COMMENTS

THE PUSH TO GROW THE CAPACITY OF INSPECTORS GENERAL: WHAT SHOULD BE NEXT FOR THE INSPECTOR GENERAL COMMUNITY

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INTRODUCTION

Congressional oversight is an integral part of America's checks and balances, yet the Constitution does not explicitly confer on Congress its authority to oversee.[1] Rather, the authority to review, monitor, supervise, and conduct investigations of programs, policies, and federal agencies comes from Congress's authority to hold "[a]ll legislative powers"[2] of government.[3] Through this implied power, Congress enjoys the fruits of its investigative authority and protects civil liberties and individual rights by monitoring the Executive Branch to ensure that it complies with laws and the Constitution.[4]

To strengthen congressional oversight and assist Congress in enhancing government accountability, Congress established statutory Inspectors General (IGs) through the Inspector General Act of 1978 (IG Act).[5] The IG Act made IGs internal watchdogs within the Executive Branch, acting as Congress's indispensable "eyes and ears" inside of federal agencies.[6] Congress intended IGs[7] to function as "independent, nonpartisan officials

1. *See Investigation & Oversight*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART, & ARCHIVES, https://history.house.gov/Institution/Origins-Development/Investigations-Oversight/ (last visited Nov. 11, 2023).

2. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

3. *A Look at the History and Importance of Congress' Power to Investigate*, VOA NEWS (Jan. 14, 2019), https://www.voanews.com/a/a-look-at-the-history-and-importance-of-congress-power-to-investigate/4743218.html.

4. *See id.*

5. *See* Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (codified as amended at 5 U.S.C. app.).

6. Danielle Brian, *It's More Clear Now Than Ever: Inspectors General Need Stronger Protections*, POGO (Apr. 13, 2020), https://www.pogo.org/analysis/2020/04/its-more-clear-now-than-ever-inspectors-general-need-stronger-protections.

7. *See* OFF. OF MGMT. & BUDGET, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS & AGENCIES (2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/M-22-04-IG-Cooperation.pdf (stating that the responsibility of Inspectors General (IGs) to remain objective is (1) crucial to the congressional oversight mission, (2) essential for safeguarding the public's faith in IGs to act as independent watchdogs for government efficacy, and (3) necessary for ensuring that IGs function with significant independence).

who aim to prevent and detect waste, fraud, and abuse" throughout the federal bureaucracy.[8]

To execute the IG mission, IGs lead Offices of Inspector General (OIGs) within Executive Branch agencies.[9] While these offices are located within a federal agency, OIGs are operationally independent from their agencies.[10] OIGs function to prevent and detect waste, fraud, abuse, and misconduct within their parent agency.[11] In carrying out this objective, OIGs conduct reviews, audits, and investigations of their agency's programs and operations "to determine whether these programs are achieving their intended results, and to identify ways to improve performance and management in the future."[12] In performing these evaluations, IGs promote economy, efficiency, and effectiveness of their agency's operations while simultaneously strengthening congressional oversight by aiding Congress in detecting mismanagement within the federal bureaucracy and by identifying ways to prevent further deficiencies.[13]

A. The Inspector General Act of 1978

The IG Act defines the duties and responsibilities of an Inspector General.[14] When first introduced, the IG Act created statutory IG positions within twelve federal agencies.[15] These IGs are now referred to as

8. BEN WILHELM, CONG. RSCH. SERV., R45450, STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER (2023).

9. *See id.*

10. *The Inspectors General*, COUNCIL OF THE INSPECTORS GEN. ON INTEGRITY & EFFICIENCY (July 14, 2014), https://www.ignet.gov/sites/default/files/files/IG_Authorities_Paper_-_Final_6-11-14.pdf.

11. *See, e.g.*, *What You Need to Know About the Office of Inspector General*, FED. TRADE COMM'N, https://www.ftc.gov/office-inspector-general/what-you-need-know-about-office-inspector-general (last visited Nov. 11, 2023).

12. *Id.*

13. *See id.*

14. *See* Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (codified as amended at 5 U.S.C. app.).

15. *See id.* § 2 (creating independent and objective Offices of Inspector General (OIG) within "the Department of Agriculture, the Department of Commerce, the Department of Housing and Urban Development, the Department of the Interior, the Department of Labor, the Department of Transportation, the Community Services Administration, the Environmental Protection Agency, the General Services Administration, the National Aeronautics and Space Administration, the Small Business Administration, and the Veterans' Administration"); *see also OIG History*, U.S. DEP'T OF TRANSP., https://www.oig.dot.gov/about-oig/oig-history (last visited Nov. 11, 2023) (explaining that prior to the Inspector

Establishment IGs[16] and are "appointed by the President, by and with the advice and consent of the Senate, 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."[17] Likewise, the President has the authority to remove Establishment IGs but must do so by "communicat[ing] in writing the reasons for any such removal or transfer to both Houses of Congress, not later than 30 days before the removal or transfer."[18]

In addition to clarifying the appointment and removal power of Establishment IGs, the IG Act details the duties and responsibilities of IGs.[19] Specifically, § 2 of the IG Act grants IGs the authority to lead OIGs.[20] OIGs are essentially the oversight division of a federal agency charged with promoting integrity and ensuring accountability within their Executive Branch host.[21] OIGs assist their IGs in conducting independent and objective oversite of their agencies' programs in predominately two ways: (1) detecting fraud and abuse through audits and investigations and (2) recommending best practices to their affiliated federal agency.[22] As described in § 2, OIGs must keep Congress and their agency head informed of any problems, fraud, or abuse they detect within the administration of their agency's programs and operations through semiannual reports.[23] The formalities of this requirement are detailed in § 5 of the IG Act.[24] In these reports, the OIG must (1) summarize the activities of the OIG, (2) include descriptions of significant problems, abuses, and deficiencies found within

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General Act of 1978 (IG Act), "[t]wo OIGs had previously been established, one in 1976 and another the following year.").

16. *See* WILHELM, *supra* note 8, at 29.

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

18. *Id.*

19. *See generally id.* § 4.

20. *See id.* § 2.

21. *See Inspector General Act*, OFF. OF INSPECTOR GEN. BD. OF GOVERNORS OF THE FED. RSRV., SYS. CONSUMER FIN. PROT. BUREAU, https://oig.federalreserve.gov/inspector-general-act.htm (last visited Nov. 11, 2023). By conducting audits and investigations without any interference from their host agency, OIGs have the independence to identify and adequately correct wrongdoings, ensuring integrity and accountability within the Executive Branch. *See id.*

22. *See* WILHELM, *supra* note 8.

23. *See* Inspector General Act of 1978, 5 U.S.C. app. § 2 (stating IGs must "keep[] the head of the establishment and the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action").

24. *See id.* § 5.

the administration of the agency or its programs and operations, and (3) provide recommendations for corrective action to these deficiencies.[25]

Most importantly, § 4 of the IG Act established criminal investigative jurisdiction for OIGs.[26] At its inception, the IG Act granted IGs the power to issue subpoenas duces tecum, also known as document subpoenas, during any OIG audit or investigation.[27] If, in the course of an audit or investigation, an IG uncovers evidence indicative of criminal behavior and develops reasonable grounds to believe that there has been a violation of federal criminal law, the IG must "report expeditiously to the [U.S.] Attorney General."[28] This requirement exists because the Department of Justice (DOJ) is the principal federal agency authorized to enforce violations of federal laws by prosecution in the United States district courts.[29]

B. Evolution of the IG Act

Since Congress first enacted the IG Act, "Congress has substantially amended the IG Act . . . to expand the number of statutory IGs" and to strengthen IG independence.[30] The most noteworthy of these amendments are: The Inspector General Act Amendments of 1988 (IG Act Amendments of 1988),[31] the Inspector General Reform Act of 2008 (IG Reform Act of 2008),[32] and the Inspector General Empowerment Act of 2016 (IG

25. *See id.* (requiring that semiannual reports of each IG must be furnished to the agency head and transmitted to the appropriate committee or subcommittee of Congress within thirty days after receipt of the report).

26. *Id.* § 4.

27. *See id.* (stating that the head of the establishment cannot prevent or prohibit the IG from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation); *id.* § 6(a)(4) (detailing IGs' subpoena powers).

28. *See id.* § 4; *see also* Press Release, Office of Public Affairs, U.S. Dep't of Just., Attorney General Merrick B. Garland Announces Department of Justice 2022–26 Strategic Plan (July 1, 2022), https://www.appropriations.senate.gov/imo/media/doc/Attorney%20General%20Merrick%20Garland%20April%2026,%202022%20Statement%20for%20the%20Record.pdf (noting that the U.S. Attorney General leads the Department of Justice (DOJ) in upholding the rule of law, keeping the country safe, and protecting the civil rights of all Americans).

29. *See About DOJ*, U.S. DEP'T OF JUST., https://www.justice.gov/about (last visited Nov. 11, 2023); *see also* 28 U.S.C. § 516 ("[T]he conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.").

30. *See* WILHELM, *supra* note 8, at 3.

