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### Inspectors General and the Importance of Independence

Kristopher Phipps

*Boston College Law School*, [kristopherhipps@gmail.com](mailto:kristopherhipps@gmail.com)

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## INSPECTORS GENERAL AND THE IMPORTANCE OF INDEPENDENCE

### INTRODUCTION

Amidst a global pandemic, President Donald Trump removed five inspectors general within the federal government, including the inspector general in charge of overseeing the coronavirus response efforts in health agencies and the inspector general directly involved with the whistleblower complaint that led to Trump's impeachment.<sup>1</sup> The President's unprecedented actions against government oversight officials calls attention to an otherwise little-noticed institution and signals a growing need for accountability in government on all levels.<sup>2</sup>

Established by the Inspector General Act of 1978, federal inspectors general provide oversight within the executive branch by detecting and investigating potential fraud, waste, and abuse.<sup>3</sup> Federal inspectors general are internal watchdogs of seventy-three federal agencies that answer directly to the head of their respective agency, who has the power to restrict or reduce investigative access of the inspector general.<sup>4</sup> Because these inspector generals must also report to Congress, however, executive branch agencies and the president have an incentive to limit the abilities of an inspector general, or in the present case, remove them from office when it is politically advantageous.<sup>5</sup> This is especially problematic for an agency created to restore public trust in government. Alternatively, a number of states — led by Massachusetts in 1980 — have

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<sup>1</sup> McCarthy, B. (2020, May 19). *Trump has pushed out 5 inspectors general since April. Here's who they are.*

PolitiFact. <https://www.politifact.com/article/2020/may/19/trump-has-pushed-out-5-inspectors-general-april-he/>

<sup>2</sup> Sinnar, S. (2013). Protecting rights from within? Inspectors general and national security oversight. *Stanford Law Review*, 65(5), 1027-1086.

<sup>3</sup> Inspector General Act of 1978, Publ. L. No. 95-452, 92 Stat. 1101 (1978).

<https://www.govinfo.gov/content/pkg/STATUTE-92/pdf/STATUTE-92-Pg1101.pdf#page=1>

<sup>4</sup> Balutis, A.P., & Upson, D. (2017, July 19). *Independence, accountability and the Office of Inspector General.*

Federal Computer Week. <https://fcw.com/articles/2017/07/19/pointcounterpoint-igs-balutis-upson.aspx>

<sup>5</sup> Pacifico, N. (2016, September 09). *Independence of inspectors general is essential.* Project on Government Oversight. <https://www.pogo.org/analysis/2016/09/independence-of-inspectors-general-is-essential/>

an Inspector General's Office with statewide jurisdiction.<sup>6</sup> In contrast to the federal model, these state inspector general offices, though part of the executive branch, operate independently and answer only to the legislature and a separate independent council.<sup>7</sup> Given the need for honest government in the recovery from the ongoing ramifications of the pandemic, it is timely and beneficial to examine the current institutional design of federal Inspectors General in comparison to those on the state level.

Independence is critical to the success of an inspector general in the performance of their statutory duties. Those duties are compromised, however, when the authority that oversees the inspector general removes them from office due to political or self-serving motivations. In light of President Trump's unprecedented actions, changes to the institutional structure of federal inspectors general should look to the states, such as Massachusetts, where the inspector general is more insulated from politics and may not be removed unilaterally.<sup>8</sup> In Part I, the history, general structure, and key characteristics of federal inspectors general are examined. Part II explores the history and structure of the Massachusetts Office of the Inspector General, as well as key characteristics. Finally, Part III discusses the importance of institutional independence to inspectors general in the context of President Trump's removals and argues potential reforms to prevent future actions on the federal level.

## I. FEDERAL INSPECTORS GENERAL OFFICES

### A. HISTORICAL BACKGROUND

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<sup>6</sup> Zisman, P. (2013, March/April). The people's watchdog. *Capitol Ideas*, 56(2), 38-39.

<sup>7</sup> MASS. GEN. LAWS ch.12A, § 1-15 (2020).

<sup>8</sup> Id. § 2.

Social Security fraud was so pervasive in the 1970s that store fronts would open with a sign reading "come in for free coffee and join the Medicaid operation."<sup>9</sup> After a series of various scandals in Federal programs in the 1970s, several Congressional hearings exposed fraud and waste in executive agencies.<sup>10</sup> These hearings discovered that a number of departments had serious deficiencies in resources and procedures used for the prevention of fraud and abuse.<sup>11</sup> Many lacked organizational structures for internal audits and investigations entirely, with some reporting to a number of various officials as opposed to one singular official.<sup>12</sup> For example, the Department of Transportation had one hundred and sixteen separate units with no main leadership.<sup>13</sup> Some had no auditory or investigative units at all.<sup>14</sup> Furthermore, many lacked resources necessary to run extensive internal audits. At the time, the internal audit cycles often lasted ten to twenty years, depending on the agency.<sup>15</sup> Moreover, almost without exception, auditors and investigators reported to the very officials that had responsibility for the programs subject to audit or investigation.<sup>16</sup> Generally, federal agencies lacked affirmative programs that looked for possible fraud and abuse and instead relied on complaints.<sup>17</sup>

These environments allowed fraud and waste in federal expenditure programs within agencies to run unchecked. As a result, Congress held a series of subcommittee hearings tasked with finding deficiencies in agencies and how to remedy them. In particular, the House

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<sup>9</sup> *Establishment of an Office of Inspector General in the Department of Health, Education, and Welfare: Hearing on H.R. 5302 Before the Subcomm. on Intergovernmental Relations and Human Res. of the H. Comm. on Gov't Operations*, 94th Cong. 14 (1976) (statement of Benjamin S. Rosenthal, Member, H.R.).

<sup>10</sup> Office of the Inspector General, *The Inspector General Act: 40 Years Later*, SOC. SEC. ADMIN. (Oct. 11, 2018), <https://oig.ssa.gov/newsroom/blog/oct11-ig-act-anniversary>.

<sup>11</sup> H.R. REP. NO. 95-584, at 4 (1977).

<sup>12</sup> H.R. REP. NO. 95-584 at 5.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> H.R. REP. NO. 95-584 at 6.

<sup>16</sup> H.R. REP. NO. 95-584 at 5.

<sup>17</sup> *Id.*

Subcommittee on Intergovernmental Relations and Human Resources investigated the Department of Health, Education, and Welfare and found wide-ranging deficiencies in detecting fraud and abuse.<sup>18</sup> With program expenditures at the time of over \$118.5 billion, the department could attribute as much as \$3 billion in annual losses due to waste or fraud in Medicare and Medicaid, as well as an additional \$750 million annually to cases of fraud alone.<sup>19</sup> Further, the Social Security Administration reported \$27 million in annual losses due to doctors, hospitals, and nursing homes overcharging for Medicare.<sup>20</sup> Federal student loan programs also reported a much higher rate of default than similar state or consumer loan programs.<sup>21</sup>

The Subcommittee's investigation concluded that the Department had no effective centralized investigatory office with the authority to monitor its disbursements.<sup>22</sup> As a practice, the federal government abdicated investigatory responsibilities for many programs to the individual states, but failed to ensure that each department had the resources necessary to oversee whether the states were actively investigating allegations of fraudulent or wasteful expenditures.<sup>23</sup> Thus, enormous amounts of money were lost because of program mismanagement and abuse. First, investigative resources were severely inadequate.<sup>24</sup> The central unit had only ten investigators and had a case backlog of over ten years.<sup>25</sup> This was not unique, however, to the Department of Health,

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<sup>18</sup> *Establishment of an Office of Inspector General in the Department of Health, Education, and Welfare: Hearing on H.R. 5302 Before the Subcomm. on Intergovernmental Relations and Human Res. of the H. Comm. on Gov't Operations, 94th Cong. 14 (1976).* Department of Health, Education, and Welfare was divided into the Department of Education and the Department of Health and Human Services in 1979.

