

PROTECTING RIGHTS FROM WITHIN? INSPECTORS GENERAL AND NATIONAL SECURITY OVERSIGHT

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Courts and Congress are often reluctant to constrain the executive branch when it limits individual rights in the pursuit of national security. Many scholars have argued that mechanisms within the executive branch can supply an alternative constraint on executive power—whether as a preferred alternative due to the comparative advantages of such institutions or as a second-best option necessitated by congressional and judicial abdication. Despite this interest in the “internal separation of powers,” there is very little attention to what such internal mechanisms are actually doing to protect individual rights.

I argue that Inspectors General (IGs), little-noticed oversight institutions within federal agencies, are now playing a significant role in monitoring national security practices curtailing individual rights. IGs have investigated the post-9/11 detentions of immigrants, the use of National Security Letters (NSLs) to obtain personal records, coercive interrogations of terrorist suspects, extraordinary rendition, military monitoring of political protests, and many other controversial counterterrorism practices. Analyzing five IG reviews at the Departments of Justice, Homeland Security, and Defense, and the Central Intelligence Agency, I argue that these investigations varied significantly in independence and rigor. At their strongest, IG reviews provided remarkable transparency on national security practices, identified violations of the law that had escaped judicial review, and even challenged government conduct where existing law was ambiguous or undeveloped. Such reviews protected rights where courts had failed and significantly reinforced other forms of oversight. At the same time, even stronger reviews

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largely did not result in remedies for most victims, repercussions for high-level executive officials, or significant rights-protective constraints on agency discretion. These case studies illuminate the potential strengths and limitations of IG rights oversight: IGs are well suited to increase transparency, evaluate the propriety of national security conduct, and reform internal procedures; on the other hand, their independence can be undermined, they may avoid constitutional questions, and they rely on political actors to implement reforms. IGs can help protect individual rights against national security abuses and should be modestly strengthened, but they do not displace the need for robust external oversight of the national security executive.

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INTRODUCTION: AN INTERNAL SEPARATION OF POWERS?

More than a decade after September 11, 2001, the debate over which institutions of government are best suited to resolve competing liberty and national security concerns continues unabated. While the Bush Administration's unilateralism in detaining suspected terrorists and authorizing secret surveillance initially raised separation of powers concerns, the Obama Administration's aggressive use of drone strikes to target suspected terrorists, with little oversight, demonstrates how salient these questions remain. 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.¹

These limitations on traditional external checks on the executive—Congress and the courts—have led to increased academic interest in potential checks within the executive branch. Many legal scholars have argued that executive branch institutions supply, or ought to supply, an alternative constraint on executive national security power. Some argue that these institutions have comparative advantages over courts or Congress in addressing rights concerns; others characterize them as a second-best option necessitated by congressional enfeeblement and judicial abdication.

Thus, Neal Katyal argues that institutions within the executive branch can provide for the “internal separation of powers” in the foreign policy arena and champions bureaucracy as a check on presidential power.² Samuel Issacharoff and Richard Pildes argue that internal dissension within the executive branch has historically protected civil liberties in wartime.³ Dawn Johnsen advocates that legal advisers within the executive branch serve to constrain unlawful executive action.⁴ Others contend that internal executive mechanisms have comparative advantages over judicial review: for instance, Gillian Metzger observes that such mechanisms can operate *ex ante* and continuously, rather than solely in response to justiciable challenges or problems that generate congressional attention, and argues that the policy recommendations of executive institutions may face less resistance than external critiques.⁵ Moreover, outside the United States, legal scholars also point to executive oversight institutions as necessary to mitigate inadequate judicial review of state national security activities.⁶

For many of these scholars, the protection of individual rights is a key concern, if not the driving force, behind separation of powers concerns.⁷ Constitutional theorists (and the Supreme Court) have long considered the protection of

1. See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 9 (D.D.C. 2010); see also *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1073 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2442 (2011); *Arar v. Ashcroft*, 585 F.3d 559, 563-64 (2d Cir. 2009) (en banc).

2. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2317-19 (2006).

3. Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 40-41 (2004).

4. Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1562 (2007).

5. Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 439-40 (2009).

6. See, e.g., Kent Roach, *Review and Oversight of National Security Activities and Some Reflections on Canada's Arar Inquiry*, 29 CARDOZO L. REV. 53, 58-59, 61-62 (2007).

7. See Johnsen, *supra* note 4, at 1564-65; Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 677 (2005).

liberty to be at the core of the constitutional separation of powers.⁸ Of course, checking executive power does not always align with protecting individual rights: an executive may prefer a more rights-protective national security policy than Congress, as in President Obama's preference for trying certain terrorist suspects in U.S. civilian courts. Nonetheless, many of the most expansive assertions of executive national security power in recent years have come precisely in the context of policies curtailing individual rights, and the internal separation of powers discourse has often responded to concerns over individual rights.

Despite the development of this substantial theoretical literature, the post-9/11 internal separation of powers discussion has mostly taken place at a high level of generality. Few have examined, in any depth, how internal institutions have functioned in practice to check executive authority or protect civil liberties. Apart from extensive debate over the Justice Department Office of Legal Counsel (OLC),⁹ the existing literature rarely explores whether the actual practices of executive oversight mechanisms support the theoretical benefits that many have suggested.

Even more surprisingly, the discussion of internal separation of powers has largely overlooked Inspectors General (IGs). Congress created IGs, which now exist in over fifty federal agencies, for the explicit purpose of monitoring agencies. Moreover, IGs in several agencies charged with national security responsibilities are squarely addressing individual rights violations. Nonetheless, very little scholarship to date has focused on the role of IGs in monitoring or protecting individual rights. Jack Goldsmith's recent account of presidential accountability mechanisms is an important exception, describing the CIA IG's review of extreme interrogations as an example of how IGs can constrain the President,¹⁰ while Ryan Check and John Radsan provide a historical discussion of the CIA IG predating the release of the interrogations report.¹¹ Apart from these accounts, others have briefly noted the institutional potential of IGs or the significance of individual investigations without examining actual national security IG reviews in any depth.¹² In fact, many proponents of internal executive

8. Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549, 1573-75 (2009).

9. See, e.g., JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007); Johnsen, *supra* note 4; Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010); Pillard, *supra* note 7.

10. JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11*, at 99-109 (2012).

11. Ryan M. Check & Afsheen John Radsan, *One Lantern in the Darkest Night: The CIA's Inspector General*, 4 J. NAT'L SECURITY L. & POL'Y 247 (2010).

12. See PHILIP B. HEYMANN & JULIETTE N. KAYYEM, *PROTECTING LIBERTY IN AN AGE OF TERROR* 114-17 (2005). See generally Kathleen Clark, *The Architecture of Accountability: A Case Study of the Warrantless Surveillance Program*, 2010 BYU L. REV. 357, 377-81; Issacharoff & Pildes, *supra* note 3, at 42-43; Pillard, *supra* note 7, at 756-57; Roach, *supra* note 6.

mechanisms dismiss IGs as focused narrowly on fraud and mismanagement,¹³ or they repeat the now-dated claim of public administration scholar Paul Light that IGs address rule-based compliance without engaging broader conceptions of accountability.¹⁴

This Article fills that gap by probing how IGs have actually functioned in protecting individual rights.¹⁵ Drawing on five case studies of IG reviews in four different federal agencies, I conclude that in certain cases IGs played a surprisingly significant role in protecting rights. At their strongest, IG reviews provided impressive transparency on national security practices, identified violations of the law that had escaped judicial review, and even challenged government conduct where existing law was ambiguous or undeveloped. For instance, the Department of Justice IG challenged the prolonged detentions of immigrants after the September 11 attacks even though these detentions were arguably legal: courts had not decided whether the government could detain aliens for investigative purposes past a statutory removal period, and the elite Office of Legal Counsel had sanctioned such detentions. The IG later exposed the FBI's widespread abuse of a covert investigative tool known as "exigent letters" at a time when no private person would have had the knowledge, standing, and incentive to sue over the practice; the investigation led the FBI to terminate the practice altogether. And the CIA IG revealed excesses in CIA interrogations of detainees at a time when the program was secret—reportedly influencing the OLC to temporarily withdraw legal advice sanctioning coercive interrogations and still later influencing Attorney General Eric Holder to reopen criminal investigations into detainee abuse. These successes challenge a court-centric view of rights enforcement and call attention to the potential of executive institutions to protect rights even in the challenging context of national security.

At the same time, the IG reviews discussed here also displayed important limitations. Even the strongest reviews rarely led to individual relief for most victims, repercussions for high-level executive officials, or significant rights-protective constraints on agency discretion. Moreover, IG reviews varied significantly: while some exhibited independence and a willingness to critique executive national security conduct, others faced obstruction or lacked rigor. In the end, IGs can help protect individual rights where courts and other forms of

13. See, e.g., Katyal, *supra* note 2, at 2347; see also Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227, 304-05 (2006) (discussing narrow interpretations of IGs' mandate).

14. ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 87 (2010); see also Pillard, *supra* note 7, at 754.

15. Throughout this Article, I use the term "individual rights" to refer to the liberty or equality interests of individuals against the state, whether in the form of constitutional rights, civil rights or civil liberties derived from other sources of U.S. law, or broader notions of human rights.

oversight are absent or unavailing but simply cannot compensate for inadequate external review.

In Part I, I describe the features that make IGs potentially more powerful than other executive oversight institutions, including their institutionalized relationship with Congress and broad investigative powers. I also describe how, despite a statutory mandate centered on investigating abuse and mismanagement in government, certain IGs are now directly involved in investigating national security policies curtailing individual rights.

Part II turns to the actual performance of national security IG reviews of individual rights. I describe five IG investigations at the Department of Justice, Central Intelligence Agency, Department of Homeland Security, and Department of Defense addressing: the treatment of post-September 11 detainees; the FBI's use of National Security Letters; the detention and interrogation of suspected terrorists abroad; the rendition of Maher Arar, a Canadian citizen, to Syria; and the military's monitoring of domestic protests. These reviews showed striking differences in rigor and independence, presenting an important puzzle for future research: why institutions with nearly identical mandates and legal powers have performed so unevenly in practice.

In Part III, I analyze how IGs in these case studies protected, or failed to protect, individual rights. I begin by exploring what a system of rights oversight should accomplish. I identify five dimensions of rights oversight consistent with IGs' statutory mandate and analyze how IG reviews both contributed to these objectives and sometimes failed to do so: increasing transparency, identifying rights violations and wrongful conduct, providing relief for victims, holding government officials accountable for abuses, and revising agency rules to prevent future abuse. Together, these reviews suggest both the key strengths and, equally significant, limitations of IG rights oversight—at once a vindication of the notion that executive mechanisms can help protect rights against national security abuses and a caution that the internal separation of powers cannot replace external checks.

Part IV advocates modestly strengthening IGs to enable them to protect rights more effectively, while retaining other limits on IG authority to preserve IG accountability and maximize their ability to issue strong critiques.

I. NATIONAL SECURITY INSPECTORS GENERAL

Despite the executive branch's traditional insistence on secrecy and discretion on matters that affect national security, every significant federal agency charged with national security responsibilities now has an Inspector General. Most have IGs subject to the Inspector General Act of 1978,¹⁶ which Congress passed as part of a broader effort in the 1970s to strengthen accountability over

16. Inspector General Act of 1978, Pub L. No. 95-452, 92 Stat. 1101, *reprinted as amended* in 5 U.S.C. app. (2011).

the executive branch.¹⁷ Congress mandated that IGs conduct audits and investigations to “promote economy, efficiency, and effectiveness” and “prevent and detect fraud and abuse” in agency programs.¹⁸

While the passage of the Inspector General Act of 1978 responded largely to concerns of “fraud, abuse and waste” in federal programs,¹⁹ it was recognized even in that period that IGs, at least in intelligence agencies, had the potential to monitor constitutional concerns. Thus, in the wake of the intelligence abuse scandals of the 1970s, the Department of Defense first established a limited, internally appointed IG for Intelligence in 1976 to examine the legality and propriety of intelligence activities,²⁰ and congressional committees recommended strengthening the capacity of the very limited internal CIA IG to monitor legal compliance.²¹ Such recommendations were not adopted at the time,²² and the Inspector General Act did not originally cover any federal agency with a significant national security role. The Defense Department, Justice Department, and CIA all resisted congressional efforts to install the more independent “statutory” IGs, contending that these institutions would jeopardize secrecy, illegally displace executive authority, or otherwise threaten law enforcement and intelligence operations.²³ Nonetheless, in the 1980s, Congress established IGs subject to the statute at the Defense Department,²⁴ State Department,²⁵ and Justice Department.²⁶ Following the Iran-Contra scandal, Con-

17. See PAUL C. LIGHT, *MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY* 11, 39, 43, 51-53 (1993).

18. Inspector General Act of 1978 § 2(2).

19. S. REP. NO. 95-1071, at 4 (1978); see also H.R. REP. NO. 95-584, at 4-7 (1977). The Senate report on the 1978 IG Act expressly distinguished the purpose of the IGs covered by the statute from that of the Inspector General for Defense Intelligence. S. REP. NO. 95-1071, at 23.

20. George B. Lotz, II, *The United States Department of Defense Intelligence Oversight Programme: Balancing National Security and Constitutional Rights*, in *DEMOCRATIC CONTROL OF INTELLIGENCE SERVICES: CONTAINING ROGUE ELEPHANTS* 109, 114 (Hans Born & Marina Caparini eds., 2007).

21. L. Britt Snider, *A Unique Vantage Point: Creating a Statutory Inspector General at the CIA*, *STUD. INTELLIGENCE*, Winter-Spring 2001, at 15, 15-16, available at https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/winter_spring01/article02.pdf.

22. *Id.* at 16.

23. See STAFF OF S. COMM. ON GOV'T OPERATIONS, 100TH CONG., *THE NEED FOR A STATUTORY INSPECTOR GENERAL IN THE DEPARTMENT OF JUSTICE* 41-45 (Comm. Print 1988) (describing Justice Department opposition); S. REP. NO. 95-1071, at 24, 38 (describing Defense Department opposition); Check & Radsan, *supra* note 11, at 253-54 (describing CIA resistance).

24. Department of Defense Authorization Act, 2003, Pub. L. No. 97-252, sec. 1117, 96 Stat. 718, 750-53 (1982) (amending Inspector General Act of 1978).

25. Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, sec. 150(a), 99 Stat. 405, 427 (1985) (amending Inspector General Act of 1978).

26. Inspector General Act Amendments of 1988, Pub. L. No. 100-504, sec. 102, 102 Stat. 2515, 2515, 2520 (amending Inspector General Act of 1978).

gress established an IG with comparable, though slightly more restricted, powers at the Central Intelligence Agency.²⁷ After September 11, Congress established an IG covered by the Inspector General Act at the new Department of Homeland Security.²⁸ And most recently, Congress expanded and strengthened IGs for the intelligence community, installing a new presidentially appointed Inspector General for the intelligence community at large²⁹ and expanding the powers of agency-appointed IGs at the National Security Agency, Defense Intelligence Agency, National Geospatial-Intelligence Agency, and the National Reconnaissance Office.³⁰ Thus, despite the original resistance of national security agencies to IGs, these institutions have proliferated—and gained power—over the past thirty years.

A. *Distinctive Features of IGs*

Among internal executive structures that might protect civil liberties or constrain executive power, IGs stand out in two ways. First, despite their location within the executive branch, IGs enjoy several statutory protections from agency interference. The Inspector General Act provides for presidential appointment and Senate confirmation of IGs “without regard to political affiliation and solely on the basis of integrity and demonstrated ability.”³¹ While the President can remove an IG without cause, the Act requires that the President communicate to Congress the reasons for any removal no later than thirty days before the removal.³² Even more significantly, IGs have a dual-reporting role that requires them to serve their agencies as well as Congress. They are required to keep both their agencies and Congress “fully and currently informed,” through submitting detailed semiannual reports to Congress as well as notifying Congress seven days after reporting any particularly serious problems to their agencies.³³ Among other extensive requirements, the semiannual reports must identify any significant IG recommendation that the agency has not fully ad-

27. Intelligence Authorization Act, Fiscal Year 1990, Pub. L. No. 101-193, sec. 801, § 17, 103 Stat. 1701, 1711-12 (1989) (amending Central Intelligence Agency Act of 1949, 50 U.S.C. § 403q (2011)).

28. Homeland Security Act of 2002, Pub. L. No. 107-296, § 103(b), 116 Stat. 2135, 2144.

29. Intelligence Authorization Act for Fiscal Year 2010, Pub. L. No. 111-259, sec. 405, § 103H, 124 Stat. 2654, 2709-10 (amending National Security Act of 1947, 50 U.S.C. § 403-3h).

30. *Id.* sec. 431, 124 Stat. at 2731-32 (amending Inspector General Act of 1978). This Article focuses on presidentially appointed IGs, such as those at the Departments of Defense, Justice, and Homeland Security, and the CIA, and not on the relatively few national security agencies that have agency-appointed IGs.

31. Inspector General Act of 1978 § 3(a); *see also* Michael R. Bromwich, *Running Special Investigations: The Inspector General Model*, 86 GEO. L.J. 2027, 2029 (1998) (noting the “expectation that IGs will survive a change in party control of the White House”).

32. Inspector General Act of 1978 § 3(b).

33. *Id.* §§ 4(a)(5), 5(d).

dressed,³⁴ facilitating congressional monitoring of agency follow-through. These detailed reporting requirements distinguish IGs from institutions such as the Justice Department OLC or Office of Professional Responsibility, which report only to the Attorney General, and help Congress overcome information problems in supervising agencies.³⁵

Other recently adopted features further protect IG independence: in budget submissions to Congress, the President must now include a statement from an IG who concludes that the budget request for the office would substantially inhibit IG performance, and the Act guarantees independent counsel for IGs.³⁶

Second, IGs enjoy broad investigative powers. The Act authorizes IGs to undertake and carry out audits and investigations without interference from agency leadership and to access documents within and beyond their agencies.³⁷ By law, IGs can access all records within their host agency, request information from other federal agencies, which are required to furnish it, and subpoena documents (but not testimony) outside federal agencies.³⁸ IGs must generally guarantee confidentiality to agency whistleblowers, and agencies are prohibited from retaliating against employees who provide information in good faith.³⁹

Despite granting IGs these broad powers, Congress accommodated national security agencies' concerns over information disclosure by permitting certain agencies to block IG investigations in sensitive circumstances. Thus, while agency heads ordinarily may not interfere with IG reviews,⁴⁰ the heads of the Departments of Defense, Justice, and Homeland Security may block investigations or reports involving sensitive information on intelligence, counterterrorism, undercover operations, or any other matters for which information disclosure would seriously threaten national security.⁴¹ Where an agency head invokes such a statutory exception to impede an IG investigation, the Inspector General Act requires a written explanation to the IG and congressional oversight committees within a set time period.⁴² Slightly broader escape clauses apply to the CIA IG and other IGs for the intelligence community, though they preserve a congressional reporting requirement.⁴³

34. *Id.* § 5(a)(3).

35. See AMY B. ZEGART, *FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC 26-27 (1999)* (describing informational barriers to congressional oversight of national security agencies).

36. Inspector General Act of 1978 §§ 3(g), 6(f)(3).

37. *Id.* § 6(a).

38. *Id.* § 6(a)(1)-(4), (b)(1).

39. *Id.* § 7.

40. *Id.* § 3(a).

41. *Id.* §§ 8(2), 8D(a)(1), 8E(a)(1), 8I(a)(1) (Departments of Defense, Treasury, Justice, and Homeland Security, respectively).

42. *Id.* §§ 8(b)(3)-(4), 8D(a)(3), 8E(a)(3), 8I(a)(3).