31. Inspector General Act Amendments of 1988, Pub. L. No. 100-504, 102 Stat. 2515.

32. Inspector General Reform Act of 2008, Pub. L. No. 110-409, 122 Stat. 4306.

Empowerment Act of 2016).[33]

Through the IG Act Amendments of 1988, Congress created a new category of IGs for designated federal entities (DFEs).[34] These IGs are now referred to as DFE IGs.[35] Congress provided DFE IGs with essentially the same power and duties as Establishment IGs.[36] The main difference between the two are that DFE IGs are appointed by, and can be removed by, their affiliated agency head instead of by the President.[37] Through the IG Reform Act of 2008, Congress established the Council of the Inspectors General on Integrity and Efficiency (CIGIE) "as the unified council of all statutory IGs."[38] CIGIE functions as an independent entity with the mission of identifying and addressing issues of integrity, economy, and effectiveness within individual government agencies and aiding "in the establishment of a professional, well-trained and highly skilled workforce in the [OIG]."[39] Lastly, Congress introduced the IG Empowerment Act of 2016 to eliminate existing uncertainty over an agency's legal responsibility to disclose potentially sensitive information to IGs.[40] The Act certified that "IGs are

33. Inspector General Empowerment Act, Pub. L. No. 114-317, 130 Stat. 1595 (2016).

34. *See* WILHELM, *supra* note 8, at 3–4, 31. Designated federal entities are required to establish and maintain OIGs. Section 8G(a)(2) of the IG Act defines and lists those designated federal agencies. This list includes federal agencies such as: Amtrak, Peace Corps, Elections Assistance Commission, Securities Exchange Commission, and Equal Employment Opportunity Commission (EEOC). *Id.* at 31.

35. *See id.* at 3–4.

36. *See* Inspector General Act Amendments of 1988, Pub. L. No. 100-504, 102 Stat. 2515.

37. *See* WILHELM, *supra* note 8, at 3–4, 13 (stating that the IG Act Amendments of 1988 also established a uniform salary rate for each Establishment IG, added several new semiannual reporting requirements, and required external peer reviews of OIGs).

38. *Inspectors General*, COUNCIL OF THE INSPECTOR GEN. ON INTEGRITY & EFFICIENCY, https://www.ignet.gov/content/ig-act-history (last visited Nov. 11, 2023); *see* Inspector General Reform Act of 2008, Pub. L. No. 110-409, 122 Stat. 4306; *see also Council of the Inspectors General on Integrity and Efficiency*, OVERSIGHT.GOV, https://www.oversight.gov/inspectors-general/council-inspectors-general-integrity-and-efficiency [hereinafter CIGIE] (last visited Nov. 11, 2023); WILHELM, *supra* note 8, at 3 (explaining that this Act also increased the uniform salary rate for Establishment IGs and established a salary formula for DFE IGs, provided additional protections to enhance the independence of IGs, such as budget protections and access to independent legal counsel, refurbished congressional notification for the removal or transfer of IGs, and increased IG semiannual reporting requirements).

39. CIGIE, *supra* note 38.

40. *See* Inspector General Empowerment Act, Pub. L. No. 114-317, 130 Stat. 1595 (2016); *see also IG Act History*, COUNCIL OF INSPECTOR GEN. ON INTEGRITY & EFFICIENCY, https://www.ignet.gov/content/ig-act-history (last visited Nov. 11, 2023).

entitled to full and prompt access to agency records . . . ."[41] Consequently, "this Act ensure[d] that IGs have the ability to conduct audits, reviews, and investigations in an independent and efficient manner."[42]

Given the United States' volatile political climate and ever-expanding federal bureaucracy, amendments to the IG Act are inevitable.[43] In May 2021, U.S. Senators Maggie Hassan (D-NH) and Chuck Grassley (R-IA) introduced another amendment to the Inspector General Act: The Inspector General Subpoena Authority Act (Senate Bill 1794).[44] Although Senate Bill 1794 was not enacted during the 117th Congress, Hassan and Grassley intended this bipartisan bill to expand upon the IG community's investigative power to subpoena by awarding IGs the power to compel testimony from contractors, grantees, and former federal employees.[45] With this expanded power, IGs could more readily ensure that they are conducting comprehensive investigations, productively detecting deficiencies within the Executive Branch, and recommending best practices to their affiliated federal agency.[46] Additionally, this power would ensure that former officials and other parties cannot escape their responsibility to cooperate with IG investigations.[47]

Even though Senate Bill 1794 was not enacted, many supported the

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41. *IG Act History*, *supra* note 40; WILHELM, *supra* note 8, at 3 (stating that this Act also resolved jurisdictional disputes between IGs).

42. *IG Act History*, *supra* note 40.

43. *See* Paul C. Light, *What American Still Want from Government Reform—a Midsummer Update*, BROOKINGS INST.: FIXGOV (July 20, 2022), https://www.brookings.edu/blog/fixgov/2022/07/20/what-americans-still-want-from-government-reform-a-midsummer-update/. With public demand for government reform at a twenty-year high because of the public's dwindling confidence in the government, Congress is asked to respond to society's needs and enact necessary reform. *Id.*

44. *See* IG Testimonial Subpoena Authority Act, S. 1794, 117th Cong. (2021); *Hassan, Grassley Introduce Bill to Strengthen Efforts to Root Out Waste, Fraud, & Abuse in Government*, CHUCK GRASSLEY (May 25, 2021) [hereinafter *Strengthening IG Efforts*], https://www.grassley.senate.gov/news/news-releases/hassan-grassley-introduce-bill-to-strengthen-efforts-to-root-out-waste-fraud-and-abuse-in-government.

45. *See* S. 1794; *Strengthening IG Efforts*, *supra* note 44.

46. *See Strengthening IG Efforts*, *supra* note 44; *Safeguarding Inspector General Independence and Integrity: Hearing on H.R. 2662, S. 1794, S. 587, and S. 426, Before the U.S. S. Comm. Homeland Sec. & Governmental Affs.*, 117th Cong. 1 (2021) [hereinafter *Safeguarding*] (statement of Michael E. Horowitz, Inspector Gen., U.S. Dep't of Just.).

47. *See* Press Release, Jimmy Gomez, Representative, House of Representatives, Top Oversight Committee Members Introduce IG Subpoena Authority Act (Mar. 19, 2021) [hereinafter Gomez Press Release], https://gomez.house.gov/news/documentsingle.aspx?DocumentID=2344.

bipartisan bill, finding it to be an overdue amendment to the IG Act[48] as Congress intended IGs to have the investigative tools necessary for effectively detecting mismanagement and addressing corruption within the federal government.[49] Additionally, proponents of Senate Bill 1794's passage believed that withholding this investigative tool would hinder IG investigations and allow Executive Branch officials to circumvent compliance with IG investigations and evade accountability initiatives.[50] While the value of adopting this amendment was—and remains—clear on its face, many people still oppose granting IGs testimonial subpoena power.[51] Specifically, challengers of the bill believe that Senate Bill 1794, as written, goes too far by increasing IG independence without incorporating the proper checks and balances.[52] Thus, opponents fear that IGs will unjustifiably exercise their discretion to subpoena individuals for testimony.[53] Further, opponents worry that granting IGs the power to subpoena testimony may result in unchecked invasions of privacy.[54] They reason that the minimal checks and balances proposed in the bill would allow IGs to avoid Fourth Amendment strictures that prevent warrantless searches, sidestep probable cause requirements, and disregard privileges provided by the Fifth Amendment.[55]

Given the U.S. government's system of checks and balances and the eroding trust of the American people in the government, these reservations

48. *See, e.g.*, Courtney Bublé, *All Inspectors General Need Testimonial Subpoena Authority, Watchdogs Say*, GOV'T EXEC. (Oct. 21, 2021), https://www.govexec.com/workforce/2021/10/all-inspectors-general-need-testimonial-subpoena-authority-watchdogs-say/186292/ ("All [IGs] should have testimonial subpoena authority in order to better conduct their oversight work . . . .").

49. *See* Brian, *supra* note 6 (explaining that Congress provided the IG community with the ability to conduct audits, investigations, and work with whistleblowers in order to strengthen congressional oversight). *See generally* Inspector General Act of 1978, Pub. L. No. 95-452, § 2, 92 Stat. 1101 (1978) (codified as amended at 5 U.S.C. app. § 3) (stating that the purpose of the IG Act was to prevent and detect fraud and abuse in the programs and operations of various agencies).

50. *See* Bublé, *supra* note 48.

51. *See* Bob Bauer & Jack Goldsmith, *Inspector General Reform on the Table*, LAWFARE (Oct. 5, 2021, 3:23 PM), https://www.lawfaremedia.org/article/inspector-general-reform-table; *see also* CHARLES DOYLE, CONG. RSCH. SERV., RL33321, ADMINISTRATIVE SUBPOENAS IN CRIMINAL INVESTIGATIONS: A BRIEF LEGAL ANALYSIS (2012).

52. *See* Bauer & Goldsmith, *supra* note 51.

53. *See id.*

54. *See id.*; DOYLE, *supra* note 51.

55. *See* DOYLE, *supra* note 51, at 3.

are fair.[56] However, these concerns do not supersede the IG community's need for this broader authority. Accordingly, Congress should reintroduce an amended version of Senate Bill 1794 that recognizes its opponent's concerns—specifically that the IG community operates with a considerable amount of liberty—while also granting IGs the investigative authority they need to effectively root out waste, fraud, and abuse within the federal government.

This Comment proceeds in four parts and analyzes what Congress passing Senate Bill 1794, as written, could mean for the IG community, the federal government, and demandees.[57] Part I provides an overview of Senate Bill 1794. Part II examines the role of subpoenas in investigations, as well as the constitutional requisites for seeking subpoenas. Part III discusses IG investigative tools and further explains the push for testimonial subpoena power. Additionally, this Part presents and analyzes the shortcomings of and fears surrounding Senate Bill 1794. This Part concludes by demonstrating why these reservations do not overshadow the IGs' need for this broader authority. Finally, Part IV provides potential solutions to address the shortcomings of Senate Bill 1794 and the challenges raised by opponents. These proposals ensure that the IG community's investigative authority is enhanced while simultaneously ensuring that IGs will not abuse the power to subpoena testimony, participate in unjust intrusions of privacy, or violate a demandees' constitutional rights.