<sup>19</sup> *Establishment of an Office of Inspector General in the Department of Health, Education, and Welfare, 94th Cong. at 8 (statement of Benjamin S. Rosenthal, Member, H.R.).*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 9.

Education, and Welfare. The Department of Labor and the Small Business Administration reported having only one-third of the audit manpower they needed to be effective, and the Department of Veteran's Affairs reported having only one-fifth.<sup>26</sup>

Second, departments did not have effective organizational structures. Units responsible for combatting fraud and abuse were scattered throughout the Department of Health, Education, and Welfare with no pattern or organization and had no single unit having the overall responsibility or authority needed to effectively lead.<sup>27</sup> Furthermore, auditors and investigators at many departments reported to different officials rather than a single, centralized reporting figure.<sup>28</sup> Similarly, the Rockefeller Commission on C.I.A. Activities criticized the C.I.A. for having such a small staff that individual program administrators were responsible for not only running programs, but also ensuring they were managed properly.<sup>29</sup> As a result, information needed for action against fraud and abuse was either extremely difficult to obtain or simply not available.<sup>30</sup>

Third, the personnel of audit and investigatory units within departments lacked the independence necessary to produce honest and thorough reports concerning serious problems within the respective department.<sup>31</sup> Most of the unit personnel were hired and fired by the officials directly responsible for the programs being investigated.<sup>32</sup> Consequently, many units opted not to make reports out of fear that the results may embarrass their own boss, which would subsequently

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<sup>26</sup> H.R. REP. NO. 95-584 at 7.

<sup>27</sup> *Establishment of an Office of Inspector General in the Department of Health, Education, and Welfare: Hearing on H.R. 5302 Before the Subcomm. on Intergovernmental Relations and Human Res. of the H. Comm. on Gov't Operations, 94th Cong. 1 (1976) (statement of L.H. Fountain, Chairman, H. Subcomm. on Intergovernmental Relations and Human Res.).*

<sup>28</sup> H.R. REP. NO. 95-584 at 5.

<sup>29</sup> *Establishment of an Office of Inspector General in the Department of Health, Education, and Welfare, 94th Cong. at 10 (statement of Benjamin S. Rosenthal, Member, H.R.).*

<sup>30</sup> *Establishment of an Office of Inspector General in the Department of Health, Education, and Welfare, 94th Cong. at 1 (statement of L.H. Fountain, Chairman, H. Subcomm. on Intergovernmental Relations and Human Res.).*

<sup>31</sup> *Id.* at 2.

<sup>32</sup> *Id.*

lead to their termination.<sup>33</sup> In addition, even when problems were made known, corrective action would often not be made until years later.<sup>34</sup> At the C.I.A., audit and investigatory units could only conduct their reviews within the confines of material the C.I.A. Director chose to provide, which made reviews of illegal activity and abuse ineffective.<sup>35</sup> Therefore, waste and fraud in various federal programs remained unchecked and millions of needy and deserving citizens were deprived of billions of dollars per year in intended support.<sup>36</sup>

At the conclusion of the Subcommittee on Intergovernmental Relations and Human Resources' investigation, Congress noted the need for a centralized auditory and investigatory office to effectively control fraud, waste, or inefficiency in program expenditures of executive agencies. Their report noted that in every instance where an Inspector General's Office was established, it was considered an integral part of the economic efficiency of the agency in which it served.<sup>37</sup> Necessary for that success, however, was a larger, more qualified staff with complete access to all information relevant to its reviews, and the authority to provide reports directly to outside bodies.<sup>38</sup> Following hearings on the Subcommittee's report, Congress passed the Inspector General Act of 1978 creating an Office of the Inspector General in twelve executive agencies to conduct oversight and promote program integrity.<sup>39</sup>

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<sup>33</sup> *Id.*

<sup>34</sup> *Establishment of an Office of Inspector General in the Department of Health, Education, and Welfare*, 94th Cong. at 2 (statement of L.H. Fountain, Chairman, H. Subcomm. on Intergovernmental Relations and Human Res.).

<sup>35</sup> *Establishment of an Office of Inspector General in the Department of Health, Education, and Welfare*, 94th Cong. at 10 (statement of Benjamin S. Rosenthal, Member, H.R.). The C.I.A. Director was implicated by the Rockefeller Commission for participating in illegal activities. The Subcommittee on Intergovernmental Relations and Human Resources noted the conclusion of the Rockefeller Commission that many of the C.I.A.'s illegal activities could have been avoided had their investigative unit been equipped with the authority to alert sources other than the Director of the improprieties festering within the agency. This conclusion helped support the case for a more independent Inspector General within executive agencies.

<sup>36</sup> *Establishment of an Office of Inspector General in the Department of Health, Education, and Welfare*, 94th Cong. at 9 (statement of Benjamin S. Rosenthal, Member, H.R.).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> 5 U.S.C. app., Inspector General's Act (1978); Inspector General's Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (1978); see *Establishment of an Office of Inspector General in the Department of Health, Education, and Welfare*,

## B. GENERAL STRUCTURE

The Inspector General Act of 1978 created independent and objective inspectors general in twelve federal agencies to combat fraud, waste, and abuse in the programs and operations of the respective agency.<sup>40</sup> Each inspector general is responsible for conducting audits and investigations related to the programs and operations of their respective agency to promote efficiency and effectiveness in preventing and detecting fraud and abuse in those programs and operations.<sup>41</sup> Each Inspector General's Office has a broad statutory mandate to fulfill their duties, allowing them to access all records available to their agency and may request information or assistance from other federal agencies.<sup>42</sup> In addition to investigating fraud, waste, and abuse, each inspector general is tasked with identifying vulnerabilities within their agency and to recommend systemic changes to strengthen controls or mitigate risks.<sup>43</sup> Moreover, they must keep their agency head abreast of their findings, thus requiring direct and prompt access to the agency head when necessary.<sup>44</sup> Further, each inspector general is required to provide Congress with a semiannual report of their findings.<sup>45</sup>

The Inspector General Act of 1978 has been amended several times since its enactment. Currently, there are seventy-two federal statutory inspectors general across the federal

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94th Cong. at 10 (statement of Benjamin S. Rosenthal, Member, H.R.); Office of the Inspector General, *The Inspector General Act: 40 Years Later*, SOC. SEC. ADMIN. (Oct. 11, 2018). Offices of the Inspector General were established in the Departments of Agriculture, Commerce, Housing and Urban Development, the Interior, Labor, and Transportation, and within the Community Services Administration, the National Aeronautics and Space Administration, the Small Business Administration, and the Veterans' Administration. An Office of the Inspector General was previously established in the Department of Health, Education, and Welfare in 1976, soon after the hearing of the Subcommittee on Intergovernmental Relations and Human Resources' report. *See* Pub. L. No. 94-505, 90 Stat. 2429 (1976).

<sup>40</sup> Council of the Inspectors General on Integrity and Efficiency, *The Inspectors General*, at 1 (July 14, 2014), [https://ignet.gov/sites/default/files/files/IG\\_Authorities\\_Paper\\_-\\_Final\\_6-11-14.pdf](https://ignet.gov/sites/default/files/files/IG_Authorities_Paper_-_Final_6-11-14.pdf).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 9, 12.

<sup>43</sup> *Id.* at 9.

<sup>44</sup> *Id.* at 5.

