Executive Restraint:
Protecting Rights and Civil Liberties in the Field of National Security

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Concerns about the protection of rights and liberties in the face of threats to national security have come to the forefront in the years after the September 11th terrorist attacks. As external restraints provided by Congress and the courts have arguably been ineffective, scholarship has turned toward protections offered by internal checks on the executive branch. One such internal check on the various executive agencies, the inspector general (“IG”) office, has garnered increased visibility in the wake of new statutory mandates to monitor rights violations. IG offices operate at numerous executive agencies at different levels of government. They represent an effort to gain greater oversight and accountability over governmental agencies and operations, and range from municipal IGs to major executive agency IGs. These IGs are tasked with preventing fraud, waste, and wrongdoing, including investigating criminal violations.

Professor Shirin Sinnar’s article, Protecting Rights from Within? Inspectors General and National Security Oversight, explores the successes and shortcomings of five IG investigations before ultimately concluding that IGs should be modestly strengthened to combat potential violations of civil liberties made in the name of national security. Her article posits that IGs are necessary internal checks on the executive branch because Congress and the courts have abdicated their role in the national security realm. However, IGs are most likely to be successful when backed by Congressional investigations, and thus, IG investigations are actually dependent on courts and Congress not abdicating their roles.

Often, the biggest obstacle for the effective protection of civil rights and liberties in the context of national security is secrecy. Few people have the necessary clearance to know about potential rights violations. IGs have unique access to executive agencies and can help combat

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1 Shirin Sinnar, Protecting Rights from Within? Inspectors General and National Security Oversight, 65 STAN. L. REV. 1027, 1085 (2013) (“Congress frequently lacks the information or incentive to oversee executive national security actions that implicate individual rights. Meanwhile, courts often decline to review counterterrorism practices challenged as violations of constitutional rights out of concern for state secrets or institutional competence.”).


3 Sinnar, supra note 1, at 1085.

4 See generally, Patricia Salkin and Zachary Kansler, Ensuring Public Trust at the Municipal Level: Inspectors General Enter the Mix, 75 ALB. L. REV. 95, 95 (2012).

5 Sinnar, supra note 1, at 1085.

6 Id. at 1027.

7 Id. at 1044–46 (discussing IG investigations into the treatment of post-September 11 detainees and the FBI’s use of National Security Letters). The IG investigation into treatment of post-September 11 detainees resulted in changes to FBI procedures. However, discipline for correctional officers responsible for detainee abuse occurred only after the IG protested in front of Congress. Id. at 1044. The IG review of DOJ national security letters was initiated by a statutory mandate from Congress upon which reauthorization of the PATRIOT Act was conditioned. The reports generated by this IG investigation led to “numerous congressional hearings, even prompting angry criticism from members of Congress who had regularly championed stronger law enforcement powers.” Id. at 1046.
this issue. However, tasking IGs with the job of addressing secrecy concerns threatens the very relationship that gives IGs their unique access. Despite the inherent risks, two of Sinnar’s proposals to strengthen IGs—institutionalizing rights and liberties in IG roles and addressing the secrecy problem—could be taken further to capitalize on IGs as the best source of information from executive agencies.

Institutionalizing Rights and Liberties in IG Roles

Sinnar first suggests that Congress should “institutionalize the civil rights and civil liberties monitoring role of national security IGs across the board.” Currently, very few IGs are statutorily required to investigate potential rights and liberties violations. Congress, however, could require all national security agency IGs to monitor this area. The question that Sinnar does not address is whether the relationship between IGs and agencies could withstand this change. While this reform seems modest, any change in the balance between access and independence could have important consequences. The potential benefits could outweigh the costs—but the costs need to be addressed.

IG offices were initially created to address concerns of fraud, abuse, waste, and mismanagement. When an IG is investigating these topics, it is not hard to imagine an agency cooperating to some extent with the investigation. The result of such an investigation might uncover ways to make the agency more efficient with little or no downside. However, when an investigation into potential violations of rights and liberties occurs, agencies could conceivably view such investigations in a very different light. Agency leadership may legitimately believe a policy is both legal and justified, while an IG might find the opposite. While neither may be inherently correct or incorrect, saving money is one thing and challenging an agencies policy—and potentially uncovering criminal violations—is another. The former might get some agency cooperation, but the latter is unlikely to get much (which is exactly what happened, for example, with the IG investigation into the rendition of Maher Arar to Syria). Additionally, focusing on

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8 As executive branch entities, IGs are built into the agencies they monitor and given Congressional authority to investigate. They have the clearance and expertise necessary to scrutinize potential rights violations. Because they are ensconced within the agencies, inspectors general can be more sensitive than courts or Congress to nuanced forms of legal evasion. And their formal and informal features of independence can help protect their ability to scrutinize the conduct of the agencies within which they are housed. Though inspectors general have not performed uniformly, they have had beneficial effects on administrative compliance.