I. SENATE BILL 1794: INSPECTOR GENERAL TESTIMONIAL SUBPOENA AUTHORITY ACT

Given its significance, Senate Bill 1794[58] was one of the three critical provisions incorporated into the bipartisan Inspector General Independence and Empowerment Act of 2021 (Independence and Empowerment Act).[59] This bipartisan Act, sponsored by Representative Carolyn Maloney (D-NY-12), was introduced in the 117th Congress to "enhance the [IG] community's ability to more effectively . . . root out waste, fraud, and abuse in the federal government."[60] Many view this Act as one of the most significant bills

56. *See Public Trust in Government: 1958–2022*, PEW RSCH. CTR. (June 6, 2022), https://www.pewresearch.org/politics/2022/06/06/public-trust-in-government-1958-2022/.

57. IG Testimonial Subpoena Authority Act, S. 1794, 117th Cong. (2021). This Comment uses the term "demandee" to refer to subpoenaed individuals.

58. *See id.*

59. Independence and Empowerment Act, H.R. 2662, 117th Cong. (2021).

60. *Safeguarding*, *supra* note 46 (statement of Michael E. Horowitz, Inspector Gen., U.S. Dep't of Just.) (explaining that the Inspector General Independence and Empowerment Act of 2021 also incorporates critical provisions from the Securing Inspector General

introduced in IG history[61] because it followed a time of extreme and increased hostility toward the oversight community by former President Donald Trump.[62]

While presidents have the power to remove Establishment IGs, presidents rarely exercise it.[63] A Congressional Research Service (CRS) report found that between January 2000 and January 2020, "there was only one instance of a president removing an [IG]."[64] That was former President Obama's removal of IG Gerald Walpin in 2009.[65] The same CRS report noted two other presidential IG removals—one on April 3, 2020, and a second on May 15, 2020.[66] President Trump executed both of these removals.[67] While this CRS report only mentioned two of Trump's removals, these were not his

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Independence Act (S. 587) and the House of Representatives' version of the IG Independence and Empowerment Act (H.R. 2262)).

61. *See IG Reforms Passed Out of Senate Committee on Bipartisan Basis*, PROTECT DEMOCRACY (Nov. 3, 2021), https://protectdemocracy.org/update/ig-reforms-passed-out-of-senate-committee-on-bipartisan-basis/. See, for example, a statement from Holly Idelson, a Policy Advocate at Protect Democracy after H.R. 2262 got out of committee:

> We commend the Senate Committee on Homeland Security and Governmental Affairs for taking up and endorsing critical reforms that would ensure federal inspector generals have the independence they need to do their jobs at the standard the public deserves . . . . The bottom line is that if lawmakers are serious about fighting corruption and regaining public trust in government, a crucial step is enacting reforms like these to strengthen the inspector general system.

Id.

62. Press Release, Comm. on Oversight & Accountability, House Passes Chairwoman Maloney's IG Independent and Empowerment Act (June 29, 2021), https://oversightdemocrats.house.gov/news/press-releases/house-passes-chairwoman-maloney-s-ig-independence-and-empowerment-act; *see* Veronica Stracqualursi, *Who Trump Has Removed from the Inspector General Role*, CNN (May 16, 2020, 12:52 PM), https://www.cnn.com/2020/05/16/politics/list-inspector-general-removed-trump/index.html.

63. Andrew Brunsden, *When Should the President Be Able to Fire a Watchdog?*, THE HILL: CONG. BLOG (July 5, 2021, 5:00 PM), https://thehill.com/blogs/congress-blog/politics/561560-when-should-the-president-be-able-to-fire-a-watchdog/.

64. Robert Farley, *Trump Twists Record on Inspectors General*, FACTCHECK (May 20, 2020), https://www.factcheck.org/2020/05/trump-twists-record-on-inspectors-general/; *see* BEN WILHELM, CONG. RSCH. SERV., IF11546, REMOVAL OF INSPECTORS GENERAL: RULES, PRACTICE, AND CONSIDERATIONS FOR CONGRESS (Jan. 12, 2023) [hereinafter REMOVAL OF IGS].

65. *See* Farley, *supra* note 64 (asserting that Obama stated that he no longer had the "'fullest confidence'" in Walpin).

66. REMOVAL OF IGS, *supra* note 64.

67. *See id.*

only IG removals.[68] According to Citizens for Responsibility and Ethics in Washington (CREW),[69] a group that oversees IG activities:

> Since Trump took office, he has left numerous IG posts vacant for significant periods of time, including at least [ten] for more than a year. Trump has fired two permanent IGs and removed three acting IGs by other means. In their places, he has nominated or installed at least six loyalists. Trump has also appointed four IGs in dual roles, in some cases creating possible conflicts of interest. In total, we have conservatively identified 25 actions by [] Trump to undermine the IG community since he took the oath of office.[70]

Trump's direct attacks on IGs are noxious to congressional oversight.[71] Not only do these assaults undermine the public's confidence in the ability of Trump's appointees to operate as nonpartisan officials objectively investigating government misconduct, but these attacks also illuminate the ease with which certain government officials can remove IGs to escape scrutiny or achieve a political objective.[72] Consequently, the attacks weakened the congressional safeguard meant to expose injustices and deficiencies within the Executive Branch.[73]

For these reasons, strengthening IG independence and IG investigative power is essential for safeguarding congressional oversight and ensuring that the IG community can effectively perform their work and promote transparency without interference by government officials or entities on behalf of the public they serve.

II. OVERVIEW OF SUBPOENAS

This Part provides an overview of subpoenas and presents the

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68. Katrina Meyer, *Without Restraint or Precedent: Trump's Attacks on the Inspectors General System*, GOV'T ACCOUNTABILITY PROJECT (June 3, 2020), https://whistleblower.org/blog/without-restraint-or-precedent-trumps-attacks-on-the-inspectors-general-system/ (stating that Trump fired or replaced a total of five acting IGs).

69. *About CREW*, CITIZENS FOR RESP. & ETHICS IN WASHINGTON, https://www.citizensforethics.org/about/ (last visited Nov. 11, 2023) (describing the organization's goal of achieving "ethical, accountable, and open" government).

70. Donald K. Sherman, *Trump's War on Watchdogs and What Congress Can Do About It*, CITIZENS FOR RESP. & ETHICS IN WASHINGTON (June 15, 2020), https://www.citizensforethics.org/reports-investigations/crew-reports/trumps-war-on-watchdogs-and-what-congress-can-do-about-it/.

71. *See* Kate Oh, *President Trump's Assault on Inspectors General Threatens Our Civil Liberties*, ACLU (May 12, 2020), https://www.aclu.org/news/civil-liberties/president-trumps-assault-on-inspectors-general-threatens-our-civil-liberties (explaining how "the damage from Trump's moves [will not] be limited to more public dollars lost to corruption and graft. It also endangers our civil liberties.").

72. *See id.*

73. *See id.*; Sherman, *supra* note 70.

constitutional challenges available to demandees for objecting to a subpoena or moving to quash a subpoena. "[T]o enforce the law and investigate crime, the government" often seeks information through the issuance of subpoenas.[74] The government relies on two forms of subpoenas: a subpoena duces tecum, a document subpoena, and a subpoena ad testificandum, a testimony subpoena.[75] Currently, OIGs can only issue a subpoena duces tecum for documents, records, or other materials during an IG audit or investigation.[76] If an individual fails to comply with a subpoena, "[IGs] may seek the enforcement of [the] subpoena 'by order of any appropriate United States district court.'"[77] Because the IG Act is silent on "sanctions for failure to comply with an [IG's] subpoena," a federal district court may exercise its "discretion in applying general contempt sanctions for noncompliance with a court order" to enforce the IG subpoena if the federal court finds the subpoena was within the IGs statutory authority, the information sought by the IG is relevant to the inquiry, and the demand is not unreasonable broad or burdensome.[78] Federal district courts will not enforce an IG subpoena if it finds that it was issued in bad faith, the entity has no jurisdiction over the matter, or if the petition for enforcement qualifies as an abuse of the court's process.[79]

A. Opponents' Concerns Over Subpoenas

For years, opponents of the administrative subpoena authority have argued that administrative subpoenas can "result in unchecked invasions of privacy" and violate a demandee's Fourth and Fifth Amendment rights.[80]

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74. Christopher Slobogin, *Subpoenas and Privacy*, 54 DEPAUL L. REV. 805, 805 (2005); *see* Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process*, 47 VAND. L. REV. 573, 576 (1994).

75. *Subpoena Laws*, LEGALMATCH, https://www.legalmatch.com/law-library/article/subpoena.html (last visited Nov. 11, 2023) (explaining that a document subpoena is a written order designed to compel an individual or records custodian to produce documents and records; a testimony subpoena is a written order used to compel a witness to provide oral testimony); DOYLE, *supra* note 51, at 4.

76. *See* 5 U.S.C. app. § 6(a)(4).

77. *Administrative Subpoena Authority Held by Inspectors General of the Various Agencies*, PEER, https://peer.org/assets/images/campaigns/whistleblower/IG1.pdf (quoting 5 U.S.C. app. § 6(a)(4)) (last visited Nov. 11, 2023).

78. *Id.*

79. *See id.*

80. DOYLE, *supra* note 51 ("Administrative subpoena authority is the power vested in various administrative agencies to compel testimony or the production of documents or both in aid of the agencies' performance of their duties.").

