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INSPECTION AND OVERSIGHT IN THE FEDERAL COURTS: CREATING AN OFFICE OF INSPECTOR GENERAL

DIANE M. HARTMUS*

On December 5, 1995, Senator John McCain introduced legislation to amend the Inspector General Act of 1978 and establish an Office of Inspector General (IG) in the Administrative Office (AO) of the United States Courts.¹ The bill was referred to the Committee on the Judiciary, but went no further and did not become law.² This article recommends that the AO support the creation of an Office of Inspector General in the federal courts.

This article begins with a discussion of the history of the Inspector General Act of 1978, its requirements, and looks at criticisms of the Act as well as claims of success. Turning to the federal courts, this article reviews federal court administration, and examines in detail concerns about what effect the creation of an IG would have on the separation of powers doctrine and judicial independence. Concluding that an IG need not threaten either of these concepts, the article discusses what the duties of an IG in the AO would include. Further, this article discusses the need for reorganization, noting that some of the statutorily prescribed duties of an IG are already performed by the AO. In many cases, however, the creation of an IG's office would require the development of new procedures and policies within the AO, and the article discusses what these would contain. The article looks in depth at the advantages to the AO of the creation of an office of IG. The article concludes with suggestions of specific amendments to the proposed legislation to address the appointment process for an IG in the AO, as well as limit the scope of investigational authority of the IG.

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1. S. 1446, 104th Cong. (1995).
2. *See id.*

I. HISTORY OF THE INSPECTOR GENERAL ACT OF 1978

A. *Early History*

The Inspector General Act of 1978³ created Offices of Inspector General (IG) in twelve federal agencies, joining two IG offices that were already in existence at the Department of Health, Education, and Welfare, and the Department of Energy.⁴ The Act codified an idea—and to some extent a practice—that had been around since the founding of the United States: The objective and independent inspection and oversight of an agency's activity. The Continental Congress, in one of the first resolutions it passed, established an IG, declaring it "essential to the promotion of discipline in the American Army, and to the reformation of the various abuses which prevail in the different departments."⁵ Abuses in Washington's army required IGs, but over the next hundred years or so there was little perceived need for IGs in the federal government, although the government did employ a handful of auditors.⁶ In the 1920s, Congress passed the Budget and Accounting Act⁷ and decided to separate oversight of the expenditure of funds from the accounting and auditing of accounts. Accordingly, the Bureau of the Budget (now the Office of Management and Budget) was created in the Executive Branch, and the General Accounting Office (GAO) was created as an arm of the Congress.⁸

The GAO grew enormously, employing over 14,000 people at the height of World War II.⁹ Critics of the GAO questioned whether it could practice both accounting and auditing, and members of Congress wondered whether the crushing workload of the GAO was distracting it from the broader aims of Congress.¹⁰ In 1950, Congress revised its earlier action and returned the accounting and internal audit function to the executive branch.¹¹ Today, the GAO is described as "an instrumentality of the United States Government independent of the executive departments."¹² All agencies are required to perform administrative audits of their accounts before submitting

3. 5 U.S.C. app. 3 § 3 (1994).

4. See Margaret J. Gates & Marjorie Fine Knowles, *The Inspector General Act in the Federal Government: A New Approach to Accountability*, 36 ALA. L. REV. 473, 474 (1985).

5. PAUL C. LIGHT, *MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY* 25 (1993) (quoting Fredrick C. Mosher, *Comment by Fredrick C. Mosher*, in *IMPROVING THE ACCOUNTABILITY AND PERFORMANCE OF THE GOVERNMENT* 72 (Bruce L.R. Smith & James D. Carroll eds., 1982)).

6. See *id.*

7. Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20 (repealed).

8. See LIGHT, *supra* note 5, at 27.

9. See *id.* (quoting NORMAN J. ORENSTEIN ET AL., *VITAL STATISTICS ON CONGRESS 1991-1992* (1992)).

10. See *id.* at 27-28.

11. Budgeting and Accounting Act of 1950, ch. 946, 64 Stat. 832 (repealed).

12. 31 U.S.C. § 702(a) (1994).

them to the Comptroller General, who is the head of the General Accounting Office.¹³ In agencies with Inspectors General, the audits are to be performed by the IG.¹⁴

B. First Modern Office of Inspector General

The Department of Agriculture is generally credited with creating the first modern IG office.¹⁵ Created after a scandal, in which Mr. Billie Sol Estes defrauded the Department out of enormous amounts of money,¹⁶ the Department of Agriculture IG was to perform audit and investigative services of the department and all its contractual parties.¹⁷ The IG served at the pleasure of, and reported only to, the Secretary of the Department. The incumbent in this office stressed that the office was not “interested in persecuting people or conducting inquisitions . . . we are in business to assist operating personnel . . . to protect individuals at all levels from false or incorrect accusations or incriminations in the discharge of their jobs.”¹⁸ The creators of the 1978 Act sought to maintain this same sentiment in the IG offices created by their legislation.

The Agricultural IG position was not statutorily protected, leaving it vulnerable to the whims of politicians.¹⁹ Although the IG received positive reviews from the General Accounting Office,²⁰ the Secretary of Agriculture and Nixon appointee, Earl Butz, eliminated the position in 1974, reestablishing two separate offices of audit and investigation.²¹ In 1977, the Secretary of Agriculture appointed by President Carter reestablished the position immediately upon taking office.²²

13. *See id.* § 3521(a).

14. *See id.* § 3521(e)(1). The IG may also choose to have the audit conducted by an independent external auditor. *See id.*

15. The Department of Agriculture is generally credited as first, but in 1959 Congress created a position called the “Inspector General and Comptroller” to be appointed by the Secretary of State. *See* LIGHT, *supra* note 5, at 28. In 1961, Congress made this position a presidential appointee, changed the name to “Inspector General, Foreign Assistance,” and attempted to strengthen the position, giving the position a permanent budget and the authority to suspend any project being investigated. *See id.* at 29. However, exactly what this office did remains unclear. *See id.* It was considered a failure and abolished in the 1970s. *See id.* at 30-31. It is not generally credited in the history of modern IG offices. *See id.* at 31.

16. *See* Billie Sol Estes v. Texas, 381 U.S. 532, 532 (1965).

17. *See* LIGHT, *supra* note 5, at 32.

18. *Id.* at 33 (quoting WALTER GELLHORN, WHEN AMERICANS COMPLAIN: GOVERNMENTAL GRIEVANCE PROCEDURES 121 (1966)).

19. *See* LIGHT, *supra* note 5, at 31-32.

20. *See* Gates & Knowles, *supra* note 4, at 477 (citing COMPTROLLER GENERAL OF THE UNITED STATES, REPORT TO THE CONGRESS, REVIEW OF ACTIVITIES OF THE INSPECTOR GENERAL, DEPT. OF AGRICULTURE, 95th Cong., 2d Sess. (1968)).

21. *See* Gates & Knowles, *supra* note 4, at 480.

22. *See* LIGHT, *supra* note 5, at 33, 35.

C. *Public and Congressional Concern*

Public concern about waste, fraud, and abuse in government reached a crescendo in the mid-seventies,²³ and public agencies were ineffective in identifying and eliminating such abuse.²⁴ In addition, there was a lack of uniformity and leadership among government agencies in responding. Many problems arose because investigators often reported to a variety of officials within their agencies, and were in some cases required to report to the officials responsible for the program under investigation.²⁵

Congress recognized the need for increased inspection and oversight capabilities in governmental agencies. In response to reports of cheating in the Medicare and Guaranteed Student Loan programs, an IG office was created in the Department of Health, Education, and Welfare in 1976.²⁶ This IG was to be appointed by the President with Senate confirmation, and was to report directly to Congress.²⁷ In early 1977, a bill was introduced in the House of Representatives seeking to create offices of IGs in eleven government agencies that would basically be identical to the office created in HEW a year before.²⁸

The bill sought to combine three contemporary strategies of accountability in the fight against waste, fraud, and abuse: compliance with rules, performance incentives, and improvements in governmental capacity.²⁹ In its report to the Senate on the bill, the Committee on Governmental Affairs acknowledged that the federal government had failed to make effective efforts to control waste, fraud, abuse, and mismanagement.³⁰ It attributed the failure

23. This was, of course, in part due to the Watergate scandal. Although Watergate was primarily a matter of ethics, in the minds of the public it served to create more suspicion about government in general, including suspicions about waste, fraud and abuse. *See* Gates & Knowles, *supra* note 4, at 503-04; *see also* Frederick C. Mosher et al., *Watergate: Implications for Responsible Government*, in *CLASSICS OF PUBLIC ADMINISTRATION 357* (Jay M. Shafritz & Albert C. Hyde eds., 4th ed. 1997).