<sup>45</sup> *Id.*



government.<sup>46</sup> Further, the Homeland Security Act of 2002 authorized twenty-four Inspectors General Offices to exercise law enforcement authority, including carrying firearms, making arrests, and executing warrants.<sup>47</sup> Additionally, the Whistleblower Protection and Enhancement Act of 2012 established the position of a whistleblower protection ombudsman responsible for educating employees about prohibitions on retaliation for protected disclosures and the remedies against any such retaliation.<sup>48</sup>

Furthermore, a fundamental distinction separates the two types of inspectors general under the Inspector General Act of 1978.<sup>49</sup> Establishment inspectors general are those that are appointed by the President of the United States with Senate confirmation.<sup>50</sup> Designated federal entity inspectors general are those that are appointed by the agency head, board, or commission.<sup>51</sup> With a small number of exceptions, both establishment and designated federal entity inspectors general share the same authority and responsibilities.<sup>52</sup>

### C. KEY CHARACTERISTICS

Tasked with promoting economy and effectiveness of programs and operations of federal agencies, as well as detecting and preventing fraud, waste, and abuse within those agencies, federal

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<sup>46</sup> Id. at 1.

<sup>47</sup> Homeland Security Act of 2002, Pub. L. No. 296, 116 Stat. 2135, Title VII(B), § 812 (2002); see Council of the Inspectors General on Integrity and Efficiency, *IG Act History*, <https://ignet.gov/content/ig-act-history> (last visited Dec. 21, 2020).

<sup>48</sup> Whistleblower Protection and Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465, Title 1, § 117 (2012); see Council of the Inspectors General on Integrity and Efficiency, *IG Act History*, <https://ignet.gov/content/ig-act-history> (last visited Dec. 21, 2020).

<sup>49</sup> Council of the Inspectors General on Integrity and Efficiency, *The Inspectors General*, at 2 (July 14, 2014). Other Inspector General Offices have been established through statutes other than the Inspector General Act of 1978. For example, the Architect of the Capitol (2 U.S.C. § 1808); Office of the Intelligence Community (50 U.S.C. § 3033); and the Special Inspector General for Afghanistan Reconstruction (National Defense Authorization Act for FY 2008, Pub. L. No. 110-181, § 1229(b) (Jan. 28, 2008)); and the U.S. Capitol Police (2 U.S.C. § 1909), among others.

<sup>50</sup> 5 U.S.C. app. § 3(a).

<sup>51</sup> Id. § 8G(c); see Dodd Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, Title IX(I), §§ 989(B-D) (2010).

<sup>52</sup> Council of the Inspectors General on Integrity and Efficiency, *The Inspectors General*, at 2.

inspectors general rely on four key abilities: Independence, subpoena power, accountability, and reporting duties. First, independence of the inspector general ensures the objectivity of its work and protects it from efforts to compromise or hinder its operations.<sup>53</sup> The inspector general's independence directly stems from its selection, appointment, and removal procedures. All inspectors general are required to be selected without regard to political affiliation and must be selected on the merits of their integrity and ability in accounting, auditing, financial analysis, law, management, investigations, and public administration.<sup>54</sup> As stated above, Establishment inspectors general are appointed by the President with Senate confirmation, and designated federal entity inspectors general are appointed by the head of their respective agency, be they an individual, board, or committee.<sup>55</sup> As for removal, the Inspector General Act provided procedural safeguards against inspectors general being removed for political reasons or because they are ineffective at performing their duties.<sup>56</sup> For both establishment and designated federal entity inspectors general, congressional notification letters must be sent by the President or agency head, respectively, to both chambers of Congress.<sup>57</sup> Said notification letters must be sent to Congress at least thirty days prior to removal and must detail the reasons for removal.<sup>58</sup>

In addition to the appointment and removal procedures and requirements, the independence of inspectors general is further enhanced by the prohibition of agency management officials from supervising the inspector general.<sup>59</sup> Moreover, the agency head and other management officials

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<sup>53</sup> See *Id.* at 1.

<sup>54</sup> 5 U.S.C. app. §§ 3(a); 8G(c).

<sup>55</sup> *Id.*

<sup>56</sup> Council of the Inspectors General on Integrity and Efficiency, *The Inspectors General*, at 3.

<sup>57</sup> 5 U.S.C. app. §§ 3(b); 8G(e).

<sup>58</sup> *Id.* [I would like to explore the consequences of whether Congress accepts the reasons or not, or whether they have a say in the matter at all, aside from just being informed].

<sup>59</sup> 5 U.S.C. app. §§ 3(a); 8G(d); see Council of the Inspectors General on Integrity and Efficiency, *The Inspectors General*, at 4. Each Inspector General is under the general supervision of their respective agency head. In *U.S. Nuclear Regulatory Comm'n v. Fed. Labor Relations Auth.*, the 4th Circuit Court held that "general supervision" equated to nominal supervisory authority. 25 F.3d 229, 235 (4th Cir. 1994).

are prohibited from preventing or denying the inspector general from initiating, carrying out, or completing any audit or investigation.<sup>60</sup> This prohibition has its limitations, however. For seven agencies – the Departments of Defense, Homeland Security, Justice, Treasury; as well as the Federal Reserve Board, Consumer Financial Protection Bureau, and the Postal Service – the agency-heads may prevent their respective inspector general for specific purposes, such as preserving a national interest, protecting the identity of undercover sources, or limiting the disclosure of information which may influence the economy.<sup>61</sup>

Second, the broad authority of federal inspectors general to access all information necessary for its audits and investigations is critical to the effective performance of its statutory duties.<sup>62</sup> This access includes any confidential information of the agency.<sup>63</sup> Further, each inspector general may coordinate with other federal agencies and can request information or assistance.<sup>64</sup> The Agency head is required to provide that information or assistance insofar as it is practical and not in violation of any legal restriction.<sup>65</sup> If an agency employee refuses to provide information or testimony, the inspector general must report the refusal to the agency head and include it in its semiannual report to Congress.<sup>66</sup> Most importantly, inspectors general have the authority to issue subpoenas for the production of documents, records, or any information necessary in its audits or

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<sup>60</sup> 5 U.S.C. app. §§ 3(a); 8G(d).

<sup>61</sup> 5 U.S.C. app. §§ 8; 8(D); 8(E); 8(I); Council of the Inspectors General on Integrity and Efficiency, *The Inspectors General*, at 4.

<sup>62</sup> 5 U.S.C. app. § 6. [Need to explore reasons for enactment of the Inspector General Empowerment Act of 2016].

<sup>63</sup> 5 U.S.C. app. § 6(a)(1); S. REP. NO. 95-1071, at 33-34 (1978); *see also supra* note 53 (although provided access, the Inspectors General from the listed seven agencies may be preventing from using or releasing such information for specific reasons listed in the statute).

<sup>64</sup> 5 U.S.C. app. § 6(c).

<sup>65</sup> *Id.*

<sup>66</sup> *see* 5 U.S.C. app. § 5(a)(5); Council of the Inspectors General on Integrity and Efficiency, *The Inspectors General*, at 11-12.

investigations.<sup>67</sup> These subpoenas are enforceable by order of any appropriate United States district court.<sup>68</sup> To assist in the performance of these broad access abilities, establishment inspectors general and particular employees are authorized by the Attorney General to exercise law enforcement powers.<sup>69</sup> These powers include carrying firearms, make arrests without a warrant for any federal offense committed in their presence, and to seek and execute warrants for arrest, search of a premises, or seizure of evidence upon probable cause.<sup>70</sup>

Third, federal inspectors general are obligated to keep both the head of the respective agency and Congress fully informed about deficiencies and progress in correcting those deficiencies in agency programs and operations.<sup>71</sup> Each federal inspector general must issue semiannual reports to Congress detailing significant issues identified by the office, recommendations related to those issues, summaries of its prosecutorial referrals, as well as any disagreements with agency management or staff.<sup>72</sup> The inspector general must first transmit their report to their agency head before delivering it to Congress.<sup>73</sup> The agency head has thirty days to prepare a companion report commenting on the inspector general's findings and submit both reports to Congress.<sup>74</sup> These reports are made available to the public upon request.<sup>75</sup>

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<sup>67</sup> 5 U.S.C. app. § 6(a)(4). [The Ward Commission noted that the Inspector General Act of 1978 did not include the power to subpoena testimony. It is unclear from the statutory language whether that is true or not. I plan to explore this further.]