However, the Supreme Court has addressed these concerns and determined that: (1) as long as "[subpoenas] are not executed in a manner reminiscent of a warrant,"[81] they "satisfy statutory requirements and are not unreasonable by Fourth Amendment standards,"[82] and (2) that the "Fifth Amendment privilege against self-incrimination is usually unavailable"[83] because most subpoenas are issued to third parties, corporations, and/or witnesses that are not the target of the investigation.[84] Nevertheless, demandees can still contest the enforcement of a subpoena through a Fourth and Fifth Amendment challenge; however, a successful challenge or "privilege claim is rare."[85]

B. Fourth Amendment Challenges to Subpoenas

The Fourth Amendment "protects people from unreasonable [government] searches and seizures."[86] However, the Fourth Amendment "is not a guarantee . . . against all searches"—it only protects individuals from unreasonable government searches.[87] In the context of subpoenas, the Supreme Court has set a lenient relevancy standard for the issuance of subpoenas, allowing "'nothing more than official curiosity'" to meet Fourth Amendment constitutional requisites.[88] As held in *United States v. Morton Salt*[89]

81. *See id.*

82. *Id.*; *see* United States v. Morton Salt Co., 388 U.S. 632, 642–43 (1950) (holding that an entity can issue an administrative subpoena and "investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."); *see also* Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 215–16 (1946) (holding that subpoenas are less intrusive than a warrant and that probable cause for the Fourth Amendment is satisfied as long as the subpoenaed documents are relevant to the inquiry).

83. Slobogin, *supra* note 74, at 806.

84. *See Okla. Press Publ'g Co.*, 327 U.S. at 208 ("[T]he Fifth Amendment affords no protection by virtue of the self-incrimination provision, whether for the corporation or for its officers").

85. Slobogin, *supra* note 7474, at 806.

86. *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."); *What Does the Fourth Amendment Mean?*, UNITED STATES COURTS, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/what-does-0 (last visited Nov. 11, 2023).

87. *What Does the Fourth Amendment Mean?*, *supra* note 86.

88. Slobogin, *supra* note 74, at 806 (quoting United States v. Morton Salt Co., 388 U.S. 632, 652 (1950)).

89. 388 U.S. 632 (1950).

and *United States v. Powell*,[90] administrative subpoenas need not satisfy a probable cause standard; instead, the Fourth Amendment only demands that an administrative subpoena be reasonable.[91] This reasonable standard requires that a subpoena "be (1) authorized for a legitimate government purpose; (2) limited in scope to reasonably relate to and further its purpose; (3) sufficiently specific so that a lack of specificity does not render compliance unreasonably burdensome; and (4) not overly broad . . . as to be oppressive."[92] Thus, a demandee may object or move to quash a subpoena if they believe responding to it would be unduly burdensome.[93] A court may grant the motion if it finds that the subpoena does not provide the demandee with reasonable time for compliance, the subpoena requires the demandee to disclose privilege or protected matter, the subpoena requests are too vague or facially insufficient, the subpoena is unreasonably oppressive and subjects the demandee "to undue burden (i.e., excessive time, effort, or hardship required to respond to the subpoena)," or the subpoena is procedurally oppressive.[94] A party seeking to challenge or quash an administrative subpoena bears the burden of proof in establishing that the subpoena at issue is unreasonable.[95]

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90. 379 U.S. 48, 51, 54, 56 (1964) (holding that the importing a probable cause standard would substantially overshoot the goal of the legislators, therefore the government does not need to show "probable cause to suspect fraud unless the taxpayer raises a substantial question that judicial enforcement of the administrative summons would be an abusive use of the court's process, predicated on more than the fact of re-examination and the running of the statute of limitations on ordinary tax liability.").

91. *See* DOYLE, *supra* note 51.

92. *In re* Subpoena Duces Tecum, 228 F.3d 341, 349 (4th Cir. 2000); *see* EEOC v. United Parcel Serv., Inc., 587 F.3d 136, 139 (2d Cir. 2009) (explaining that an agency may enforce an administrative subpoena if it shows "[1] that the investigation will be conducted pursuant to a legitimate purpose, [2] that the inquiry may be relevant to the purpose, [3] that the information sought is not already within [the agency's] possession, and [4] that the administrative steps required . . . have been followed").

93. *See* Robert Fojo, *How to Respond to a Third-Party Subpoena for Documents*, LEGAL.IO (Apr. 1, 2015), https://www.legal.io/articles/5170764/How-to-Respond-to-a-Third-Party-Subpoena-for-Documents (explaining that demandees will likely not be required to comply with a subpoena that subjects them to undue burden).

94. *Id.* ("There may be other grounds to support a motion to quash [a subpoena], such as technical defects on the face of the subpoena, or that the subpoena was not served properly."); *see also* MICHAEL ASIMOW & RONALD M. LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW 173 (5th ed. 2020).

95. *See* DOYLE, *supra* note 51, at 9 (citing United States v. R. Enterprises Inc., 498 U.S. 292, 301 (1991)).

C. Fifth Amendment Challenges to Subpoenas

The Fifth Amendment guarantees that the government cannot compel an individual to provide incriminating information.[96] An individual can invoke the Fifth Amendment to protect themselves if (1) the communication is compelled, (2) the communication is testimonial in nature, and (3) providing such testimony is self-incriminating.[97] However, the Fifth Amendment privilege usually fails as a challenge to administrative subpoenas for many reasons.[98] For one, the Supreme Court has established that the Fifth Amendment does not protect corporations, banks, unincorporated entities, partnerships, or third parties.[99] Since so much of our information is now recorded and held by third parties, when

> [A] third part[y is] ordered to produce information via a subpoena, they cannot, under any plausible interpretation of the Fifth Amendment, be said to be incriminating themselves. Thus, when the government compels production from a [third party] recordholder—whether the recordholder is a hospital, an Internet Service Provider, or another government agency—it is not violating the target's Fifth Amendment right.[100]

Relatedly, a custodian of a third party's records cannot claim any personal Fifth Amendment privilege relating to the third party's records and must disclose the records even if the documents or the act of producing them may incriminate the custodian.[101] Additionally, the Supreme Court has established that the Fifth Amendment privilege does not apply in situations where a statute

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96. U.S. CONST. amend. V ("No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."); *see What Does It Really Mean To "Take the Fifth"?*, MOLOLAMKEN LLP, https://www.mololamken.com/knowledge-What-Does-It-Really-Mean-To-Take-the-Fifth (last visited Nov. 11, 2023).

97. *See, e.g.*, United States v. Doe, 465 U.S. 605, 608, 611 (1984) (stating that a demandee can assert the Fifth if the act of producing documents would be incriminating because it would admit that the documents existed, were authentic, and that the demandee possessed them); Schmerber v. California, 384 U.S. 757, 760, 761 (1966) (holding that "the [Fifth Amendment] privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature); Gilbert v. Cal., 388 U.S. 263, 266 (1967) (explaining that the Fifth Amendment protects "only compulsion of 'an accused's communications . . . and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers[.]'").

98. ASIMOW & LEVIN, *supra* note 94, at 174.

99. *See* Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 208 (1946).

100. Slobogin, *supra* note 74, at 808.

101. *See* Braswell v. United States, 487 U.S. 99, 102, 108, 110 (1988) (holding that collective entity doctrine applies, even though custodian's act of producing the records could incriminate the custodian, because the custodian is a corporation's representative, thus the act of production is deemed one of the corporations and not the individual).

requires an entity to prepare the subpoenaed records pursuant to a lawful regulatory scheme.[102] If this scenario applies, the documents must be produced even if the act of producing them is incriminating.[103]

While the Supreme Court has limited the Fifth Amendment in these respects, this does not mean that a demandee cannot raise a successful Fifth Amendment privilege against self-incrimination.[104] An individual still retains the right to refuse to incriminate themselves and, in most cases, can request to receive immunity.[105] Immunized testimony functions as "a rational accommodation between the imperatives of the [Fifth Amendment] privilege and the legitimate demands of government to compel citizens to testify."[106] It permits the government to compel the demandee to testify while also guaranteeing the demandee that the government will not use their testimony against them in any subsequent criminal proceedings.[107]

III. IG INVESTIGATIVE TOOLS AND THE LACK THEREOF

This Part offers a brief overview of an OIG's investigations and examines the investigative tools IGs currently have and utilize during their investigations. Within most OIGs, there is an Office of Investigations (OI), a team tasked with conducting criminal, civil, and administrative investigations of fraud, waste, or abuse within their affiliated agency.[108] OIGs initiate these "investigations based on information received from a variety of sources."[109] After reviewing the received information, the OI

102. *See* Shapiro v. United States, 335 U.S. 1, 37 (1948) (Frankfurter, J., dissenting) (stating that all records which Congress may require individuals to keep "because they fall within some regulatory power of Government, become 'public records' and thereby . . . fall outside the protection of the Fifth Amendment"); Craib v. Bulmash, 777 P.2d 1120, 1130 (Cal. 1989).

103. *Shapiro*, 335 U.S. at 5.

104. *See* DOYLE, *supra* note 51, at 7.

105. ASIMOW & LEVIN, *supra* note 94, at 176 (explaining that immunized testimony does not extend to the production of documents prepared pursuant to a lawful regulatory scheme).

106. *The Power to Compel Testimony and Disclosure*, JUSTIA, https://law.justia.com/constitution/us/amendment-05/08-power-to-compel-testimony-and-disclosure.html (last visited Nov. 11, 2023).

107. ASIMOW & LEVIN, *supra* note 94, at 175 (noting that while immunized testimony affords demandees protection from the use of their testimony in subsequent criminal proceedings, it does not prevent the government from using the testimony to impose administrative sanctions).