24. *See* James S. Richards & William S. Fields, *The Inspector General Act: Are Its Investigative Provisions Adequate to Meet Current Needs?*, 12 *GEO. MASON L. REV.* 227, 229 (1990). In some instances employees were not required to report evidence of irregularities and many agencies had no programs for identifying fraud, waste, and abuse. *See id.* In some agencies, investigations were not allowed without the approval of the officials responsible for the programs under investigation. *See id.* (citing H.R. REP. NO. 584, 95th Cong., 1st Sess. 5-7 (1978)).

25. *See id.*

26. *See* Gates & Knowles, *supra* note 4, at 480. Interestingly, the Department of Health, Education and Welfare opposed the bill, claiming that it would "seriously hamper the Secretary's ability to manage the Department" and "would deprive the Secretary of the control necessary to guarantee 'the integrity of the Department's program funds.'" *Id.* at 485; *See also* H.R. 11347, 94th Cong. (1976); S. REP. NO. 94-1324 (1976).

27. *See* Gates & Knowles, *supra* note 4, at 481.

28. *See* H.R. 2819, 95th Cong., 1st Sess., 123 *CONG. REC.* 3172 (1977); Gates & Knowles, *supra* note 4, at 489.

29. *See* LIGHT, *supra* note 5, at 11.

30. *See* Gates & Knowles, *supra* note 4, at 499.

to “. . . deficiencies in the way executive establishments ha[d] approached their audit and investigative responsibilities.”³¹ In particular, the report noted the need to make the audit and investigative functions accountable only to the Secretary, or head, of the agency, noting the inherent conflict when the investigator and auditor are under the control of the director of the program being investigated.³²

The agencies affected by the bill uniformly testified in opposition. They strongly opposed the requirement that the IG be a presidential appointee, arguing that this politicized investigative activity, placing the audit and investigative functions above the agency’s administration.³³ Additionally, the Office of Legal Counsel at the Department of Justice (DOJ) stated that several provisions of the bill violated the doctrine of separation of powers.³⁴ Specifically, DOJ objected to the requirement that the IG report directly to Congress. DOJ noted that it “ha[d] repeatedly taken the position that continuous oversight of the functioning of Executive agencies . . . is not a proper legislative function,”³⁵ although it admitted that “numerous statutes with this defect were currently in force.”³⁶ DOJ further objected that the doctrine of separation of powers would be violated by making the IG “subject to divided and possibly inconsistent obligations to the Executive and Legislative Branch. . . .”³⁷ DOJ also expressed concern that the IG’s “unrestricted access . . . to Executive branch information, coupled with the unqualified obligation to provide that material to Congress, compromises the recognized privilege of the executive office in investigations.”³⁸

Negotiations between the White House and Congress led to a compromise in the legislation: The IG’s report was to be transmitted to Congress through the head of the agency, who could respond to the report but not change it.³⁹ DOJ did not pursue its objections based on the separation of powers doctrine,⁴⁰ and in 1978 the bill was signed into law by President

31. *Id.* (quoting S. REP. No. 1071, 95th Cong., 2d Sess. 5 (1978)).

32. *See id.* at 499.

33. *See Gates & Knowles, supra* note 4, at 491-92.

34. *See id.* at 501.

35. *Id.* (citing memorandum from Attorney General Griffen Bell to President Jimmy Carter (Feb. 24, 1977) (enclosing memorandum from John M. Harmon, Acting Assistant Attorney General, Office of Legal Counsel to Griffin Bell, Attorney General (Feb. 21, 1977)) (copy available in The University of Alabama School of Law Library)).

36. *Id.*

37. *Id.*

38. *Id.* at 501-02.

39. At the request of the White House, the bill was pulled from the floor by the Speaker of the House before a vote could be taken. *See id.* at 502. Initially the compromise included a promise to eliminate the requirement that the President report to Congress his reasons for removing an IG. *See id.* However, this provision reappeared in the final copy of the bill, which President Carter signed into law on Oct. 12, 1978. *See id.* at 503.

40. The courts have not specifically been asked to address the separation of powers issues raised by DOJ. However, the authority of IGs has been implicitly recognized in cases affirming the right of IGs to conduct audits as well as civil and criminal investigations. *See,*

Carter.⁴¹

II. THE INSPECTOR GENERAL ACT OF 1978

A. *Duties of Inspectors General*

The Inspector General Act of 1978 charges IGs with five main duties. First, they are to conduct and supervise audits and investigations relating to the programs and operations of their agency.⁴² Second, they are to review existing and proposed legislation relating to their agencies, and to make recommendations regarding the impact of such legislation on the economy and efficiency of the agency.⁴³ Third, they are to recommend policies to promote economy, efficiency and effectiveness, and to provide leadership and coordination with other federal, state and local agencies.⁴⁴ Fourth, they are to prevent and detect fraud and abuse in the programs and operations of their agencies.⁴⁵ Fifth, they are to provide a means for keeping the head of the agency and the Congress informed about problems and deficiencies in the administration of their agencies' programs and operations, as well as the necessity for, and the progress of, corrective action.⁴⁶

B. *Appointment Process*

The Act specifies that Inspectors General are to be appointed by the President 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."⁴⁷ The IG reports directly to the agency head or the second in command, and is not to report to, or be supervised by, anyone else in the agency.⁴⁸ The Act specifies that no one in the agency shall prevent the IG from carrying out, or completing, an audit or investigation.⁴⁹

e.g., Brock v. Pierce County, 476 U.S. 253 (1986) (requiring recipient of government funds to repay amount used unlawfully as discovered in an audit conducted by the IG for the Dept. of Labor); Cornelius v. Nutt, 472 U.S. 648 (1985) (upholding disciplinary action taken addressing employee misconduct that was confirmed by an investigation conducted by the IG of the General Services Administration); United States v. Westinghouse Elec. Corp., 788 F.2d 164 (3rd Cir. 1986) (recognizing right of IG to conduct criminal investigations and issue subpoenas).

41. See Pub. L. No. 95-452, 92 Stat. 1101 (codified as amended at 5 U.S.C. app. 3 §§ 1-11 (1978)).

42. See 5 U.S.C. app. 3 § 4(a)(1) (1994).

43. See *id.* § 4(a)(2).

44. See *id.* § 4(a)(3), (4).

45. See *id.* § 4(a)(4).

46. See *id.* § 4(a)(5).

47. *Id.* § 3(a).

48. See *id.*

49. See *id.*

Inspectors General so appointed may only be removed from office by the President, who must communicate the reasons for any such removal to both Houses of Congress.⁵⁰ In 1988, the Act was amended to provide for the creation of IGs in several executive “entities,” such as the Consumer Product Safety Commission, the Equal Employment Opportunity Commission, and the Federal Election Commission.⁵¹ These IGs are appointed by the head of that agency in which they serve and are supervised only by the head of the agency.⁵² If the IG is removed from office or transferred, the agency head must set forth in writing the reasons for the action to both Houses of Congress.⁵³

C. Further Requirements of the Act

The Act requires each IG to appoint an Assistant Inspector General for Auditing and an Assistant Inspector General for Investigations.⁵⁴ Combining the auditing and investigation responsibilities in the Office of the IG is one of the organizational changes mandated by the Act.⁵⁵ Another change is the requirement that the IG report directly to Congress, in semiannual reports, every significant problem, abuse, and deficiency identified during the previous six months.⁵⁶ Also, within seven days of becoming aware of “particularly serious or flagrant problems, abuses, or deficiencies,” an IG must file a report with the agency head, who then files a report with Congress.⁵⁷ Although the Act provides that the IG file these reports with the agency head, the reports are to be passed on to Congress unchanged.⁵⁸ The head of the agency may, however, send comments regarding the report directly to Congress.⁵⁹ Nevertheless, this ability to speak directly to Congress protects the independence of the IG and is a source of significant power.

The IG Act reorganizes the way information is reported in agencies as a strategy to improve the auditing and investigative functions of the agencies.⁶⁰ By locating an Assistant IG in charge of Audits and an Assistant IG in charge of Investigations in one office, the Act seeks to further interaction

50. *See id.* § 3(b).

51. *See* Pub. L. 100-504, Title I, § 104(a), 102 Stat. 2522 (codified at 5 U.S.C. app. 3 § 8G (1988)).

52. *See* 5 U.S.C. app. 3 § 8G(c), (d) (1994).

53. *See id.* § 8G(e).

54. *See id.* § 3(d)(1), (2).

55. The Act requires that auditing and investigation functions be under one manager, the IG, instead of being located in different part of an agency as was a more traditional structure. *See* Gates & Knowles, *supra* note 4, at 505.

56. *See* 5 U.S.C. app. 3 § 5(a)(1) (1994).

57. *Id.*

58. *See* Gates & Knowles, *supra* note 4, at 502.

59. Both the IG’s report and the agency head’s report must be made available to the public 60 days after filing. *See* 5 U.S.C. app. 3 § 5(c) (1994).