<sup>68</sup> 5 U.S.C. app. § 6(a)(4).

<sup>69</sup> 5 U.S.C. § 6(f)(1), (3); see Council of the Inspectors General on Integrity and Efficiency, *The Inspectors General*, at 10. Designated federal entity Inspectors General may also exercise law enforcement authorities, but only upon a determination of eligibility by the Attorney General. The determining factors of eligibility are whether the office is significantly hampered in the performance of its responsibilities without such powers, whether available assistance from other law enforcement is inadequate, and whether the office has adequate safeguards in place to ensure proper exercise of the powers. 5 U.S.C. § 6(f)(2).

<sup>70</sup> 5 U.S.C. § 6(f)(1)(A-C).

<sup>71</sup> 5 U.S.C. § 4(a)(5).

<sup>72</sup> 5 U.S.C. § 5(a).

<sup>73</sup> 5 U.S.C. § 5(b). The reports must be submitted to the agency head no later than April 30 and October 31 of each year.

<sup>74</sup> 5 U.S.C. § 5(b).

<sup>75</sup> 5 U.S.C. § 5(c). At a reasonable cost.

Fourth, federal inspectors general have several mechanisms for accountability. Among them, the Council of the Inspectors General on Integrity and Efficiency is the unified council of all statutory inspectors general that addresses the integrity, economy, and effectiveness issues experienced by all agencies.<sup>76</sup> Furthermore, the Council develops standards and policies for each office and assists in professional training for employees of the inspectors general.<sup>77</sup> Additionally, the Council serves as an independent reviewer and investigator as to allegations of misconduct against the inspector general or their employees.<sup>78</sup> Further, inspector general offices are required to comply with generally accepted government auditing standards established by the Comptroller General in the conducting of its audits.<sup>79</sup> Moreover, the inspector general is kept accountable through public scrutiny by releasing all of their reports on their mandated websites.<sup>80</sup>

## II. MASSACHUSETTS OFFICE OF THE INSPECTOR GENERAL

### A. HISTORICAL BACKGROUND

In the Spring of 1975, amidst a federal investigation into corruption in Pennsylvania, a representative from the construction-management firm McKee, Berger, and Mansueto, Inc. responded to a question before a grand jury of whether he was aware of similar corruption occurring in any other state. His response: Massachusetts.<sup>81</sup> This testimony was directly forwarded to the Boston field office of the Federal Bureau of Investigation.<sup>82</sup> Thus launched an investigation into the Bureau of Building Construction's award of a multi-million-dollar contract to McKee,

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<sup>76</sup> Inspector General Reform Act of 2008, Pub. L. 110-409, 122 Stat. 4302 (2008); *see* Council of the Inspectors General on Integrity and Efficiency, *IG Act History*.

<sup>77</sup> *Id.*

<sup>78</sup> 5 U.S.C. § 11(d)(1)(4).

<sup>79</sup> 5 U.S.C. § 4(b)(1); U.S. GOV'T ACCOUNTABILITY OFFICE, *Inspectors General: Independence Principles and Considerations for Reform*, (June 8, 2020), at 1, <https://www.gao.gov/assets/710/707412.pdf>.

<sup>80</sup> 5 U.S.C. § 8M(b)(1). Excluding reports containing classified or otherwise prohibited information.

<sup>81</sup> David Farrell, *Two Senators on Trial: A Long, Twisting Tale of Politics*, BOS. GLOBE, Feb. 20, 1977, at A1, A4.

<sup>82</sup> *Id.* at A4.

Berger, and Mansueto, Inc. for the construction of the University of Massachusetts – Boston campus and buildings.<sup>83</sup>

Aided by former Governor of Massachusetts Endicott Peabody as their attorney, the firm successfully bid for the contract in early 1971, ensuring a profit of one-and-a-half percent of \$150 million.<sup>84</sup> A local state politics reporter at the time characterized the contract as a "sweetheart deal" that indicated little negotiation and possible collusion between the firm and the Bureau of Building Construction, within the Office of Administration and Finance.<sup>85</sup> In response to the allegation, the state legislature filed an order to form a joint committee to investigate the awarding of the contract and those involved.<sup>86</sup> The committee, headed by Senator Joseph DiCarlo, a potential opponent of Secretary of Administration and Finance Donald Dwight in the upcoming gubernatorial election, set out with the purpose of placing blame on Secretary Dwight.<sup>87</sup> In a series of private meetings after the first round of committee hearings, Senator DiCarlo offered a favorable reporting for McKee in return for a payment of \$30,000 to \$40,000.<sup>88</sup> The special committee report concluded that the contract was in no way illegal and there existed no possibility where the firm could unilaterally reward itself.<sup>89</sup> By the time of the federal investigation in 1975, the company received close to six million dollars in profit.<sup>90</sup>

At the conclusion of the investigation, Senator DiCarlo and another were indicted and later found guilty of violating the Hobbs Act, which prohibits extortion by public officials, and the

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<sup>83</sup> Id. at A1.

<sup>84</sup> Id. at A4.

<sup>85</sup> Id. at A1, A4.

<sup>86</sup> Id. at A4.

<sup>87</sup> William F. Doherty, *Sen. Kelly Named Co-Conspirator in Extortion Case*, BOS. GLOBE, Jan. 26, 1977, at pg. 1, 9.

<sup>88</sup> Id. at pg. 9.

<sup>89</sup> Farrell, *supra* note 1, at A4.

<sup>90</sup> Id.

Travel Act, which prohibits interstate travel for illegal purposes.<sup>91</sup> Three years later, the legislature ordered the creation of the Special Commission Concerning State and County Buildings to investigate the awarding of architectural and construction contracts in Massachusetts over the previous twenty years.<sup>92</sup>

Chaired by John W. Ward, the former president of Amherst College, the Special Commission issued a twelve-volume report on public corruption in state and county buildings.<sup>93</sup> The commission found billions of dollars of waste in building projects and concluded that corruption was a way of life in Massachusetts.<sup>94</sup> Moreover, the commission uncovered shoddy work and low standards in construction.<sup>95</sup> For example, the library at Salem State College<sup>96</sup> was structurally unable to support itself and the weight of books, furniture, and students.<sup>97</sup> Further, the façade of the "World's Tallest Library" at the University of Massachusetts – Amherst was so unsecure that it rendered the building unusable just eight years after its construction.<sup>98</sup> In addition, the Worcester County Jail had several defects such that its use was impractical, including a failing automatic cell-lock system.<sup>99</sup> Perhaps the most striking, the campus of the University of Massachusetts – Boston, the very project that led to the commission, had a multitude of structural

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<sup>91</sup> William F. Doherty, *DiCarlo, MacKenzie Convicted on All 8 Counts of Corruption*, BOS. GLOBE, Feb. 26, 1977, at pg. 1, 3.

<sup>92</sup> Michael Knight, *Massachusetts Told of Wide Corruption*, N.Y. TIMES, Jan. 1, 1981, § 1, at 1.

<sup>93</sup> OFFICE OF THE INSPECTOR GENERAL, History of the Massachusetts OIG: About John William Ward and the "Ward Commission," MASS.GOV, <https://www.mass.gov/info-details/history-of-the-massachusetts-oig#about-john-william-ward-and-the-%E2%80%9Cward-commission%E2%80%9D-> (last visited Nov. 10, 2020).

<sup>94</sup> *Id.* (Political influence, not professional performance, was the main condition for receiving state business).