9 Sinnar, *supra* note 1, at 1082.

10 Originally IGs were tasked with investigating fraud, waste, and abuse. These are areas IGs are still serve an important function.

IGs might be diverting attention from other important responsibilities, including their historic mandate to investigate waste, fraud, and mismanagement in their agencies. Undoubtedly, IGs must balance their various responsibilities, including the important task of uncovering and preventing financial waste. For instance, agencies that purchase costly military and surveillance technology, such as the Defense Department, vitally need IGs to patrol contractor abuse and waste.

*Id.* at 1079.

11 This particular investigation encountered resistance from the very beginning.
rights violations also reduces an IG’s ability to investigate issues of abuse and waste. Thus, there is a strong argument for caution when it comes to modifying the institutional roles of IG offices.

Acknowledging that risk, there has been at least some success where IGs have been given the institutional role of monitoring civil rights and liberties. IGs who have investigated rights violations have rarely lost all agency access and have experienced some positive outcomes. Accordingly, it is equally worthwhile to consider an even stronger alternative to Sinnar’s proposal. For example, to ensure IG offices are staffed by people who could focus on the institutional role of protecting rights and liberties, IGs could create separate groups to focus on civil rights and liberties. Currently, for example, the CIA Office of Inspector General is split into groups focused on audits, inspections, and investigations. Congress could mandate the creation of separate groups focused exclusively on rights and liberties investigations that could further strengthen IG offices’ ability to conduct thorough investigations in this arena.

Ultimately, people tend to take their roles within an organization seriously. IG office investigators are more likely to adequately investigate potential rights violations if they believe that to be their core responsibility. Such staff members are also more likely to focus on, and dedicate significant attention to, rights and liberties if that is the entirety of their job. Explicit

Executive officials repeatedly impeded the IG investigation and the public release of information from it. In 2004, then-IG Clark Kent Ervin told Congress that government counsel had impeded his investigators’ access to documents and witnesses by citing privilege concerns associated with Arar’s lawsuit against high-level government officials. In late 2004, the IG reached an agreement with the Department of Homeland Security (“DHS”) on the privilege claims, but the IG experienced further resistance, prompting a member of Congress to write DHS to urge cooperation.

Id. at 1052.

12 According to Sinnar, investigations by the DOJ IG, for example, provided some successes.

For instance, while the two DOJ IG reviews contained thorough, reasoned analysis and demonstrated a willingness to probe the evidence and question official explanations, the DHS and DOD reviews contained incomplete and thinly analyzed accounts of agency conduct, leading some members of Congress to rebuke those IGs for lackluster performance. In addition, while the DOJ IG enjoyed broad access to agency officials and records, the DHS IG faced significant obstruction during the rendition investigation, and the CIA IG’s continued investigation of detention-related abuses triggered an agency backlash several years after the initial interrogations review.

Id. at 1040. Thus, Sinnar points to two investigations with positive outcomes and two that were less successful. The experience of the CIA IG provides a cautionary tale where it seems the IG lost considerable access due to an investigation.


14 For example, upon his appointment as NSA IG, Joel Brenner increased scrutiny on NSA data collection despite having previously served as senior counsel to the NSA and as head of U.S. counterintelligence.

When I became NSA inspector general in 2002, my office had been examining collection rules and the training program for collectors and analysts. It assumed that if the rules were compliant with law and if the training was good, the rules were being followed. I rejected that approach, and my office began to audit actual collection practices. This practice—and only this practice—can assure the public that the law is obeyed, and it should be designed into every sensitive collection program.

statutory mandates supported by active congressional involvement could lead to stronger critiques in investigation reports and, potentially, substantial reforms preventing future violations.

Addressing the Secrecy Problem

Sinnar also proposes addressing the secrecy problem, suggesting Congress could amend the Inspector General Act to require all IG reports to be made publicly available, with appropriate exceptions for properly classified information. There is at least one potential issue with this idea, as the proposal could be rendered useless if the exception were to swallow the rule. It seems likely that such a requirement would lead to overclassification of information (and increased claims of privilege). In fact, this problem has already occurred in the Arar rendition report which remains heavily redacted despite the fact that the alleged justification for the redactions—ongoing civil litigation—has ended.