60. *See* Gates & Knowles, *supra* note 4, at 504.

between the two units, presumably strengthening the effectiveness of each unit.⁶¹ At the same time, the Act recognizes the uniqueness of each function by requiring that they remain in separate units.⁶² Beyond this guidance on organization the Act is silent, leaving it to each IG to decide how best to organize her office.⁶³

D. Criticisms of Current Offices of Inspectors General

A Vision Statement and Statement of Reinvention Principles adopted by the federal IGs in 1994 stresses that IGs “are not adversaries of program managers” and that they share the “common goal of improving Government programs.”⁶⁴ This is most likely a response to criticisms that IGs have focused on the “finding [of] waste, fraud and abuse” portion of their mission, to the exclusion of the “promoting efficient effective service” portion.⁶⁵ A standard of evaluation that rates IGs on the number of “mistakes” they find has contributed to this problem and too often resulted in the development of adversarial relationships with agency managers.⁶⁶ In his information gathering for the National Performance Review (NPR),⁶⁷ Vice President Al Gore noted that “federal employees complain[ed] that the IGs’ basic approach inhibits innovation and risk taking. . . . [T]he IG’[s] watchfulness [is] compelling employees to follow every rule, document every decision, and fill out every form. . . .”⁶⁸ often stanching any efforts to do things better, which may involve breaking the rules.⁶⁹ As a result, the NPR recommended that the focus of IGs be broadened to improve systems, preventing waste, fraud, and abuse rather than merely identifying them. The NPR noted that this was part of the IGs’ original mandate, and that no new legislation need be passed to make this happen.⁷⁰ The report encouraged IGs to collaborate with agency managers and suggested that criteria be established for judging IG perform-

61. *See id.* at 505.

62. *See id.*

63. A brief example of one IG’s organizational chart may be found at the home page of the Office of the Inspector General of the Peace Corps (visited Feb. 1999) <<http://www.peacecorps.gov/about/oig.html>>. A list of IG home pages may be found at <<http://web.jjay.cuny.edu/~pub-mgt/intranet.html>> (visited Feb. 1999).

64. *IG Vision Statement and Statement of Reinvention Principles* (visited Mar. 9, 1999) <<http://www.ignet.gov/ignet/internal/manual/vision.html>>.

65. *See* AL GORE, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS 31-32 (1993).

66. *See id.* at 32.

67. The NPR is President Clinton’s initiative to “reinvent” government. Begun on March 3, 1993, when President Clinton asked Vice President Gore to lead an effort to “review” the workings of the federal government, the initiative has resulted in thousands of recommendations and produced numerous reports. *See generally* GORE, *supra* note 65.

68. GORE, *supra* note 65, at 32.

69. *See id.*

70. *See id.*

ance, beyond counting the number of “mistakes” found.⁷¹

There are also concerns with the limited law enforcement authority granted to IGs under the Act.⁷² While the Act grants IGs the authority to conduct criminal investigations, it does not authorize them to carry firearms, make arrests, or serve warrants.⁷³ These are authorities routinely granted to criminal investigators in the executive branch.⁷⁴ This lack of authority puts at risk those IGs who may be called upon to enter high-crime areas, identify themselves as federal agents, and attempt to gather information.⁷⁵ As a result, over half of all the criminal investigators employed in offices of IGs have sought some type of law enforcement authority derived from sources outside the Act.⁷⁶ This has led to confusion, administrative red tape, and increased costs.⁷⁷ This problem could be addressed by a statute that grants IGs the authority to carry firearms, make arrests, and serve process, including search warrants, under guidelines established by the Attorney General.⁷⁸

E. Successes

Despite these concerns, the IG concept has proven to be quite successful. By 1989 there were twenty-seven presidentially appointed IGs, and thirty-four nonpresidentially appointed IGs.⁷⁹ Today, there are over 15,000

71. *See id.*

72. *See Richards & Fields, supra* note 24, at 232-33.

73. *See id.* at 233.

74. In fact, IGs are trained at the Federal Law Enforcement Training Center with investigators from other federal law enforcement agencies, such as the Federal Bureau of Investigations, the United States Secret Service, and the Drug Enforcement Agency. *See id.* at 233.

75. *See id.* at 234.

76. For instance, criminal investigators may seek to obtain “special deputations” from the Department of Justice, which involves a multi-step approval process taking three to four months to complete. *See id.* at 238. IGs may also seek a delegation of authority from their agency heads pursuant to section 9(a)(2) of the Act, which provides that the agency head may transfer to the IG “. . . other. . . functions, powers or duties, . . . properly related to the functions of the Office.” *See* 5 U.S.C.A. app. 3 § 9(a)(2) (1994). This approach, which has no foundation in case law, jeopardizes investigations and raises issues of liability. *See Richards & Fields, supra* note 24, at 239-40.

77. *See Richards & Fields, supra* note 24, at 237.

78. *See id.* at 240.

79. In 1989, presidentially-appointed IGs existed in the Departments of Agriculture, Commerce, Housing and Urban Development, Interior, Labor, Transportation, Education, State, Defense, Justice, Treasury, the Community Services Administration, the Environmental Protection Agency, the General Services Administration, the National Aeronautics Administration, the Veterans Administration, the United States Synfuels Corporation, the Agency for International Development, the Railroad Retirement Board, the United States Information Agency, the Arms Control and Disarmament Agency, the Federal Emergency Management Administration, the Nuclear Regulatory Commission, the Office of Personnel Management, the Resolution Trust Company, and the Central Intelligence Agency. *See* LIGHT, *supra* note 5, at 26. Nonpresidentially appointed IGs existed at Action, Amtrak, the Appalachian Regional Commission, the Board of Governors of the Federal Reserve System, the Board for International Broadcasting, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Corporation for Public Broadcasting, the Equal Employment Oppor-

employees in the offices of federal IGs.⁸⁰ Although measurements of total money saved or money put to better use by IGs vary widely, it is safe to say that IG audits and investigations have revealed instances of waste, fraud, and abuse in federal agencies that collectively now total in the billions of dollars.⁸¹ In a recent report to Congress, the Office of the IG for the Department of Health and Human Services (HHS) reported that in the twenty years since its inception, its work has resulted in savings of more than \$80 billion to the federal government. For fiscal year 1996, it reported savings of \$4.7 billion, "comprised of \$4,184.9 billion in implemented recommendations to put funds to better use, \$274.6 million in disallowances from questioned costs, and \$237.4 million from investigative receivables."⁸² As a further example of recent success, on March 27, 1997, the HHS IG reported uncovering a Medicare fraud scheme perpetrated by a mental health care executive in the amount of \$2.5 million.⁸³

tunity Commission, the Farm Credit Administration, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Election Commission, the Federal Home Loan Bank Board, the Federal Labor Relations Authority, the Federal Maritime Commission, the Federal Trade Commission, the Government Printing Office, the Interstate Commerce Commission, the Legal Service Corporation, the National Archives and Records Administration, the National Credit Union Administration, the National Endowment for the Arts, the National Endowment for the Humanities, the National Labor Relations Board, the National Science Foundation, the Panama Canal Commission, the Peace Corps, the Pension Benefit Guaranty Corporation, the Securities and Exchange Commission, the Smithsonian Institution, the Tennessee Valley Authority, the United States International Trade Commission, and the United States Postal Service. *See id.*

80. *See* GORE, *supra* note 65, at 31.

81. *See* Richards & Fields, *supra* note 24, at 227-28.

82. *See* DEPARTMENT OF HEALTH AND HUMAN SERVICES OFFICE OF INSPECTOR GENERAL, SEMIANNUAL REPORT FOR PERIOD ENDING SEPT. 30, 1996 (visited Mar. 6, 1999) <<http://www.dhhs.gov/progorg/oig/semann/index.html>>.

83. *See* DEPARTMENT OF HEALTH AND HUMAN SERVICES OFFICE OF INSPECTOR GENERAL MEDIA ADVISORY, *Mental Health Care Executive Pled Guilty in Medicare Fraud Scheme* (Mar. 27, 1997) (visited Mar. 6, 1999) <<http://www.dhhs.gov/progorg/iog/medadv/mandersn/html>>.

III. INSPECTORS GENERAL IN THE COURTS⁸⁴

A. *Federal Court Administration*

Administration of the federal courts is unique. Unlike any executive agency, the administrative structure of the federal courts is highly decentralized. The federal court system is comprised of independent judges who are governed largely by agreement and consensus with very little hierarchical structure.⁸⁵ Each of the ninety-four district courts and thirteen circuit courts of appeals is allowed considerable latitude in implementing national policy guidance.⁸⁶ Decisions regarding most administrative functions in the courts are the responsibility of the local courts. This has been particularly true in the areas of budget, information resource management, and personnel.⁸⁷ Under the guidance of the chief judge (who is the senior incumbent and serves a maximum of seven years),⁸⁸ court executives, clerks of court, and their staffs perform day-to-day administrative functions such as management of cases, finances, space and facilities, and personnel systems.