<sup>95</sup> *Id.*

<sup>96</sup> Now Salem State University.

<sup>97</sup> SPECIAL COMM'N CONCERNING ST. & CTY. BLDGS., FINAL REPORT TO THE GENERAL COURT (*WARD COMM'N*) (1980), Vol. VI at 43-46.

<sup>98</sup> *Id.* at 66.

<sup>99</sup> *Id.* at 134.

defects and hazards that required several more millions of dollars to be spent to make the buildings usable.<sup>100</sup>

Principal among its findings, however, was the need for a state office whose sole responsibility was to investigate and address problems within state government.<sup>101</sup> More specifically, the Commonwealth needed a separate state agency tasked with the duty to prevent and detect fraud, waste, and abuse in the expenditure of public tax dollars.<sup>102</sup> The functions of prevention and program review were not, at the time, traditional roles of prosecutors on the state or local levels.<sup>103</sup> As a result, the Commonwealth could not conduct comprehensive investigations into fraud or abuse in its programs, nor did it have the staff and resources available to make the type of analysis that would reveal the existence of any fraud.<sup>104</sup> Therefore, fraudulent practices such as those uncovered by the Commission could flourish unchecked, thus increasing the cost of public programs.<sup>105</sup>

Moreover, both the state auditor and prosecutors, federal, state, and local, lacked the authority and review capabilities needed for the task of detecting and preventing fraud.<sup>106</sup> First, the State Auditor could not launch a full-scale investigation into allegations of fraud in expenditures. It was limited to a review of documents within the state's own files and could only make determinations as to whether expenditures complied with the appropriate statutes, regulations, and standards and procedures of accounting and auditing.<sup>107</sup> Second, prosecutors could investigate only

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<sup>100</sup> Id. at 97-104.

<sup>101</sup> OFFICE OF THE INSPECTOR GENERAL, *supra* note 13, Creation of the OIG.

<sup>102</sup> SPECIAL COMM'N CONCERNING ST. & CTY. BLDGS., FINAL REPORT TO THE GENERAL COURT (*WARD COMM'N*) (1980), Vol. III at 86.

<sup>103</sup> Id.

<sup>104</sup> Id.

<sup>105</sup> Id.

<sup>106</sup> Id. at 87.

<sup>107</sup> Id.



specific instances of fraud and corruption and were limited by the scope of the allegations and issues in a particular case.<sup>108</sup> Further, prosecutors lacked the power and expertise in white-collar crime and political corruption to conduct wide-ranging, systemic investigations into particular projects or programs.<sup>109</sup> Third, the Attorney General's Office did not have their own investigative staff to routinely develop the evidence needed to criminally prosecute procurement fraud.<sup>110</sup> Nor did it have necessary resources devoted to making recommendations for systemic reform to reduce the recurrence of criminal activity.<sup>111</sup> Lastly, the prosecution of singular instances of procurement fraud could not deter future acts of corruption. Instead, preventing the corruption that occurred prior to the Commission required correcting the practices and procedures of state agencies on an on-going basis.<sup>112</sup>

## B. GENERAL STRUCTURE

The Ward Commission, therefore, recommended an institutional mechanism to regularly review government contracts awarded within Massachusetts.<sup>113</sup> The agency needed familiarity with the contracts awards process, including standard procedures and involved actors, and knowledge about financial transfers and corporate operations.<sup>114</sup> Modeled after the Inspector General Act of 1978, the Ward Commission suggested an office on the state level that would conduct and supervise audits and investigations relating to state programs and operations, provide leadership and coordination by recommending policies that promote economic efficiency, and detect and prevent fraud and abuse in those programs and operations.<sup>115</sup> Furthermore, the office

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<sup>108</sup> Id.

<sup>109</sup> Id.

<sup>110</sup> WARD COMM'N, Vol. III at 88.

<sup>111</sup> Id.

<sup>112</sup> Id.

<sup>113</sup> Id.

<sup>114</sup> Id. at 87, 88.

<sup>115</sup> Id. at 89.

would provide valuable guidance to the executive branch and legislature relating to problems and deficiencies in the administration of programs, viable corrective actions to those problems, and report on the progress of those solutions.<sup>116</sup>

The Commission emphasized that the success of the office would depend on the overall design of the office.<sup>117</sup> First, the office required consolidated audit and investigative functions, as well as sufficient staff and resources committed to the single responsibility of detecting fraud, waste, and abuse.<sup>118</sup> Second, the office needed the power to inspect the books, accounts, and other documents necessary audit and investigate various agencies.<sup>119</sup> Third, it also needed authorization to use legal processes when voluntary cooperation was withheld or when believed necessary to obtain evidence before it was lost, destroyed, or otherwise unavailable.<sup>120</sup> Lastly, creating an apolitical body with broad jurisdiction would support effective prosecution of fraud and corruption in all areas of state procurement.<sup>121</sup>

In addition to the goal of preventing and detecting fraud, waste, and abuse in the expenditure of public monies, a successful state inspector general's office equipped with the requisite abilities would provide added benefits to the overall function and efficiency of state government. Detecting and reducing fraud and waste in procurement would result in significantly lower costs to the government.<sup>122</sup> Additionally, firms that wished to do business with the state would have a fairer and more hospitable playing field without rampant corruption.<sup>123</sup> Lastly, the confidential nature of the office's proceedings would protect public officials, individuals, and

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<sup>116</sup> WARD COMM'N, Vol. III at 89-91.

<sup>117</sup> *Id.* at 90.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 91.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 91, 92.

<sup>122</sup> *Id.* at 90.

<sup>123</sup> *Id.* at 91.

business firms from unjust publicity or violations of privacy further promoting a fair and equitable business climate in Massachusetts.<sup>124</sup>

### C. KEY CHARACTERISTICS

As a result of the Ward Commission's findings, the Massachusetts Legislature created the first state inspector general's office in the United States.<sup>125</sup> Following most of the Commission's recommendations, the Massachusetts Office of the Inspector General is tasked with detecting and preventing fraud, waste, and abuse at all levels of government, reviewing programs and practices to identify vulnerabilities and areas for improvement, and providing guidance to public officials on public procurement and disposition of property and services.<sup>126</sup> The success of the Inspector General in fulfilling its mission depends largely on its four main characteristics: Independence, subpoena power, referral capabilities, and confidentiality.

First, the Inspector General's independence allows it to effectively investigate fraud, waste, and abuse in public agencies and programs, including those within the same branch of government. Although part of the organizational structure within the executive branch, the Inspector General may not be unilaterally removed from office by the governor.<sup>127</sup> Instead, they may only be removed for cause by a majority vote of the attorney general, state auditor, and governor.<sup>128</sup> The reasons for removal must be written and sent to the clerk of the senate, clerk of the house, and the governor, as well as be deemed a public document.<sup>129</sup> Furthermore, the Inspector General is appointed by

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<sup>124</sup> Id.

<sup>125</sup> OFFICE OF THE INSPECTOR GENERAL, History of the Massachusetts OIG: Creation of the OIG, MASS.GOV; *see also* 1980 MASS. ACTS Ch. 388.

<sup>126</sup> MASS. GEN. LAWS ch. 12A, §§ 7,8; OFFICE OF THE INSPECTOR GENERAL, Learn About the OIG: What We Do, MASS.GOV, <https://www.mass.gov/info-details/learn-about-the-oig> (last visited Nov. 10, 2020).

<sup>127</sup> *See* MASS. GEN. LAWS ch. 12A, § 2.

<sup>128</sup> MASS. GEN. LAWS ch. 12A, § 2; *see also* WARD COMM'N, Vol. III at 92. The Ward Commission recommended that the Inspector General only be removed for cause after a legislative hearing.