43. *Id.* § 8G(d)(2)(A)-(B); 50 U.S.C. §§ 403-3h(f), 403q(b)(3)-(b)(4) (2011).

Agencies appear to have rarely invoked these escape clauses.⁴⁴ The Department of Homeland Security has never invoked its authority to impede an investigation,⁴⁵ and the Department of Justice has done so only once.⁴⁶ While the congressional reporting requirement may deter agencies from using this authority,⁴⁷ the latent threat of obstruction may also influence IGs to stay within perceived limits. National security IGs thus face an additional constraint beyond the threat of presidential removal common to all IGs.

B. *Rights Monitoring Among National Security IGs*

IGs now play a significant role in addressing the impact of counterterrorism policies on individual rights, despite their traditional association with detecting fraud, waste, and abuse. In the post-9/11 period, Congress explicitly required two IGs, those at the Departments of Justice and Homeland Security, to monitor complaints of individual rights violations. The Patriot Act, passed six weeks after the September 11 attacks, required the DOJ IG to designate an official to “review information and receive complaints alleging abuses of civil rights and civil liberties” by department officials and to report twice a year to Congress on its activities.⁴⁸ Notably, this provision did not apply solely to complaints related to the Patriot Act, but encompassed civil liberties or civil rights complaints against any department official.⁴⁹ Congress also made explicit a civil rights role for the new DHS IG, requiring the IG to designate a senior

44. See, e.g., Snider, *supra* note 21, at 20 (reporting that the CIA had not invoked authority to interfere with CIA IG during the eight-year tenure of the first presidentially appointed IG).

45. E-mail from Richard N. Reback, Counsel to the Inspector Gen., U.S. Dep’t of Homeland Sec., to author (Mar. 11, 2011) (on file with author).

46. E-mail from William M. Blier, Gen. Counsel to the Inspector Gen., U.S. Dep’t of Justice, to author (Mar. 1, 2011) (on file with author); see also MICHAEL R. BROMWICH, U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., EPILOGUE: THE CIA-CONTRA-CRACK COCAINE CONTROVERSY: A REVIEW OF THE JUSTICE DEPARTMENT’S INVESTIGATIONS AND PROSECUTIONS 1 (1998) (reporting that the Attorney General blocked for six months the release of the report on whether U.S. government officials had protected California drug dealers linked to the Nicaraguan Contras).

47. COMM’N OF INQUIRY INTO THE ACTIONS OF CAN. OFFICIALS IN RELATION TO MAHER ARAR, A NEW REVIEW MECHANISM FOR THE RCMP’S NATIONAL SECURITY ACTIVITIES 391 (2006) (reporting that Department of Homeland Security and Department of Justice IGs believe that the reporting requirement prevents abuse of escape clauses).

48. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, § 1001, 115 Stat. 272, 391, *reprinted as amended in* 5 U.S.C. app.

49. See OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 1001 OF THE USA PATRIOT ACT 20 (Mar. 2006) [hereinafter PATRIOT ACT REPORT (Mar. 2006)].

official to investigate civil rights allegations and to work with the DHS Officer for Civil Rights and Civil Liberties on policy recommendations.⁵⁰

On other occasions, Congress mandated that IGs conduct special investigations into counterterrorism programs that raised civil liberties concerns. When Congress reauthorized expiring provisions of the Patriot Act in 2006, it directed the DOJ IG to review several controversial investigative tools used by the FBI.⁵¹ In 2008, Congress directed multiple IGs to review the warrantless surveillance program initiated by President Bush after the September 11 attacks and to report on the impact of expanded surveillance authorities on U.S. persons.⁵²

The new statutory mandates have raised the profile of IGs' rights-monitoring roles. The DOJ IG has been particularly visible in investigating national security practices implicating individual rights. In response to the Patriot Act mandate, the IG established a new branch to investigate civil rights complaints, coordinated with the Justice Department Civil Rights Division on post-9/11 backlash complaints, and publicized its new role.⁵³ From September 2001 through September 2011, the IG completed approximately twenty-one special reviews and audits that it deemed related to its Patriot Act responsibilities.⁵⁴ These reviews covered such topics as the Department's treatment of September 11 detainees, use of investigative tools, investigations of domestic advocacy groups, terrorist watch list processes, and participation in detainee abuse abroad. Importantly, these reviews addressed systemic civil rights concerns raised by Congress, the media, or public interest groups, not just fact-specific individual complaints.⁵⁵

The CIA IG has also investigated human rights concerns presented by its programs, particularly with respect to detainee interrogations and treatment. Most prominently, the IG reviewed the CIA's use of "enhanced" interrogation techniques against CIA detainees in the two-year period following the Septem-

50. Homeland Security Civil Rights and Civil Liberties Protection Act of 2004, Pub. L. No. 108-458, sec. 8303, § 705(a), 118 Stat. 3867, 3867 (amending Homeland Security Act of 2002, 6 U.S.C. § 345(a)); *id.* sec. 8304, § 8I, 118 Stat. at 3868 (amending Inspector General Act of 1978).

51. USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, §§ 106A, 119, 120 Stat. 192, 200-02, 219-21 (2006).

52. Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, § 301(b)(1), 122 Stat. 2436, 2471.

53. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 1001 OF THE USA PATRIOT ACT 5, 10-17 (July 2002).

54. The IG lists such reviews in its semiannual reports to Congress on implementation of Section 1001 of the USA Patriot Act. *See Special Reports*, OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., <http://www.justice.gov/oig/reports/special.htm> (last updated Apr. 2013). This number excludes reports that only analyzed agency responses to earlier IG recommendations, but counts separately follow-up reports based on additional investigation. These twenty-one reports cover fourteen separate topics.

55. *Cf. Roach, supra* note 6, at 76-78 (explaining the importance of self-initiated audits and investigations).

ber 11 attacks.⁵⁶ The IG also reportedly investigated the agency's detention and interrogations of suspects in Iraq, the rendition of suspects to other governments, the registration of "ghost" detainees, and the deaths of several detainees in CIA custody, although reports from these investigations have not been made public.⁵⁷ The IG reportedly referred twenty-four detainee abuse cases to the Justice Department for possible prosecution.⁵⁸ Most recently, the CIA IG reviewed the agency's role in building a New York Police Department intelligence unit that mapped and monitored Muslim communities.⁵⁹

Other IGs, including those at the Department of Homeland Security, the Department of Defense (DOD), and the National Security Agency (NSA), have on occasion reviewed individual rights concerns arising out of their agencies' national security programs, although the extent of their work is difficult to assess, in part because many reports remain classified. The DOD IG reported on department-ordered investigations of detainee abuse,⁶⁰ allegations that the military used mind-altering drugs on detainees,⁶¹ and intelligence collection activities.⁶² The DHS IG investigated the rendition of Maher Arar, a Canadian citizen, to Syria, and the effectiveness of a redress process for travelers facing difficulties from terrorist watch list screening.⁶³ The NSA IG, a nonpresidentially appointed IG, is said to have monitored the President's post-9/11 NSA surveillance program while it was secret, though little is known

56. OFFICE OF THE INSPECTOR GEN., CENTRAL INTELLIGENCE AGENCY, COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES (SEPTEMBER 2001-OCTOBER 2003) 1-2 (2004) [hereinafter CIA INTERROGATIONS REPORT].

57. See Complaint at 5-6, *ACLU v. CIA*, No. 1:11-CV-00933 (D.D.C. May 18, 2011) (suing under FOIA to obtain six enumerated CIA IG reports); see also Douglas Jehl, *Questions Left by C.I.A. Chief on Torture Use*, N.Y. TIMES, Mar. 18, 2005, at A1.

58. Carrie Johnson et al., *Inquiry into CIA Practices Narrows; Ex-Agency Directors Urge Administration to Drop Investigation*, WASH. POST, Sept. 19, 2009, at A1.

59. *CIA's Watchdog: No Problem with NYPD Partnership*, THE CAPITAL, Dec. 24, 2011, at A3. My FOIA request to the CIA IG for this report, made in May 2012, is still pending.

60. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF DEF., REVIEW OF DoD-DIRECTED INVESTIGATIONS OF DETAINEE ABUSE (2006).

61. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF DEF., INVESTIGATION OF ALLEGATIONS OF THE USE OF MIND-ALTERING DRUGS TO FACILITATE INTERROGATIONS OF DETAINEES (2009).

62. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF DEF., THE THREAT AND LOCAL OBSERVATION NOTICE (TALON) REPORT PROGRAM (2007) [hereinafter TALON REPORT]; see also *IG Monthly Newsletter*, U.S. DEP'T OF DEF., OFF. OF INSPECTOR GEN. (May 2011), <http://www.dodig.mil/eletter/2011/May2011.html> (listing a classified June 2011 report on "questionable intelligence activities").

63. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., THE REMOVAL OF A CANADIAN CITIZEN TO SYRIA (2008) [hereinafter ARAR REPORT]; OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., EFFECTIVENESS OF THE DEPARTMENT OF HOMELAND SECURITY TRAVELER REDRESS INQUIRY PROGRAM (2009).

about what such monitoring entailed.⁶⁴ The NSA IG and others conducted a joint review of the program in 2009.⁶⁵ It is not publicly known whether the first IG for the Intelligence Community, confirmed in late 2011, has issued any reports pertaining to individual rights.

The number and significance of rights-related investigations of national security policies may represent an expansion from earlier periods. Certainly, some IGs had investigated civil or human rights concerns in the pre-9/11 period: for instance, the DOJ IG had regularly investigated individual complaints of border agents' abuse of immigrants near the U.S.-Mexico border,⁶⁶ and had occasionally examined other high-profile civil rights concerns.⁶⁷ These DOJ IG investigations, however, only rarely intersected with national security programs before the September 11 attacks: the DOJ IG issued only three reports on rights-related concerns in the national security context in the ten-year period prior to September 11, 2001,⁶⁸ compared to twenty-two such reports between 2001 and 2011.⁶⁹ The CIA IG investigations of detainee abuse may also represent an expansion compared to the office's earlier investigations of human rights complaints in Central America, though secrecy around its reviews makes definitive judgments impossible.

The involvement of certain IGs in monitoring individual rights threatened by national security policies is now unmistakable. The real question is how these IG reviews operated, and what they achieved.

64. According to Jack Goldsmith, the NSA IG was denied a request to see the Office of Legal Counsel analysis supporting the program. GOLDSMITH, *supra* note 9, at 181-82.

65. OFFICES OF INSPECTORS GEN. OF THE U.S. DEP'T OF DEF., U.S. DEP'T OF JUSTICE, CENT. INTELLIGENCE AGENCY, NAT'L SEC. AGENCY, AND OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, UNCLASSIFIED REPORT ON THE PRESIDENT'S SURVEILLANCE PROGRAM (2009).

66. *See, e.g.*, OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, SEMIANNUAL REPORT TO CONGRESS: OCTOBER 1, 1992-MARCH 31, 1993, at 6 (1993).

67. *See, e.g.*, OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, SEMIANNUAL REPORT TO CONGRESS: APRIL 1, 1996-SEPTEMBER 30, 1996, at 2 (1996); OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, SEMIANNUAL REPORT TO CONGRESS: OCTOBER 1, 1995-MARCH 31, 1996, at 4-5 (1996).

68. The IG's semiannual reports to Congress reference a 1995 review of violence committed against U.S. civilians in Guatemala, OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, SEMIANNUAL REPORT TO CONGRESS: APRIL 1, 1995-SEPTEMBER 30, 1995, at 2 (1995), a 1997 review of FBI laboratory practices in terrorism prosecutions, OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, SEMIANNUAL REPORT TO CONGRESS: OCTOBER 1, 1996-MARCH 31, 1997, at 2 (1997), and a 2001 investigation of the failure to disclose evidence in the Oklahoma City prosecution, OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, SEMIANNUAL REPORT TO CONGRESS: APRIL 1, 2001-SEPTEMBER 30, 2001, at 35 (2001).

69. *See supra* note 54 and accompanying text.

II. CASE STUDIES OF NATIONAL SECURITY IG REVIEWS

In this Part, I describe five IG investigations of national security practices affecting individual rights, focusing on the process, key findings, and impact of each investigation. These IG reviews covered: (1) the treatment of post-September 11 detainees (DOJ); (2) the FBI's use of national security letters (NSLs) and other methods of obtaining personal records (DOJ); (3) the detention and interrogation of suspected terrorists abroad (CIA); (4) the rendition of Maher Arar, a Canadian citizen, to Syria (DHS); and (5) the military monitoring of domestic protests (DOD). In Part III, I will analyze in greater detail the particular contributions of these reviews to rights oversight and their limitations.

These five cases alone make strikingly clear the diversity of IG reviews. The investigations varied significantly in rigor, apparent independence, and impact. 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.

Let me say a few words about case selection. I selected these reviews to shed light on rights-related investigations of national security programs by four statutory IGs, those at the Departments of Justice, Homeland Security, and Defense, and the CIA, between September 2001 and September 2011. All of these agencies have presidentially appointed IGs, and thus these cases are not intended to speak to conditions at the relatively few agency-appointed IGs that still exist in some national security agencies, such as at the NSA. Of at least twenty-seven rights-related reviews conducted by the selected agencies,⁷⁰ I selected five in order to provide a "thick" description of the content, process, and impact

70. *See supra* notes 60-68 and accompanying text (noting fourteen distinct Department of Justice IG reviews, seven CIA IG reviews, three Defense Department IG reviews, and two Department of Homeland Security reviews in this time period addressing individual rights questions in the national security context, in addition to a joint IG investigation of the President's Surveillance Program). Determining which reviews address rights is itself subjective, given that apart from the Justice Department, which lists reviews relevant to its Patriot Act responsibilities, agencies do not categorize which reviews they consider related to rights. Here, I have defined rights broadly to include the liberty or equality interests of individuals against the state, whether in the form of constitutional rights, civil rights or civil liberties derived from other sources of U.S. law, or broader notions of human rights. I identified reviews that substantially engage questions of rights in the national security context, not those that may have merely peripherally raised such questions, although again, these choices necessarily involve some subjectivity.

of these reviews. This sample is not necessarily representative of IG national security rights-related reports at large or the performance of particular IGs. Among the five case studies, I included two IG reviews that legal scholars have cited as notable—the DOJ IG September 11 detainees review and the National Security Letters review—to examine the strengths and limitations of what might be a high-water mark of IG investigations.⁷¹ Other substantive and pragmatic considerations guided case selection decisions. For instance, the CIA IG review on detainee interrogations is the only rights-related report of that agency from this period that has been publicly released.⁷² The DHS IG review of the Maher Arar rendition is one of two DHS IG national security-related reviews in this time period squarely focused on concerns over individual rights.⁷³ In addition, the DOD IG review examined here was, at the time of writing, the sole declassified rights-related report of that IG based on a direct IG investigation.⁷⁴

Because these research choices focus on public reports and on cases where IGs acted, they leave unanswered questions about classified IG reports and about scenarios in which IGs failed to act. Furthermore, differences across even the relatively few IG reviews examined here suggest the crucial need for further research into IG national security oversight and the question of divergent IG performance, in particular. The strengths or weaknesses of a single review cannot be attributed to the inherent capacity of a particular IG office: for instance,

71. HEYMANN & KAYYEM, *supra* note 12, at 115; Clark, *supra* note 12, at 377-78, 380-81; Issacharoff & Pildes, *supra* note 3, at 42.

72. *See supra* note 57 and accompanying text.

73. The other DHS IG report between September 2001 and September 2011 directly addressing individual rights concerns in the national security context assesses a DHS program established to assist individuals with federal screening and border crossing procedures. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., EFFECTIVENESS OF THE DEPARTMENT OF HOMELAND SECURITY TRAVELER REDRESS INQUIRY PROGRAM (2009). Of these two reviews, I focused on the Arar rendition review because it addressed the rights implications of a national security practice rather than auditing a program specifically set up to address a civil liberties problem. Beyond these two reviews, DHS has investigated other national security programs affecting liberty but with an exclusive or nearly exclusive focus on effectiveness considerations. *See, e.g.*, OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., ROLE OF THE NO FLY AND SELECTEE LISTS IN SECURING COMMERCIAL AVIATION (2009); OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., SURVEY OF DHS DATA MINING ACTIVITIES (2006). Other DHS IG reports address DHS department-wide compliance with federal privacy laws or the protection of personally identifiable information in data systems. *See, e.g.*, OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT PRIVACY STEWARDSHIP (2010); OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., BETTER ADMINISTRATION OF AUTOMATED TARGETING SYSTEM CONTROLS CAN FURTHER PROTECT PERSONALLY IDENTIFIABLE INFORMATION (REDACTED) (2007).

74. A DOD IG report investigating allegations of the use of mind-altering drugs on detainees was released in redacted form in 2012, after the completion of this Article. Another important rights-related DOD IG report addresses DOD investigations of detainee abuse but without drawing on an independent investigation. *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF DEF., *supra* note 60.

the DHS IG, which exhibited limited independence in the Arar rendition investigation, issued stronger critiques of certain civil rights matters outside the national security context.⁷⁵ While further research is essential to understanding the role IGs play in protecting rights from within, the cases here are a first step in that direction, illustrating how IGs monitor individual rights in various national security matters and suggesting the potential strengths and limitations of IG rights oversight.

A. *More Consequential Reviews*

1. *Department of Justice IG review of September 11 detainees*

Soon after the September 11 attacks, the Department of Justice began detaining hundreds of aliens for suspected terrorist ties, mostly from Muslim countries, and ultimately held more than 750 of them on immigration violations.⁷⁶ In 2003, DOJ IG Glenn Fine issued two highly critical reports on the treatment of September 11 detainees: the first a 198-page report covering the decisionmaking behind the prolonged detentions and the second addressing harsh conditions and physical abuse at the Metropolitan Detention Center in Brooklyn.⁷⁷ While recognizing the “monumental challenges” facing the Department after the September 11 attacks, the IG concluded that the “chaotic situation” did not excuse actions that resulted in “significant” mistreatment of the detainees.⁷⁸

The reports concluded that the FBI had indiscriminately and haphazardly labeled aliens as being of interest to the terrorism investigation and then lagged in clearing them of terrorist ties, resulting in lengthy detentions.⁷⁹ Prison officials subjected detainees at the Metropolitan Detention Center to particularly harsh conditions of confinement, including an initial total communications blackout, “lockdown” for twenty-three hours a day, and physical abuse by federal prison guards.⁸⁰ Most notoriously, prison guards slammed detainees into a

75. See, e.g., OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., *THE PERFORMANCE OF 287(G) AGREEMENTS* (2010).

76. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, *THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 195* (2003) [hereinafter *SEPTEMBER 11 DETAINEES REPORT*].

77. *Id.*; OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, *SUPPLEMENTAL REPORT ON SEPTEMBER 11 DETAINEES' ALLEGATIONS OF ABUSE AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK* (2003) [hereinafter *SUPPLEMENTAL METROPOLITAN DETENTION CENTER REPORT*].

78. *SEPTEMBER 11 DETAINEES REPORT*, *supra* note 76, at 195, 197.

79. *Id.* at 51-52, 70.