The principal policymaking body of the federal judiciary—the Judicial

84. This paper discusses the creation of an OIG in the federal court system. However, an informal search for court systems having Inspectors General, conducted with the assistance of the National Center for State Courts, turned up only two examples: the Unified Court System of the State of New York and the court system for the State of Florida. Created by an order of the Chief Judge of the State of New York in 1982, the Inspector General of the Unified Court System has oversight over the court system's 12,700 nonjudicial employees. The New York IG handles cases involving complaints against court employees, conducts all background investigations of prospective employees, and investigates or studies the "affairs, functions, accounts, methods, personnel or efficiency" of any court in the system. See order creating the position of Inspector General of the Unified Court System in the State of New York, Sec. 2. (A undated, unsigned, copy of the order creating the New York position, received from the Inspector General's office, is on file with the author.) The order creating the position does not specify any appointment process, and the current IG, who was selected by the Chief Judge and the Chief Administrative Judge of the State of New York, has held the position since its creation. See Martin Fox, *Courts' Inspector General-Tough, But Fair, in His Work*, NEW YORK L.J., Mar. 16, 1989, at 1. Notably, the New York IG does not have jurisdiction over complaints against judges and cannot investigate judges. Telephone interview with William Gallagher, Inspector General of the Unified Court System of the State of New York (Feb. 24, 1997). Any complaints about judges he receives are referred to the State Commission on Judicial Conduct. See *id.* In fact, a proposal to create an office of Judicial Inspector General, with the power to investigate complaints against judges and file formal charges was defeated in the New York State Senate in 1991. See Gary Spencer, *Judicial Conduct Commission Reform Bill Gains Momentum*, NEW YORK L.J., May 23, 1991, at 1. The Florida IG is charged with "providing a central point for coordination and responsibility for activities that promote accountability, integrity, and efficiency in government." FLA. STAT. ch. 20.055 (2) (1997). The IG is appointed by the Chief Justice of the State Supreme Court and may be removed from office only by the Chief Justice. See FLA. STAT. ch. 20.055 (3)(a), (c) (1997).

85. See William Lucianovic, *Strategic Planning in the Judicial Branch*, 25 THE PUBLIC MANAGER 23 (Fall 1996).

86. See *id.*

87. See *id.* at 24.

88. See 28 U.S.C. § 136 (3)(a) (1994).

Conference of the United States—oversees an extensive network of committees and is composed of twenty-seven judges and the Chief Justice of the United States. In 1938, Congress created the Administrative Office of the United States Courts (AO) to provide a wide range of administrative, legal, and program support services to the federal courts.⁸⁹ The director of the AO is charged with carrying out the decisions of the Judicial Conference⁹⁰ and directing an agency with approximately 900 employees and a budget of \$44 million, which in turn provides administrative support to a judiciary with a budget of \$2.7 billion and over 27,000 employees.⁹¹

B. Relationship Between the Judicial and Legislative Branches

The creation of an office of an IG in the AO revisits the delicate issue of the relationship between the legislative and judicial branches. The exact location of the line between judicial independence and congressional oversight of the judiciary has never been firmly established. Tension between the branches over the administrative operations of the judiciary is ongoing.⁹² The creation of an IG who reports directly to Congress raises questions involving the separation of powers doctrine and the effect such an office might have on judicial independence.

1. Separation of Powers

Critics of the creation of an office of IG in the federal courts will argue that it violates the “separateness but interdependence, autonomy but reciprocity” that the Supreme Court has identified as being the essence of the separation of powers doctrine.⁹³ Neither history nor the Constitution supports this assertion. There are no well-accepted arguments supporting the proposition that the judiciary has, or should have, as a branch, the level of independence in its administration that individual judges have in their judicial decisionmaking.⁹⁴

In 1939, Congress removed the Department of Justice’s administrative authority over the federal courts and created the AO, effectively removing

89. See UNITED STATES GENERAL ACCOUNTING OFFICE, GAO/GGD-96-114 THE FEDERAL JUDICIARY: REVIEWS OF COURT OPERATIONS SHOULD ADHERE TO OVERSIGHT STANDARDS: REPORT TO THE RANKING MINORITY MEMBER SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT AND THE DISTRICT OF COLUMBIA, COMMITTEE ON GOVERNMENTAL AFFAIRS 1-2 (1996) [hereinafter GAO REPORT ON COURT OVERSIGHT STANDARDS].

90. See 28 U.S.C. § 604 (1994).

91. See 141 CONG. REC. S18016-03 (Dec. 5, 1995) (statement of Senator McCain).

92. See *infra* Part V.A.

93. See *Loving v. United States*, 517 U.S. 748, 757 (1996).

94. See Gordon Bermant & Russell R. Wheeler, *Federal Judges and the Judicial Branch: Their Independence and Accountability*, 46 MERCER L. REV. 835, 845 (1995).

the executive branch from the day-to-day affairs of the judiciary.⁹⁵ In so doing, Congress placed the responsibility for the day-to-day administrative authority over the courts in the hands of the courts themselves. However, in the creation of the AO, Congress did not renounce its responsibility for the authorization, appropriation, and oversight of the federal courts.⁹⁶ The Constitution grants Article III judges the protections of tenure during good behavior and a salary that cannot be diminished.⁹⁷ However, as Chief Justice Rehnquist recently noted, the “federal courts are heavily dependent upon Congress for virtually every other aspect of their being.”⁹⁸ Congress’ responsibilities include authorizing every judgeship in the federal system,⁹⁹ establishing the level of judicial compensation,¹⁰⁰ determining the jurisdiction of the federal court,¹⁰¹ establishing the substantive law and procedure applied in federal courts,¹⁰² and appropriating the funds for the judiciary’s budget.¹⁰³ In creating the AO, Congress retained the ability to make changes in the way the AO operates. In fact, in 1990, Congress changed the process for appointing the Director of the AO, transferring the responsibility from the Supreme Court to the Chief Justice in consultation with the Judicial Conference

95. *See id.*

96. *See id.*

97. *See* U.S. CONST. art. III, § 1.

98. William H. Rehnquist, *1994 Year-End Report on the Federal Judiciary*, reprinted in 18 AM. J. TRIAL ADVOCACY 499, 499 (1995).

99. Congress last created new federal judgeships in 1990. *See* Judicial Improvements Act of 1990, Pub. L. 101-650, 104 Stat. 5089 (1990). The Judicial Conference has submitted to the 105th Congress a request to create new judgeships at the appellate, district and bankruptcy levels. The request was denied. *See* *Judicial Conference Meets, Seeks New Judgeships for Growing Workload*, THE THIRD BRANCH, Apr. 1997 (visited Mar. 3, 1999) <<http://www.uscourts.gov/ttb/apr97ttb/396jc.htm>>; *see also* THE THIRD BRANCH, Dec. 1998 (visited Mar. 3, 1999) <<http://www.uscourts.gov/ttb/dec98ttb/december1998.html>>.

100. Legislation seeking a pay increase for federal judges was submitted in both the House and the Senate of the 105th Congress. *See* H.R. 875, 105th Cong. (1997); *see also* S. 394, 105th Cong. (1997). In addition, the legislation sought to repeal section 140 of P.L. 97-92, which requires that Congress affirmatively vote for cost-of-living increases for federal judges. The legislation was defeated. *See* *Committee Addresses Crisis in Federal Pay*, THE THIRD BRANCH, Feb. 1999 (visited Mar. 3, 1999) <<http://www.uscourts.gov/ttb/feb99ttb/february1999.html>>.

101. Federal question jurisdiction was not conferred upon the federal courts by Congress until 1875. *See* L. Ralph Mecham, *Introduction to Mercer Law Review Symposium on Federal Judicial Independence*, 46 MERCER L. REV. 637, 640 (1995).

102. Congress has the authority to regulate the Rules of Procedure used in federal courts. In the Rules Enabling Act of 1934, Congress delegated a portion of that authority to the judiciary, reserving for itself the right to reject, enact, amend, or defer any rules. *See* Rehnquist, *supra* note 98, at 499, 500; Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1658 (1995).

103. During the budget crisis of 1996, the Chief Justice requested that Congress pass a separate appropriation funding the judiciary in full while negotiations continued on the rest of the budget. *See* Patrick E. Longan, *Faces of Washington: The Budget Crises and The Courts*, 43 FED. LAW. 27 (May 1996). On January 6, 1996, the President signed P.L. 104-91 funding the judiciary at an increase of 5.1% over the budget for fiscal year 1995. *See* *Judiciary Secures FY 96 Funding*, THE THIRD BRANCH, Jan. 1996, at 1, 10.

of the United States.¹⁰⁴ Provided that the suggestions regarding appointment, discussed below, are implemented, the creation of an IG in the AO does not violate the separation of powers doctrine between the legislature and the judiciary and is an appropriate exercise of legislative oversight.¹⁰⁵

2. *Judicial Independence*

The separation of powers doctrine is only one of the requirements for an unbiased judiciary. Equally important is the requirement of judicial independence.¹⁰⁶ Some may argue that the mere presence of an IG, with unfettered investigatory powers, would be chilling to judicial independence. The judiciary in this country is founded upon the belief that judges must remain free from outside pressure, political or otherwise, in rendering decisions in the cases before them.¹⁰⁷ The presence of an IG, ready to investigate a judge's every move, could pose a threat to judicial independence.