<sup>129</sup> Id.

majority vote of the governor and two constitutional officers whose responsibilities come closest to that of the Inspector General's Office, the attorney general and state auditor.<sup>130</sup>

To further ensure independence, the Inspector General's Office is entirely apolitical. The Inspector General is statutorily required to be appointed without regard to political affiliation.<sup>131</sup> It must instead be selected solely on the basis of integrity and ability in accounting, auditing, financial analysis, law, management, and criminal justice administration.<sup>132</sup> Further, the Inspector General has a five-year term so as not to coincide with the four year terms of the constitutional officers involved in the selection process.<sup>133</sup> Moreover, officers and employees of the Inspector General's Office are prohibited from holding or running for elected office, holding any position in a political party or committee, or campaigning for any candidate for public office while employed or for three years after leaving the office.<sup>134</sup>

Second, the Office of the Inspector General has broad authority to subpoena documents and testimony during the course of its investigations.<sup>135</sup> As the role of the office is to police the Commonwealth in all areas of state procurement, the Inspector General has access to all records in state departments and agencies, with the exception of the legislature and Department of Veteran's Services,<sup>136</sup> and the cooperation of all their officers and employees.<sup>137</sup> The office also

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<sup>130</sup> MASS. GEN. LAWS ch. 12A, § 2; WARD COMM'N, Vol. III at 92, 93. The Ward Commission recommended that, instead of the governor, the Secretary of Public Safety, being the executive branch representative responsible for law enforcement related activities, vote to appoint or remove the Inspector General. The Commission also recommended that to prevent a deadlock in the appointing process, the candidates for the position should be nominees selected by a majority vote of the deans of the seven Massachusetts law schools. The legislature opted not to include this provision.

<sup>131</sup> MASS. GEN. LAWS ch. 12A, § 2.

<sup>132</sup> *Id.*

<sup>133</sup> MASS. GEN. LAWS ch. 12A, § 2; WARD COMM'N, Vol. III at 92.

<sup>134</sup> MASS. GEN. LAWS ch. 12A, § 4.

<sup>135</sup> MASS. GEN. LAWS ch. 12A, § 15; 945 MASS. CODE REGS. § 1.06, 1.07 (2004).

<sup>136</sup> MASS. GEN. LAWS ch. 12A, § 9; MASS. GEN. LAWS ch. 66, § 18; 945 MASS. CODE REGS. § 1.05(3)(a); *see* WARD COMM'N, Vol. III at 91, 92. The Ward Commission recommended that all agencies be subject to the Inspector General's access and disagreed with the legislature exempting themselves from investigation.

<sup>137</sup> MASS. GEN. LAWS ch. 12A, § 9; 945 MASS. CODE REGS. § 1.05(3).

has access to the records and testimony of private citizens, firms, or other entities including contractors.<sup>138</sup> Moreover, the office may request the assistance of any public body in accessing records and testimony.<sup>139</sup> If information or assistance is refused or withheld by employees within a particular agency, the Inspector General can solicit the direct assistance of the agency head or secretary.<sup>140</sup> Furthermore, failure of public or private entities to create, keep, and produce records for inspection may lead to additional punishment.<sup>141</sup> In requesting this information, the Inspector General must first seek voluntary production unless doing so would interfere with its investigation.<sup>142</sup>

If the Inspector General is refused voluntary production of documents or testimony, or if doing so would interfere with its investigations, the office may issue summonses requiring such information.<sup>143</sup> Unlike criminal summonses, the Inspector General need not prove probable cause that certain behavior has occurred.<sup>144</sup> Instead, it must only show reason belief that individuals or agencies have information relevant to any matter under investigation or review.<sup>145</sup> This subpoena power not only allows the office to conduct investigations into specific allegations of fraud or abuse, but also allows it to conduct audits and reviews of public agencies that may uncover wasteful practices or otherwise undetectable instances of corruption or fraud. Without this power, the Inspector General would be hindered from performing its duties as it would have to prove its case before conducting any investigation.<sup>146</sup> Moreover, it could not perform useful audits or

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<sup>138</sup> 945 MASS. CODE REGS. § 1.05(4-5).

<sup>139</sup> 945 MASS. CODE REGS. § 1.05(3)(c).

<sup>140</sup> 945 MASS. CODE REGS. § 1.05(3)(e).

<sup>141</sup> MASS. GEN. LAWS ch. 30, § 39R; 945 MASS. CODE REGS. § 1.05(4)(d).

<sup>142</sup> 945 MASS. CODE REGS. § 1.06(1)(g); *see* MASS. GEN. LAWS ch. 12A, § 9, 15 (requiring a majority vote approval from the Inspector General Council).

<sup>143</sup> MASS. GEN. LAWS ch. 12A, § 9; 945 MASS. CODE REGS. § 1.06.

<sup>144</sup> *See* WARD COMM'N, Vol. III at 93.

<sup>145</sup> MASS. GEN. LAWS ch. 12A, § 9, 15; 945 MASS. CODE REGS. § 1.06(2)(a).

<sup>146</sup> *See* WARD COMM'N, Vol. III at 93.

reviews of agencies and would therefore fail in its duty to detect and prevent fraud, waste, and abuse. Therefore, the broad subpoena power is critical to the effective and dutiful performance of the Inspector General's responsibilities.

Third, to promote the effectiveness of the prevention of fraud and corruption, the Inspector General has the power to refer its investigative or audit findings to the appropriate prosecutorial office.<sup>147</sup> When the Inspector General has reason to believe that a person under investigation has engaged in criminal behavior, they may refer the relevant findings to the Attorney General of the Commonwealth or appropriate federal prosecutor.<sup>148</sup> Furthermore, the office may refer its findings to the State Ethics Commission or to any other federal, state, or local agency with an interest in the findings.<sup>149</sup> In addition, if a matter may lead to the recovery of public money on behalf of the Commonwealth, the Inspector General may refer the case to the Attorney General for a civil recovery action.<sup>150</sup>

Additionally, the success of the Inspector General is aided and guided by collaboration with related state departments.<sup>151</sup> The Inspector General Council serves as a consultant to the Inspector General and is available to assist the Inspector General in their audits and investigations.<sup>152</sup> The Council is comprised of the Attorney General, State Auditor, Secretary of Public Safety and Security, State Comptroller, an attorney admitted to practice within Massachusetts, a citizen with experience in business or accounting or on the faculty of a college of business or accounting, and two members of the public.<sup>153</sup> With required quarterly meetings

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<sup>147</sup> MASS. GEN. LAWS ch. 12A, § 10; 945 MASS. CODE REGS. § 1.09.

<sup>148</sup> 945 MASS. CODE REGS. § 1.09(1)(a).

<sup>149</sup> 945 MASS. CODE REGS. § 1.09(3)(a).

<sup>150</sup> 945 MASS. CODE REGS. § 1.09(2).

<sup>151</sup> *See* MASS. GEN. LAWS ch. 12A, § 3.

<sup>152</sup> *Id.*; *see also* WARD COMM'N, Vol. III at 91. The Ward Commission disagreed with the creation of the Inspector General Council as it would inject political partisanship into the offices controlling the Council.

<sup>153</sup> MASS. GEN. LAWS ch. 12A, § 3.

with and available assistance from the Inspector General Council, the Inspector General is provided with additional expertise that allows it to carry out extensive, comprehensive investigations in the expenditure of public funds.

Fourth, and finally, the statutorily required confidentiality of the Inspector General and its employees in their investigations and findings allows the office to remain independent in its duties, create a fair and equitable business environment, and encourage transparency and cooperation in the expenditure of public money.<sup>154</sup> The confidentiality of the office precludes political motivations from interfering with its duties and ensures that the office cannot be used as a mechanism for retaliation against political opponents. Additionally, the public and business entities are protected from unjust publicity, thus maintaining a fair business environment reduced of bad actors.<sup>155</sup> Moreover, confidentiality allows public agencies and businesses to cooperate with the Inspector General and commit themselves to proper and more efficient use of public money without fear of political damage or public retaliation.

