleged that the agency head had not established a valid claim of executive privilege,¹⁶⁵ the DOI OIG explained that the DOI OIG would not take a position contrary to the Executive in such dispute because the dispute is between the agency head and Congress—not Congress and the middle-man.¹⁶⁶ Rather, the inspector general explained that the current practice “is that only the President can assert executive privilege and will only do so after receiving a recommendation from the Attorney General.”¹⁶⁷ Additionally, the practice “involves efforts to resolve disputes through

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 41.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Testimony of Deputy IG Kendall, *supra* note 160 at 8.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

. . . [the] process of accommodation.”¹⁶⁸ Accommodation, as described by one Attorney General, “is an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch.”¹⁶⁹ This argument from the DOI OIG does not destroy the independence Congress meant for it, and other inspectors general, to have. In a dispute that has constitutional implications, the inspector general must stay independent and neutral by recognizing that Congress must seek the information from the agency head because the privilege and the privileged information belong to the agency head.¹⁷⁰

This example establishes three important reasons for inspectors general to surrender to claims of privilege and the attempted control of information from their respective head agencies. By accepting the privilege and forcing Congress to battle claims of executive privilege, inspectors general (1) heighten chances of receiving privileged information and overall open access to documents; (2) allow for Congress and the Executive—the owner of the privilege—to work out the claim of privilege through the process of accommodation; and (3) remain the independent component Congress established them to be.

IV. CONCLUSION

Returning to the questions posed by the Introduction: (1) Can Congress effectively overcome an agency’s claim of executive privilege by requesting documents from an inspector general; (2) When the inspector general relies on confidential, privileged information in his or her report, is Congress able to request those documents because they were impliedly released already; and (3) Can the President legally control privileged documents once an inspector general receives them? First, Congress cannot overcome an agency’s claim of executive privilege by requesting the documents from the respective inspector general. Second, when an inspector general relies on confidential, privileged information in its reports, Congress cannot request those documents directly from the inspector general. Third, the President

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*; see also Congressional Oversight of the White House, *supra* note 71, at 21.

¹⁷⁰ Testimony of Deputy IG Kendall, *supra* note 150, at 8.

can legally control privileged documents once the inspectors general receive them. The Executive always has legal control of privileged documents that the inspectors general receive because the President was vested this control through the Constitution and within her role over the removal of inspectors general. Finally, inspectors general benefit from following the lead from the Executive's and agency head's control.