108. *Office of Investigations*, U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. OF INSPECTOR GEN., https://oig.hhs.gov/about-oig/office-investigations/ (last visited Nov. 11, 2023).

109. *FAQs About OIG Investigations*, U.S. DEP'T OF COM. OFF. OF INSPECTOR GEN.,

determines whether the complaint requires further investigation, should be referred to another government entity or enforcement agency, or should be closed out.[110] When an OIG opens an investigation, the OI will investigate the matter using various tools and activities, such as record review, document analysis, monitoring, voluntary interviews, document subpoenas, consensual monitoring, *Garrity*[111] and *Kalkines*[112] warnings, and undercover operations.[113]

While it may seem as though OIGs already have many investigative tools at their disposal, their inability to subpoena testimony from former federal employees, federal contractors, grant recipients, and non-governmental witnesses is detrimental to their investigations.[114] Lack of this authority significantly hinders an OIG's ability to conduct complete oversight, as they are unable to obtain potentially critical evidence unless such witnesses voluntarily agree to interview.[115] At a hearing before the House Committee on Oversight and Government Reform, which took place on November 15, 2017, the Honorable Michael Horowitz, Inspector General of DOJ, embraced this notion and testified in support of granting IGs testimonial subpoena authority.[116] Specifically, IG Horowitz stated that:

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https://www.oig.doc.gov/Pages/FAQs-About-OIG-Investigations.aspx (last visited Nov. 11, 2023) (stating that OIGs typically initiate investigations based on information that they receive from: the OIG's fraud, waste, and abuse hotline, internal OIG audits or investigations, referrals from other agencies, qui tam lawsuits, referrals from the U.S. Government Accountability Office, DOJ referrals, or United States Office of Special Counsel regarding whistleblower disclosure, and other congressional requests).

110. *See Office of Inspector General – Investigations*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/who-we-are/inspector-general/office-of-inspector-general-investigations (last visited Nov. 11, 2023).

111. *See* Garrity v. New Jersey 385 U.S. 493 (1967); *Internal Investigations of Government Employees:* Garrity *and* Kalkines *Warnings*, BURNHMAN & GOROKHOV, PLLC, https://www.burnhamgorokhov.com/internal-investigations-government-employees-garrity-kalkines-warnings/ (last visited Nov. 11, 2023) [hereinafter Garrity *and* Kalkines *Warnings*] (explaining that the government uses *Garrity* warnings to tell federal employees that if they voluntarily participate in an interview for an internal investigation, the government can use their answers in court).

112. *See* Kalkines v. United States, 473 F.2d 1391 (Fed. Cir. 1973); *see also* Garrity *and* Kalkines *Warnings*, *supra* note 111 (stating that an OIG may issue a *Kalkines* warning to provide their employees with immunity from criminal prosecution while compelling them to make statements or face disciplinary action, such as termination).

113. *See* WILHELM, *supra* note 8, at 8, 10–11; *see also Office of Investigations*, OFF. OF INSPECTOR GEN., U.S. GEN. SERVS. ADMIN., https://www.gsaig.gov/content/office-investigations (last visited Nov. 11, 2023).

114. *Safeguarding*, *supra* note 46, at 3.

115. *See id.*

116. *Id.*

> [A]bsence of [testimonial subpoena] authority hinders the ability of OIGs to conduct complete oversight. Without this authority, OIGs are unable to obtain potentially critical evidence from former federal employees, employees of federal contractors and grant recipients, and other non-governmental witnesses unless they voluntarily agree to be interviewed. For example, a federal employee's resignation or retirement enables the former employee to avoid being interviewed by an OIG about serious misconduct the former employee allegedly engaged in while working for the federal government.[117]

Likewise, IG Horowitz expressed that an IG's inability to compel testimony from federal contractors and grant recipients can negatively impact an OIG's investigation into the abuse of federal funds within their federal agency.[118] This ultimately impacts the government's ability to recover misused federal funds.[119] Further, IG Horowitz shared that the lack of this authority impacts the ability of law enforcement components to investigate and adjudicate misconduct cases.[120] One entity that IG Horowitz cited as being particularly hindered by the lack of this authority is the FBI's Office of Professional Responsibility (OPR).[121]

The FBI's OPR conducts investigations into FBI officials who have been accused of crimes or misconduct in the exercise of their professional duties.[122] These high-ranking officials should not be able to easily escape accountability, yet they do.[123] In more than 10% of the misconduct cases pending before the FBI's OPR in fiscal years 2017 and 2018, the FBI employee who allegedly committed the misconduct retired or resigned prior to the disciplinary process being completed.[124] Because these officials were no longer acting government employees, the FBI could not subpoena them for testimony.[125] Consequently, the OPR's investigation into these alleged cases was obstructed.[126]

In advancing his approval for IG testimonial subpoena authority, IG Horowitz explained that in nearly every significant review that his office completed since he became IG in 2012, his office has noted how the lack of testimonial subpoena authority has either undermined his office's efforts or significantly delayed completion of his office's work.[127] The DOJ's review of

117. *Id.*
118. *See id.* at 4.
119. *See id.*
120. *See id.* at 3.
121. *See id.* at 3–4.
122. *See id.*
123. *See id.*
124. *Id.*
125. *See id.*
126. *See id.*
127. *Id.* at 4.

the FBI's handling of the allegations against Former USA Gymnastics physician Lawrence (Larry) Nassar serves as a key example of this phenomenon.[128] Further, it illuminates just how harmful the lack of this authority can be.[129]

For eighteen years, Nassar was the sports doctor for the United States women's national gymnastics team.[130] Nassar used his employment as the team's doctor to deceive and sexually assault seventy or more children and young women.[131] By the summer of 2015, "the FBI was on notice . . . that Nassar had engaged in widespread and ongoing sexual assaults, under the guise of medical treatment," yet "the Bureau failed to take steps to halt the abuse or notify other law enforcement agencies that might have had jurisdiction."[132] The DOJ OIG issued a review that "sharply criticized" the FBI's mishandling of the case.[133] In this review,[134] the former President of USA Gymnastics, Steve Penny, refused to accept the DOJ OIG's "request for a voluntary follow up interview . . . after the OIG learned additional information about his and a former FBI Special Agent in Charge's actions and potential conflict of interest."[135] Since the OIG could not subpoena Penny for testimony, Penny was able to avert accountability, the criminal legal system, and congressional oversight.[136]

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128. *Id.*

129. *Id.*

130. Christine Hauser, *13 Nassar Abuse Victims Seek $10 Million Each From F.B.I.*, N.Y. TIMES (Apr. 21, 2022), https://www.nytimes.com/2022/04/21/sports/larry-nassar-usa-gymnastics-fbi.html; *see Nassar Sexual Abuse Victims Reach $380m Deal with USA Gymnastics*, AL JAZEERA (Dec. 13, 2021), https://www.aljazeera.com/news/2021/12/13/sexual-assault-victims-reach-380m-settlement-with-usa-gymnastics; Tyler Piccotti, *Larry Nassar*, BIOGRAPHY (July 10, 2023), https://www.biography.com/crime-figure/larry-nassar.

131. *See* Hauser, *supra* note 130.

132. Carrie Johnson, *Survivors of Abuse by Larry Nassar Target FBI for Mishandling Their Case*, NPR (Apr. 21, 2022, 5:42 PM), https://www.npr.org/2022/04/21/1094047967/survivors-of-abuse-by-larry-nassar-target-fbi-for-mishandling-their-case; *see* OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., INVESTIGATION AND REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S HANDLING OF ALLEGATIONS OF SEXUAL ABUSE BY FORMER USA GYMNASTICS PHYSICIAN LAWRENCE GERARD NASSAR (July 2021) [hereinafter INVESTIGATION AND REVIEW] (explaining that even though the FBI knew about the Nassar allegations in 2015, the FBI did not open an official investigation into Nassar until May 2016); *see also* Press Release, Dep't of Just. Off. Of Inspector Gen., DOJ Releases Report of Investigation and Review of the FBI's Handling of Allegations of Sexual Abuse by Former USA Gymnastics Physician Lawrence Gerard Nassar (July 14, 2021).

133. Hauser, *supra* note 130.

134. INVESTIGATION AND REVIEW, *supra* note 132.

135. *Safeguarding*, *supra* note 46, at 4.

136. *Id.*

Similarly, IG Horowitz testified that the DOJ OIG was hindered in its review of the FBI's Crossfire Hurricane Investigation.[137] 'Crossfire Hurricane' was the code name for the FBI's 2016 and 2017 counterintelligence investigation into potential links between Russian officials and then-candidate Trump's 2016 presidential campaign.[138] The FBI's Crossfire Hurricane Investigation took off following the production of the *Steele Dossier*, a report by British Intelligence Officer Christopher Steele, alleging that Russian operatives and members of Trump's campaign conspired to interfere in the U.S. election to benefit Trump.[139] In his testimony, IG Horowitz explained that the "[DOJ OIG] would have directly benefited from the ability to subpoena former government and non-government individuals who had direct knowledge about the election reporting by Christopher Steele" and that the OIG's inability to do so significantly inhibited their review into the matter.[140]

Former federal employees, like those discussed above, refuse to comply with OIG investigations and submit testimony all too frequently.[141] As a result, the OIG community's "ability to hold former officials fully accountable for serious misconduct is often undermined, thereby diminishing the public's trust in its government."[142] Thus, legislation is needed to endorse

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137. *See id.*

138. *See* Julian Sanchez, *The Crossfire Hurricane Report's Inconvenient Findings*, JUST SECURITY (Dec. 11, 2019), https://www.justsecurity.org/67691/the-crossfire-hurricane-reports-inconvenient-findings/.