#### D. LIMITATIONS

The Massachusetts Inspector General's Office largely benefits from its independence and apolitical nature in the exercise of its duties. Despite these key advantages, however, the Office's effectiveness is hindered in two ways: reliance on whistleblowers for reports of fraud and lack of final authority on investigatory findings. First, the Inspector General's Office relies upon anonymous whistleblower tips to initiate most of its investigations. Absent a whistleblower complaint, the Office is largely in the dark about instances of potential fraud or abuse. Without whistleblowers, the Office would be forced to conduct largescale audits of virtually all state funded programs. Lacking resources and funding to conduct such audits, whistleblowers are

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<sup>154</sup> MASS. GEN. LAWS ch. 12A, § 13; *see* 945 MASS. CODE REGS. § 1.14(1).

<sup>155</sup> *See* WARD COMM'N, Vol. III at 91.

essential to the operation of the Office. However, this reliance leaves the Office susceptible to vulnerabilities faced by whistleblowers, such as fear of loss of employment or confidentiality concerns, among others. In its most recent annual reports, the Office pushed for further whistleblower protections to ensure the abilities of the Office.<sup>156</sup>

Second, though the Office produces the findings of its investigations to the respective agency and in its annual report, the agency in question is not required to follow the recommendations.<sup>157</sup> Instead, the recommendations only provide the agency guidance to correct the action and methods to avoid future instances of wrongdoing. As such, it is not guaranteed the agency will take the action, though failure to do so will lead to heightened scrutiny of the agency. Moreover, it is only when there is a determination or suspicion of criminal activity that the Inspector General may report its findings to law enforcement agencies, such as the Massachusetts Attorney General or United States Attorney's Office.<sup>158</sup> Thus, misuse of state funding or poor practices found in an agency will not stop or be fixed based upon the findings of the Inspector General alone. Outside pressures and good faith are necessary for corrective actions to actually occur.

### III. TRUMP'S REMOVALS & THE IMPORTANCE OF INDEPENDENCE

#### A. INDEPENDENCE

Inspectors general are mandated to prevent and detect fraud, waste, and abuse through audits and investigations into public agencies and programs. The power of independence provides

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<sup>156</sup> See e.g. 2020 Annual Report at 54, Massachusetts Inspector General's Office, <https://www.mass.gov/doc/office-of-the-inspector-general-2020-annual-report/download>.

<sup>157</sup> See 945 MASS. CODE REGS. § 1.09.

<sup>158</sup> 945 MASS. CODE REGS. § 1.09(1). The Inspector General may also refer its findings to the Attorney General when there is belief the matter may be appropriate for a civil action to recover money for the Commonwealth.



essential accountability and transparency over government expenditures.<sup>159</sup> Tasked with investigating and reporting misconduct in the very agency or branch under which they serve, the independence of inspectors general is so critical to their duties that statutory restrictions are in place to ensure their work cannot be politically motivated, nor can they be removed for political retaliations.<sup>160</sup> Without this independence, inspectors general cannot conduct their work free from internal and external pressures which undermines their main purpose of government oversight.

## B. TRUMP'S FRIDAY NIGHT MASSACRES<sup>161</sup>

Over the course of a month in the Spring of 2020, President Trump removed five inspectors general seemingly to undermine independent oversight of his administration and to retaliate against those he believes conspired against him in the first<sup>162</sup> impeachment hearings or were otherwise disloyal.<sup>163</sup> Raising further concern, President Trump named several political appointees to the inspector general vacancies, an apparent contradiction to the apolitical mandate of their selection.<sup>164</sup>

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<sup>159</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, *Inspectors General: Independence Principles and Considerations for Reform*, (June 8, 2020), at 1.

<sup>160</sup> See 5 U.S.C. app. §§ 3(a); 8G(c); 8G(e); MASS. GEN. LAWS ch. 12A, § 2.

<sup>161</sup> See Aaron Blake, *Trump's Slow-Motion Friday Night Massacre of Inspectors General*, WASH. POST, May 18, 2020, <https://www.washingtonpost.com/politics/2020/05/16/trumps-slow-moving-friday-night-massacre-inspectors-general/>. The Trump Administration announced the removals late on Friday nights, a period of low media interaction, typically known as a Friday-night news dump. Trump's removals have been likened to the Saturday Night Massacre, where President Nixon fired the special prosecutor of the Watergate investigation.

<sup>162</sup> President Trump was impeached twice. The first time in early 2020; the second in early 2021.

<sup>163</sup> See Blake, *supra* note 169; Philip Rucker, Karen DeYoung, Lisa Rein, and Hannah Knowles, *Trump Ramps Up Retaliatory Purge with Firing of State Department Inspector General*, WASH. POST, May 16, 2020, [https://www.washingtonpost.com/politics/trump-ramps-up-retaliatory-purge-with-firing-of-state-department-inspector-general/2020/05/16/8f8b55da-979a-11ea-82b4-c8db161ff6e5\\_story.html](https://www.washingtonpost.com/politics/trump-ramps-up-retaliatory-purge-with-firing-of-state-department-inspector-general/2020/05/16/8f8b55da-979a-11ea-82b4-c8db161ff6e5_story.html); Liz Goodwin, *Trump Wages a War on Watchdogs as Coronavirus Elevates Their Importance*, BOS. GLOBE, May 7, 2020, <https://www.bostonglobe.com/2020/05/07/nation/trump-wages-war-watchdogs-coronavirus-elevates-their-importance/>.

<sup>164</sup> Liz Goodwin, BOS. GLOBE, May 7, 2020; see 5 U.S.C. app. §§ 3(a); 8G(c).

First, President Trump fired Steve Linick, Inspector General of the State Department, listing no specific reason other than that he lost confidence in Mr. Linick.<sup>165</sup> Prior to his removal, Mr. Linick's office issued a report alleging leaders in the State Department mistreated and harassed staffer for being disloyal to President Trump.<sup>166</sup> Further, Mr. Linick provided documents detailing allegations into Ukraine disinformation to the House's impeachment committee, and was allegedly investigating Secretary of State Mike Pompeo.<sup>167</sup> President Trump nominated Stephen Akard, a former aide to Vice President Mike Pence, to the vacancy.<sup>168</sup>

Second, President Trump fired the Inspector General of the Intelligence Community, Michael Atkinson, for "doing a terrible job."<sup>169</sup> Mr. Atkinson famously forwarded the Ukraine whistleblower complaint that led to President Trump's first impeachment.<sup>170</sup> Third, President Trump removed acting Inspector General of the Department of Health and Human Services Christi Grimm, after Ms. Grimm's office issued a report detailing severe shortages of equipment and procedures for coronavirus response.<sup>171</sup> Fourth, acting Inspector General of the Department of Defense, Glenn Fine, was removed shortly after being named to oversee the Trump Administration's handling of a \$2 trillion coronavirus stimulus package, with Trump citing

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<sup>165</sup> Jen Kirby, *Trump's Purge of Inspectors General, Explained*, VOX, May 28, 2020, <https://www.vox.com/2020/5/28/21265799/inspectors-general-trump-linick-atkinson>.

<sup>166</sup> Aaron Blake, *Trump's Slow-Motion Friday Night Massacre of Inspectors General*, WASH. POST, May 18, 2020.

<sup>167</sup> *Id.*; see Jen Kirby, *Trump's Purge of Inspectors General, Explained*, VOX, May 28, 2020. President Trump alleged that Secretary Pompeo urged him to fire Mr. Linick, saying "I don't know him. Never heard of him. But I was asked by . . . Mike."

<sup>168</sup> Aaron Blake, *supra* note 163.