The solution lies in not granting IGs the power to investigate a judge's "every move." Specifically, a judge's judicial decisionmaking should not be exposed to the threat of investigation, by an IG or anyone else. Legislation creating the office of IG must clearly assert that the IG is not to investigate the process or substance of judicial decisionmaking.¹⁰⁸ Complaints of judicial misconduct should continue to be handled according to the dictates of 28 U.S.C. section 372.¹⁰⁹ Of course, investigations into waste, fraud, and abuse in the courts may indirectly affect the working environment of judges. However, protection from direct investigation provides the element of assurance needed to protect judicial independence.

IV. DUTIES OF AN INSPECTOR GENERAL IN THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

In many cases, the creation of an office of IG would require reorganiza-

104. Pub. L. 101-650, Title III, § 307, 104 Stat. 5112 (1990) (codified as amended at 28 U.S.C. § 601 (1994)).

105. Assuming that the IG is appointed by the Chief Justice, *see* discussion *infra* Part VI.B.1.

106. Bermant and Wheeler distinguish between "decisional independence" the ability of a judge to make a legal decision unfettered by the threat of coercion, and "administrative" or "branch" independence, the ability of the judiciary to administer itself according to systems it establishes. *See* Bermant & Wheeler, *supra* note 94, at 838. It is generally believed that while Constitutional protections exist to protect "decisional independence," they do not exist for "administrative" independence. *See id.*

107. *See* Bermant & Wheeler, *supra* note 94, at 839.

108. Although the bill does not clearly state this, in his statement introducing his legislation to Congress, Senator McCain stressed that he wanted "to make clear that the inspector general at the AO would have no authority to review and report on matters involving the Federal courts' judicial decisions. Jurisdiction would be limited strictly to the administrative functions performed by the AO." 141 CONG. REC. S18016-03 (Dec. 5, 1995).

109. *See infra* Part VI.B.2.

tion of AO departments to bring existing functions under the control of the IG. The AO already performs, with varying levels of success, certain duties prescribed by the 1978 Act. The creation of an IG would strengthen these functions by requiring that they be performed in accordance with generally accepted government standards.

A. *Auditing and Program Reviews*

Among its duties, the AO conducts financial audits and “program reviews.”¹¹⁰ The manner in which this is done has changed significantly after the responsibility for court audits and disbursement of judicial funds was transferred to the AO from the Department of Justice in 1975.¹¹¹ From 1975 to 1985, the AO had an audit department that performed routine cyclical financial audits and management reviews of the courts at the same time.¹¹² In 1985, the Director of the AO began to receive comments from judges that the AO’s “management review process should be more sensitive to matters that were exclusively the concern of the courts.”¹¹³ In the same year, the AO separated the financial audit function from the program review function, placing them on different review cycles.¹¹⁴

In 1988, the AO reorganized, discontinuing the Office of Audit and Review and creating an Office of Audit to conduct only court financial reviews.¹¹⁵ The work of program reviews was delegated to individual program units within the AO, and an Office of Program Assessment (OPA) was created to oversee and coordinate the individual program units’ efforts at review and to carry out “special reviews and investigations.”¹¹⁶

In 1996, Senator Carl Levin requested that the General Accounting Office (GAO) review the internal oversight of administrative operations within the federal judiciary, including examining how the AO assessed the efficiency of local court operations and promoted the use of efficient administrative practices within the judiciary.¹¹⁷ The report found that, although the AO was following generally accepted government auditing standards in its financial audits, its OPA lacked structure and clear standards for conducting nonfinancial reviews.¹¹⁸ Specifically, the report found that program reviews did not usually result in written reports, the results of the reviews were not generally distributed to all affected parties, and in those areas where reports were prepared and recommendations were made, follow-up on recommen-

110. GAO REPORT ON COURT OVERSIGHT STANDARDS, *supra* note 89, at 3.

111. *See id.*

112. *See id.* at 2.

113. *Id.*

114. *See id.*

115. *See id.*

116. *See id.*

117. *See id.*

118. *See id.* at 4.

dations was inconsistent.¹¹⁹ Some of the statistics were grim. Of the 376 reviews the GAO examined, “244 of the reviews . . . either did not result in written reports, were erroneous entries, had reports that the AO could not locate, were duplicate entries in OPA’s data, were never completed, or had reports that were still in draft form.”¹²⁰

The GAO reported that in November of 1995 (only weeks before the introduction of Senator McCain’s bill), the OPA had issued written standards for conducting program assessments.¹²¹ With two significant exceptions, the GAO confirmed that these standards tracked generally accepted government auditing standards.¹²² The exceptions were that the new standards did not require that program assessors be independent of the unit they were assessing, or that assessment reports be distributed to all officials who could act on the findings and recommendations, and thus the GAO recommended that the standards be amended.¹²³ In a written response to the GAO report, the AO stated that it agreed with the report’s recommendations and intended to adopt them without reservation.¹²⁴ Because IGs are legislatively mandated to comply with standards established by the Comptroller General for the auditing of federal agencies,¹²⁵ the creation of an IG in the AO would assure that the recommendations were carried out and maintained in the future.

B. *Review of Existing and Proposed Legislation*

In 1976, the AO created an Office of Legislative Affairs (OLA) to perform liaison activities with Congress, other governmental entities, and private sector organizations.¹²⁶ Among its stated functions are the preparation of responses to legislative or policy inquiries from Congress, the monitoring of congressional activity that will have a major impact upon the judiciary, and the establishment and promotion of “. . . better lines of communication between the federal judiciary, the Congress, the executive branch, state governments [and] bar associations. . . .”¹²⁷

The OLA also is tasked with preparing Judicial Impact Statements analyzing the effects of legislative and executive branch proposals, and legislation on the resources and operations of the federal judiciary.¹²⁸ OLA esti-

119. *See id.*

120. *See id.* at 6.

121. *See id.* at 7.

122. *See id.*

123. *See id.* at 15.

124. *See id.* at 22.

125. *See* 5 U.S.C. app. 3 § 4(b)(1)(A).

126. Telephone interview with Arthur White, Deputy Director of the Office of Legislative Affairs (June 30, 1997).

127. Memorandum describing the mission and functions of the OLA, provided by the OLA of the AO (on file with the author).

128. *See id.* The ability of the AO to correctly predict the impact of proposed legislation

mates that it tracked approximately 1500 bills during the 104th Congress, and is currently tracking 849 bills in the 105th Congress.¹²⁹ These include not only bills that refer directly to the federal courts, but any bill that would affect the federal courts in any way, including new criminal or civil statutes that would increase the courts' workload.

Although no formal records are kept, official exchanges between Congress and the judiciary have increased over the last ten years.¹³⁰ Clearly, the AO recognizes the need for continued liaison and outreach with Congress. Because the Inspector General Act of 1978 imposes on the IG the duty of reviewing proposed legislation¹³¹ and maintaining coordination with other federal agencies,¹³² the work currently being done by the OLA in the AO need not change, but only be relocated.

C. *The Promotion of Efficiency and Effectiveness*

In its report to Senator Levin on oversight standards, the GAO also noted efforts the courts are making to promote more efficient practices.¹³³ The report mentioned the establishment of an Economy Subcommittee within the Judicial Conference's Budget Committee, which is charged with reviewing the judiciary's budget submission and initiating and pursuing studies about "ways to economize while continuing to provide a consistently high quality of justice."¹³⁴ And finally, to act as an "honest broker" of ideas relative to economy and efficiency.¹³⁵ As the GAO acknowledged, the changes proposed by OPA represent not only a significant improvement but also a significant change in the way oversight has been conducted in the courts.¹³⁶

Early in 1996, the AO published a report detailing its many efforts to improve the efficiency of the court system, including reviews to help courts make efficient and effective use of technology and the development of handbooks, training manuals and other guides for use by the courts that identify efficient practices, and investigations of allegations of fraud, waste, loss, or

is questionable. The AO estimated that Congress's decision in 1992 to federalize child support obligations would result in an estimated 500 additional cases per year; however, as of 1995, there had not been a single felony conviction for this offense. See Orrin G. Hatch, *Congress and the Courts: Establishing a Constructive Dialogue*, 46 MERCER L. REV. 661, 666 (1995).