139. *See id.* While the FBI contemplated surveillance of individuals within Trump's orbit with ties to Russia in August 2016, DOJ attorneys determined that investigators lack probable cause to establish that Trump or his closest ties were "acting as an 'agent of a foreign power,' the critical showing [the FBI needed] to make to the Foreign Intelligence Surveillance Court." *Id.* However, all of "[t]hat changed in September [2016], when the FBI got wind of former British intelligence officer Christopher Steele's research into Trump's Russian ties—opposition research indirectly commissioned by the Democratic National Committee, and now notorious under the collective moniker 'The Steele Dossier.'" *Id. See* Marshall Cohen, *The Steele Dossier: A Reckoning*, CNN (Nov. 18, 2021), https://www.cnn.com/2021/11/18/politics/steele-dossier-reckoning/index.html; *Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation*, OFF OF INSPECTOR GEN. U.S. DEP'T OF JUST. (Dec. 2019), https://www.justice.gov/storage/120919-examination.pdf.

140. *Safeguarding*, *supra* note 46, at 4.

141. *See, e.g.*, *id.* (explaining that the DOJ OIG was unable to properly assess the DOJ's "zero tolerance policy" on immigration enforcement because former Attorney General Sessions did not agree to be interviewed by the OIG and the OIG could not compel his testimony); *Investigative Summary 21-062*, OFF. OF INSPECTOR GEN. U.S. DEP'T OF JUSTICE (Apr. 19, 2021), https://oig.justice.gov/sites/default/files/reports/21-062.pdf.

142. *Safeguarding*, *supra* note 46, at 4.

accountability within the Executive Branch and enhance the OIG community's ability to detect waste, fraud, and abuse. Such legislation will ultimately strengthen congressional oversight and restore the public's faith in the federal government.

A. Challengers of Senate Bill 1794 and Their Concerns

As discussed in Part I. A., U.S. Senators Hassan and Grassley introduced Senate Bill 1794 to the 117th Congress to expand the IG community's investigative power by rewarding IGs with the ability to compel testimony from contractors, grantees, and former federal employees.[143] While Congress did not enact this bill during the 117th Congress, Senators Hassan and Grassley believed that IGs, with this expanded power, would be able to more readily detect and correct deficiencies and misconduct within their affiliated agency and promote greater transparency and accountability within the entire federal government.[144]

While Senate Bill 1794 was an appropriate action for enhancing congressional oversight and strengthening the oversight tools that hold the government accountable, challengers of the Senate Bill 1794 argued that the bill increased IG independence without incorporating the proper checks and balances to ensure that IG's do not abuse their testimonial subpoena power or that there are no unchecked invasions of privacy.[145] Specifically, challengers criticized the bill for only including two safeguards: the first of which required IGs to notify the Attorney General of their plan to issue a subpoena seven days before issuing the subpoena, while the second required CIGIE to promulgate standards and provide trainings relating to the issuance of a subpoena, conflicts of interest, and any other matter the Council determined to be necessary for ensuring that IGs make appropriate use of this robust authority.[146]

Opponents found these broad safeguards to be inadequate controls for guaranteeing that IGs will not avoid Fourth Amendment strictures, sidestep

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143. *See Strengthening IG Efforts*, *supra* note 44.

144. Press Release, Office of U.S. Senator Maggie Hassan, Senators Hassan and Grassley Introduce Bill to Strengthen Efforts to Root Out Waste, Fraud, & Abuse in Government (May 24, 2021), https://www.hassan.senate.gov/news/press-releases/senators-hassan-and-grassley-introduce-bill-to-strengthen-efforts-to-root-out-waste-fraud-and-abuse-in-government.

145. *See Strengthening IG Efforts*, *supra* note 44.

146. S. 1794, 117th Cong. (2021); *see, e.g.*, Jory Heckman, *Senators Seek 'Guardrails' on Expanded Subpoena Power for Inspectors General*, FED. NEWS NETWORK (Oct. 21, 2021, 6:23 PM), https://federalnewsnetwork.com/agency-oversight/2021/10/senators-seek-guardrails-on-expanded-subpoena-power-for-inspectors-general.

probable cause requirements, and disregard privileges provided by the Fifth Amendment, and, therefore, should be revised.[147] This Part will analyze these concerns and consider their legitimacy.

As discussed previously in Part II, two forms of subpoenas are: (1) a subpoena duces tecum, a document subpoena, and (2) a subpoena ad testificandum, a testimony subpoena.[148] Recipients can challenge both types of subpoenas, but a successful challenge is rare.[149] In the context of document subpoenas, a successful challenge is rare because of the assumption that subpoenas are not intrusive and typically only seek information that has been voluntarily surrendered to a third party.[150] Unlike a government search under the Fourth Amendment, document subpoenas do not involve "trespass or force" and "cannot be finally enforced except after challenge."[151] Additionally, it is well-established that document "subpoenas do not trigger 'actual searches,' because they do not require a physical intrusion; rather, they are" searches carried out by the target themselves.[152]

While courts do not consider a subpoena for the production of documents to constitute a government search, a recipient can still challenge the issuance of a subpoena under another Fourth Amendment protection: reasonableness.[153] Under a reasonableness challenge, a demandee can argue that the subpoena is overbroad or that compliance is unduly burdensome.[154] Additionally, a demandee can challenge a subpoena under the Fifth Amendment right against self-incrimination.[155] In challenging the subpoena under the Fifth, a "[demandee may] claim that complying with the subpoena

147. *See* DOYLE, *supra* note 51, at 3.

148. *Subpoena Laws*, *supra* note 75.

149. *See* Slobogin, *supra* note 74, at 806; Hughes, *supra* note 74, at 577.

150. *See* Slobogin, *supra* note 74, at 828 (noting that, in *United States v. Miller*, the Court held that "one cannot challenge government access to personal information possessed by a third-party recordholder because one has surrendered it 'voluntarily' and thus 'assumes the risk' that the third party will provide it to the government.").

151. Hale v. Henkel, 201 U.S. 43, 80 (1906) (McKenna, J., concurring).

152. Slobogin, *supra* note 74, at 827 (quoting Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 195 (1946) ("No officer or other person has sought to enter petitioners' premises against their will, to search them, or to seize or examine their books, records or papers without their assent, otherwise than pursuant to orders of court authorized by law and made after adequate opportunity to present objections, which in fact were made.")).

153. *See* Slobogin, *supra* note 74, at 806; *In re* Subpoena Duces Tecum, 228 F.3d 341, 348 (4th Cir. 2000) (stating that subpoenas "are limited by the general reasonableness standard of the Fourth Amendment.").

154. *See* Slobogin, *supra* note 74, at 806; 228 F.3d at 348.

155. *See* Orin Kerr, *Does Carpenter Revolutionize the Law of Subpoenas?*, LAWFARE (June 26, 2018, 6:44 PM), https://www.lawfareblog.com/does-carpenter-revolutionize-law-subpoenas.

implies certain statements—that the records exist, that the recipient has them, and that the recipient thinks that they are authentic—and that [the recipient cannot] be forced to testify against himself."[156] In instances of third parties, however, recipients of a subpoena cannot assert the Fifth Amendment privilege on behalf of protecting someone else.[157]

Unlike document subpoenas, case law documenting constitutional objections to subpoenas for testimony is rather bare. However, minimal precedent shows that subpoenas ad testificandum are constitutionally equivalent to subpoenas duces tecum.[158] This means that courts hold subpoenas for testimony to the same relevancy standards of document subpoenas: "nothing more than official curiosity."[159] Accordingly, a government entity can issue an administrative subpoena for testimony to investigate "merely on suspicion that the law is being violated, or even just because [the entity] wants assurance that it is not."[160] This lax standard allows the probable cause requirement found in the Fourth Amendment to be established as long as the subpoenaed information is relevant to the inquiry.[161]

Since administrative subpoenas need not satisfy the traditional probable cause standard, the Fourth Amendment only demands that an administrative subpoena be reasonable, a standard that requires the subpoena be: "(1) authorized for a legitimate governmental purpose; (2) limited in scope to reasonably relate to and further its purpose; (3) sufficiently specific so that a lack of specificity does not render compliance unreasonably burdensome; and (4) not overly broad for the purposes of the inquiry as to be oppressive . . . ."[162]

Thus, the demandee seeking to quash or modify a subpoena bears the burden of establishing that it is unduly burdensome or lacking in specificity.[163] In the context of a subpoena for testimony, these arguments are harder to ascertain since compliance only requires speech and not

156. *Id.*

157. *See* Fisher v. United States, 425 U.S. 391, 410 (1976) (holding that recipients of a subpoena cannot assert the Fifth Amendment privilege of someone else); Kerr, *supra* note 155.

158. *See* Slobogin, *supra* note 74, at 833–35.

159. United States v. Morton Salt Co., 338 U.S. 632, 652 (1950).

160. *Id.* at 642–43.

161. *See* Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 215–16 (1946).

162. *In re* Subpoena Duces Tecum, 228 F.3d 341, 349 (4th Cir. 2000).