<sup>169</sup> Mary Clare Jalonick, Kevin Freking, and Deb Riechmann, *Trump Suggests Firing Watchdog was Payback for Impeachment*, YAHOO! NEWS, Apr. 3, 2020, [https://news.yahoo.com/trump-fires-watchdog-handled-ukraine-024044168.html?ncid=facebook\\_yahoonews akfmevaatca](https://news.yahoo.com/trump-fires-watchdog-handled-ukraine-024044168.html?ncid=facebook_yahoonews akfmevaatca).

<sup>170</sup> Aaron Blake, *supra* note 163.

<sup>171</sup> *Id.*

political bias.<sup>172</sup> Fifth, President Trump replaced acting Inspector General of the Department of Transportation, Mitch Behm.<sup>173</sup>

### C. NEED FOR REFORM

Although Congress cannot block the President from removing an inspector general, it can pressure the President in providing more detailed reasons for the removal.<sup>174</sup> Tension between Presidents and inspectors general overseeing the executive branch is not new.<sup>175</sup> However, President Trump's unilateral removals without detailed explanation are unprecedented.<sup>176</sup> Such removals undermine the integrity and effectiveness of the inspectors general.

Varying only slightly in their organization and functions<sup>177</sup>, federal inspectors general and the Massachusetts Inspector General differ in one important regard: Massachusetts' Inspector General may not be removed unilaterally, instead requiring a majority vote of the Attorney General, State Auditor, and the Governor.<sup>178</sup> Thus, the executive – the governor – may not remove the Inspector General unilaterally. In contrast with the federal government, whose agency officials are governed by the Administrative Procedure Act,<sup>179</sup> Massachusetts lacks an administrative procedure act or constitutional provision that grant executive removal power over agency officials.<sup>180</sup> Accordingly, state agency officials are protected from unitary executive actions. Moreover, the Inspector General has greater freedom to act apolitically and provide

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<sup>172</sup> Id. Mr. Fine was replaced by a former White House Aide.

<sup>173</sup> Id. This removal was uncontroversial, but still troubling in the wake of the other four removals.

<sup>174</sup> Bill McCarthy, *Trump Has Pushed Out 5 Inspectors General Since April. Here's Who They Are*, POLITIFACT, May 19, 2020, <https://www.politifact.com/article/2020/may/19/trump-has-pushed-out-5-inspectors-general-april-he/>.

<sup>175</sup> Editorial Board, *Stop the Purge of Inspectors General*, BOS. GLOBE, May 18, 2020, <https://www.bostonglobe.com/2020/05/18/opinion/stop-purge-inspectors-general/>.

<sup>176</sup> Aaron Blake, *supra* note 163.

<sup>177</sup> Not accounting for the organizational and Constitutional differences between the state and federal systems.

<sup>178</sup> MASS. GEN. LAWS ch. 12A, § 2.

<sup>179</sup> See 5 U.S.C. § 551 (2012).

<sup>180</sup> *Executive Control of Agencies: State Executive Removal Power Over Agency Officials*, BALLOTPEdia, [https://ballotpedia.org/Executive\\_control\\_of\\_agencies:\\_State\\_executive\\_removal\\_power\\_over\\_agency\\_officials](https://ballotpedia.org/Executive_control_of_agencies:_State_executive_removal_power_over_agency_officials) (last accessed May 5, 2021).

objective oversights of state agencies. Such a mechanism maintains the objectivity of the removal process and significantly reduces the likelihood of removal for political reasons. Thus, the governor cannot remove the inspector general for reasons akin to President Trump's.

In response to President Trump's actions, the House introduced the Inspector General Independence Act which would allow the inspector general to be fired only for specified reasons.<sup>181</sup> This requirement, however, can be manipulated, as Congress lacks the power to block a removal.<sup>182</sup> Instead, the federal model of inspectors general could be modified to require a majority vote of the U.S. Attorney General, U.S. Auditor General, and the President. This removal method, however, likely implicates the Appointments Clause.<sup>183</sup>

Alternatively, given the independent nature of inspectors general, the Supreme Court's ruling in *Humphrey's Executor v. United States* could provide a means for Congress to insulate the removal of inspectors general from the President's will.<sup>184</sup> As with the Federal Trade Commission, the various inspectors general are intended to be impartial, apolitical, and quasi-judicial or quasi-legislative.<sup>185</sup> Holding such an officer to continue at the will of the President would thwart Congress' intention that the office be independent and nonpartisan.<sup>186</sup> Thus, another reform would be to require congressional approval by a majority vote of a specified committee for the removal

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<sup>181</sup> Danielle Haynes, *House Democrats Seek Protections for Inspectors General*, UPI, May 22, 2020, [https://www.upi.com/Top\\_News/US/2020/05/22/House-Democrats-seek-protections-for-inspectors-general/4951590167718/](https://www.upi.com/Top_News/US/2020/05/22/House-Democrats-seek-protections-for-inspectors-general/4951590167718/).

<sup>182</sup> Seemingly, the President can fire an Inspector General for a political reason and doctor a report listing one of the specified reasons.

<sup>183</sup> See U.S. CONST. art. II, § 2, cl. 2. Whether federal inspectors general are "inferior" or "principal" officers is outside the scope of this paper. Similarly, whether and how the Appointments Clause is implicated is beyond the scope of this paper.

<sup>184</sup> 295 U.S. 602, 623 (1935).

<sup>185</sup> *Id.* at 623-24 ("But if the intention of Congress that no removal should be made during the specified term except for one or more of the enumerated causes were not clear upon the face of the statute . . . it would be made clear by a consideration of the character of the [office]"). Reviewing the FTC, the Court also considered the nature of the Commission's members being "called upon to exercise the trained judgment of a body of experts 'appointed by law and informed by experience.'" *Id.* (quoting *Ill. Central R. Co. v. Interstate Commerce Comm'n*, 206 U.S. 441, 454 (1907)). The Inspector General Act of 1978 has similar requirements.

<sup>186</sup> *Humphrey's Ex'r*, 295 U.S. at 624-26.

for cause of an inspector general. Indeed, Congress may limit the President's removal power as it deems best for public interest.<sup>187</sup> A separate removal process would further insulate the inspector general from political motivations and fears and would increase the strength of its independence. Doing so would serve to increase government accountability and efficiency in the detection of fraud, waste, and abuse. A step that is necessary to restore public faith in government and promote future federal expenditures for programs that serve the people.

#### IV. CONCLUSION

Inspectors general serve to provide transparency and accountability for the aim of strengthening public trust in the government. Without checks on independence, inspectors general are doomed to fail in their mission. The federal model ought to look to the states for reform ideas, so that actions like those of President Trump do not occur in the future. Of course, state and federal systems, though similar in organization, differ functionally under the Constitution. In a vacuum, the checks on removal of the Massachusetts Inspector General could translate to federal inspectors general, further insulating them from the political will of the President. This does not account, however, for the political and constitutional limitations faced by Congress. Nevertheless, to strengthen the independence of federal inspectors general from the will of the President, legislative changes to the Inspector General Act of 1978 should focus on the appointment and removal of the respective inspectors general.<sup>188</sup> Though far from perfect, the successes of the Massachusetts Inspector General can largely be attributed to the independence of the office from the will of the Governor. The checks on removal provide the Inspector General assurance that its actions will not be motivated or affected by political considerations. Similar protections for federal inspectors

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<sup>187</sup> See *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 537 F.3d 667, 683 (2008) (quoting *United States v. Perkins*, 116 U.S. 483, 483 (1886)).

<sup>188</sup> Any such change would likely only apply to federal entity inspectors general through Congress' powers under the Sweeping Clause, as establishment inspectors general are likely subject to the Appointments Clause.

general would strengthen the effectiveness of each office and prevent similar unilateral, politically-motivated removals of inspectors general from reoccurring.