80. *Id.* at 111-13, 162; *SUPPLEMENTAL METROPOLITAN DETENTION CENTER REPORT*, *supra* note 77, at 8.

soon-bloodied T-shirt taped to a wall that pictured the American flag and the motto, “These colors don’t run.”⁸¹

The scope, access, and rigor of the IG investigation are striking. Justified as an exercise of the IG’s responsibilities under the Patriot Act and IG Act,⁸² the investigation went beyond individual allegations of detainee abuse, squarely targeting the Justice Department’s “hold until cleared” detention policy that led to lengthy confinement.⁸³ Released with almost no redactions,⁸⁴ the reports also provided an exceptionally detailed accounting of the government’s post-9/11 detention decisions. In addition, the IG surmounted the one significant attempt to obstruct the investigation noted in the reports: although Metropolitan Detention Center officials repeatedly impeded IG attempts to obtain videotapes of detainees, IG investigators discovered more than 300 videotapes in a prison storage room, many of which revealed prison staff engaging in “the very conduct they specifically denied in their interviews.”⁸⁵

The reports drew tremendous media attention, including front-page coverage in major national newspapers,⁸⁶ and Congress held several hearings questioning Justice Department officials on the detentions,⁸⁷ with members of both parties praising the IG report.⁸⁸ Still, the Justice Department vigorously defended its actions,⁸⁹ and Attorney General John Ashcroft asked Congress for an expansion of law enforcement powers just two days after the reports’ release.⁹⁰

81. SUPPLEMENTAL METROPOLITAN DETENTION CENTER REPORT, *supra* note 77, at 11, 12, 16.

82. SEPTEMBER 11 DETAINEES REPORT, *supra* note 76, at 3.

83. *See id.* at 4, 8, 9.

84. *See, e.g., Lessons Learned—The Inspector General’s Report on the 9/11 Detainees: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 8, 12 (2003) [hereinafter *Lessons Learned Hearing*] (testimony of Glenn A. Fine, Inspector Gen., Dep’t of Justice) (noting that the Department “fully cooperated” with review and required the redaction of only a “few phrases and words”).

85. SUPPLEMENTAL METROPOLITAN DETENTION CENTER REPORT, *supra* note 77, at 40-42.

86. *See, e.g., Steven Fainaru, Report: 9/11 Detainees Abused; Justice Dept. Review Outlines Immigrant Rights Violations*, WASH. POST, June 3, 2003, at A1; Eric Lichtblau, *U.S. Report Faults the Roundup of Illegal Immigrants After 9/11*, N.Y. TIMES, June 3, 2003, at A1; Cam Simpson, *Government Report Faults Handling of 9/11 Detainees*, CHI. TRIB., June 3, 2003, at 1.

87. *See Oversight Hearing: Law Enforcement and Terrorism: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2005); *Lessons Learned Hearing*, *supra* note 84; *U.S. Department of Justice: Hearing Before the H. Comm. on the Judiciary*, 108th Cong. (2003).

88. *See, e.g., Lessons Learned Hearing*, *supra* note 84, at 2, 4, 16, 22, 77.

89. Fainaru, *supra* note 86; Eric Lichtblau, *Ashcroft Defends Detentions as Immigrants Recount Toll*, N.Y. TIMES, June 5, 2003, at A23.

90. *U.S. Department of Justice: Hearing Before the H. Comm. on the Judiciary*, *supra* note 87.

In response to the IG's extensive recommendations⁹¹ and insistence that agencies adequately follow through,⁹² the FBI agreed to adopt more objective criteria for classifying detainees as "of interest" to future terrorism investigations,⁹³ and DHS announced that agency counsel would independently determine when immigrants should be detained in excess of standard time frames, rather than relying on FBI designations.⁹⁴ In addition, when the Bureau of Prisons lagged in disciplining correctional officers responsible for detainee abuse, the IG protested before Congress,⁹⁵ and the agency eventually terminated two correctional officers and suspended or demoted others.⁹⁶ By August 2006, the IG had declared all but one of its original twenty-one recommendations resolved.⁹⁷

2. Department of Justice IG review of National Security Letters

When Congress passed the Patriot Act six weeks after the September 11 attacks, it made it significantly easier for the FBI to issue National Security Letters—administrative orders not requiring a judge's authorization—to obtain consumer records from phone companies, Internet providers, credit agencies, and financial institutions.⁹⁸ The new rules permitted the FBI to issue NSLs so long as the information sought was "relevant" to an international terrorism investigation without demonstrating that the information pertained to a foreign

91. See SUPPLEMENTAL METROPOLITAN DETENTION CENTER REPORT, *supra* note 77, at 43-45; SEPTEMBER 11 DETAINEES REPORT, *supra* note 76, at 187-94.

92. See OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, ANALYSIS OF DOJ AND DHS SECURITY RESPONSES (2003); OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, ANALYSIS OF THE SECOND RESPONSE BY THE DEPARTMENT OF JUSTICE TO RECOMMENDATIONS IN THE OFFICE OF THE INSPECTOR GENERAL'S JUNE 2003 REPORT ON THE TREATMENT OF SEPTEMBER 11 DETAINEES (2004) [hereinafter ANALYSIS OF THE SECOND RESPONSE]; OFFICE OF THE INSPECTOR GEN., DEP'T OF JUSTICE, ANALYSIS OF THE RESPONSE BY THE FEDERAL BUREAU OF PRISONS TO RECOMMENDATIONS IN THE OIG'S DECEMBER 2003 REPORT ON THE ABUSE OF SEPTEMBER 11 DETAINEES AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK, SPECIAL REPORT (2004).

93. ANALYSIS OF THE SECOND RESPONSE, *supra* note 92, at 6.

94. Memorandum from Asa Hutchinson, Undersec'y, Border & Transp. Sec., to Michael J. Garcia, Assistant Sec'y, U.S. Immigration & Customs Enforcement (Mar. 30, 2004), available at http://www.asylumlaw.org/docs/united_states/ICE_implementation_of_detention041304.pdf.

95. Richard B. Schmitt & Richard A. Serrano, *Inaction in New York Prison Abuse Stirs Anger*, L.A. TIMES, May 21, 2005, at A13; see also SUPPLEMENTAL METROPOLITAN DETENTION CENTER REPORT, *supra* note 77, at 1-2, 7.

96. PATRIOT ACT REPORT (Mar. 2006), *supra* note 49, at 14.

97. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 1001 OF THE USA PATRIOT ACT 9 (Aug. 2006) [hereinafter PATRIOT ACT REPORT (Aug. 2006)].

98. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS 8-9 (2007) [hereinafter NSL 2007 REPORT].

power, and authorized a broader range of FBI officials to approve them.⁹⁹ In late 2005 and early 2006, as Congress debated reauthorizing sunset provisions of the Patriot Act, Justice Department officials insisted that rigorous oversight over NSLs already existed and that no allegation of abuse had been substantiated.¹⁰⁰ Congress subsequently renewed expiring Patriot Act provisions, while requiring the DOJ IG to review the effectiveness and use of NSLs, “including any improper or illegal use.”¹⁰¹

That statutory mandate led to three highly critical reports from DOJ IG Fine on the FBI’s use of NSLs and other investigative tools.¹⁰² In numerous instances, the IG concluded, the FBI used NSLs in violation of statutes or internal guidelines,¹⁰³ but had failed to report the “overwhelming majority” of possible intelligence violations “through the self-reporting mechanism established 25 years ago to identify and address such violations.”¹⁰⁴ Most damning, the IG found that the FBI had circumvented even the relatively lenient NSL requirements in issuing “exigent letters”: these letters asked phone companies to hand over customer records outside standard legal processes by citing “exigent” circumstances, even where no emergency existed, and falsely stated that the agency had already requested grand jury subpoenas for the same information.¹⁰⁵ The FBI had even obtained phone records by scribbling requests on post-it notes or taking “quick peeks” at the computer screens of phone company personnel stationed at FBI headquarters.¹⁰⁶ The IG attributed the use of these extralegal processes to “numerous, repeated, significant management failures” implicating even the “FBI’s most senior officials.”¹⁰⁷

Despite these trenchant critiques, the IG investigations supported the FBI’s position in several respects. Most importantly, the IG concluded that the information obtained from NSLs had “contributed significantly” to terrorism investigations¹⁰⁸ and that the Patriot Act’s changes to the law, according to agency

99. *Id.*

100. See, e.g., Barton Gellman, *The FBI’s Secret Scrutiny*, WASH. POST, Nov. 6, 2005, at A1; Glenn Greenwald, *Shocking New Revelation: Unchecked Government Powers Get Abused*, SALON (Mar. 6, 2008), <http://www.salon.com/2008/03/06/nsls>.

101. USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 119, 120 Stat. 192, 219 (2006).

102. OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION’S USE OF EXIGENT LETTERS AND OTHER INFORMAL REQUESTS FOR TELEPHONE RECORDS (2010) [hereinafter EXIGENT LETTERS REPORT]; OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, A REVIEW OF THE FBI’S USE OF NATIONAL SECURITY LETTERS: ASSESSMENT OF CORRECTIVE ACTIONS AND EXAMINATION OF NSL USAGE IN 2006 (2008) [hereinafter NSL 2008 REPORT]; NSL 2007 REPORT, *supra* note 98.

103. NSL 2007 REPORT, *supra* note 98, at 66-67.

104. NSL 2008 REPORT, *supra* note 102, at 132.

105. NSL 2007 REPORT, *supra* note 98, at xxxiv, xxxviii.

106. EXIGENT LETTERS REPORT, *supra* note 102, at 45-47.

107. *Id.* at 213.

108. NSL 2007 REPORT, *supra* note 98, at 48.

officials, made NSLs more useful.¹⁰⁹ The IG also concluded that in most cases where the FBI had violated the law, it could have legally obtained the same information.¹¹⁰

The first two NSL reports primarily recommended procedural changes geared to strengthening future oversight—improving FBI databases, issuing guidance to the field, and better monitoring NSL files.¹¹¹ In 2010, the IG’s special report on exigent letters went further in naming individuals responsible for the abuse and calling on the agency to decide whether to discipline them.¹¹² By the time the IG issued that report, several individuals it named, including the head of the FBI unit that issued exigent letters and the chief national security legal adviser, had left the agency.¹¹³ The FBI told Congress in April 2010 that it was exploring possible discipline against others,¹¹⁴ but to date does not appear to have disciplined anyone involved.¹¹⁵

After the IG’s first report, the FBI terminated the use of exigent letters.¹¹⁶ In fact, even before that point, the very knowledge within the FBI that the IG was investigating exigent letters had led to a significant drop in their use.¹¹⁷ A year after the first NSL report was issued, the IG confirmed that the FBI had taken “significant” steps to improve its procedures.¹¹⁸ In addition, the NSL reports generated numerous congressional hearings,¹¹⁹ even prompting angry criticism from members of Congress who had regularly championed stronger law enforcement powers.¹²⁰

109. *Id.* at 43–45.

110. *Id.* at 67.

111. NSL 2008 REPORT, *supra* note 102, at 161–63; NSL 2007 REPORT, *supra* note 98, at 125.

112. EXIGENT LETTERS REPORT, *supra* note 102, at 256.

113. *Id.* at 256 n.270; *see also* David Hechler, *Who Will Take the Fall?*, CORP. COUNS., June 1, 2010, at 22.

114. Hechler, *supra* note 113.

115. *Id.* To date, no DOJ IG semiannual or Patriot Act report to Congress refers to any such discipline taken.

116. EXIGENT LETTERS REPORT, *supra* note 102, at 214.

117. *Id.* at 166.

118. NSL 2008 REPORT, *supra* note 102, at 161.

119. *See, e.g.*, Matthew Korade, *National Security Letters Draw Further Fire at Senate Judiciary Hearing*, CONG. Q. HOMELAND SEC. (Apr. 23, 2008), available at 2008 WLNR 7883570; Keith Perine, *FBI Director Argues Against Patriot Act Rewrite, Requests Broader Power*, CONG. Q. TODAY (Mar. 27, 2007), <http://www.cq.com/doc/news-2479078>; Ari Shapiro, *FBI Investigations Faulted in Scathing Report*, NAT’L PUB. RADIO (Mar. 9, 2007), <http://www.npr.org/templates/story/story.php?storyId=7812242>.

120. *FBI’s Use of Exigent Letters ‘Sloppy’ but Agency Reforming*, *House Judiciary Told*, COMM. DAILY, Apr. 15, 2010, available at 2010 WLNR 8097779 [hereinafter *FBI’s Use of Exigent Letters ‘Sloppy’*] (reporting that Representative James Sensenbrenner told FBI officials he felt “betrayed” because he had long defended the administration’s antiterrorism policies while the FBI continued to evade civil liberties protections).

3. CIA IG review of coercive interrogations

In August 2009, the Obama Administration made public a redacted version of a report that the CIA had sought to suppress for five years—the CIA IG’s review of detentions and interrogations in the intense two-year period following the September 11 attacks. The IG initiated the investigation in 2003 after CIA leadership and other personnel informed the office of unauthorized interrogation methods and concerns over potential human rights violations.¹²¹ In response, the IG documented the CIA’s adoption of harsh interrogation techniques and the agency’s solicitation of an August 2002 OLC opinion that authorized ten coercive techniques against a senior al Qaeda official, including wall slamming and waterboarding, and that served as the legal foundation for other detainee interrogations.¹²²

Though nearly half of the report remains redacted, the public portions cast doubt on the legality and effectiveness of certain interrogation practices the agency had used. While finding “few instances of deviations” from approved procedures, the IG concluded that the use and frequency of waterboarding presented a “notable exception.”¹²³ The IG determined that the CIA had misrepresented to the OLC the severity of the technique and its potential harm, and that the OLC relied upon such representations in approving the practice.¹²⁴ For instance, interrogators waterboarded al Qaeda operative Khalid Shaykh Muhammad 183 times, despite the OLC memo’s assumption that any repetition of enhanced techniques would not be substantial.¹²⁵ In addition, while the CIA had represented that its methods would cause no long-term mental harm, CIA medical professionals disputed the assertion that waterboarding, as actually practiced, “was either efficacious or medically safe.”¹²⁶ Beyond waterboarding, the IG reported that CIA agents had used other unauthorized techniques, such as threatening one detainee with a semiautomatic handgun and revving a power drill while he stood naked and hooded.¹²⁷

Equally significant, the IG refused to conclude that enhanced interrogation techniques had been effective. While agreeing that the CIA’s interrogations as a whole helped apprehend terrorists and identify terrorist plots, the IG concluded that, based on the limited data, it could not be determined whether detainees

121. CIA INTERROGATIONS REPORT, *supra* note 56, at 1-2.

122. *Id.* at 4, 22-23.

123. *Id.* at 5.

124. *Id.* at 20-21 & n.26, 37; *see also* Interrogation of Al Qaeda Operative, 26 Op. O.L.C., 2002 WL 34501675, at *1 (Aug. 1, 2002) (stating that legal opinion was limited to facts provided by CIA and would not necessarily apply if facts were to change).

125. Interrogation of Al Qaeda Operative, 26 Op. O.L.C., 2002 WL 34501675, at *1; CIA INTERROGATIONS REPORT, *supra* note 56, at 44-45.

126. CIA INTERROGATIONS REPORT, *supra* note 56, at 21 n.26.

127. *Id.* at 41-42.

produced greater or better information specifically as a result of enhanced techniques.¹²⁸

According to news accounts, the CIA attempted to hinder the IG's continued investigations of detainee abuse several years after the IG review. In 2007, the CIA conducted its own investigation of the IG's office, prompted by complaints that the IG was on a "crusade" against the agency's detention programs, and the IG office agreed to establish an ombudsman to receive complaints against the office.¹²⁹

The CIA successfully resisted efforts to publicize the report for some time. Upon completion, the report was provided only to the Justice Department and the heads of congressional intelligence committees, and was not shared with the full committees until late 2006.¹³⁰ The *New York Times* first publicly revealed the existence of the report in 2005,¹³¹ but it was not until August 2009 that the report was released, still half-redacted, and over the strong objections of senior CIA officials and former Bush Administration officials.¹³²

The release of the report internally resulted in some changes, though some of these changes were short-lived or affected interrogation practices only at the margins. The CIA adopted new policies to involve medical personnel in monitoring waterboarding, limit consecutive use of the practice, and cap sleep deprivation at 180 hours.¹³³ In addition, according to one account, the IG report's graphic descriptions of CIA interrogation practices led the new head of OLC, Jack Goldsmith, to question the interrogations program; Goldsmith withdrew two OLC memos sanctioning enhanced interrogations before submitting his resignation.¹³⁴ He also advised the CIA to suspend waterboarding until the

128. *Id.* at 85, 89-91, 100.

129. Mark Mazzetti, *C.I.A. Tells of Changes for Its Internal Inquiries*, N.Y. TIMES, Feb. 2, 2008, at A9; Mark Mazzetti & Scott Shane, *C.I.A. Watchdog Becomes Subject of C.I.A. Inquiry*, N.Y. TIMES, Oct. 12, 2007, at A1. In addition, one journalist has described a meeting between Vice President Cheney and CIA IG John Helgerson, following the initial interrogations review, as an attempt at intimidation. See JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* 288-89 (2008). Helgerson himself, however, has disputed that characterization and has described the meeting as a briefing for the Vice President without any pressure to change his conclusions. See GOLDSMITH, *supra* note 10, at 277-78 n.73.

130. Mark Hosenball, *Report Reveals CIA Conducted Mock Executions*, NEWSWEEK, (Aug. 20, 2009), <http://www.thedailybeast.com/newsweek/2009/08/20/report-reveals-cia-conducted-mock-executions.html>.

131. Douglas Jehl, *Report Warned C.I.A. on Tactics in Interrogation*, N.Y. TIMES, Nov. 9, 2005, at A1.

132. Hosenball, *supra* note 130.

133. Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques that May Be Used in the Interrogation of a High Value al Qaeda Detainee, 2005 WL 6334005, at *4, *9, *31 n.51 (Op. O.L.C. May 10, 2005).

134. MAYER, *supra* note 129, at 288, 294; Jeffrey Rosen, *Conscience of a Conservative*, N.Y. TIMES MAG. (Sept. 9, 2007), <http://www.nytimes.com/2007/09/09/magazine/09rosen.html>.

agency could more thoroughly review the IG report.¹³⁵ After Goldsmith's departure, however, the OLC reaffirmed the use of waterboarding¹³⁶ and issued new memos deeming harsh interrogation methods consistent with the federal prohibition on torture¹³⁷ and with U.S. obligations under the Convention Against Torture.¹³⁸ The 2005 OLC memos also brushed aside the IG's cautious position on the effectiveness of enhanced interrogations, instead accepting the CIA's claim that enhanced interrogations had led to "specific, actionable intelligence" on terrorist threats.¹³⁹ Despite the renewed legal authority for enhanced interrogations, the CIA claims that it has not waterboarded any detainees since 2003,¹⁴⁰ and some commentators have credited the IG investigation for the cessation of the practice.¹⁴¹

After taking office, President Obama ordered the CIA to abide by stricter Army Field Manual interrogation standards¹⁴² and reassigned the lead role in high-value detainee interrogations to the FBI.¹⁴³ Even after the change of administration, the IG report played a role: Attorney General Holder reportedly

135. OFFICE OF PROF'L RESPONSIBILITY, U.S. DEP'T OF JUSTICE, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS 115 (2009) [hereinafter OPR REPORT].

136. *Id.* at 127.

137. Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques that May Be Used in the Interrogation of a High Value al Qaeda Detainee, 2005 WL 6334005, at *1, *34; Application of 18 U.S.C. §§ 2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees, 29 Op. O.L.C., 2005 WL 6334006, at *1, *18 (May 10, 2005).

138. Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees, 2005 WL 6334007, at *1 (Op. O.L.C. May 30, 2005).

139. *Id.* at *8, *22-25.

140. Brian Ross & Richard Esposito, *Exclusive: Only Three Have Been Waterboarded by CIA*, ABC NEWS (Nov. 2, 2007), <http://abcnews.go.com/blogs/headlines/2007/11/exclusive-only>.