129. See Memorandum from Desiree L. Watkins to Arthur White (July 2, 1997) (on file with the author).

130. See Deanell Reece Tacha, *Judges and Legislators: Enhancing the Relationship*, 44 AM. U. L. REV. 1537, 1546 (1995).

131. See 5 U.S.C. app. 3 § 4(a)(2) (1994).

132. See 5 U.S.C. app. 3 § 4(a)(4) (1994).

133. See GAO REPORT ON COURT OVERSIGHT STANDARDS, *supra* note 89, at 11.

134. See *id.*

135. See *id.*

136. See *id.*

abuse.¹³⁷ The AO has also begun review of the work measurement methodology used for court staffing purposes to determine how greater efficiencies might be incorporated into the methodology.¹³⁸

The AO exhibits a growing recognition of the importance of program reviews, economy, efficiency, and outreach. Coordinating these functions in one office, while continuing to maintain an independent section for auditing, as outlined in the Inspector General's Act, could be a useful tool for the AO. It would serve not only in promoting these efforts, but also in providing a visible response to the prevention and detection of fraud and abuse.

D. Prevention and Detection of Fraud and Abuse

The prevention and detection of fraud and abuse in the courts is highly dependent on the information obtained from financial audits. However, fraud and abuse are not limited to financial wrongdoings, and may include incompetent or inadequate employee performance, problems with alcohol or drug abuse on the job, employees engaging in activities that fall outside of the defined duties of their job, or even criminal activity by a court employee. Complaints of employee misconduct¹³⁹ clearly fall under the category of prevention and detection of fraud and abuse. However, at present, the AO has no established procedure for handling complaints made by users of the courts regarding the actions or conduct of an employee of the courts.¹⁴⁰ An inquiry to the AO Office of General Counsel confirmed that there are no procedures for receiving or investigating complaints about court or AO employees.¹⁴¹ It was suggested that an individual court, or the clerk of the court, might have informal procedures for handling such complaints, but they would not be uniform to all courts. Moreover, there are no regulations pertaining to any investigation requirements and no central records kept of such complaints.¹⁴² Short of filing a lawsuit, a user of the court has no assistance, or even guidance, on how to register a formal complaint against a court employee.¹⁴³ Nor does the user have any guarantee that a complaint will ever be

137. *See id.* at 23.

138. *See id.*

139. As used in this section, employee misconduct refers to misconduct by employees of the courts other than judges. Complaints of judicial misconduct are handled according to 28 U.S.C. § 372 and are discussed *infra* notes 160-67 and accompanying text. Employee misconduct would also include complaints against employees of the AO.

140. Telephone Interview with Susan Katan, Assistant General Counsel, Office of General Counsel, Administrative Office of the United States Courts (June 30, 1997). The AO does have an Equal Employment Opportunity office that presumably would become involved in a complaint raising issues of race, gender, or other illegal discrimination.

141. Complaints alleging financial misconduct would presumably be referred to the Audit Department of the AO, although again, there is no regulation that requires this. *See id.*

142. *See id.*

143. Lawsuits filed against court employees, including judges, are handled by the AO Office of General Counsel. *See id.*

investigated. Similarly, there is no procedure for receiving and investigating complaints made by a court employee about waste, fraud, or abuse, much less any procedure to protect the identity of the employee.

Obviously, this system, or the lack thereof, needs review. The IG Act specifically permits IGs to receive and investigate complaints made by employees and requires that the identity of the employee not be disclosed.¹⁴⁴ One of the initial tasks of an IG should be to establish uniform procedures to be used in all federal courts for the filing of complaints against court employees, and investigation procedures that must be followed for each complaint. This is an area where the creation of an IG in the AO would result in the establishment of formal procedures and policies that would clearly strengthen the oversight capacity of the federal courts over their own operations.

E. Communication of Problems and Deficiencies to Congress and the Director

Congress currently learns about the activities of the AO from a statutorily required annual report. The statute requires that the Director of the AO submit to Congress a report¹⁴⁵ “of the activities of the Administrative Office and the state of the business of the courts. . . .”¹⁴⁶ This report must be accompanied by statistical data on the business of the courts.¹⁴⁷ The statute does not enumerate the data required, and nowhere is the Director specifically mandated to detail problems and deficiencies in the administration of the courts or plans for corrective action, as required in the reports filed by an IG.¹⁴⁸

In addition to this annual report, the Director may from time to time testify before Congress on issues of immediate concern, including budget requests.¹⁴⁹ Individual judges, acting as representatives of the Judicial Conference, also testify before Congress, frequently on pending legislation, the passage of which would directly affect the federal courts.¹⁵⁰

144. See 5 U.S.C. app. 3 § 7(a), (b) (1994).

145. See 28 U.S.C. § 604(a)(4) (1994).

146. *Id.* § 604(a)(3).

147. See *id.* § 604 (a)(2).

148. Although it could be argued that reporting on the “business of the courts” includes reporting on problems and deficiencies, the statute is simply not that specific, and thus arguably, problems need not be detailed. See *id.*

149. In November of 1995, AO Director Leonidas Ralph Mecham testified before the Senate Environmental and Public Works’ Subcommittee on Transportation and Infrastructure on the issue of courthouse construction. See *Senate Committees Review Courthouse Construction Program*, THE THIRD BRANCH, Dec. 1995 (visited Mar. 3, 1999) <<http://www.uscourts.gov/ttb/decttb/cowen.htm>>. In April of 1996, Director Mecham testified before Congress on the Administrative Office’s portion of the judiciary’s budget request for fiscal year 1997. See *Judiciary Presents FY 97 Funding Request*, THE THIRD BRANCH, May 1996, at 1-3.

150. Chief Justice Henry A. Politz of the Fifth Circuit Court of Appeals and Judge Ann Claire Williams of the Northern District of Illinois testified before Congress on May 14, 1997,

Clearly, in many cases, the creation of an IG would require only a reorganization of departments that already perform aspects of the statutorily prescribed IG duties. In other cases, the creation of an IG office offers the opportunity to create policies and procedures for addressing areas of oversight that remain unexamined by the AO. While this will no doubt require that the AO learn new skills, such efforts will not only strengthen the inspection and oversight capacity of the AO, but will also assist the judiciary in its outreach efforts to Congress and the public.

V. BENEFITS OF ESTABLISHING AN OFFICE OF INSPECTOR GENERAL IN THE COURTS

Neither the AO nor the Judicial Conference supported Senator McCain's bill.¹⁵¹ Presumably this lack of support signifies, at best, a wariness for the creation of an IG in the AO. However, this wariness is misplaced. Although the establishment of an office of IG would require that Congress be informed of problems and deficiencies in the administration of the judiciary as well as the progress of corrective actions, there is significant benefit to the judiciary from the creation of such an office. Providing information to Congress on problems in the administration of the judiciary in a predictable, timely fashion may not only assure that such problems and deficiencies are indeed handled properly, it may also serve to mitigate congressional inquiries into the administrative workings of the judiciary.¹⁵²

A. Congressional Scrutiny

Senator McCain's bill is the latest in a series of events that signal Congress' increasing concern with the administrative affairs of the federal judi-

regarding the impact H.R. 1252 could have on court operation, management and independence. H.R. 1252 is an amalgam of five suggested reforms to the federal courts, including allowing parties on either side of a civil case to remove the assigned judge without stated cause or reason, providing that any complaint of judicial misconduct be referred to a circuit outside of the circuit where the complaint was made, and requiring the convening of a district court of three judges to consider applications for injunctions restraining the enforcement of a state law adopted by referendum on the grounds of unconstitutionality. See *Leadership Speaks Out on Judicial Issues*, THE THIRD BRANCH, June 1997 (visited Mar. 3, 1999) <<http://www.uscourts.gov/ttb/june97ttb/balance.htm>>. Judges also frequently testify before Congress on the issue of creating new judgeships. In February of 1997, Chief Judge Julia Smith Gibbons (W.D. Tenn.), among others, testified before a Senate Subcommittee on the allocation of judgeships. See *Judiciary Seeks to Balance Workload and Judgeship Needs*, THE THIRD BRANCH, Feb. 1997 (visited Mar. 3, 1999) <<http://www.uscourts.gov/ttb/feb97ttb/balance.htm>>.

151. The AO had no official response to the bill. It is interesting to note, however, that in November of 1995, the month before Senator McCain's bill was introduced, the AO adopted new standards for conducting program assessments. The standards, with two exceptions, discussed *supra* notes 121-25 and accompanying text, tracked generally accepted government auditing standards.