163. DAVID J. LENDER, JARED R. FRIEDMANN, WEIL, GOSTHAL & MANGES LLP, PRACTICAL LAW LITIGATION, *Subpoenas: Enforcing a Subpoena (Federal)*, https://www.weil.com/~/media/files/pdfs/2018/subpoenas-enforcing-a-subpoena-federal.pdf (last visited Nov. 11, 2023).

document production.[164] Likewise, the demandee must overcome the well-established standard that a subpoena for testimony is not a government search within the meaning of the Fourth Amendment since there is no physical intrusion of the target; instead, the demandee is offering evidence through speech themselves.[165] Nevertheless, a demandee can still quash or modify a subpoena through a successful reasonableness challenge by demonstrating that the subpoena imposes extreme hardship on the demandee because of the time, effort, expense, or traveling it requires to comply.[166] In the instance of third parties, however, a demandee cannot challenge a third party subpoena ad testificandum since the demandee has no privacy interest in the personal information they surrender voluntarily to the third party.[167]

In terms of the Fifth Amendment, a demandee can invoke the Fifth Amendment privilege against self-incrimination when the government compels the demandee to testify.[168] The privilege, however, is personal to the individual asserting it, so a demandee cannot invoke it to protect a third party or another person from being incriminated.[169] Likewise, the privilege does not extend to corporations, third parties, small partnerships, labor unions, and other artificial organizations.[170]

But what happens if the demandee is an individual who witnessed the incriminating act occur and is unsure if testifying would ultimately implicate themselves? In theory, the witness is afforded Fifth Amendment protection;

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164. *See id.* (citing Fed. R. Civ. P. 37); David J. Lender, Jared R. Friedmann, Weil, Gotshal & Manges LLP, Jason B. Bonk & Cozen O'Connor, *Subpoenas: Responding to a Subpoena*, PRACTICAL LAW LITIGATION 7 (2014), https://www.cozen.com/templates/media/files/subpoenasrespondingtoasubpoena.pdf; Subpoena Ad Testificandum Issued to Humana, Inc. Dated Apr. 10, 2017, No. 161-0026, 2017 WL 2665273 (June 15, 2017).

165. *See Okla. Press Publ'g Co.*, 372 U.S. at 195 (explaining that no actual search took place because the government did not physically intrude on or search the target).

166. *See How to Quash a Subpoena*, CODY WARNER PC (June 2, 2023), https://codywarnercriminaldefense.com/how-to-quash-a-subpoena/; *In re* Subpoena Duces Tecum, 228 F.3d 341, 348 (4th Cir. 2000).

167. *See* United States v. Miller, 425 U.S. 435, 451 (1976) (Brennan, J., dissenting).

168. *See Fifth Amendment Protection Against Self-Incrimination*, PRACTICAL LAW SECURITIES LITIGATION & WHITE COLLAR CRIME, https://us.practicallaw.thomsonreuters.com/w-020-4335 (last visited Nov. 11, 2023) [hereinafter PRACTICAL LAW].

169. *Id.*; United States v. Nobles, 422 U.S. 225, 234 (1975).

170. *See* Bellis v. United States, 417 U.S. 85, 100–01 (1974) (holding that small partnerships or other artificial organizations cannot invoke the Fifth Amendment privilege against self-incrimination); United States v. White, 322 U.S. 694, 704–05 (1944) (holding that labor unions cannot invoke the Fifth Amendment privilege against self-incrimination); *Nobles*, 422 U.S. at 234.

however, there is a caveat to asserting this privilege.[171] Unlike its application in criminal cases, where the fact-finder cannot draw adverse inferences against the witness when claiming a privilege under the Fifth Amendment, a government entity can draw an adverse inference in an administrative case when a witness claims this privilege.[172] Thus, the witness is forced to fight the balance between potentially providing the government with incriminating testimony with their potential fate of invoking adverse inferences if they invoke the privilege. This quandary traps demandees and arguably allows the government to sidestep the privacy interest fundamental to the Fifth Amendment.[173]

Additionally, under the Fifth Amendment, a demandee can "refuse to answer specific questions on the ground of self-incrimination."[174] Refusing to answer certain questions but not others allows the demandee to cooperate with the investigation while also safeguarding their constitutional right against self-incrimination.[175] Relatedly, if a demandee wants to cooperate with the investigation but is worried about self-incrimination, the demandee can request immunity from the government entity.[176]

While Fourth and Fifth Amendment challenges to administrative subpoenas are available, the likelihood that a demandee raises a successful challenge is unlikely, hence the uproar of opposition from those who opposed the passage of Senate Bill 1794.[177] Specifically, opponents of the bill worry that granting IGs the power to subpoena testimony would allow the government to readily sidestep the Fourth Amendment and undermine the protections of the Fifth Amendment, making it easier for the government to get the information it wants while leaving demandees with very little recourse if they were to be subpoenaed.[178]

In response to this opposition, proponents of expanded subpoena authority[179] heavily endorsed the bill through example.[180] For instance,

171. *See* PRACTICAL LAW, *supra* note 168.

172. *See* ASIMOW & LEVIN, *supra* note 94, at 174; *see, e.g.*, Baxter v. Palmigiano, 425 U.S. 308, 320 (1976) (holding that a demandee can exercise their right to remain silent in a prison disciplinary proceeding but that the factfinder can use that silence against the demandee).

173. Aaron Van Oort, *Invocations as Evidence: Admitting Nonparty Witness Invocations of the Privilege Against Self-Incrimination*, 65 U. CHI. L. REV. 1435, 1439 (1998).

174. *See* ASIMOW & LEVIN, *supra* note 94, at 174.

175. *See id.*

176. *See id.* at 175.

177. Slobogin, *supra* note 74, at 806; Heckman, *supra* note 146.

178. *See id.* at 807.

179. *See id.*

180. *See, e.g.*, Bublé, *supra* note 48 (revealing that DOJ Inspector General Horowitz

proponents attested that "the Department of Defense IG was granted statutory authority by Congress in 2009 to compel testimony from former agency employees and third party witnesses in its investigations, and has used that authority sparingly and only to advance its efforts to curb government waste, fraud, and abuse."[181] Likewise, proponents defended Senate Bill 1794 by referring to significant situations, such as those referenced in Part III, where the lack of subpoena authority for testimony has hampered comprehensive oversight efforts.[182] By doing so, proponents effectively demonstrated just how far-reaching, devastating, and harmful the consequences of not having this authority could be.

Even though the need for this investigative authority is apparent, the government must balance this interest with its obligation to protect the constitutional rights of the people it serves.[183] If enacted in a later Congress, Senate Bill 1794 will undoubtedly do great for congressional oversight by providing Congress's internal watchdogs with the investigative tools necessary for effectively detecting mismanagement and addressing corruption within the Executive Branch while also advancing public trust in the government. Nonetheless, the government has a duty to consider what the value of this work is when it can so easily undermine the people and constitutional rights it ultimately serves to protect.

The next Part of this Comment offers solutions to address the shortcomings of Senate Bill 1794 and the challenges raised by opponents. If implemented, these proposals will ensure that the IG community's investigative authority is enhanced while simultaneously certifying that IGs will not abuse the power to subpoena testimony, participate in unjust intrusions of privacy, or violate demandees' constitutional rights.

IV. RECOMMENDATIONS

While Senate Bill 1794 included procedural safeguards—(1) the IG must notify the Attorney General not less than seven days before issuing a subpoena, and (2) CIGIE must promulgate standards and provide training relating to the issuance of subpoenas—Congress should amend the bill prior to reintroducing it in another congressional session to include stronger

believes all IGs should have testimonial subpoena authority because the Department of Defense OIG has substantially benefited from the authority).

181. *Safeguarding*, *supra* note 46, at 4.

182. *See supra* Part IG INVESTIGATIVE Tools and the Lack Thereof

183. *Human Rights and Democracy*, U.S. DEP'T OF STATE, https://www.state.gov/policy-issues/human-rights-and-democracy/ (last visited Nov. 11, 2023) (expressing that the protection of fundamental and constitutional rights is "a foundation stone in the establishment of the United States over 200 years ago.").

external checks and tracking mechanisms to guarantee that IGs will not abuse this power or undermine constitutional protections afforded by the Fourth and Fifth Amendment.[184]

Before reintroducing Senate Bill 1794, Congress should amend the bill to incorporate more comprehensive language within its procedural safeguards; this will counteract potential abuse of the authority through external checks that better ensure compliance. When incorporating these amendments into the bill, Congress should refer to the Strengthening Oversight for Veterans Act of 2021 (VA Act).[185] This legislation strengthened congressional oversight by providing the Department of Veterans Affairs' IG with testimonial subpoena authority.[186] Similar to Senate Bill 1794, the VA Act incorporates procedural controls into its statutory language to ensure that the VA IG makes responsible use of this authority.[187]

However, the VA Act currently includes additional and stronger controls than Senate Bill 1794 does.[188] Evaluation of the VA Act reveals that the legislation includes three essential safeguards:

> First, it requires the OIG to provide the proposed witness notice of its intent to issue a subpoena, giving the witness the opportunity to testify voluntarily. Second, it requires the OIG to notify the U.S. Attorney General before issuing a subpoena and gives the Attorney General up to 10 days to object if the subpoena may interfere with an ongoing investigation. The OIG must also endeavor to arrange the interview in a location convenient to the witness. Additionally, the OIG would be required to report to Congress in the OIG's mandated semiannual report the number of testimonial subpoenas issued, the number of individuals interviewed pursuant to the subpoenas, the number of times the Attorney General objected to the issuance of a subpoena, and any other matters the OIG considers appropriate related to this authority.[189]

Just like the VA Act, Senate Bill 1794 should include stricter and inflexible

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184. *See id.*

185. *See* Strengthening Oversight for Veterans Act, Pub. L. No. 117-136, 136 Stat. 1251 (2022).