141. *See, e.g.*, Check & Radsan, *supra* note 11, at 291; Eric Lichtblau & Scott Shane, *Report Faults 2 Who Wrote Terror Memos*, N.Y. TIMES, Feb. 20, 2010, at A1. From the public evidence, it is difficult to separate out the impact of the IG report on the reported cessation of waterboarding from that of the explosive Abu Ghraib prisoner abuse scandal and the leaking of OLC legal memos. In addition, in 2012, fresh allegations of a previously unreported instance of waterboarding have raised new questions about the CIA's official account of the program. *See* Charlie Savage & Scott Shane, *Libyan Alleges Waterboarding by C.I.A. in Afghanistan, Rights Group Says*, N.Y. TIMES, Sept. 6, 2012, at A9.

142. Ken Dilanian, *CIA Avoiding Interrogations*, CHI. TRIB., Apr. 11, 2011, at C10; Greg Miller & Julian E. Barnes, *Obama Orders Gitmo, CIA Prisons Closed*, CHI. TRIB., Jan. 23, 2009, at C6.

143. *See* Marisa Taylor, *FBI Chief Vows to Protect Terror Detainees from Rendition*, MCCLATCHY NEWSPAPERS (Sept. 16, 2009), <http://www.mcclatchydc.com/2009/09/16/75556/fbi-chief-vows-to-protect-terror.html>.

made his controversial decision to reopen criminal investigations into CIA detainee abuse after reading the IG report.¹⁴⁴

B. *Less Consequential Reviews*

1. *Department of Homeland Security IG review of Maher Arar rendition*

In perhaps the most notorious case of “extraordinary rendition” that has come to public light, U.S. authorities transferred Maher Arar, a Canadian citizen transiting through New York, to Syria, where he was interrogated under torture and detained for close to a year.¹⁴⁵ Before his arrival in New York, the INS had matched Arar’s name to a database of suspected terrorists, and he was turned over to the FBI for interrogation.¹⁴⁶ The INS found Arar ineligible for admission on the grounds that he was a member of al Qaeda.¹⁴⁷ Twelve days after his arrival, U.S. authorities flew Arar to Jordan, where Syrian authorities took custody.¹⁴⁸

For almost a year, Arar remained under detention in Syria. According to a complaint Arar later filed, Syrian security officers beat him with an electric cable, threatened to place him in a “spine-breaking ‘chair,’” interrogated him on questions that “bore a striking similarity” to those previously asked by the FBI, and when not questioning him, confined him in a dark, grave-like underground cell.¹⁴⁹ An independent Canadian government commission later concluded that Arar posed no security threat,¹⁵⁰ and that Canadian authorities had wrongly described Arar to U.S. officials as an Islamic extremist with suspected al Qaeda links.¹⁵¹ The Canadian government formally apologized to Arar and agreed to compensate him over \$10 million for his ordeal.¹⁵²

144. Daniel Klaidman, *Independent’s Day*, NEWSWEEK, July 20, 2009, at 35, 41; Josh Meyer & Greg Miller, *Holder Opens Inquiry of CIA Interrogations*, L.A. TIMES, Aug. 25, 2009, at A1; see also Attorney Gen. Eric Holder, U.S. Dep’t of Justice, Statement Regarding a Preliminary Review into the Interrogation of Certain Detainees (Aug. 24, 2009), available at <http://www.fas.org/irp/news/2009/08/ag082409.html>.

145. See Complaint ¶¶ 1, 11, 64, 66, *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (No. CV-04-0249), *aff’d*, 585 F.3d 559 (2d Cir. 2009) (en banc).

146. MAHER ARAR REPORT, *supra* note 63, at 6.

147. *Id.* at 6-7, 30.

148. *Id.* at 7.

149. Complaint, *supra* note 145, ¶¶ 51-52, 54, 58.

150. COMM. OF INQUIRY INTO THE ACTIONS OF CAN. OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: ANALYSIS AND RECOMMENDATIONS 9 (2006) [hereinafter ARAR COMMISSION REPORT], available at http://www.sirc-csars.gc.ca/pdfs/cm_arar_rec-eng.pdf.

151. *Id.* at 13, 19, 24-26.

152. *Arar v. Ashcroft*, 585 F.3d 559, 574 (2d. Cir 2009) (en banc); Editorial, *Tortured Justice*, N.Y. TIMES, Dec. 8, 2008, at A28.

In early 2004, the DHS IG began an investigation of Arar's case at the request of Representative John Conyers, Jr., then ranking member of the House Judiciary Committee.¹⁵³ Almost four years later, IG Richard Skinner issued a classified report to Congress and then a one-page unclassified summary to the public.¹⁵⁴ After additional congressional pressure, the IG made public a highly redacted version of the report that omitted whole paragraphs and pages.¹⁵⁵ DHS has not yet released a fuller version, despite the fact that Arar's litigation against U.S. officials—a major reason cited for the withholding of information—ended in 2010.¹⁵⁶

The IG concluded that the INS properly found Arar inadmissible¹⁵⁷ and that the agency could not dismiss the information it had at the time of Arar's terrorist connections, however unreliable it turned out to be.¹⁵⁸ The report also stated that the Acting Attorney General disregarded Arar's request to return to Canada, his country of citizenship, as prejudicial to U.S. interests.¹⁵⁹ The IG did "not know" why the Acting Attorney General deemed Arar's return to Canada prejudicial, but noted concern regarding the "porous" U.S.-Canada border.¹⁶⁰

More revealing, the IG reported that INS attorneys had concluded that returning Arar to Syria would "more likely than not result in his torture," a conclusion that would ordinarily make transfer to Syria unlawful under the Convention against Torture and implementing U.S. regulations.¹⁶¹ However, those regulations permit removal to a country if the Secretary of State has received assurances from a foreign government that an alien would not be tortured, and the Attorney General has concluded that such assurances are "sufficiently reliable."¹⁶² The IG concluded that in the Arar case, assurances were received, but were "ambiguous regarding the source or authority purporting to bind the Syri-

153. MAHER ARAR REPORT, *supra* note 63, at 37, 41-42.

154. See OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., THE REMOVAL OF A CANADIAN CITIZEN TO SYRIA (UNCLASSIFIED SUMMARY) (2008), available at http://www.oig.dhs.gov/assets/Mgmt/OIG_08-18_Mar08.pdf.

155. See U.S. Department of Homeland Security Inspector General Report OIG-08-18, 'The Removal of a Canadian Citizen to Syria': Joint Hearing of the Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the H. Comm. on the Judiciary and the Subcomm. on Int'l Orgs., Human Rights, & Oversight of the H. Comm. on Foreign Affairs, 110th Cong. 30, 32 (2008) [hereinafter *Joint Hearing on Arar*] (statement of Richard L. Skinner, Inspector Gen., U.S. Dep't of Homeland Sec.).

156. See *Arar*, 585 F.3d at 564, 130 S. Ct. 3409 (2010).

157. *Joint Hearing on Arar*, *supra* note 155, at 26 (statement of Richard L. Skinner, Inspector Gen., U.S. Dep't of Homeland Sec.).

158. See MAHER ARAR REPORT, *supra* note 63, at 18.

159. *Id.* at 19-21.

160. *Id.* at 21.

161. *Id.* at 22-23.

162. *Id.* at 27.

an government.”¹⁶³ Moreover, contrary to regulations, their reliability “appears not to have been examined.”¹⁶⁴

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.¹⁶⁵ In late 2004, the IG reached an agreement with DHS on the privilege claims, but the IG experienced further resistance, prompting a member of Congress to write DHS to urge cooperation.¹⁶⁶ In addition, the “principal INS decision-makers involved in the Arar matter,” including the former INS Commissioner, had left government and refused to be interviewed,¹⁶⁷ and lacking subpoena power over testimony, the IG could not compel them.¹⁶⁸

Although the IG faced external obstacles to its investigation, members of Congress and former IG Ervin criticized the IG office itself for not sufficiently resisting such interference.¹⁶⁹ In addition, the IG acknowledged that it had not even attempted to interview certain high-level decisionmakers, including the Acting Attorney General.¹⁷⁰ The IG issued only two recommendations and deemed both resolved without suggesting any interest in monitoring compliance.¹⁷¹ The first addressed a relatively peripheral issue, the time period for aliens to respond to charges that they were inadmissible for security-related grounds, while the IG simply declared the second recommendation resolved after ICE promised to “consult” with the State Department before accepting non-torture assurances.¹⁷²

163. *Id.* at 5.

164. *Id.* at 22.

165. Letter from Clark Kent Ervin, Inspector Gen., U.S. Dep’t of Homeland Sec., to Rep. John Conyers, Jr. (July 14, 2004), reprinted in MAHER ARAR REPORT, *supra* note 63, app. D at 43-44; see also Arar v. Ashcroft, 585 F.3d 559, 563 (2d Cir. 2009) (en banc) (affirming dismissal of Arar’s claims against the Attorney General and other senior government officials for violations of the Torture Victim Protection Act and the Due Process Clause).

166. *Joint Hearing on Arar*, *supra* note 155, at 27-28 (statement of Richard L. Skinner, Inspector Gen., U.S. Dep’t of Homeland Sec.).

167. *Id.* at 19 (statement of Richard L. Skinner, Inspector Gen., U.S. Dep’t of Homeland Sec.).

168. See *id.* at 28 (statement of Richard L. Skinner, Inspector Gen., U.S. Dep’t of Homeland Sec.).

169. See, e.g., *id.* at 3, 11, 36.

170. *Id.* at 75-76 (statement of Richard L. Skinner, Inspector Gen., U.S. Dep’t of Homeland Sec.). The IG finally interviewed the Deputy Attorney General following the hearing, but did not change any findings. OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., THE REMOVAL OF A CANADIAN CITIZEN TO SYRIA: ADDENDUM I (2010).

171. MAHER ARAR REPORT, *supra* note 63, at 35-36.

172. *Id.*

2. *Department of Defense IG review of military monitoring of protests*

In December 2005, major news outlets reported that the military was tracking antiwar and antimilitary recruitment protests as part of an expanding mission of collecting domestic intelligence.¹⁷³ According to the news reports, the Pentagon's little known Counterintelligence Field Activity Agency (CIFA) maintained a database of suspicious activity reports from citizens and other law enforcement agencies on potential threats of terrorism or harm to U.S. military installations.¹⁷⁴ Dozens of these Threat and Local Observation Notice reports, or Talon reports, focused on antiwar protest groups.¹⁷⁵ Amid public concern, two members of Congress requested that the DOD IG investigate whether the military was surveilling domestic groups in violation of intelligence laws and department regulations.¹⁷⁶

The Defense Department reacted swiftly to the outcry. In March 2006, it acknowledged that it had improperly retained information on protests in the database, and announced that it had since purged the information.¹⁷⁷ It also announced a new policy that, going forward, Talon reports should only cover international terrorist threats and should comply with a Defense Department regulation on intelligence collection, rather than a more lenient regulation for department law enforcement activities.¹⁷⁸ In April 2007, the new Undersecretary of Defense for Intelligence recommended ending the Talon program altogether, "particularly in light of its image in Congress and the media."¹⁷⁹ The Defense Department announced the closure of the Talon database later that year and said it would develop a new system for reporting threats to military interests.¹⁸⁰

173. Walter Pincus, *Defense Facilities Pass Along Reports of Suspicious Activity: 'Raw Information' from Military, Civilians Is Given to Pentagon*, WASH. POST, Dec. 11, 2005, at A12; *Is the Pentagon Spying on Americans?* (NBC television broadcast Dec. 14, 2005), available at http://www.msnbc.msn.com/id/10454316/ns/nbcnightlynews-nbc_news_investigates/t/pentagon-spying-americans.

174. Pincus, *supra* note 173; *Is the Pentagon Spying on Americans?*, *supra* note 173.

175. *Is the Pentagon Spying on Americans?*, *supra* note 173.

176. Letter from Representative Zoe Lofgren to Thomas F. Gimble, Acting Inspector Gen., U.S. Dep't of Def. (Dec. 30, 2005), *reprinted in* TALON REPORT, *supra* note 62, app. B at 17-19; Letter from Representative Anna G. Eshoo to Thomas Gimble, Acting Inspector Gen., U.S. Dep't of Def. (Jan. 12, 2006), *reprinted in* TALON REPORT, *supra* note 62, app. C at 20-21.

177. *Pentagon Admits Errors in Spying on Protesters*, NBCNEWS.COM (Mar. 10, 2006), www.msnbc.msn.com/id/11751418/ns/us_news/t/pentagon-admits-errors-spying-protestors.

178. *See* TALON REPORT, *supra* note 62, at iii.

179. Walter Pincus, *Pentagon to End Talon Data-Gathering Program*, WASH. POST, Apr. 25, 2007, at A10 (internal quotation mark omitted).

180. Press Release, Sgt. Sara Wood, Am. Forces Press Serv., Defense Department to Close Talon System (Aug. 21, 2007).

In June 2007, after the Undersecretary's recommendation to close Talon but before its formal discontinuation, the DOD IG issued its report. The report, signed by Deputy IG for Intelligence Shelton Young, concluded that the military had legally gathered data on protests to protect military forces and installations, and had not intentionally monitored U.S. persons' First Amendment activities.¹⁸¹ The IG report also stated, however, that CIFA had not complied with a department regulation requiring it to delete information on U.S. persons after ninety days except where specifically authorized.¹⁸² The report made no recommendations, citing "ongoing management actions."¹⁸³

The slim report—with just fourteen pages of analysis—contributed little information that was not publicly known, and elicited scant media attention despite significant media interest in the underlying controversy. An ACLU FOIA request had already revealed that the Talon database had nearly 13,000 entries by December 2005, including almost 3000 with U.S. person information and 186 on domestic antimilitary protests.¹⁸⁴ Although the IG audit resulted in slightly different numbers, and some additional detail, the disclosures were not significant in light of the FOIA release and the department's previous admissions.

More significantly, the IG analysis was thin, even conclusory, on several key issues. For instance, the report stated in several places that the purpose of the Talon reports (before the March 2006 policy change) was force protection and law enforcement, not intelligence collection.¹⁸⁵ Although the report does not define, or explain the distinction between, law enforcement and intelligence collection, the IG seemed to be making the point that a 1982 regulation governing intelligence collection did not apply.¹⁸⁶ That regulation sharply limited the types of information that could be collected about U.S. persons and largely required a foreign nexus for targeting U.S. persons, such as participation in international terrorist activities.¹⁸⁷ The IG based its conclusion on the fact that reports came from citizens and law enforcement personnel concerned about possible threats to the military, not from active military monitoring, and that a substantial number involved actual police incidents.¹⁸⁸ But the IG did not ad-

181. TALON REPORT, *supra* note 62, at i-ii, 8.

182. *Id.* at ii, 7-8.

183. *Id.* at iii.

184. Review of the Talon Reporting System (undated), *available at* http://www.aclu.org/files/pdfs/safefree/talon_review_20070117.pdf; *see also* Press Release, ACLU, ACLU Report Shows Widespread Pentagon Surveillance of Peace Activists (Jan. 17, 2007), *available at* <http://www.aclu.org/national-security/aclu-report-shows-widespread-pentagon-surveillance-peace-activists>.

185. TALON REPORT, *supra* note 62, at i-ii, 5-8, 11.

186. *See id.* at 6.

187. *See* UNDERSEC'Y OF DEF. FOR POLICY, U.S. DEP'T OF DEF., PUB. NO. 5240.1-R, PROCEDURES GOVERNING THE ACTIVITIES OF DOD INTELLIGENCE COMPONENTS THAT AFFECT UNITED STATES PERSONS 16-18 (1982).

188. TALON REPORT, *supra* note 62, at 5, 7.

dress other facts that suggested that the Talon program had a mixed mandate including intelligence gathering, or at best an unclear one; Deputy Secretary of Defense Paul Wolfowitz's ambiguous 2003 order implementing Talon could be read as authorizing intelligence gathering and analysis on domestic threats.¹⁸⁹

The IG report had other notable omissions. For instance, the report offered no explanation of why U.S. Northern Command, a second Defense Department component that stored Talon information, deleted all Talon reports just before media revelations of the program.¹⁹⁰ The deletion prevented the IG from assessing whether Northern Command had complied with information retention requirements.¹⁹¹ Moreover, the IG did not address the reasons for CIFA's failure to comply with retention regulations (beyond database limitations) or who, if anyone, should be considered responsible. It also offered no guidance on whether the replacement to Talon should incorporate stronger privacy and First Amendment controls, or, as some department officials had suggested, looser constraints to permit longer-term tracking of possible threats.¹⁹² Following the IG report, several Democratic members of the House Intelligence Committee, including the representative who had requested the investigation, charged that the report failed to address fundamental questions raised by the program.¹⁹³

III. ASSESSING IG RIGHTS OVERSIGHT

In this Part, I explore how the five IG reviews described above addressed individual rights. I first discuss what it means to protect individual rights in the national security context, identifying five dimensions of rights oversight that are consistent with IGs' broad statutory mandate. Second, I analyze how IG reviews in fact contributed to these five dimensions of rights oversight. I conclude that while IG reviews varied significantly, several reviews created significant transparency on national security conduct, identified violations of the law that escaped judicial review, and even contested government restrictions on liberty where existing law was sparse or ambiguous. Certain reviews led agencies to end the abuses that were documented or to significantly reform their proce-

189. See Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., Collection, Reporting, and Analysis of Terrorist Threats to DoD Within the United States (May 2, 2003), reprinted in TALON REPORT, *supra* note 62, app. F, at 30-31; see also Review of the Talon Reporting System, *supra* note 184, at 1-2 (noting that the wording of the 2003 memo led to different interpretations on what could be reported through Talon).

190. TALON REPORT, *supra* note 62, at 5.

191. *Id.*

192. See Review of the Talon Reporting System, *supra* note 184, at 1 (reporting concern that limits on retaining records with U.S. person information would hinder long-term tracking of terrorist threats).

193. Letter from Representative Anna G. Eshoo et al., U.S. House of Representatives Permanent Select Comm. on Intelligence, to Claude M. Kicklighter, Inspector Gen., Dep't of Def. (June 27, 2007), available at http://eshoo.house.gov/images/documents/Intel/talon%20%20letter%20to%20ig_6_27_2007.pdf.

dures. Yet even stronger reviews largely did not call for, nor did they result in, remedies for most victims, repercussions for high-level executive officials, or significant rights-protective constraints on agency discretion. As a whole, these cases suggest the strengths and limitations of IG rights oversight: IGs are well suited to increase transparency, evaluate the propriety of national security conduct, and reform internal procedures; on the other hand, their independence can be undermined, they are ill positioned to determine violations of constitutional rights, and they depend on political actors to enforce recommendations.

A. *Five Dimensions of Rights Oversight*

While the internal separation of powers literature is often concerned with protecting individual rights against an overreaching executive, the literature tells us little about how internal institutions should protect individual rights. My normative premise is that an ideal system of “rights oversight” in the national security context should address at least five objectives: (1) increasing the transparency of national security practices; (2) identifying rights violations and wrongful government conduct, whether or not that conduct contravenes existing law; (3) providing relief for victims of abuses; (4) holding government officials accountable for wrongful conduct abridging rights; and (5) revising agency rules to prevent future abuses. As I discuss further below, legal scholars often identify these goals (individually or in some combination) as the goal of judicial review or review by other institutions designed to protect individual rights. In my view, an internal institution may be valuable in contributing to rights protection even if it does not address all five of these dimensions, so long as the overall structure of rights oversight addresses the whole.¹⁹⁴ On the other hand, if the question is whether a particular executive mechanism can compensate for inadequate external review by institutions that we expect to perform the full range of oversight functions, such as courts, then it is important to assess that institution’s contributions to all five dimensions.

Of course, the relative priority of these goals may be contested, even among rights advocates, and an extensive literature debates effective remedial schemes for constitutional and civil rights violations.¹⁹⁵ Without resolving such disagreements here, I use this metric primarily to describe how IGs contributed to varying facets of rights protection and where they fell short.