152. See *infra* notes 164 and accompanying text.

ciary. In 1990, Congress passed the Civil Justice Reform Act (CJRA), requiring each district court to develop an “expense and delay reduction plan” to address the reasons for delay in the district and recommend cost cutting measures.¹⁵³ The Civil Justice Reform Act specifically requires that a report be prepared and made available to the public that lists, for each judge in the district, the number of motions that have been pending for more than six months, the number of bench trials that have been waiting to go to trial for more than six months, and the number of cases that have not been terminated within three years of filing.¹⁵⁴ The passage of this legislation marked the first time in the history of the judiciary that judges were required to provide these figures to the public. In some instances, the revelations have been startling. A federal district court judge in New York was found to have 55 cases that had been pending more than three years, and one case in which the parties had been waiting 11 years for a decision.¹⁵⁵

Many in the judiciary share a concern that the independence of the judicial branch is eroded by such legislative and executive intervention in the operation of the judicial branch.¹⁵⁶ However, Congress has continued to act. As recently as 1996, Senator Charles Grassley, Chairman of the Senate Judiciary Subcommittee on Administrative Oversight and the Courts, sent a survey to all active and senior court of appeals and district court judges asking a series of questions dealing with judicial administration and workload, circuit conferences, and outside work activities. The survey was conducted “in an attempt to directly communicate with, and elicit input from, the judiciary in order to better understand the needs of the federal judiciary, as well as to find cost efficiencies with the judicial system.”¹⁵⁷ Although some judges

153. See 28 U.S.C. §§ 471-482 (1994). Almost unanimously, federal judges attacked this legislation, claiming that it “interferes with both the integrity and the independence of our . . . courts . . . it is bad policy . . . it will increase costs and delays rather than reduce [them]. . . . The tendency for the Legislative Branch to micro-manage the Judicial Branch should be resisted by those who truly see the value of an independent judiciary.” *Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearing Before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the House Committee on the Judiciary*, 101st Cong., 2d Sess. 431-433 (1990) (statement of Judge G. Thomas Eisele, Chief Judge of the U.S. District Court for the Eastern District of Arkansas).

154. See 28 U.S.C. § 476 (1994).

155. See Doreen Carvajal, *New York's Clogged U.S. Courts Delaying Civil Verdicts for Years*, N.Y. TIMES, Apr. 17, 1995, at A1. The case is identified in the article as *Brown v. Trion*. A Westlaw search revealed an opinion from Judge Glasser in 1983 granting defendant's motion for summary judgement. See *Brown v. Trion Indus.*, 223 U.S.P.Q. 1106 (1983). No further opinions in this case were found.

156. The entire issue of 46 MERCER L. REV. (1995) is devoted to the subject of judicial independence. See Linda S. Mullenix, *Judicial Power and the Rules Enabling Act*, 46 MERCER L. REV. 733 (1995); Deanell Reece Tacha, *Independence of the Judiciary for the Third Century*, 46 MERCER L. REV. 645 (1995). But see Edwin Meese III, *Reining in the Federal Judiciary*, 80 JUDICATURE 178 (1997).

157. U.S. SENATE JUDICIARY SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS, REPORT ON THE JAN. 1996 JUDICIAL SURVEY (PART 1, U.S. COURTS OF APPEAL) (1996).

were supportive of the survey, many resounded continuing concerns that this was an interference with the independence of the judiciary and an attempt to "micro-manage" the judiciary.¹⁵⁸ In publishing a report on the survey, Senator Grassley noted that "the results of the survey . . . revealed several areas of interest that the Subcommittee intends to pursue through legislative initiative and/or Congressional inquiry."¹⁵⁹ Among the recurrent themes that Senator Grassley identified in the survey responses was the promotion of further cost savings within the judiciary.¹⁶⁰ Methods to be explored to accomplish these savings include courtroom sharing, reviewing staffing needs, and increased use of case management practices and programs.¹⁶¹

Other actions discussed by Congress are considerably more alarming, including calls for the abolishment of life tenure,¹⁶² the election of federal judges, and giving Congress the power to override court decisions.¹⁶³

The creation of an IG office could aid the courts in addressing Congress' increasing concerns. Currently, whenever Congress has a question about an operation within the judiciary, it orders an investigation by the General Accounting Office (GAO). Since 1993, in addition to the GAO report on oversight standards, Congress has ordered the GAO to investigate courthouse construction and the process used by the federal judiciary to estimate its space needs, the Judicial Survivors Annuities System, the Judiciary Automation Fund, judicial security, and the National Fine Center (a project to centralize criminal debt collection and accounting in the federal judiciary), as well as to provide a detailed report of appropriations, expenditures, and functions of the AO.¹⁶⁴ These investigations are often extremely frus-

158. *See id.* at 1. Two comments expressing concern were included in the report, identified only by the judge's circuit. A judge from the Eighth Circuit stated: "The courts are best able to establish their own internal procedures, just as the House and Senate are best able to determine the rules and practices that each body will follow. I would hope that extreme care and caution be exercised and that there not be efforts to micro-manage what has been so carefully and conscientiously developed by the courts over a considerable period of time." *Id.* A judge from the Ninth Circuit was more blunt: "Issues like the over-use of law clerks and publishing practices should not be subject to legislative oversight or corrective legislation because they are 'judicial problems'." *Id.*

159. *Id.*

160. *See id.*

161. *See id.*

162. On April 23, 1997, New Hampshire Senator Bob Smith introduced legislation limiting the terms of federal judges to ten years. *See Smith Introduces Bill Calling for Term Limits for Judges* (Press Release, Apr. 23, 1997) available in 1997 WL 4431941, at *1.

163. *See* ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 117 (1996).

164. *See* FEDERAL JUDICIARY SPACE: LONG RANGE PLANNING PROCESS NEEDS REVISION (Testimony, Oct. 7, 1993, GAO/T-GGD-94-18); *see also* FEDERAL PENSIONS: JUDICIAL SURVIVORS' ANNUITIES SYSTEM COSTS AND BENEFIT LEVELS (Letter Report, June 26, 1987, GAO/GGD-97-87); JUDICIARY AUTOMATION FUND: REAUTHORIZATION SHOULD BE LINKED TO BETTER PLANNING AND REPORTING (Testimony, June 30, 1994, GAO/T-GGD/AIMD-94-176); FEDERAL JUDICIAL SECURITY: COMPREHENSIVE RISK-BASED PROGRAM SHOULD BE FULLY IMPLEMENTED (Chapter Report, July 14, 1994, GAO/GGD-94-112); NATIONAL FINE CENTER: PROGRESS MADE BUT CHALLENGES REMAIN FOR CRIMINAL DEBT SYSTEM (Letter Report, May

trating for the judiciary because the AO views the GAO's approach to the judiciary as lacking an understanding of the many structural and administrative characteristics that make the judiciary a unique organization, unlike any agency that the GAO works with in the executive branch. The creation of an IG within the courts would allow the courts, either working alone, or in conjunction with the GAO, to bring knowledge of the unique administrative and structural design of the judiciary to these investigations. Undoubtedly, this would assist Congress in obtaining a more accurate response to its concern as to how the judiciary is functioning. An IG, working within the court system and having specialized knowledge of the courts, would also assist in making recommendations for action most appropriate to the structural and administrative characteristics of the courts.

B. Public Distrust

Congress' actions have been fueled, at least in part, by public sentiment. Public confidence in the judiciary is low and continues to decline.¹⁶⁵ Delay, expense,¹⁶⁶ highly publicized trials with seemingly unjust outcomes, and publicity about lavish spending on new federal courthouses¹⁶⁷ have reinforced the public's suspicion and raised concerns about judicial accountability.

The appointment of an IG in the judiciary, properly publicized, could be an important step toward stemming growing public distrust of judicial accountability. Because an IG is required to file reports with Congress on a regular basis which are available to the public,¹⁶⁸ the courts would thus provide the public with an increased ability to monitor and understand the workings of the judiciary. The judiciary has attempted to communicate its efforts at efficiency and increased accountability to the public with seemingly little success. As a central point for information and data, an IG's office could help make the judiciary's public outreach efforts more visible.¹⁶⁹

25, 1995, GAO/AIMD-95-76); THE FEDERAL JUDICIARY: OBSERVATIONS OF SELECTED ISSUES (Briefing Report, Sept. 18, 1995, GAO/GGD-95-236BR).

165. See Frances Kahn Zemans, *From Chambers to Community*, 80 JUDICATURE 62, 63 (1996).

166. Delay and expense were two of the most common complaints leading to the enactment of the Civil Justice Reform Act. See JAMES S. KAKALIK ET AL., IMPLEMENTATION OF THE CIVIL JUSTICE REFORM ACT IN PILOT AND COMPARISON DISTRICTS xiii (1996).

167. See Kathleen Kerr, *Foley Square: Opulence in the Courts*, NEWSDAY, May 1, 1994, at A6; see also Bob Hohler, *Senate Panel Raps Breyer Over Fan Pier*, THE BOSTON GLOBE, Dec. 15, 1994, at 1.

168. See 5 U.S.C. app. 3 § 5(c) (1994).

169. Courts are trying to improve communication with the communities they serve and heighten public awareness of how the courts function, including the initiation of cost saving measures. See Edited Transcript of Panel Discussion, *Court-Community Collaboration: New Partnerships for Court Improvement*, 80 JUDICATURE 213 (1997); see also Gary S. Brown, *Court Monitoring: A Say for Citizens in their Justice System*, 80 JUDICATURE 219 (1997).

C. *Efficient Administrative Practices*

An IG office in the AO could also serve as a clearinghouse for information about up-to-date, appropriate management techniques. An IG could become a key player in the court's management efforts. With a clear understanding that the role of the IG is not only to identify waste, fraud, and abuse, but, more importantly, to assist the courts in preventing these ills, an IG's office could provide leadership in efficient administration. By focusing on programs to uncover and correct inefficiencies, and promote modern methods of management, the IG would be a central source to which judges could turn for guidance in effective administrative practices, as well as assistance in handling any actual waste, fraud, or abuse by court employees.