186. *See id.*

187. *See id.*; *see also Hearing to Consider Pending Legislation, Before the U.S. S. Comm. on Veterans' Affs.*, 117th Cong. (2021) [hereinafter *Hearing to Consider Pending Legislation*] (statement of Christopher A. Wilber, Counselor to the Inspector General of the U.S. Department of Veterans Affairs).

188. *Compare* S. 1794, 117th Cong. § 2(1) (2021) (containing two procedural safeguards that work to ensure that's IGs make accountable use of their authority to subpoena testimony), *with* Strengthening Oversight for Veterans Act § 2, 136 Stat. at 1251–52 (containing three procedural safeguards that work to ensure that the VA IG makes accountable use of their ability to issue subpoenas for testimony).

189. *Hearing To Consider Pending Legislation*, *supra* note 187, at 77 (statement of Christopher A. Wilber, Counselor to the Inspector General of the U.S. Department of Veterans Affairs).

standards to ensure that the IGs make accountable use of this authority.

A. Provision to Provide Notice of Intent

The first control within the VA Act serves as a prerequisite for issuing a subpoena.[190] Under this provision, the VA OIG must provide its witness with notice of its intent to subpoena them.[191] This control works to protect witnesses from spontaneous and unjust government intrusion. Additionally, it provides witnesses with the chance to testify voluntarily.[192]

Congress should amend Senate Bill 1794 to include a notice provision. This provision not only protects the rights of witnesses but may also benefit an OIG if the witness decides to testify voluntarily. If a witness wants to testify voluntarily, an OIG will not have to go through the subpoena drafting and approval process.

B. Amending the U.S. Attorney General Provision

The VA Act also includes stricter language in its notification to the U.S. Attorney General provision.[193] Right now, Senate Bill 1794 requires (1) OIGs to notify the U.S. Attorney General seven days before issuing a subpoena and (2) take into consideration any objection provided by the Attorney General relating to the subpoena.[194] In contrast, the VA Act gives the Attorney General "up to [ten] days to object if the subpoena may interfere with an ongoing investigation."[195] Following in the VA Act's footsteps,[196] Congress should amend the U.S. Attorney General notification provision of Senate Bill 1794 by increasing the amount of time the Attorney General has for reviewing the order from seven to ten days. This ten-day time frame gives the Attorney General sufficient time to consider the order and object to the subpoena if necessary.

Additionally, Congress should amend the Attorney General provision further by adding a condition that precludes OIGs from issuing a subpoena if the Attorney General objects on the grounds that it may interfere with an ongoing investigation. The VA Act currently includes this check within its

190. *See* Strengthening Oversight for Veterans Act § 2(a), 136 Stat. at 1251–52.

191. *See id.*

192. *See id.*

193. *Compare* S. 1794, *with* Strengthening Oversight for Veterans Act § 2(a).

194. *See* S. 1794.

195. *Hearing to Consider Pending Legislation*, *supra* note 187, at 77; *see* Strengthening Oversight for Veterans Act § 2(a).

196. *See* Strengthening Oversight for Veterans Act § 2(a).

legislation.[197] Incorporating this condition into Senate Bill 1794 is crucial because it ensures that IGs cannot undermine the Attorney General's determination.

C. Provision Regarding Location

Moreover, Congress should amend the Senate Bill 1794 to include a provision that compels OIGs to arrange all witness interviews, to the greatest extent possible, in a location convenient to the witness. In crafting this provision, Congress should amend Senate Bill 1794 to incorporate the language proscribed in the VA Act, which obliges the IG "to the greatest extent practicable, [to] travel to the residence of the witness, the principal place of business of the witness, or other similar location that is in proximity to the residence of the witness."[198] This additional provision benefits the subpoenaed witness by making the subpoena less burdensome and easier to comply with.

D. Semiannual Report Requirement

Unlike Senate Bill 1794, the VA Act includes a provision requiring OIGs to detail certain metrics relating to its subpoena authority in its mandated semiannual report to Congress.[199] Mirroring the VA Act, Congress should add a provision to Senate Bill 1794 that requires each OIG to report to Congress through their "mandated semiannual report[,] the number of testimonial subpoenas issued, the number of individuals interviewed pursuant to the subpoenas, the number of times the Attorney General objected to the issuance of a subpoena, and any other matters the OIG considers appropriate related to this authority."[200] By adding this provision, Congress can better ensure that OIGs are making responsible use of this authority because it requires OIGs to reflect on how often they utilize this authority and obliges them to report this information to Congress and the American people. With this information, Congress can effectively evaluate the IG community's use of this authority and identify areas that need improvement.

While Congress has paramount authority for enhancing Senate Bill 1794, it is not the only government entity that can remarkably address the shortcomings of the bill. Just like Congress, CIGIE can adopt practices and establish standards to ensure that IGs are not abusing this robust power.

197. *See id.*

198. *Id.*

199. *Compare* S. 1794 *with* Strengthening Oversight for Veterans Act § 2.

200. *Hearing to Consider Pending Legislation*, *supra* note 187, at 77*; see* Strengthening Oversight for Veterans Act § 2.

E. Creating the Subpoena Panel

As described in the current language of Senate Bill 1794, CIGIE is charged with the task of "promulgat[ing] standards and provid[ing] training relating to the issuance of subpoenas, conflicts of interest, and any other matter the Council determines necessary" for ensuring that OIGs make responsible use of its subpoena authority.[201] In carrying out this section, CIGIE should create a Subpoena Panel charged with reviewing subpoenas that the Attorney General objects to in instances not relating to the interference of ongoing investigations. This review board will assist OIGs in understanding why the Attorney General objected to their subpoena and support OIGs in issuing subpoenas without facial defects. CIGIE shall require the Subpoena Panel to review each submitted subpoena and provide the corresponding OIG with their feedback within ten days of receiving the subpoena. In each review, the Subpoena Panel must consider whether the OIG has jurisdiction over the investigation, whether the subpoena was issued in good faith, whether the subpoena is facially sufficient, and whether the information requested is relevant to the inquiry.

F. Other Standards

In addition to creating the Subpoena Panel, CIGIE can create and issue guidance documents for testimonial subpoenas. For example, one guidance document may encourage OIGs to make subpoena ad testificandum requests go through layers of internal OIG approval before an IG can submit the subpoena to the Attorney General. Likewise, CIGIE can provide OIGs with general guidance that requires IGs to consider certain principles before submitting their request for approval by the Attorney General. This guidance may require IGs to consider the following:

- How the testimony sought pertains to the OIG's investigation;
- Whether the OIG has jurisdiction;
- Whether the OIG can obtain the information sought through means other than a subpoena; and
- Whether the information sought is privileged.

Considerations like these require IGs looking to issue a subpoena for testimony to evaluate why they are choosing this means. Further, these considerations compel IGs to reflect on their actions, recall the vigor of this

201. S. REP. NO. 117-226, at 7727 (2022); *see Council of the Inspectors General on Integrity and Efficiency*, COUNCIL INSPECTORS GEN. ON INTEGRITY & EFFICIENCY, https://www.oversight.gov/inspectors-general/council-inspectors-general-integrity-and-efficiency (last visited Nov. 11, 2023).

investigative tool, and ultimately consider whether issuing the subpoena is the best practice for retrieving this information. CIGIE should make these guidelines available to OIGs and the public on its website under the *Compliance Guides* tab, found on their *Resources* page.[202]

CONCLUSION

Senators Hassan and Grassley introduced Senate Bill 1794 in 2021 to expand upon the IGs' investigative power to subpoena by rewarding IGs with the power to compel testimony from contractors, grantees, and former federal employees.[203] With this expanded subpoena power, IGs can ensure that they are conducting comprehensive investigations, productively detecting deficiencies within the Executive Branch, and recommending best practices to their affiliated federal agency. Additionally, this power helps ensure that former officials and other parties cannot hide from their responsibility to cooperate with IG investigations.[204]

On its face, Senate Bill 1794 is a much-needed amendment for effectively detecting mismanagement and addressing corruption within the federal government; however, hidden under the surface is an ugly possibility: the minimal checks and balances proposed in the bill permit IGs to avoid Fourth Amendment strictures preventing warrantless searches, disregard privileges provided by the Fifth Amendment, and sidestep probable cause requirements.[205]

To address these concerns while also strengthening congressional oversight, Congress should amend Senate Bill 1794 to incorporate additional provisions, stricter standards, and more exacting language in its procedural safeguards before reintroducing the bill. Likewise, CIGIE must promulgate guidance and construct the Subpoena Panel to review subpoenas that the Attorney General objects to. Together, these solutions will not only guarantee that the IG community acquires the capacity they need to effectively root out waste, fraud, and abuse within the federal government, but they will also help ensure that

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202. *Resources*, COUNCIL INSPECTORS GEN. ON INTEGRITY & EFFICIENCY, https://www.ignet.gov/content/manuals-guides#compliance-guides (last visited Nov. 11, 2023).

203. *See* Gomez Press Release, *supra* note 47.

204. *See id.*

205. *See* CHARLES DOYLE, CONG. RSCH. SERV., RL32880, ADMINISTRATIVE SUBPOENAS AND NATIONAL SECURITY LETTERS IN CRIMINAL AND FOREIGN INTELLIGENCE INVESTIGATIONS: BACKGROUND AND PROPOSED ADJUSTMENTS 3, 8 (2005) (explaining that administrative subpoenas lack the safeguards that accompany the issuance of a search warrant which worries critics because the government does not have to overcome probable cause requirements).

IGs will not abuse this grave authority, participate in unjust intrusions of privacy, violate a demandee's constitutional rights, avoid Fourth Amendment strictures that prevent warrantless searches, or disregard privileges provided by the Fifth Amendment.