194. See Clark, *supra* note 12, at 362-63 (arguing that accountability mechanisms may be effective even if they operate at only one of four “stages” of accountability, if other mechanisms are in place to address other stages).

195. See, e.g., David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1202 n.10, 1212; Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1016-21 (2004); William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 145-56 (2004).

All five of these dimensions are consistent with IGs' broad statutory mandates, though some are closer to IGs' core mandates. The Inspector General Act clearly envisioned IGs as mechanisms to increase transparency, identify serious problems in agencies, and recommend reforms. The statute does not specifically address individual relief for victims or accountability for individuals responsible for abuses (apart from criminal violations), though both of these functions fall within IGs' broad mandate to recommend "corrective action."¹⁹⁶ Importantly, IGs have only an advisory role: they can recommend corrective measures and monitor compliance, but they rely on agencies and Congress to implement reform.

Increasing transparency. Perhaps the least controversial function of rights oversight is to provide enough information about national security conduct to enable external assessment.¹⁹⁷ Excessive secrecy allows abuses to go undetected and stymies assessment of whether the security benefits of a program justify burdens on individual rights. Congress, the public, and agencies themselves require information on the scope, effectiveness, and rights implications of national security programs. Moreover, the IG Act squarely mandates a transparency function for IGs, requiring them to keep agencies and Congress fully informed about serious problems in agencies and ordering agencies, in general, to make semiannual IG reports public.¹⁹⁸

Identifying rights violations and wrongful conduct. Where the object of concern is individual rights, an agency's compliance with laws or regulations put in place to protect rights is the logical starting point for evaluation. But in the national security context, legal doctrine itself might be underdeveloped as a result of procedural and substantive barriers to judicial review or because legislation lags behind fast-moving executive national security policymaking.¹⁹⁹ Thus, a focus on legal compliance alone might not adequately protect individual liberty or equality interests. IGs have a statutory obligation to report on serious problems, not just legal abuses,²⁰⁰ permitting them to identify government conduct that unfairly harms individuals or constrains liberty even where the conduct does not violate existing law.

Providing relief for victims. As scholars and courts have observed, providing remedies to victims of wrongful government conduct not only compensates victims—a traditional purpose of individual rights and remedies law—but also serves to acknowledge government responsibility for abuses, deter future mis-

196. See Inspector General Act of 1978, Pub. L. No. 95-452, § 4(a)(5), *reprinted as amended in* 5 U.S.C. app. (2011).

197. See HEYMANN & KAYYEM, *supra* note 12, at 109-10; Clark, *supra* note 12, at 404-05; Jonathan H. Marks, *9/11 + 3/11 + 7/7 = ? What Counts in Counterterrorism*, 37 COLUM. HUM. RTS. L. REV. 559, 618-20 (2006).

198. Inspector General Act of 1978 §§ 4(a)(5), 5(c). CIA semiannual reports are not required to be made public. See 50 U.S.C. § 403q(d)(1).

199. See, e.g., Pillard, *supra* note 7, at 692.

200. See, e.g., Inspector General Act of 1978 § 5(a)(1).

conduct, and restore victims' sense of inclusion in a social and political community.²⁰¹ Although IGs cannot order relief, they are statutorily required to recommend "corrective action" for abuses.²⁰² Such corrective action could include remedies for victims ranging from apologies or other symbolic gestures to financial compensation to case-specific "injunctive" relief, such as expungement of information from government databases, dismissal of indictments, or release from detention.

Holding government officials accountable. Identifying and holding personally accountable the government decisionmakers and agents responsible for policies or conduct improperly curtailing rights can deter future abuse. Measures to promote individual accountability might range from, at a minimum, the stigma of being named in an IG review, to more serious employment measures (disciplinary investigations, suspensions, demotions, or dismissal), to referral for criminal prosecution. While IGs cannot order discipline, they can build a factual record on individual accountability and recommend that agencies adopt disciplinary measures, and they are also legally required to report to the Attorney General whenever they have reasonable grounds to suspect a violation of federal criminal law.²⁰³

Revising agency rules to prevent future abuses. The ultimate objective of any system of oversight is to prevent future abuses. IGs can support prospective reform by recommending changes to agency managerial or oversight processes or new statutory or administrative substantive rules, such as heightened legal constraints on agency discretion. Such proposals fall within IGs' mandate to prevent future abuse by recommending policy changes and commenting on existing and proposed legislation and regulations.²⁰⁴ Procedural reforms might include requiring higher-level approval of actions implicating rights, greater oversight by agency counsel, or improving agency databases or systems to enable better oversight. IGs can also recommend greater substantive constraints on agency discretion, such as the prohibition of a controversial practice or a requirement of ex ante judicial approval.

B. *How IG Reviews Addressed These Dimensions*

IG reviews contributed, to varying extents, to the five dimensions of rights oversight. Most notably, several reviews contributed significantly to the transparency of national security practices implicating rights, identified legal violations that escaped judicial review, and even criticized restrictions on liberty that

201. See, e.g., Eric K. Yamamoto et al., *American Racial Justice on Trial—Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269, 1302-04, 1334 (2003).

202. See Inspector General Act of 1978 § 4(a)(5).

203. *Id.* § 4(d).

204. *Id.* § 4(a)(2)-(3).

did not violate existing law. IG reviews also helped end specific abuses, held mid- and lower-level officials accountable for violations, and reformed agency procedural rules. At the same time, however, even stronger reviews largely did not precipitate individual relief for most victims, consequences for senior agency leadership, or significant constraints on agency discretion.

1. *Increasing transparency*

Most of the IG reviews studied here disclosed significant new information about national security programs, and several created remarkable transparency on issues that were previously highly secret. IG reviews frequently brought to light information on civil liberties violations that had not surfaced through litigation or alternative forms of congressional oversight.

Most notably, the DOJ IG's reviews of NSLs disclosed both the unprecedented extent to which the FBI relied on NSLs—information that public interest organizations had unsuccessfully sued to obtain²⁰⁵ and that the FBI had “significantly understated” to Congress²⁰⁶—and the fact that the FBI had used exigent letters to bypass legal processes altogether. Legal and practical barriers made it almost impossible for such information to surface through other channels: a statutory “gag order” forbade NSL recipients from revealing the records requests, phone companies complying with exigent letters had no incentive to expose their circumvention of privacy laws, and targets of either practice had no way of knowing that the government had sought their records. Moreover, the law only required the FBI to provide limited, classified reports to Congress on NSLs, and until 2006 did not require any public disclosure.²⁰⁷ Without identifiable victims of abuse, the information that might reveal abuses of authority resided almost exclusively within the executive branch.

IGs made use of their auditing expertise and broad investigative powers to access and analyze information. In the DOJ IG NSL review, the IG not only drew on a large sample of publicly unavailable data, but also used a detailed, resource-intensive audit to make the raw data on NSL usage comprehensible.²⁰⁸ In other cases, IGs appeared to enjoy extraordinary access to high-level government officials and individual employees under scrutiny. In the Septem-

205. *See, e.g.,* ACLU v. U.S. Dep't of Justice, 265 F. Supp. 2d 20, 22 (D.D.C. 2003) (denying civil liberties groups' attempts to uncover through FOIA the number of times the government had used surveillance tools authorized by the Patriot Act, including NSLs); *see also* Doe v. Ashcroft, 334 F. Supp. 2d 471, 502 (S.D.N.Y. 2004) (noting that the government completely redacted a listing of NSLs issued in a document released pursuant to an ACLU FOIA request), *vacated in part as moot*, Doe v. Gonzales, 449 F.3d 415 (2d Cir. 2006).

206. NSL 2007 REPORT, *supra* note 98, at xvi-xviii, xlv.

207. *See id.* at xvi, xix, 9.

208. *See* NSL 2008 REPORT, *supra* note 102, at 4, 76 (describing separate IG analysis of FBI audit); NSL 2007 REPORT, *supra* note 98, at ix; *see also* Cuéllar, *supra* note 13, at 231-32 (arguing that audits provide untapped potential to check executive discretion in areas where judicial review proves inadequate).

ber 11 detainees review, for instance, the DOJ IG interviewed Attorney General John Ashcroft, FBI Director Robert Mueller, and INS Commissioner James Ziglar,²⁰⁹ and “administratively compelled” interviews with staff at the Metropolitan Detention Center, who could then be subject to discipline for refusing to answer questions or for not responding truthfully.²¹⁰

In addition, the CIA IG interrogations review suggests that the information from IG investigations informed decisionmaking *within* the executive branch, even in the absence of public transparency. Although the CIA IG report was publicly blocked for years, at the time of its release within the executive branch it revealed critical information about actual CIA interrogation practices, apparently with some impact. For instance, the report has been credited with influencing OLC head Goldsmith to withdraw an OLC memo approving extreme interrogations in June 2004²¹¹ and possibly contributing to the decision to end waterboarding.²¹² At the time the report was first issued internally—before the release of the Abu Ghraib photos—it supplied one of the earliest graphic depictions of extreme interrogations. In addition, because the CIA National Clandestine Service later destroyed ninety-two videotapes of detainee interrogations that the IG had reviewed,²¹³ the IG report’s description of those interrogations, including the repeated use of waterboarding, remains an essential source on those interrogations.

Even weaker IG reviews revealed important facts: despite the DHS IG Arar rendition report’s spotty account of the decisionmaking behind Arar’s transfer to Syria, for instance, the report did reveal that the Acting Attorney General had deemed Arar’s return to Canada prejudicial to U.S. interests and that the government had issued an “operations order” to fly Arar to the Middle East even before it received assurances that he would not be tortured.²¹⁴

Information disclosed through IG reports helped civil rights plaintiffs corroborate allegations of government abuse. A number of plaintiffs cited or incorporated IG reports into their complaints and courts took judicial notice of their contents. Using the DOJ IG September 11 detainee reports, former detain-

209. See SEPTEMBER 11 DETAINEES REPORT, *supra* note 76, at 7.

210. SUPPLEMENTAL METROPOLITAN DETENTION CENTER REPORT, *supra* note 77, at 6 & n.7.

211. See MAYER, *supra* note 129, at 288, 294.

212. See *supra* notes 140-141 and accompanying text.

213. Ken Dilanian, *CIA Avoids Charges: Officers Won't Be Prosecuted over the Destruction of Interrogation Tapes*, L.A. TIMES, Nov. 10, 2010, at A14; Peter Finn & Julia Tate, *Destruction of Tapes Caused Concern at CIA*, WASH. POST, April 16, 2010, at A3. According to a Deputy Assistant IG, the IG’s office viewed the videotapes in an overseas facility without taking custody or making copies of them. *ACLU v. Dep’t of Def.*, 827 F. Supp. 2d 217, 224 (S.D.N.Y. 2011). It is unclear what input the CIA IG provided regarding the potential destruction of the videotapes, although there is evidence that the IG told CIA officials that his office no longer required the videotapes for its investigation, which some CIA officials represented as providing clearance for their destruction. See *id.* at 225-26.

214. MAHER ARAR REPORT, *supra* note 63, at 21, 26-27, 29.

ees survived motions to dismiss their civil rights claims against Justice Department officials²¹⁵ and obtained the dismissal of a criminal indictment based on speedy trial right violations.²¹⁶ And former counsels for detainees brought a new suit challenging the secret recording of attorney-client conversations at the Metropolitan Detention Center.²¹⁷

For instance, in *Turkmen v. Ashcroft*, eight September 11 detainees who had sued Attorney General Ashcroft, FBI Director Robert Mueller, and officials at federal detention facilities twice amended their complaint with new information from the DOJ IG's detainee reports.²¹⁸ In partially rejecting motions to dismiss, the district court extensively cited those reports, noting that they substantiated plaintiffs' claims of physical and verbal abuse,²¹⁹ and further ruled that the reports enabled plaintiffs to plead that certain high-ranking defendants were personally involved in establishing wrongful policies.²²⁰ In fact, the IG reports had a second-order transparency benefit for plaintiffs: the *Turkmen* plaintiffs were not only able to use the findings of the reports, but also obtained through discovery notes of interviews that IG investigators had conducted with a number of high-level Justice Department officials.²²¹ Five of the named plaintiffs in *Turkmen* eventually reached a \$1.26 million settlement with the U.S. government.²²²

Litigation and IG investigations did not always reinforce each other as mechanisms for information release, however. In the Arar rendition review, the DHS IG attributed its withholding of information largely to Arar's lawsuit, ob-

215. *Turkmen v. Ashcroft*, No. 02-CV-2307(JG), 2006 WL 1662663, at *1 (E.D.N.Y. June 14, 2006), *aff'd in part and vacated in part*, 589 F.3d 542 (2d Cir. 2009); *see also* al-Kidd v. Ashcroft, 580 F.3d 949, 954 n.6, 981 (9th Cir. 2009), *rev'd*, 131 S. Ct. 2074 (2011).

216. *See, e.g.*, *United States v. Benatta*, No. 01-CR-247E, 2003 WL 22202371 (W.D.N.Y. Sept. 12, 2003); Docket, *Benatta*, 2003 WL 22202371 (No. 1:01cr00247).

217. *Lonegan v. Hasty*, 436 F. Supp. 2d 419 (E.D.N.Y. 2006).

218. *Turkmen*, 2006 WL 1662663, at *3-4.

219. *Id.* at *18-19.

220. *Id.* at *35.

221. *See, e.g.*, Brief for Ibrahim Turkmen et al. as Amici Curiae Supporting Respondents at 11-20, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (No. 07-1015), 2008 WL 4805227 (submitting information obtained in discovery from OIG interview notes with numerous officials, including FBI Director Robert Mueller and Bureau of Prisons Director Kathy Hawk Sawyer).

222. Press Release, Ctr. for Constitutional Rights, Five New York Men Detained and Abused in Post-9/11 Immigration Sweeps Settle Case for \$1.26 Million (Nov. 3, 2009), *available at* <http://ccrjustice.org/newsroom/press-releases/five-new-york-men-detained-and-abused-post-9/11-immigration-sweeps-settle-ca>. The Supreme Court established a heightened pleading standard in the related case of *Iqbal*, 556 U.S. 662, leading the Second Circuit to vacate and remand part of the district court's ruling in *Turkmen v. Ashcroft*, 589 F.3d 542, 546-47 (2d Cir. 2009). However, other *Turkmen* plaintiffs amended the complaint once more to plead senior Justice Department officials' personal involvement in greater factual detail. Fourth Amended Complaint and Demand for Jury Trial, *Turkmen*, No. 02-CV-2307(JG) (E.D.N.Y. June 14, 2006), 2010 WL 6000431.

erving that public disclosure of information subject to discovery privileges would deter agencies from providing IGs with sensitive materials.²²³ Although officials likely invoked litigation privileges in part to hide damaging information, concerns over the litigation do not appear wholly pretextual, and Arar himself, like other civil rights plaintiffs,²²⁴ refused IG interview requests on account of parallel litigation.²²⁵

In addition, those opposed to information release sometimes argued that IG reviews reduced the need for other transparency measures, such as FOIA disclosures. When civil liberties organizations sought to obtain the names and arrest information of post-9/11 detainees, amici for the government countered that the pending DOJ IG investigation provided an alternative channel for identifying potential abuses.²²⁶ Ultimately, the D.C. Circuit reversed a lower court decision ordering release of the detainees' names,²²⁷ just two weeks after the IG issued its report revealing significant aggregate information about the detainees (though not their names).²²⁸

More often, however, IG investigations and FOIA demands were mutually reinforcing as vehicles for transparency. On several occasions, IGs launched investigations following disclosures of questionable government conduct from civil rights groups' FOIA requests.²²⁹ Where agencies fought to keep IG reports classified, as in the case of the CIA IG report on coercive interrogations, FOIA lawsuits by advocacy groups helped bring reports to public light. In fact, for CIA records, the symbiotic relationship between IG review and FOIA disclosure is explicit: by statute, if the IG is investigating an alleged impropriety

223. *Joint Hearing on Arar*, *supra* note 155, at 13 (statement of Richard L. Skinner, Inspector Gen., U.S. Dep't of Homeland Sec.).

224. *See, e.g.*, OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FBI'S HANDLING OF THE BRANDON MAYFIELD CASE 23 (2006) [hereinafter FBI'S HANDLING OF THE BRANDON MAYFIELD CASE].

225. MAHER ARAR REPORT, *supra* note 63, at 38.

226. *See* *Ctr. for Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918, 948 (D.C. Cir. 2003) (Tatel, J., dissenting).

227. *Ctr. for Nat'l Sec. Studies v. Dep't of Justice*, 215 F. Supp. 2d 94, 113 (D.D.C. 2002), *rev'd*, 331 F.3d 918.

228. *See* SEPTEMBER 11 DETAINEES REPORT, *supra* note 76, at 20-23. On the other hand, the IG review may have encouraged the district court to rule in favor of FOIA disclosure: in rejecting one FOIA exemption, that court noted that concerns over the post-9/11 detentions were "sufficiently substantial" that the IG had initiated an investigation. *Ctr. for Nat'l Sec. Studies*, 215 F. Supp. 2d at 105-06.

229. *See, e.g.*, OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FBI'S INVESTIGATION OF CERTAIN DOMESTIC ADVOCACY GROUPS 1 (2010) [hereinafter REVIEW OF THE FBI'S INVESTIGATION OF DOMESTIC ADVOCACY GROUPS]; OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FBI'S INVOLVEMENT IN AND OBSERVATIONS OF DETAINEE INTERROGATIONS IN GUANTANAMO BAY, AFGHANISTAN, AND IRAQ (2008).

or violation of law, the CIA cannot invoke an otherwise available FOIA exemption to shield “operational files” that have been provided to the IG.²³⁰

2. *Identifying rights violations and wrongful conduct*

In several cases, IG reviews concluded that executive officials had violated the law or, even in the absence of a legal violation, had engaged in wrongdoing. Like judicial findings, IGs’ declarations of government wrongdoing had expressive significance, perhaps drawing even greater legitimacy from an expectation that executive institutions would not lightly criticize executive conduct. The DOJ IG reports on September 11 detainees and NSLs, and the CIA IG report on harsh interrogations, provided powerful statements of the wrongfulness of government actions.

IG investigations sometimes proceeded where the underlying rights concerns eluded judicial review. The DHS IG investigated Arar’s rendition where separation of powers and state secrets concerns ultimately led courts to decline review of his case and others challenging renditions.²³¹ The DOJ IG NSL reviews exposed noncompliance with the law where courts could not have intervened, for lack of a private plaintiff with the knowledge, incentive, and standing to mount a legal challenge.²³² Even where courts could have intervened, IGs had the institutional advantage of being able to assess compliance against a broad range of legal authorities, including agency rules and internal policies, which did not create judicially enforceable rights.

Furthermore, IGs sometimes showed a willingness to hold the executive accountable even in the “gaps of the law.” Particularly in the national security context, the lack of judicial review can result in substantive underdevelopment of the law. Cornelia Pillard has criticized the OLC and Solicitor General’s office for taking advantage of this non-enforcement, arguing that where courts had not prohibited certain executive conduct, these institutions simply concluded that no constitutional problem existed.²³³

By contrast, IGs in several cases critiqued government action even where no specific legal provision applied or where interpretations of the law were

230. 50 U.S.C. § 431(c)(3) (2011); *ACLU v. Dep’t of Def.*, 827 F. Supp. 2d 217, 220-22 (S.D.N.Y. 2011).

231. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1073 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2442 (2011); *see also* *Arar v. Ashcroft*, 585 F.3d 559, 563, 576-77 (2d Cir. 2009) (en banc).