Sinnar also suggests requiring that IGs notify Congress when they disagree with major classification decisions. Addressing the secrecy problem would be a step in the right direction, but it would be problematic if no benefit were realized due to increased classification, redaction, and claims of privilege. Accordingly, Sinnar’s companion proposal to require IGs to report disagreements with major classification decisions is important. To take that proposal even farther, IGs should be required to audit agencies regarding classification.

16 Sinnar, supra note 1, at 1083.
18 Sinnar, supra note 1, at 1083. This is, admittedly, a privilege concern more than one of classification, but the general proposition is essentially the same.
19 Id.
20 Goitein and Shapiro, supra note 17, at 40–42.

[ ] Audits would help ensure that the improvements contained in the December 2009 executive order are realized. For example, the order contains a requirement that classifiers refrain from classification if there is ‘significant doubt’ regarding the need to classify. In theory, this provision should change the default in cases where classifiers are uncertain about the need to classify, which could in turn lead to a substantial reduction in overclassification. In practice, however, the incentives that currently promote classification in such cases—the culture of secrecy among certain agencies, fear of sanctions for ‘underclassifying,’ and the press of business—are likely to prevail unless classifiers are held accountable for their adherence to the new rule. President Obama’s executive order also requires derivative classifiers to identify themselves on documents that they classify. This requirement will make it possible, for the first time, to hold derivative classifiers accountable for mistakes or abuses—but only if there is a system in place for assessing their performance.

Id. This proposal builds on the successes achieved by the Interagency Security Classification Appeals Panel (ISCAP).

One of the brightest spots in the sad story of the rampant overclassification of national security information is the [ICSAP]. Both government insiders with authorized access to classified information as well as members of the general public can ask the ISCAP to review the classification of information. As Steven Aftergood has proclaimed, the ISCAP ‘is among the most successful classification reform initiatives of the last half century.’
only that information from IG investigations is made public, but also that agencies could not nullify IG recommendations by merely classifying information as confidential.

In sum, Sinnar’s article is somewhat misleading. IGs are not exactly protecting rights from within the executive branch, but rather protecting rights through access to executive branch agencies, often combined with strong backing from Congress and the public. The ability to straddle the line between authority and access is a dangerous game where veering too far in either direction could have dramatic negative results. Thus, Sinnar’s modest proposals for strengthening IGs reflect prudent caution. However, more robust options should be considered. Through stronger IG offices, Congress will have greater access and more information regarding executive agencies. Absent such access and information Congress cannot act as the external check on executive power that the Constitution envisioned. Congress should ensure it has the tools to discover and investigate violations to prevent the wholesale abdication of its duty to protect rights and liberties from the creeping encroachment of national security justifications.

Sinnar concludes by stating, “IGs offer an important and underappreciated source of protection for individual rights, but an incomplete antidote to judicial or congressional inaction.”21 This is incorrect. In reality, IGs offer no protection of individual rights at all. IGs provide no remedies, they hold no wrongdoers accountable, they don’t revise agency rules, and they don’t provide relief for victims.22 Instead, IGs produce information. They use their unique access to executive agencies to provide Congress and the broader public with information on what happens when national security is on the line. It is up to Congress and the public at large to act.

Mary-Rose Papandrea, Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment, 94 B.U.L. Rev. 449, 472 (2014). Unfortunately, while ISCAP has been successful, it deals with a small number of cases.

Although the ISCAP has certainly declassified a significant percentage of the information it has reviewed, it lacks the staff to review more than several dozen requests each year. The lack of a robust staff to deal with the increasing number of appeals, larger systemic issues of overclassification . . . . To date, the ISCAP has also largely dealt with declassification requests from historians and has spent little time on more current classification issues.

Id. at 472–73.

21 Sinnar, supra note 1, at 1086.

22 Instead, IGs are limited, for the most part, to investigating and reporting.

The inability of inspectors general to enforce their recommendations further limits their oversight capacity. They can launch investigations, report findings, and propose recommendations, but it is up to Congress, the President, or agency heads to implement proposed reforms—which often is a lost cause. Although inspectors general can effectively shed light on abuses and shortcomings, they alone cannot alter agency practices and procedures.