VI. CREATING AN OFFICE OF INSPECTOR GENERAL IN THE FEDERAL COURTS

A. *Senator McCain's Bill*

Currently, the IG Act specifically excludes the AO from its purview.¹⁷⁰ Seeking to "enhance the cost-effective use of the taxpayer resources utilized to administer our Federal courts," Senator McCain's proposed bill sought to create the position of IG in the AO.¹⁷¹ The legislation called for a presidentially-appointed IG, modifying the usual method of appointment only slightly.¹⁷² The bill specified that the Judicial Conference of the United States submit a list of individuals for nomination as IG of the AO to the President. The President, with the advice and consent of the Senate, then selects an individual from this list to serve as IG.¹⁷³ The IG would report to and be under the general supervision of the Director of the AO, but like all other presidentially-appointed IGs, could be removed from office only by the President.¹⁷⁴

Senator McCain's bill imposes the same duties on the IG of the AO as all other IGs: perform audits; review legislation; promote economy, efficiency, and effectiveness; liaison with other agencies; prevent and detect fraud and abuse; and inform Congress and the agency head about problems and corrective action. The bill specifically requires the transfer of the AO's "Office of Audit,"¹⁷⁵ which conducts routine cyclical financial reviews of the

170. The section of the Act requiring the creation of nonpresidentially-appointed IGs specifies that it does not cover any entity in either the judicial or the legislative branches. See 5 U.S.C. app. 3 § 8G(a)(1)(F) (1994). The judiciary is not named in the section of the Act requiring Presidentially appointed IGs. See *id.* § 3.

171. See 141 CONG. REC. S18016-03 (Dec. 5, 1995) (statement of Senator McCain).

172. See S. 1446, 104th Cong. § 2.

173. See *id.* § 2(a)(2).

174. See 5 U.S.C. app. 3 § 3(a) (1994).

175. See S. 1446, 104th Cong. § 2(b).

courts and oversees the work of contract financial auditors, to the newly created "Office of Inspector General." As discussed earlier, because the AO currently handles some of the other duties the bill requires of IGs, other offices would undoubtedly be transferred to the Office of the IG as well.¹⁷⁶

B. Required Amendments of McCain's Legislation

1. The Appointment Process

The legislation introduced by Senator McCain must be amended significantly in order to be successful. His bill, as introduced, contains two serious flaws. The bill's most glaring error lies in the appointment process outlined for the IG of the AO. The bill directs that the IG is to be chosen by the President from a list of individuals submitted by the Judicial Conference of the United States.¹⁷⁷ By requiring the IG in the AO to be a presidential appointee, Senator McCain's bill infringes on the separation of powers doctrine. Because the judiciary is an independent branch of government, the appointment process for an IG should parallel, not copy, that of the Executive branch. The Chief Justice, the leader of the judiciary, should appoint the IG for the courts, with the advice and consent of the Senate. The Chief Justice alone should have the power to remove the IG, communicating the reasons for removal to the Senate. The IG should report to the head of the AO, and have the same powers to conduct investigations as presidentially-appointed IGs and the same reporting requirements to Congress as all other federal IGs. This structure preserves administrative independence within the judiciary, while it directly provides Congress with information about concerns regarding the judiciary.

2. The Investigative Authority of the Inspector General

A second significant flaw in Senator McCain's bill lies in its unfettered grant of investigative power over judges to IGs.¹⁷⁸ The investigative jurisdiction of the IG into allegations of judicial misconduct should be limited. Specifically, an IG should become involved in investigations of judicial misconduct only at the invitation of either the chief judge of the circuit, or any other judicial body involved in the discipline procedure. Furthermore, an IG should have no authority to review, or even comment on, the substance of court decisions. Without these limitations, the creation of an office of IG with the authority to investigate a particular judge on a complaint of judicial misconduct, or review the content of judicial opinions, threatens the concept of judicial independence that is the cornerstone of our democracy and the

176. See *supra* Part IV.

177. See S. 1446, 104th Cong. §2(a)(2).

178. Senator McCain's bill does not address an IG's investigative authority in any manner. See *id.*

foundation of a fair, impartial judiciary.

With the passage of the Judicial Conduct and Disability Act of 1980 in Title 28 of the United States Code (hereinafter "Judicial Misconduct Act"),¹⁷⁹ Congress gave the federal judiciary the task of devising its own self-disciplinary framework.¹⁸⁰ That framework includes the right of any person alleging that a judge has engaged in judicial misconduct to file a complaint with the clerk of the court of appeals for that circuit.¹⁸¹ On the basis of information available, the chief judge may also, by written order providing reasons, identify a complaint, dispensing with the need to file a written complaint.¹⁸² The chief judge of the circuit is charged with handling the complaint, which under current law may include disposing of it as frivolous¹⁸³ or appointing a special committee of judges to investigate the allegations¹⁸⁴ and file a written report with the judicial council of the circuit of the committee's findings and recommendations for action.¹⁸⁵

A third choice should be added that allows the chief judge, or any other judicial body involved in the investigatory process, to request that the IG conduct an investigation of the allegations and file a written report with the judicial council of the circuit stating the IG's findings and recommendations for action. The chief judge, or any of the other judicial bodies involved, would thus have the option to call upon the investigative skills of the IG in matters deemed appropriate for investigation by someone other than a fellow judge. For instance, allegations that involve personnel issues or administrative irregularities are best investigated by an IG, while issues related to judicial decisionmaking or courtroom demeanor are probably best left to fellow judges.

The Judicial Misconduct Act further provides that after the filing of a written report, the judicial council may take a number of steps, including certifying a judge as disabled, requesting voluntary retirement, ordering that no further cases be assigned to the judge for a certain amount of time, and privately or publicly censuring a judge.¹⁸⁶ Alternatively, the judicial council may refer any complaint to the Judicial Conference of the United States.¹⁸⁷ The Conference may conduct further investigation, take further action, and may transmit the record to the House of Representatives.¹⁸⁸ The House may take whatever action it considers to be necessary, including impeachment

179. 28 U.S.C. § 372 (1994).

180. See Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L.J. 989, 993 (1996).

181. See 28 U.S.C. §372 (c)(1) (1994).

182. See *id.*

183. See *id.* § 372(c)(3)(A).

184. See *id.* § 372 (c)(4)(A).

185. See *id.* § 372 (c)(5).

186. See *id.* § 372 (c)(6).

187. See *id.* §§ 372(c)(7)(A), (c)(7)(B).

188. See *id.* § 372 (c)(8)(A).

proceedings.¹⁸⁹ Significantly, the Judicial Misconduct Act does not allow the Judicial Council or the Judicial Conference to remove a judge from office. Removal of a federal judge may be accomplished only through impeachment.¹⁹⁰ However, given the Constitutional salary and tenure protections afforded federal judges, peer pressure is perhaps the most effective method of handling incidents of misconduct among federal judges. Complaints about the conduct of federal judges that come to the attention of the IG of the AO should be referred initially to the chief judge of the circuit.

Exempting judicial misconduct from the purview of an IG for the AO, except at the invitation of a chief judge or other judicial body involved in the disciplinary process, does not mean that judges would not be affected by the creation of such a position. With jurisdiction over all non-judicial employees, an IG may be involved in investigating actions taken by court employees within chambers as well as promoting effective practices within administrative work done in chambers. Furthermore, a judge would be free to call upon the IG to assist his court in preventing, or uncovering and correcting, inefficiencies, waste, fraud, or abuse. In this sense, an IG would be a valuable resource for a federal judge eager to employ the most effective management practices.

VII. CONCLUSION

IGs serve as independent internal watchdogs charged with safeguarding, and at times repairing, their agencies' integrity. The Long Range Plan for the Federal Courts, issued by the Judicial Conference two years ago, calls for the federal court system to "ensure its own accountability through the example of its leadership, self-imposed standards of conduct that are more stringent than those for other public officials, [and] a demonstrated ability to make efficient use of the resources it has been given. . . ."¹⁹¹ By working with Congress in the creation of an Office of Inspector General for the federal courts, rather than risking having such an office forced upon it, the judiciary may ensure that the position is responsive to, and respectful of, the mission of the judiciary. An amended bill, providing for appointment by the Chief Justice and limits on the investigative authority of the IG, could provide for the creation of an IG in the AO to stem the increasing scrutiny and suspicion of Congress. By discouraging even more dire attempts by Congress to control the federal courts, creation of such an office may in fact be an important step in the effort to protect judicial independence. Furthermore, the creation of such an office would demonstrate the strength of the judiciary's commitment to the goals of accountability and the efficient and effective delivery of justice.

189. *See id.*

190. *See Breyer, supra* note 180, at 993.

191. JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 9 (1995).