232. Lawsuits preceding the IG reports had successfully challenged the “gag order” provisions applicable to NSL recipients, but not other provisions of the law more directly affecting targets. *See, e.g., Doe v. Gonzales*, 386 F. Supp. 2d 66 (D. Conn. 2005), *vacated as moot*, 449 F.3d 415 (2d Cir. 2006); *Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004), *vacated in part as moot*, *Doe v. Gonzales*, 449 F.3d 415. In addition, at the time the IG first declared the FBI’s use of exigent letters improper and illegal, no potential plaintiff would have known that the government used exigent letters.

233. Pillard, *supra* note 7, at 740.

strongly contested. For instance, in the DOJ IG September 11 detainees review, the IG criticized the INS's protracted service of immigration charging documents on detainees, which impeded their ability to contest the charges or apply for bond, even though no regulation or policy specified when the INS should serve those documents.²³⁴ Similarly, the IG strongly criticized prolonged detentions even though it noted that the lawfulness of detention past a statutory ninety-day removal period had yet to be adjudicated.²³⁵ Ultimately, the Second Circuit in *Turkmen* sidestepped the merits of that question: the court concluded that government defendants were entitled to qualified immunity and chose not to reach the underlying constitutional issue.²³⁶ In view of judicial disinclination to resolve the matter, the IG's sharp critique of the prolonged detention of September 11 detainees remains the most authoritative "official" judgment that the government's actions were wrong.

In fact, IGs sometimes went further in actually challenging the legal judgments of others within the executive branch. For example, in its NSL reviews, the DOJ IG rejected FBI counsel's after-the-fact legal justifications for the use of exigent letters.²³⁷ The FBI General Counsel argued that a provision in the Electronic Communications Privacy Act permitting voluntary disclosure of records by telecommunications companies in emergencies could justify the use of exigent letters.²³⁸ But the IG pronounced that justification unconvincing because the exigent letters did not frame their requests as voluntary, because the department issuing exigent letters denied relying upon the provision, and because the FBI did not recite the factual predication required to invoke the cited provision.²³⁹

Even more striking, in its 2010 report on exigent letters, the DOJ IG warned against a *new* legal argument that the FBI asserted would justify future voluntary disclosure of records by communications providers.²⁴⁰ The statutory provision on which the FBI based this new argument was redacted in the IG report, although it appears to relate to the voluntary disclosure of international communications.²⁴¹ The IG cautioned that invocation of the new legal authority created a "significant gap in FBI accountability and oversight," and that Con-

234. SEPTEMBER 11 DETAINEES REPORT, *supra* note 76, at 29, 35-36.

235. *See id.* at 92, 158.

236. *Turkmen v. Ashcroft*, 589 F.3d 542, 550 (2d Cir. 2009).

237. *See* EXIGENT LETTERS REPORT, *supra* note 102, at 11, 260-63; NSL 2007 REPORT, *supra* note 98, at 95-98.

238. NSL 2007 REPORT, *supra* note 98, at 95.

239. *Id.* at 96-97.

240. EXIGENT LETTERS REPORT, *supra* note 102, at 263 & n.278.

241. The Justice Department later acknowledged that the provision in question was 18 U.S.C. § 2511(2)(f), which pertains to the voluntary disclosure of international communications. *See* Complaint ¶ 8, Elec. Frontier Found. v. Dep't of Justice, 892 F. Supp. 2d 95 (D.D.C. 2012) (No. 1:11-CV-00939-RJL); *see also* Marisa Taylor, *Obama Assertion: FBI Can Get Phone Records Without Oversight*, MCCLATCHY NEWSPAPERS (Feb. 11, 2011), <http://www.mcclatchydc.com/2011/02/11/108562/obama-assertion-fbi-can-get-phone.html>.

gress and the Department of Justice should consider controlling the exercise of that authority in light of recent abuses.²⁴² Thus, moving beyond an assessment of how past agency practices complied with the law, the IG did what courts are rarely in a position to do—warn against a *prospective* legal justification that would bypass ordinary legal requirements.

Moreover, on several occasions, IGs criticized, on normative grounds, practices specifically declared lawful by the OLC, the executive branch's "chief legal adviser" whose opinions are binding on requesting agencies.²⁴³ In the NSL review, the DOJ IG warned against the FBI's new argument for voluntary disclosure even though the OLC had at least partly approved the FBI's legal interpretation of the relevant provision.²⁴⁴ Before the release of the September 11 detainees report, the OLC concluded that it was not unlawful to hold aliens for investigative purposes past a statutory 90-day removal period,²⁴⁵ but the IG still censured INS officials for not raising legal concerns over the practice as promptly and strongly as they should have.²⁴⁶

And in the report that dealt at greatest length with OLC interpretations, the CIA IG strongly suggested disapproval of the coercive interrogation program despite OLC's blessing. According to one OLC staffer, CIA and OLC officials made efforts to dissuade the IG from independently assessing the program's legality by demonstrating that OLC had already done so.²⁴⁷ The publicly released version of the report did not explicitly challenge OLC's legal reasoning, nor did it independently address compliance with the Torture Convention or domestic prohibitions on torture.²⁴⁸ Yet the review hinted that the legal reasoning of the August 2002 OLC opinion was suspect, noting that it contained "technical" definitions and "finely detailed analysis" to support its conclusion that enhanced interrogations would not violate the law.²⁴⁹ Moreover, the IG review noted that, irrespective of legal compliance, enhanced interrogations

diverge[d] sharply from previous Agency policy and practice, rules that govern interrogations by U.S. military and law enforcement officers, statements of U.S. policy by the Department of State, and public statements by very senior U.S. officials, including the President, as well as the policies expressed by Members of Congress, other Western governments, international organizations, and human rights groups.²⁵⁰

242. EXIGENT LETTERS REPORT, *supra* note 102, at 268.

243. *See* Pillard, *supra* note 7, at 710-12.

244. EXIGENT LETTERS REPORT, *supra* note 102, at 263-64 & n.278.

245. SEPTEMBER 11 DETAINEES REPORT, *supra* note 76 at 106, 108.

246. *Id.* at 108.

247. *See* OPR REPORT, *supra* note 135, at 100-01.

248. Initial news reports about the IG report said it had concluded that the CIA's practices amounted to unlawful "cruel, inhuman, and degrading treatment," *see* Jehl, *supra* note 131, but the publicly released version only notes that the OLC legal opinions did not consider the question, *see* CIA INTERROGATIONS REPORT, *supra* note 56, at 101.

249. CIA INTERROGATIONS REPORT, *supra* note 56, at 101.

250. *Id.* at 101-02.

In all three cases, IGs did not do what an institution with a “narrow compliance mandate” might be expected to do; they did not merely evaluate compliance with established law, but objected to policies on normative grounds even where the law was silent or where the OLC had sanctioned policies. Nonetheless, IGs did not assess the law as courts would. First, even when directly rejecting an agency’s legal interpretation, IGs did not necessarily cite case precedent, legislative history, or other standard sources of authority. For instance, in rejecting the FBI’s legal justification for exigent letters, the DOJ IG stated that those who issued exigent letters could not have been relying on the voluntary disclosure provision *at the time* because their own statements, and the face of the letters, contradicted that assertion.²⁵¹ Thus, rather than ask whether a legal rule justified past conduct—the more traditional inquiry—the IG queried whether government officials responsible for the conduct in question contemporaneously relied on that rule. In this case, the IG’s legal analysis imposed a higher standard of accountability—not whether agency lawyers could come up with a possible legal justification after the fact, but whether government officials acted according to their best understanding of the law at the time they acted.

A second striking difference between IG and judicial interpretation is that IGs rarely invoked rights as such. For instance, though concerns about the treatment of detainees suffuse the DOJ IG September 11 detainees report, the word “rights” rarely appears in the 198-page document, which speaks instead of the “enormous ramifications” for detainees subject to untimely FBI clearance procedures²⁵² or the “important” effects of delaying service of immigration charging documents.²⁵³ Not merely semantic, the avoidance of rights-talk reflects the fact that ultimately, while IGs can evaluate government conduct that disadvantages individuals, they do not judge the existence or scope of constitutional rights. The more abstract or contested the right in question—as constitutional rights in the national security context most often are—the less IGs are able to evaluate compliance.

Moreover, despite the independent legal judgment IGs sometimes displayed, the willingness to declare government conduct illegal clearly varied across reviews. The DOD IG military monitoring review concluded that the military had violated a department regulation requiring deletion of unnecessary information about U.S. persons from databases, but quibbled that this failure was not “illegal,” but rather a “regulatory violation.”²⁵⁴ And the DHS IG Arar rendition review seemed unwilling to declare government conduct illegal even where its own factual findings suggested violations of U.S. regulations and the

251. EXIGENT LETTERS REPORT, *supra* note 102, at 11; NSL 2007 REPORT, *supra* note 98, at 96-97.

252. SEPTEMBER 11 DETAINEES REPORT, *supra* note 76, at 71.

253. *Id.* at 35-36.

254. TALON REPORT, *supra* note 62, at 8.

United Nations Convention Against Torture. That IG concluded that “it does not appear that any INS personnel whose activities we reviewed violated any then-existing law, regulation, or policy,”²⁵⁵ but elliptically added that it had not “completely discounted th[e] possibility” of violations, especially because it had not been able to interview everyone involved.²⁵⁶ Even without reaching any specific conclusion on individuals responsible, the DHS IG report might have concluded that the failure to examine the reliability of nontorture assurances violated the law.²⁵⁷ In fact, the Arar case ought to have been a relatively easy case for acknowledging mistakes, since, unlike other cases where a challenged action at least arguably improved U.S. security, no one continued to defend his transfer and the Secretary of State had conceded that the case was mishandled.²⁵⁸ Ultimately, while IGs may be well positioned to identify legal violations and misconduct that elude judicial review, that ability does not ensure their willingness to do so.

3. *Providing relief for victims*

Of the five dimensions of individual rights protection, IG reviews seemed least directed at providing relief for victims, though in certain cases the reviews helped spur relief for a limited number of affected individuals.²⁵⁹ To be sure, it is difficult to imagine what retrospective individual relief would have looked like in two of the reviews: in the CIA IG interrogations review, it is not clear what would have been appropriate relief for high-level al Qaeda detainees already subjected to enhanced interrogations; and in the DOD IG military monitoring review, information on protests retained in violation of regulations had already been purged from DOD databases.

But more surprisingly, the September 11 detainees reports were also silent on the question of individual relief. Even if monetary compensation or the termination of any ongoing immigration proceedings were politically nonstarters,

255. MAHER ARAR REPORT, *supra* note 63, at 35.

256. *Id.*; see also *Joint Hearing on Arar*, *supra* note 155, at 77, 117 (testimony of Richard L. Skinner, Inspector Gen., U.S. Dep’t of Homeland Sec.).

257. Pressed in a congressional hearing, DHS IG Skinner went somewhat further, refusing to rule out the possibility that the government had sent Arar to Syria to face coercive interrogations and agreeing that the incident might state a prima facie criminal violation of U.S. law. *Joint Hearing on Arar*, *supra* note 155, at 53, 74 (testimony of Richard L. Skinner, Inspector Gen., U.S. Dep’t of Homeland Sec.).

258. See, e.g., *Rice Admits U.S. Erred in Deportation*, N.Y. TIMES, Oct. 25, 2007, at A10.

259. I do not address the DOJ IG’s separate mechanism for addressing individual complaints of civil liberties violations, which appears to have been used primarily by Muslim inmates in federal prisons alleging discriminatory treatment. See, e.g., OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 1001 OF THE USA PATRIOT ACT 5-16 (Aug. 2011) (describing individual complaints received).

the IG did not recommend even more modest measures, such as a formal apology or compensation limited to those who had experienced the most egregious physical abuse. While the reports did help several former detainees secure a monetary settlement against the government, and at least one detainee overcome a criminal indictment, these individuals represented a tiny fraction of the more than 750 involved.

The DHS IG Arar rendition review neither recommended, nor led to, relief for Arar: unlike the Canadian government, which compensated Arar almost \$10 million, the U.S. government has not formally apologized or provided monetary relief. The Second Circuit meanwhile affirmed the dismissal of Arar's claims on the grounds that "special factors" counseled against extending a *Bivens* remedy to the "extraordinary rendition" context.²⁶⁰ The IG report played little explicit role in the court's decision: the majority en banc opinion took judicial notice of the IG finding that Syrian nontorture assurances were received only to emphasize that judicial examination of secret diplomatic relationships would raise separation of powers and institutional competence concerns.²⁶¹

In the DOJ IG NSL reviews, the IG examination of exigent letters resulted in FBI apologies to newspapers whose phone records were illegally obtained²⁶² and the partial deletion of information in FBI databases obtained from improper requests.²⁶³ The DOJ IG supported, however, the FBI's decision to retain most of the records improperly obtained through exigent letters or listed in "blanket" NSLs, so long as they met statutory standards, even if applied after the fact.²⁶⁴ The IG noted that the FBI feared losing important national security information and that no exclusionary rule applied in this context, and thus approved the notion that the FBI should not be required to destroy information it could have lawfully obtained.²⁶⁵

4. *Holding government officials accountable*

The IG reviews largely spared high-level executive officials from direct blame, while in several cases fostered accountability for lower-level officials. Even where IGs faulted high-level decisions or mismanagement, leading to possible reputational consequences for certain agency heads, they recommended specific consequences only for lower-level officials directly involved in clear violations of the law. Thus, the DOJ IG report on September 11 detainees concluded that high-level officials approved, or were at least aware of, the

260. *Arar v. Ashcroft*, 585 F.3d 559, 563 (2d Cir. 2009) (en banc).

261. *Id.* at 578 & n.10.

262. EXIGENT LETTERS REPORT, *supra* note 102, at 102 n.126.

263. *Id.* at 276.

264. *Id.* at 210-11, 275-76.

265. *Id.* at 210-11.

“hold until cleared” policy that resulted in prolonged detention,²⁶⁶ but did not single out any high-level official for blame. Its recommendation that the Bureau of Prisons discipline ten correctional officers directly responsible for physically abusing detainees²⁶⁷ eventually resulted in terminations, suspensions, and demotions of several officers.²⁶⁸ Yet these actions spared those who formulated the detention policies, whether due to a pragmatic political judgment or to sympathy for the view that the Department had acted aggressively under difficult circumstances to prevent another terrorist attack.²⁶⁹

In the NSL investigation, the DOJ IG ultimately went further, calling on the agency to decide whether to discipline a number of named FBI supervisors and attorneys whose actions contributed to the misuse of exigent letters.²⁷⁰ These individuals included two heads of the unit that issued exigent letters as well as the deputy and assistant general counsels of the FBI counsel’s national security branch.²⁷¹ By the time the IG issued its report on exigent letters, several individuals it named had left the agency.²⁷² At the same time, the IG did not recommend sanctions against senior FBI leadership, despite deeming “every level” of the FBI, including the “FBI’s most senior officials,” responsible for “numerous, repeated, and significant” management failures.²⁷³ Further, while blaming the FBI General Counsel for some management failures, the IG specifically exempted her from disciplinary consideration because it concluded that she had no prior notice of violations.²⁷⁴ Thus, the DOJ IG opted, at most, to recommend discipline for those who knew of, and failed to prevent, clear violations of the law. Although high-level FBI officials were compelled to defend their actions in the media and Congress as a result of IG scrutiny, no senior DOJ official lost his or her position on account of violations, and in 2011 Congress approved an unusual extension of FBI Director Robert Mueller’s ten-year term.²⁷⁵

High-level agency officials largely escaped individual accountability despite other critical IG reviews. For instance, while the CIA IG interrogations report is credited for Attorney General Holder’s decision to reopen certain

266. SEPTEMBER 11 DETAINEES REPORT, *supra* note 76, at 37-40.

267. SUPPLEMENTAL METROPOLITAN DETENTION CENTER REPORT, *supra* note 77, at 1-2, 7.

268. PATRIOT ACT REPORT (Mar. 2006), *supra* note 49, at 14.

269. *See, e.g.*, SEPTEMBER 11 DETAINEES REPORT, *supra* note 76, at 186.

270. EXIGENT LETTERS REPORT, *supra* note 102, at 256.

271. *See id.* at 224, 230, 234-36.

272. *Id.* at 256 n.270; *see also* Hechler, *supra* note 113 (discussing Deputy General Counsel Julie Thomas’s departure from the agency).

273. EXIGENT LETTERS REPORT, *supra* note 102, at 213.

274. *Id.* at 213, 237.

275. Charlie Savage, *Senate Extends Term of F.B.I. Director*, N.Y. TIMES THE CAUCUS (July 27, 2011), <http://thecaucus.blogs.nytimes.com/2011/07/27/senate-extends-term-of-f-b-i-director>.

criminal investigations into detainee abuse,²⁷⁶ those investigations concerned only officers who used interrogation methods not approved by the OLC, sparing those who designed or implemented the OLC-approved interrogations program. Ultimately, no criminal charges were filed even from this relatively narrow group of reopened criminal cases.²⁷⁷

Finally, neither the DHS IG Arar rendition review nor the DOD IG military monitoring review discussed individual accountability at all, even though each had identified shortcomings: the failure to examine whether Syrian nontorture assurances were reliable and the violation of information retention regulations adopted to protect individual rights.²⁷⁸

5. *Revising agency rules to prevent future abuses*

The final, and arguably most important, dimension of rights oversight is the revision of agency rules to prevent future abuses, whether through improving agency processes or imposing new “substantive” constraints on agency discretion. The most significant “substantive” reform that resulted directly from IG oversight is the termination of the use of exigent letters, which the FBI ordered following the DOJ IG’s first report on NSLs.²⁷⁹ In addition, the CIA IG interrogations report possibly contributed to a decision not to waterboard further detainees, although based on the public record it is difficult to separate out the effect of the IG report from the more public pressure resulting from the infamous Abu Ghraib scandal. Apart from these effects, the IG reports seem to have created more procedural reform and oversight than substantive change, and largely left executive agencies with the broad legal discretion to repeat past abuses.

Both DOJ IG reviews resulted in the reform of agency processes that could improve decisionmaking and compliance with existing rules. The reports called for better processes for inter- and intra-agency consultation, improved training and guidance to staff, increased internal legal oversight of agency actions, and better recordkeeping to facilitate evaluations of legal compliance.²⁸⁰ Following

276. Klaidman, *supra* note 144, at 35; Meyer & Miller, *supra* note 144; *see also* Holder, *supra* note 144.

277. Scott Shane, *No Charges Filed on Harsh Tactics Used by the C.I.A.*, N.Y. TIMES (Aug. 30, 2012), <http://www.nytimes.com/2012/08/31/us/holder-rules-out-prosecutions-in-cia-interrogations.html>.

278. The DHS IG said it had referred information to the DOJ Office of Professional Responsibility regarding individuals in the Acting Attorney General’s office. *Joint Hearing on Arar*, *supra* note 155, at 57 (testimony of Richard L. Skinner, Inspector Gen., U.S. Dep’t of Homeland Sec.). No public information has been released about any Office of Professional Responsibility review.

279. EXIGENT LETTERS REPORT, *supra* note 102, at 214.

280. SUPPLEMENTAL METROPOLITAN DETENTION CENTER REPORT, *supra* note 77, at 43-45 (calling for better training of prison guards and development of a policy on videotaping detainees); NSL 2008 REPORT, *supra* note 102, at 161-63 (recommending better recordkeep-

the September 11 detainees report, the FBI agreed with an IG recommendation to use more objective criteria, such as watch list status, to designate detainees as subjects of investigative interest, responding to the arbitrary manner by which many innocent post-9/11 detainees were deemed threats.²⁸¹ The IG credited agencies with a relatively high level of compliance with its recommendations.²⁸² Some of these recommendations, and the resulting dialogue between the IG and host agencies in addressing them, employed a level of technical detail unthinkable in judicial interventions or congressional committee oversight: for instance, the IG and FBI went back and forth over whether, to accurately report the impact of NSLs on U.S. citizens, a field in an NSL database tracking citizenship status should default to “U.S. citizen,” default to “non-U.S. citizen,” or require FBI agents to affirmatively record a target’s citizenship.²⁸³

Despite these strengthened internal controls, the IG reviews often preserved broad agency discretion in ways that could arguably lead to a repetition of the earlier abuses. IG investigations rarely led to significant rights-protective “substantive” constraints on agency discretion, such as measures that would prevent an agency from engaging in a practice, require a higher substantive threshold before an agency could undertake an action (such as a higher standard for individual suspicion before employing an investigative tool), or require court approval for a contested practice.

In some cases, this outcome may have been defensible based on the IG’s findings. For instance, in the first NSL review, the DOJ IG concluded both that the FBI had violated the law but also that NSLs contributed significantly to terrorism investigations²⁸⁴—suggesting no obvious answer to whether the permissive Patriot Act standard for issuing NSLs appropriately resolved liberty-security tradeoffs. But even where the DOJ IG viewed limitations on agency discretion as the optimal reform, the IG review did not lead to that result. In its final report on exigent letters, the DOJ IG recommended that Congress regulate the agency’s ability to ask phone companies to voluntarily disclose customer records, warning that new reliance on a previously unused statutory provision could lead to renewed circumvention of the NSL requirements.²⁸⁵ This request was unusual: the DOJ IG appears to direct its recommendations overwhelming-

ing, training, and guidance on NSL use and oversight); NSL 2007 REPORT, *supra* note 98, at 124-25 (recommending improved tracking and documentation of NSLs and greater involvement of agency counsel); SEPTEMBER 11 DETAINEES REPORT, *supra* note 76, at 188, 190 (advocating better consultation within and among agencies on detainee issues and concerns).

281. See ANALYSIS OF THE SECOND RESPONSE, *supra* note 92, at 6.

282. See NSL 2008 REPORT, *supra* note 102, at 15 (finding “significant progress” in implementing recommendations but warning that it was “too soon” to conclude that new controls would fully eliminate the problems identified); PATRIOT ACT REPORT (Aug. 2006), *supra* note 97, at 9 (noting that all but one of the original twenty-one recommendations were fulfilled).

283. NSL 2008 REPORT, *supra* note 102, at 22-23.

284. NSL 2007 REPORT, *supra* note 98, at 48, 65, 67.

285. See EXIGENT LETTERS REPORT, *supra* note 102, at 263-68.

ly to the Department of Justice, not Congress.²⁸⁶ Nonetheless, Congress has not acted on the IG's proposal, leaving the FBI with an even broader basis for seeking voluntary disclosures than it had previously claimed.

Thus, the FBI's broad discretion to obtain personal records without a court order remains intact—even expanded—despite three critical IG reviews. In responding to the critiques, the FBI successfully framed the problem as one of inadequate procedures and implementation, rather than excessive power, and could then claim it had fixed the problem with better internal controls.²⁸⁷ Ultimately, Congress reauthorized expiring provisions of the Patriot Act,²⁸⁸ and declined to act on separate legislation to establish judicial oversight over NSLs²⁸⁹ or a new sunset provision on their use.²⁹⁰

The DOJ IG September 11 detainees review likewise preserved broad executive authority to detain aliens in emergencies. The DOJ IG recommended that immigration authorities define the “extraordinary circumstances” that might justify a departure from a standard forty-eight-hour period for making a charging decision following an alien's arrest.²⁹¹ In response, DHS adopted a policy defining extraordinary circumstances as any “significant” disruption or a “compelling law enforcement need”—a standard so broad as to permit future mass detentions with delayed notice under circumstances even less exceptional than the September 11 attacks.²⁹² The IG nonetheless declared the recommendation resolved.²⁹³ Nor did Congress respond to the IG report by passing legislation to limit prolonged immigration detention in the absence of criminal

286. The DOJ IG's request that Congress control the FBI's ability to rely on the statutory provision in question appears to be the sole DOJ IG recommendation directed at Congress among the entire set of twenty-two national security rights-related DOJ IG reports published between 2001 and 2011.

287. See *FBI's Use of Exigent Letters 'Sloppy,' supra* note 120.

288. Lisa Mascaró, *Patriot Act Provisions Extended Just in Time*, L.A. TIMES (May 27, 2011), <http://articles.latimes.com/2011/may/27/nation/la-na-patriot-act-20110527>.

289. National Security Letter Reform Act of 2007, S. 2088, 110th Cong.; S. 2088 (110th): *National Security Letter Reform Act of 2007*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/110/s2088> (last visited May 3, 2013) (indicating that bill died after referral to committee); National Security Letters Reform Act of 2007, H.R. 3189, 110th Cong.; H.R. 3189 (110th): *National Security Letters Reform Act of 2007*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/110/hr3189> (last visited May 3, 2013) (indicating that the bill died after referral to committee).

290. USA PATRIOT Act Sunset Extension Act of 2009, S. 1692, 111th Cong. (2009); S. 1692 (111th): *USA PATRIOT Act Sunset Extension Act of 2009*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/111/s1692> (last visited May 3, 2013) (indicating that the bill died after being reported to committee).

291. SEPTEMBER 11 DETAINEES REPORT, *supra* note 76, at 190; see also 8 C.F.R. § 287.3(d) (2012).

292. Memorandum from Asa Hutchinson, *supra* note 94; see also Shoba Sivaprasad Wadhia, *Immigration: Mind Over Matter*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 201, 230-31 (2005).

293. See OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 1001 OF THE USA PATRIOT ACT 10 (Sept. 2004).

charges or court approval. A key legislative effort responding to the post-9/11 detentions died in committee.²⁹⁴

In the case of the CIA IG interrogations review, while the OLC temporarily withdrew legal support for enhanced interrogations following the IG report, new OLC leadership reaffirmed support for the CIA interrogations program. Stronger restrictions on interrogations later adopted seem less a result of the IG report than of separate public and congressional pressure following the Abu Ghraib scandal and public leaking of the controversial OLC memos. For instance, Congress passed a measure purporting to ban cruel, inhuman, and degrading treatment almost a year before the full congressional intelligence committees received the IG report.²⁹⁵ There is likewise no evidence that the DHS IG Arar rendition report or the DOD IG military monitoring report influenced later restrictions on renditions or military monitoring of U.S. persons.

The lack of new legal constraints does not mean that these reviews lacked impact. The procedural changes and internal controls that agencies adopted may have lessened the likelihood of future abuses. Moreover, it is possible that in the absence of the IG reviews, Congress would have given even greater powers to the executive than it actually did. Indeed, one can also point to administration proposals that Congress did not adopt wholesale, such as the Justice Department's 2003 request for greater powers, dubbed "Patriot Act II" at the time.²⁹⁶ It is also possible that the political fallout from these IG investigations deterred (or might in the future deter) agencies from curtailing rights, even where they had legal discretion to do so. Ultimately, assessing whether the government has beneficially "learned" from IG investigations may depend on how one defines the problematic conduct in question: skeptics have argued, for example, that the Obama Administration has "learned" from the Bush Administration experience with detaining suspected terrorists by choosing to kill suspects rather than detain them. The more immediate point is that even strikingly critical IG reviews did not necessarily result in significant legal constraints on executive discretion.

294. See Civil Liberties Restoration Act of 2004, S. 2528, 108th Cong. (2004); S. 2528 (108th): *Civil Liberties Restoration Act of 2004*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/108/s2528> (last visited May 3, 2013) (indicating that the bill died after referral to committee); Civil Liberties Restoration Act of 2004, H.R. 4591, 108th Cong. (2004); H.R. 3189 (110th): *National Security Letters Reform Act of 2007*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/110/hr3189> (last visited May 3, 2013) (indicating that the bill died after referral to committee). The bills' exception to standard procedures for aliens certified as suspected terrorists, § 201(a), was significantly narrower than the emergency exception DHS ultimately adopted.

295. Charlie Savage, *Bush Could Bypass New Torture Ban*, BOS. GLOBE, Jan. 4, 2006, at A1.

296. See Editorial, *Patriot Act, Part II*, N.Y. TIMES, Sept. 22, 2003, at A16; Dan Eggen, *2003 Draft Legislation Covered Eavesdropping*, WASH. POST, Jan. 28, 2006, at A2.

C. *The Strengths and Limits of IGs*

Together, the IG case studies discussed in this Article suggest both the underappreciated strengths and limitations of IG rights oversight. The accomplishments of IGs challenge rights advocates' skepticism about internal oversight: in several cases, IGs helped protect rights where courts were largely absent, and significantly reinforced other accountability mechanisms. But the limitations of IGs, particularly in constraining executive discretion, caution against viewing IGs as a replacement for robust external review.

IGs demonstrated several notable strengths. First, at their best, IGs provided remarkable transparency on national security practices, uncovering violations of the law that might have otherwise evaded scrutiny. The best example of this was the DOJ IG's investigation of NSLs, where the IG's exposure of exigent letters led the FBI to ban the practice at a time when private parties would have lacked the knowledge, let alone standing, to challenge the practice in court. In fact, IGs may be most significant in areas where secrecy is greatest: the CIA IG interrogations review shed light within the executive branch on interrogations abuses at a time when the program itself was secret, reportedly influencing the OLC to temporarily withdraw opinions approving coercive interrogations, and still later influencing the Attorney General to reopen criminal investigations into detainee abuse. In fact, among these case studies, all but the DOD IG military monitoring review disclosed significant new information about national security programs that litigation and direct congressional oversight had not generated.

Second, several IGs challenged restrictions on liberty where existing law was sparse or undeveloped—a common problem in the national security context, where the scarcity of judicial review leaves gaps in legal doctrine. IGs evaluated compliance with other norms (internal agency rules, general notions of proportionality or fairness) that would not be enforceable in court. Thus, the DOJ IG September 11 detainees review challenged lengthy immigration detentions, declaring them wrongful where courts refused to reach key constitutional questions. Rather than treat the absence of law as a free pass for the executive, the IG still faulted the detention policies for profoundly harming innocent individuals—and criticized government lawyers for not vigorously questioning their legality. As described, that critique had enormous rhetorical impact, attracting widespread media and congressional attention, helping some former detainees secure a monetary settlement against the government, leading to the disciplining of abusive correctional officers, and triggering the reform of agency procedures for security-related detentions.

And third, as internal institutions, IGs appeared to benefit from expertise and legitimacy that allowed them to recommend tailored reform of internal procedures and controls. For instance, in the exigent letters and September 11 detainees reviews, the Justice Department IG recommended numerous specific procedural reforms that created stronger internal oversight. A court attempting

to impose similar structural relief might have found it difficult to acquire the institutional knowledge—or legitimacy—to patrol agencies at that level of detail.

The cases nonetheless suggest important limits to the role of IGs. First, in certain cases, it appears that executive officials sought to undermine the independence of IGs. Most dramatically, the CIA launched an unprecedented investigation of the IG office in response to the IG's ongoing probe of detainee abuse. Other IGs faced less dramatic, but perhaps equally significant, constraints: the DHS IG struggled to access and publicize information on the Arar rendition case, and the lack of rigor in the DOD IG military monitoring review raises questions of agency cooptation. Clearly, the independence of IGs, which affects their ability and willingness to subject agency policies to rigorous review, is a prerequisite for effective rights oversight.

Some differences in the apparent independence and rigor of the reviews examined here may be due to the factual circumstances of particular investigations. For instance, it is possible that in the DOJ IG September 11 detainees review and the CIA IG interrogations review, internal opposition within the agencies to the programs at issue helped IGs obtain information or emboldened them to issue more critical findings.²⁹⁷ In addition, IG reviews may have faced greatest resistance where White House officials or high-level political appointees were implicated: Vice President Cheney is reported to have been a strong proponent of the CIA interrogations program,²⁹⁸ and according to one account, high-level political appointees in the acting Attorney General's office made the decision to send Arar to Syria.²⁹⁹ But differences across IG offices, or among the individual IGs, may also account for the varying robustness of these investigations. For instance, the notable contrast between the DOJ IG's persistence in locating detainee videotapes and the DOD IG's failure to explain the deletion of data from military databases might stem from differences in the independence or political orientations of the two IGs. The existence in the DOJ IG office of a special unit staffed by prosecutors and others experienced in sensitive, complex investigations may also help explain the rigor of certain DOJ IG reviews.³⁰⁰ A crucial question for future research relates to the on-the-ground factors that affect IG independence, including the staffing and budget of IG of-

297. See CIA INTERROGATIONS REPORT, *supra* note 56, at 94; SEPTEMBER 11 DETAINEES REPORT, *supra* note 76, at 78, 87.

298. See, e.g., Editorial, *Vice President for Torture*, WASH. POST, Oct. 26, 2005, at A18.

299. See *Joint Hearing on Arar*, *supra* note 155, at 39, 72-73 (testimony of Scott Horton, Distinguished Visiting Professor, Hofstra Law Sch.).

300. See EXIGENT LETTERS REPORT, *supra* note 102, at 2 (noting participation of the DOJ IG Oversight and Review Division in investigation). For descriptions of the Oversight and Review Division, see OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, SEMI-ANNUAL REPORT TO CONGRESS: APRIL 1, 2010-SEPTEMBER 30, 2010, at 7 (2010); and Bromwich, *supra* note 31, at 2033-34.

fices,³⁰¹ the susceptibility of particular IGs to be “captured” by the agencies they are charged with overseeing,³⁰² and long vacancies in IG positions.³⁰³

A second limitation stems from the type of legal interpretation that IGs conduct. In these cases, IGs did not evaluate questions of constitutional rights compliance. Rather, IGs conducted factual investigations to assess compliance with subconstitutional rules (contained in statutes, regulations, or internal guidelines) or evaluated the propriety of national security conduct irrespective of legality. These are important functions that sometimes allow them to do what courts cannot do: for instance, as noted earlier, IGs can evaluate the propriety of government conduct where courts can only assess compliance with justiciable law. On the other hand, it appears that IGs do not typically evaluate violations of constitutional rights, at least in the great many cases where the scope of such rights is highly contested. IGs might view independent analyses of constitutional questions as outside their core strengths, or might view such a function as blurring jurisdictional lines with the OLC. While refraining from constitutional interpretation may be institutionally appropriate for IGs, it does suggest that IGs do not compensate for the scarcity of judicial review; if one believes that constitutional law ought to constrain executive national security conduct, IGs do not fill the gap in constitutional compliance.

Third, of the dimensions of rights oversight discussed here, IGs seemed least directed at obtaining relief for individual victims of rights violations. This was most notable in the September 11 detainees review, where the DOJ IG clearly found that hundreds of individuals caught up in the terrorism investigation had suffered great harm, but nonetheless did not recommend individual remedies, such as an official apology. It may be that IGs do not view individual relief as a primary jurisdictional concern, at least outside the separate statutory mandate of the DOJ and DHS IGs to address individual complaints. The IG Act makes no mention of individual relief, and IGs may not even hear directly from those who claim a rights violation, making them less able to determine the specific extent of harm to victims. While these considerations may explain why IGs do not prioritize individual relief or issue detailed remedial recommendations for victims, it is not clear why IGs could not, in appropriate cases, instigate the agencies or Congress to explore appropriate redress for individuals.

301. See, e.g., *Strengthening the Unique Role of the Nation's Inspectors General: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 110th Cong. 46 (2007) (statement of Glenn A. Fine, Inspector Gen., Dep't of Justice) (describing underfunding of IGs as the most important challenge to IG effectiveness).

302. See T. Christian Miller, *The Scrutinizer Finds Himself Under Scrutiny*, L.A. TIMES, Sept. 25, 2005, at 30 (describing allegations that former DOD IG Joseph Schmitz blocked investigations of senior Bush administration officials and noting that Schmitz left his IG role to take a position with a prominent defense contractor).

303. See Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 956 (2009) (noting lengthy vacancies in statutory IG positions).

A fourth limitation is that IGs, lacking the power to enforce recommendations, rely on political actors to implement reforms. But these political actors—agencies and Congress—may be particularly unwilling to implement reforms or enforce rights where the costs of national security policies are borne by unpopular and politically weak minorities—such as immigrants, foreigners, or Muslims. In addition, IGs, as internal actors, might themselves refrain from proposing the strongest reforms in order to preserve their working relationship with agencies or agency leadership.

Even the strongest IG reviews described here did not lead to accountability for high-level agency officials or to significant constraints on agency discretion. While IGs facilitated accountability for lower-level agency employees, they generally recommended no discipline for senior agency leadership, even when faulting them for serious mismanagement, as in the NSL review. Neither did IG reviews lead to observable punitive or professional consequences for high-level decisionmakers, at least apart from the need to defend the agency's policies to Congress or the public. And with regard to the reform of agency rules, even the most critical IG reviews did not lead agencies or Congress to constrain agency legal discretion. IG investigations did not lead to new policies prohibiting extreme interrogation methods, limiting immigration detention powers, or curbing the FBI's power to seek new voluntary disclosures of phone records. In the CIA interrogations case, the Justice Department OLC temporarily rescinded legal support for coercive interrogations, but, under new leadership, once again sanctioned harsh interrogations at the CIA's behest. In the FBI case, while the agency banned exigent letters in response to the IG investigation, the FBI then asserted a new legal basis for asking phone companies to hand over customer phone records, and Congress has not yet followed through on the IG's request to control that legal authority.

Of course, the optimal liberty-security balance on each of these issues is sharply contested, and there is further disagreement on the specific remedial measures that ought to result from even an acknowledged rights violation. Some may view the fact that higher-level officials escaped sanction or that agencies retained broad discretion as the right outcomes, not limitations on the effectiveness of internal reviews. But whether or not one views the outcome in any of these particular cases as appropriate, the broader point is that the reliance of IG rights enforcement on political processes may limit their ability to protect individual rights, particularly those of stigmatized or politically unpopular communities.

All of this suggests caution in embracing IGs, or any mechanism for the "internal separation of powers," as a substitute for external review. IGs are well suited to increase transparency, evaluate the propriety of national security conduct, and reform internal procedures; on the other hand, their independence can be undermined, they may be ill positioned to determine violations of constitutional rights, and they rely on political actors to implement reforms. In addition, moving beyond these case studies, one might legitimately ask whether IGs have

the capacity to investigate the full range of national security conduct implicating individual rights, and whether, given their agency-specific attention, they can effectively review national security practices spanning multiple agencies.³⁰⁴ Yet the strengths and weaknesses of IGs cannot be compared to a rarefied ideal but rather should be compared to the actual performance of other institutions. IGs sometimes protect rights where courts are failing and reinforce a range of other internal and external institutions in holding the national security executive accountable.

IV. STRENGTHENING IG RIGHTS OVERSIGHT

While IGs will remain a partial solution, certain reforms can strengthen their capacity to protect individual rights in the national security context. The scope and powers of IGs should be strengthened to expand IG rights oversight and investigative authority, but without granting such independence or enforcement powers as to undermine their current strengths.

A. *Why Strengthen IG Rights Oversight*

IGs can and ought to do more to protect rights from within. This does not mean that among executive institutions, IGs are uniquely in a position to do so. In the post-9/11 period, Congress created new institutions such as the Privacy and Civil Liberties Oversight Board and civil liberties officers within national security agencies, supplementing existing national security oversight institutions such as the President's Intelligence Oversight Board. IGs are not necessarily inherently superior to these other institutions. Most significantly, they may lack the expertise in, and degree of commitment to, civil rights and liberties of institutions specifically dedicated to rights oversight. But given certain institutional strengths and the very fact that they have sometimes succeeded in protecting rights where others failed, IGs should be supported in that role.

Not only do IGs benefit from statutory independence and significant information-gathering powers, but they also benefit from their existing stature, which newer institutions created specifically for rights oversight still struggle to acquire. For instance, while several national security agencies have appointed civil liberties officers to review counterterrorism policies, responding to a congressional mandate, few have the budget, staff, or visibility of IGs, with the possible exception of the DHS Office for Civil Rights and Civil Liberties.³⁰⁵ Even that office enjoys less stature and information-gathering authority than the agency's IG: the head of the Office for Civil Rights and Civil Liberties is not

304. See HEYMANN & KAYYEM, *supra* note 12, at 116-17.

305. See 42 U.S.C. § 2000ee-1 (2011).

subject to Senate confirmation³⁰⁶ and lacks the power to subpoena documents.³⁰⁷ Meanwhile, the Privacy and Civil Liberties Oversight Board, created in 2004 to review government terrorism policies, first lacked independence from the White House and then lay dormant for years, without board members, an agenda, meetings, or staff.³⁰⁸ It remains to be seen whether the recently reconstituted board will be successful. Given the scope and pace with which the executive has acquired and employed new national security powers, no single internal institution is sufficient to provide oversight, but the independence, powers, stature, and past successes of IGs are a good reason to support, and indeed strengthen, their rights oversight role.

One might also question whether, in reviewing national security practices threatening rights, 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. IGs ought to set priorities according to the key challenges their agencies face. But for most, if not all, agencies with a national security mission, the exertion of vast, often secret, investigative and lethal powers creates significant risks of infringing on rights and liberties. Thus, for these agencies' IGs, a neutral, risk-based approach to determining agendas ought to lead rights issues to be among the IGs' key priorities. Far from representing "mission creep," investigating potential rights abuses is a critical response to the contemporary challenges facing national security agencies.

A final reservation might come from those who fear that strengthening IGs' capacity for rights oversight might deflect more robust attempts to constrain the executive. Indeed, some scholars who defend expanded executive national security powers view the potential for internal institutions to ward off external checks on the executive as a strength: Eric Posner and Adrian Vermeule have argued that executive "self-binding" mechanisms help the executive gain

306. *See, e.g.*, 6 U.S.C. § 113(d)(3) (providing for presidential appointment, but not Senate confirmation, of an Officer for Civil Rights and Civil Liberties at DHS).

307. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 802, 121 Stat. 266, 358 (2007) (amending Homeland Security Act of 2002 § 222, 6 U.S.C. § 142) (describing civil liberties officers' access to agency information).

308. *See* GARRETT HATCH, CONG. RESEARCH SERV., RL34385, PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD: NEW INDEPENDENT AGENCY STATUS 1-2, 4 (2012); Scott Shane, *The Troubled Life of the Privacy and Civil Liberties Oversight Board*, N.Y. TIMES THE CAUCUS (Aug. 9, 2012), <http://thecaucus.blogs.nytimes.com/2012/08/09/the-troubled-life-of-the-privacy-and-civil-liberties-oversight-board>.

public trust to pursue aggressive policies without undue constraint,³⁰⁹ while Goldsmith argues that IGs, in particular, can enhance executive power.³¹⁰

Certainly, executive officials have invoked IGs in an attempt to abate civil liberties concerns and thereby preserve or strengthen executive power. The Bush Administration sought to defend the National Security Agency warrantless surveillance program by claiming it had been thoroughly vetted by the Justice Department and the NSA Inspector General.³¹¹ FBI Director Mueller sought to allay senators' concerns over FBI surveillance of a peaceful antiwar rally by inviting an IG review of the matter.³¹² And the Obama Administration sought to reassure courts that it could be trusted in invoking the state secrets privilege by issuing a policy that, among other provisions, required the Justice Department to refer "credible allegations of government wrongdoing" to IGs.³¹³

For Congress, too, the promise of IG oversight may attract, or at least allow members to justify, support for legislation to expand executive counterterrorism powers that threaten civil liberties. In a committee hearing on the September 11 detainees report, Senator Arlen Specter argued that an aggressive IG would "ease the public concern so that when [the Attorney General] comes back for the next PATRIOT Act we do not have a wave of public opposition."³¹⁴ Indeed, Congress has often required IG reviews of national security programs in the course of increasing government investigative or surveillance powers,³¹⁵ and some members of Congress have cited these provisions, among other checks, as enabling broader support for the legislation.³¹⁶

309. Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 894 (2007).

310. GOLDSMITH, *supra* note 10, at 106.

311. See *ACLU v. Nat'l Sec. Agency*, 493 F.3d 644, 648 n.1 (6th Cir. 2007) (reprinting White House statement of Dec. 17, 2005); *U.S. Department of Justice: Hearing Before the H. Comm. on the Judiciary*, 109th Cong. 31 (2006) (statement of Albert Gonzalez, U.S. Att'y Gen.).

312. See REVIEW OF THE FBI'S INVESTIGATION OF DOMESTIC ADVOCACY GROUPS, *supra* note 229, at 30-31.

313. Memorandum from the Att'y Gen. to Heads of Exec. Dep'ts and Agencies on Policies and Procedures Governing Invocation of the State Secrets Privilege 3 (Sept. 23, 2009), available at <http://www.justice.gov/opa/documents/state-secret-privileges.pdf>.

314. *Lessons Learned Hearing*, *supra* note 84, at 21 (statement of Sen. Arlen Specter).

315. Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, § 301(b)(1), 122 Stat. 2436, 2471-72; USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, §§ 106A, 119, 120 Stat. 192, 200-02, 219-21 (2006); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, § 1001, 115 Stat. 272, 391, *reprinted as amended in 5 U.S.C. app.* (2011).

316. See, e.g., 154 CONG. REC. 14,380-82 (2008) (statement of Sen. Dianne Feinstein) (supporting FISA Amendments Act of 2008); 152 CONG. REC. 2429 (2006) (statement of Sen. Harry Reid) (commenting on IG audit provision in the Patriot Reauthorization Act of 2005).

On the other hand, there are good reasons to question the notion that IG oversight has, on the whole, strengthened executive power. The mere fact of IG oversight may not dispel public concern over illegality, especially because the public may largely expect internal watchdogs to validate government programs. For instance, the NSA wiretapping program generated widespread criticism with almost no attention to the NSA IG's apparent prior approval. In addition, the negative findings of specific IG reports may attract greater attention than either positive reviews or the mere presence of IG oversight. Attempts to use IG reviews to bolster support for the government can backfire: the IG review of First Amendment activities actively invited by Director Mueller to dispel congressional concern ultimately revealed a damning FBI cover-up attempt, even though it vindicated the FBI as to other allegations.³¹⁷ And in contrast to Senator Specter's suggestion, Congress did not adopt a "new Patriot Act" wholesale, and demands for that law *did* encounter public opposition, with widespread reference to the September 11 detainees IG report as prime evidence of government abuse.³¹⁸ Where Congress did expand executive national security powers, one might also question whether IG oversight provisions made a real difference to the outcome, given the powerful political pressures to acquiesce to executive demands.

In addition, thus far, federal courts adjudicating national security cases have rarely cited IGs as a reason or justification for declining judicial review. Most federal decisions on national security issues that cite IG reports do so to corroborate plaintiffs' civil rights claims³¹⁹ or rely on IG reports for factual information alone.³²⁰ While two federal courts partially justified decisions to block or limit civil rights litigation by pointing to IG investigations, the availability of IG reviews does not appear to have driven either decision. In *Mohamed v. Jeppesen Dataplan, Inc.*, the Ninth Circuit cited the availability of nonjudicial channels of redress, including IG investigations, in rejecting a chal-

317. See REVIEW OF THE FBI'S INVESTIGATION OF DOMESTIC ADVOCACY GROUPS, *supra* note 229, at 66, 177, 186-87.

318. See *America After 9/11: Freedom Preserved or Freedom Lost?: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2003); see also Dan Eggen, *Measure Expands Police Powers*, WASH. POST, Dec. 10, 2004, at A1 (describing passage of legislation that partially adopted Patriot Act II proposals).

319. See, e.g., *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 989, 990 (9th Cir. 2012); *Al-Kidd v. Ashcroft*, 580 F.3d 949, 954-55, 976-77 (9th Cir. 2009); *Lombardi v. Whitman*, 485 F.3d 73, 75-77 (2d Cir. 2007); *Lonegan v. Hasty*, 436 F. Supp. 2d 419, 423-24, 429-30 (E.D.N.Y. 2006); *Turkmen v. Ashcroft*, 2006 WL 1662663, at *3, *17-19, *35 (E.D.N.Y. June 14, 2006); *Turkmen v. Ashcroft*, 2006 WL 1517743, at *4 (E.D.N.Y. May 30, 2006); *United States v. Benatta*, 2003 WL 22202371, at *5-6, *10 (W.D.N.Y. Sept. 12, 2003); *Ctr. for Nat'l Sec. Studies v. Dep't of Justice*, 215 F. Supp. 2d 94, 105-06 (D.D.C. 2002).

320. See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662, 667 (2009); *Arar v. Ashcroft*, 585 F.3d 559, 577-78, 617 (2d Cir. 2009) (en banc); *Doe v. Mukasey*, 549 F.3d 861, 879 (2d Cir. 2008).

lenge to extraordinary renditions on state secrets grounds.³²¹ But the discussion of alternative remedies reads more like an attempt to assuage the court's apparent anxiety over its "painful" decision and to instigate the political branches to act, rather than as a determinative factor behind the decision.³²² Similarly, the existence of IG reviews hardly seem determinative in *Rahman v. Chertoff*, where the Seventh Circuit reversed the certification of a class of U.S. citizens who had repeatedly been stopped and questioned by border agents when returning to the country.³²³ The court opined that executive agencies' responsiveness to IG recommendations for improving terrorist watch list processes suggested that the "political processes are receptive to citizens who are abused by bureaucrats."³²⁴ Nonetheless, it is hard to imagine that this decision, with its full-throated call for judicial deference, would have been any different in the absence of the IG review.

But more broadly, it seems indisputable that the prospect of IG oversight *can* in particular cases either constrain or strengthen executive power, and the "net" impact defies any attempt at measurement. It is also possible that as IGs attract more attention, they might be invoked more often as a substitute for more robust measures to protect individual rights.

Yet this risk—that a mechanism for accountability can be used to deflect other desirable checks or balances—is certainly not unique to IGs. Indeed, it could be argued that any institution designed to check power simultaneously empowers: it is theoretically possible that judicial review of executive policies, for instance, actually strengthens the executive by leading Congress to grant more authority to the executive than it otherwise would. Most proponents of individual rights would nonetheless support judicial review of national security conduct, preferring the discernible benefits of judicial review to the speculative possibility that such review leads to the future allocation of greater power to the executive. Similarly, in my view, attempts to use IGs to fend off other checks are not a reason to disfavor IGs, but only to insist that IGs not be treated as a substitute for other forms of review. Strengthening IGs offers an important, but certainly not sufficient, means of protecting rights.

B. *Reforms to Strengthen IGs*

Turning from whether IGs should be strengthened to how they might be strengthened, there are several modest steps Congress might take to support IG rights oversight. First, Congress could further institutionalize the civil rights and civil liberties monitoring role of national security IGs across the board. As Philip Heymann and Juliette Kayyem have recommended, Congress could ex-

321. 614 F.3d 1070, 1091 & n.14 (9th Cir. 2010) (en banc).

322. *See, e.g., id.* at 1073, 1093.

323. 530 F.3d 622 (7th Cir. 2008).

324. *Id.* at 627.

PLICITLY require that other national security IGs (beyond those at the DOJ and DHS) examine policies implicating rights, especially where Congress has expanded the executive's counterterrorism powers.³²⁵

Active congressional involvement, including explicit statutory mandates for IG reviews on matters of individual rights, can assist IGs in gaining access to agency information, issuing strong critiques, and securing reform. The DOJ IG justified its critical September 11 detainees and NSL reports by the specific congressional mandates to assess post-9/11 civil liberties complaints and audit NSLs. Where IGs encountered agency resistance, as in the DHS IG Arar investigation, intervention by members of Congress helped sustain pressure on agencies.³²⁶ Of course, congressional involvement does not guarantee a rigorous report: the DOD IG military monitoring report seemed least rigorous despite congressional requests for the investigation, and the CIA IG interrogations review reflected independence and rigor despite the lack of such intervention. In combination with other factors, however, a specific congressional mandate may help provide political cover for probing IG reviews.

Second, in light of the fact that certain IG reports remain entirely classified or largely redacted, Congress and IGs themselves could address the secrecy problem. At least six CIA IG reports related to individual rights are not yet public, and the DHS IG Arar rendition report remains heavily redacted despite the fact that Arar's civil lawsuit, a major reason cited for the redactions, has ended. Congress could amend the Inspector General Act to include a default rule that all IG reports covered by the Act, not just semiannual reports,³²⁷ be made publicly available, with appropriate exceptions for properly classified information. Similarly, it could require the CIA IG to issue an unclassified version of its semiannual reports and unclassified summaries of other reports to the public.³²⁸ More modestly, IGs could be required to notify Congress, in their semiannual reports, any time they disagree with major classification or redaction decisions of their agencies. Finally, the Council of Inspectors General on Integrity and Efficiency, the existing interagency council of IGs, could develop

325. See HEYMANN & KAYYEM, *supra* note 12, at 109, 114.

326. Of course, the effectiveness of congressional involvement may vary according to whether the same political party controls both Congress and the White House. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2330 (2006). On the other hand, in the case studies discussed here, both the highly critical DOJ IG September 11 detainees report and the CIA IG interrogations review were begun and released during periods of "unified" government, raising the possibility that the strength of IG oversight is not as dependent on the presence of "divided" government as other forms of oversight.

327. See Inspector General Act of 1978, Pub. L. No. 95-452, § 5(c), 92 Stat. 1101, *reprinted as amended in* 5 U.S.C. app. (2011) (requiring that semiannual reports be made public).

328. See 50 U.S.C. § 403q(d)(1) (requiring only classified semiannual reports to Congress).

best practices to address privilege concerns in cases where IG investigations occur parallel to civil litigation.

Third, Congress could modestly strengthen IGs' investigative authority by empowering them to issue subpoenas for the testimony of former government officials related to their time in government. Currently IGs can only subpoena documents, not testimony, outside the federal government, and that inability stymied certain IG investigations: for instance, the DHS IG could not compel interviews with senior INS officials involved in the Arar rendition and hinted that fuller access might have changed its conclusions.³²⁹

Fourth, Congress could strengthen rights oversight by expanding the jurisdiction of certain statutory IGs. For instance, unique among IGs, the DOJ IG lacks jurisdiction over allegations of misconduct related to "the authority of an attorney to investigate, litigate, or provide legal advice."³³⁰ Instead, the DOJ IG must refer such allegations to the separate DOJ Office of Professional Responsibility,³³¹ an office which reports solely to the Attorney General³³² and whose capacity to deter misconduct has been seriously questioned.³³³ The limitation on the DOJ IG's jurisdiction has prevented it from investigating certain national security policies limiting individual rights, such as the detention of individuals on material witness warrants.³³⁴

The expansion of IG power should proceed cautiously. Not only do concerns with IG independence need to be balanced against concerns for IG accountability,³³⁵ but stronger measures to buttress IGs might actually have a perverse result. For instance, one reason that IGs have been relatively successful may be, ironically, that their remedial powers are limited. By comparison, legal scholars have argued that courts, which are empowered to decide both rights and remedies, sometimes define rights narrowly in order to avoid costly remedies. Daryl Levinson has argued that rather than define rights with reference to pure constitutional values and then determine remedies, courts construct rights in such a way as to avoid undesirable remedial consequences, such as the need for continuing onerous judicial oversight.³³⁶ In contrast, Mariano-

329. See MAHER ARAR REPORT, *supra* note 63, at 35, 38; see also Ellen Nakashima & Carrie Johnson, 'Inappropriate' Secrecy Hurt Surveillance Effort, *Report Says*, WASH. POST, July 11, 2009, at A3 (reporting that former administration officials denied IG interview requests in probe of presidential surveillance program).

330. See Inspector General Act of 1978 § 8E(b)(3).

331. *Id.*

332. See OFFICE OF PROF'L RESPONSIBILITY, DEP'T OF JUSTICE, ANNUAL REPORT 2010, at 1 (2010).

333. See, e.g., Norman W. Spaulding, *Independence and Experimentalism in the Department of Justice*, 63 STAN. L. REV. 409, 440 (2011).

334. See, e.g., FBI'S HANDLING OF THE BRANDON MAYFIELD CASE, *supra* note 224, at 5.

335. See generally PROJECT ON GOV'T OVERSIGHT, INSPECTORS GENERAL: ACCOUNTABILITY IS A BALANCING ACT (2009).

336. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 884-85 (1999).

Florentino Cuéllar has noted that certain auditing institutions, like truth and reconciliation commissions, have “likely traded off explicit punitive power in exchange for political and economic resources” to “audit more cases or to do so more intensely.”³³⁷

While IGs cannot order remedies, that very limitation may make them relatively more free to issue strong critiques of past agency conduct. If IGs had greater power to enforce recommendations, they would likely face greater obstruction in gathering information and greater pressure to soften their underlying findings. By disconnecting IG findings of responsibility from direct consequences, IGs can lay out damaging facts with less need to temper their findings out of fear of obstruction or the difficulty of determining appropriate remedies.³³⁸ Thus, the overall system of rights oversight may benefit most from modestly strengthening IG powers and further linking them to congressional and public channels of accountability, but retaining their role as advisory institutions.

CONCLUSION

IGs support the view of internal separation of powers theorists that institutions within the executive branch can help protect individual rights curtailed by national security policies. Although courts are usually viewed as the primary institutions for rights enforcement, IGs in several cases protected rights where courts had failed. In particular, several IG reviews produced richly detailed examinations of national security practices, identified violations of the law that had escaped public scrutiny, and even challenged government restrictions on liberty where existing law was ambiguous or undeveloped. Surprisingly, IGs on some occasions even cast doubt on the conclusions of other legal institutions within the executive branch, including agency counsel and the OLC. At their best, IG investigations led decisionmakers to end egregious abuses, such as the use of exigent letters. While even the most critical and consequential reviews largely did not call for, nor obtained, remedies for most victims, repercussions for high-level executive officials, or significant constraints on future agency discretion, IG reviews in several cases compared favorably to courts and reinforced other congressional and executive accountability mechanisms.

Of course, critical and consequential IG reviews do not represent the full range of IG investigations. National security IGs investigating individual rights concerns sometimes failed to overcome agency obstruction or to rigorously probe the evidence, as two of the case studies here made clear. These disparities suggest an important need for further research: Why do the rigor and inde-

337. Cuéllar, *supra* note 13, at 289 n.208.

338. *See* Issacharoff & Pildes, *supra* note 3, at 43 (suggesting that IG reports are less constrained than court decisions in affixing blame to individuals because they do not attach monetary sanctions).

pendence of IG investigations, undertaken by institutions with nearly identical statutory mandates and powers, differ so greatly? Under what conditions can IGs exercise independence and provide effective oversight? The organization and staffing of IG offices, the culture of agencies, and the backgrounds, career trajectories, professional incentives, and political orientations of the IGs themselves may all be part of that story.

Nor do the achievements of even the most robust of IGs ultimately mitigate concerns over judicial or congressional inaction. IGs cannot decide fundamental questions of constitutional rights. They do not necessarily place much weight on providing relief to individual victims of rights violations. They may be illequipped to precipitate constraints on agency discretion, even where such constraints can best protect individual rights against national security abuses. In the end, IGs offer an important and underappreciated source of protection for individual rights, but an incomplete antidote to judicial or congressional inaction.