

INTERNAL OVERSIGHT AND THE TENUOUS PROTECTION OF NORMS

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Oversight institutions within the executive branch can play an important role in checking executive power. But the independence and efficacy of these institutions depend on unwritten conventions that are now under threat.

In “Democratic Erosion and the Courts,” Aziz Huq argues that national judiciaries have an uneven track record of resisting democratic erosion, and that U.S. courts are ill-equipped to do so in the face of sustained political pressure. One reason that U.S. judges are unlikely to prevail in inter-branch battles, he argues, is that judicial independence is protected more by unwritten conventions than by constitutional law. Thus, motivated political actors can undercut courts without actually violating the law.

Huq usefully turns our attention to the international scene, where other countries’ experiences remind us that courts have sometimes delayed democratic backsliding, but rarely arrested it. The very willingness to consider lessons from abroad—which Huq and Tom Ginsburg do more comprehensively in their larger project on “constitutional retrogression”¹—is a welcome departure from the larger tendency to assume American exceptionalism. And it seems right that, if constitutional restrictions on jurisdiction-stripping, the removal of judges, and executive non-compliance with court orders are less robust than imagined, courts provide a weaker defense to democratic erosion than many assume.²

In this response, I extend Huq’s point on the role of conventions in protecting independence to a different category of U.S. institutions designed to check executive power—oversight mechanisms within the executive branch. Like courts, internal oversight mechanisms rely on

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¹ See Tom Ginsburg & Aziz Huq, *How to Lose a Constitutional Democracy*, 65 *UCLA L. REV.* 78 (2018).

² Indeed, Tara Leigh Grove makes a persuasive case that norms against removing judges (outside the impeachment process), obstructing federal court orders, and “court-packing” are historically contingent, while neither law nor conventions prevent Congress from stripping the federal courts of jurisdiction. Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 *VAND. L. REV.* 465 (2018).

norms, not just formal law, to protect their independence. Some of these norms, however, are now facing serious pressure from a combination of shorter-term reasons (Trump) and longer-term developments (deepening polarization).³

Legal scholars have argued for over a decade that institutions within the executive branch can help keep the President and agencies accountable to the law or other democratic values.⁴ Legal offices, Inspectors General (IGs), civil rights and compliance offices, independent agencies like the Office of Special Counsel or the Privacy and Civil Liberties Oversight Board, and the bureaucracy itself are part of an “ecosystem” of accountability.⁵ Internal forces, in mutually reinforcing relationships with external institutions (courts, Congress, advocacy groups, and the media), can promote transparency, investigate misconduct, assess legal compliance, and integrate secondary mandates into the work of agencies.⁶

At the same time, the effectiveness of these internal mechanisms is highly contingent. One reason is their limited independence. Located within the executive branch, they face a constant risk of cooptation or obstruction, all the more so when the same political party controls the presidency and Congress. A second reason is that most internal oversight institutions have no power to compel executive action or order sanctions for violations. Rather, their power to constrain executive action depends on their ability to investigate, persuade, and/or shame.

Both the independence and influence of these institutions, in turn, derives in large part from conventions, not law.⁷ This is true across a range of institutions that check executive power, whether it is the power of the President, agencies, or executive officials.

The Justice Department Office of Legal Counsel (OLC), for instance,

³ This is not to suggest, of course, that the rise of Trump is unconnected from longer-term trends contributing to the erosion of democratic norms, such as the rightward shift of the Republican party, the growth of white cultural anxiety, or structural economic changes.

⁴ See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2318 (2006) (proposing internal mechanisms to check executive branch).

⁵ See generally JACK GOLDSMITH, *THE TERROR PRESIDENCY* (2007); Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53 (2014); Shirin Sinnar, *Institutionalizing Rights in the National Security Executive*, 50 HARV. C.R.-C.L. L. REV. 289 (2015) [hereinafter Sinnar, *Institutionalizing Rights*]; Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027, 1032–34 (2013).

⁶ See, e.g., Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423 (2009).

⁷ Adrian Vermeule has argued that conventions play a crucial role in protecting agency independence within the administrative state, but with a primary focus on regulatory agencies rather than oversight institutions. See Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163 (2013).

can only constrain presidential action if the President seeks and follows its legal advice, and if the office is willing to say “no” when it believes the law requires it. But no law blocks the President from bypassing OLC, or prevents OLC from telling the President what he wants to hear. Rather, at best, cultural norms and traditions dispose the office to providing “its best understanding of the law,” and Presidents typically choose not to cripple it because OLC is only useful to an administration if it is perceived as independent.⁸

Similarly, inspectors general, which act as watchdogs within federal agencies, enjoy relative independence from the President and agencies because norms have evolved that protect them beyond statutory provisions. For example, no law prevents incoming Presidents from asking incumbent IGs to resign wholesale, as Presidents do with many other presidential appointees. The Inspector General Act does not establish fixed terms for IGs, nor limits their removal to cases of “good cause,” but only requires that Presidents notify Congress thirty days before removing them.⁹ Nonetheless, a norm against the partisan removal of IGs has developed, and no President has removed them collectively since President Ronald Reagan in 1981.¹⁰ Similarly, norms constrain agencies from readily using an exceptional power they have under the law to block IG investigations for national security reasons.¹¹

Another oversight institution, the Office of Government Ethics (OGE), relies heavily on norms to persuade executive branch officials to comply with ethical standards regarding conflicts of interest. While applicable laws do not require executive officials to divest assets, the OGE has long advised officials to do so, and apparently most officials traditionally complied.¹² According to OGE’s former director, the threat of exposure to one’s supervisor or the public typically persuaded officials to go beyond the minimal legal requirements.¹³

But political will can overcome the norms that protect these

⁸ See Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1708, 1723 (2011) (book review).

⁹ Inspector General Act of 1978, 5 U.S.C. app. § 3(b) (2016); see also *Walpin v. Corp. for Nat’l & Cmty. Servs.*, 630 F.3d 184, 187–88 (D.C. Cir. 2011) (refusing to reinstate IG based on the Obama Administration’s alleged failure to comply with IG Act).

¹⁰ See Eric Lichtblau, *Tighter Lid on Records Threatens to Weaken Government Watchdogs*, N.Y. TIMES (Nov. 27, 2015), <https://www.nytimes.com/2015/11/28/us/politics/tighter-lid-on-records-threatens-to-defang-government-watchdogs.html> (noting President Reagan’s firing of fifteen IGs).

¹¹ Sinnar, *Institutionalizing Rights*, *supra* note 5, at 310.

¹² See Ryan Lizza, *How Trump Broke the Office of Government Ethics*, NEW YORKER (July 14, 2017), <https://www.newyorker.com/news/ryan-lizza/how-trump-broke-the-office-of-government-ethics> (noting the different attitude in the Trump Administration).

¹³ See *id.* (citing Former OGE Director Walter Shaub).

institutions' independence and efficacy. OGE has recently experienced a serious assault on such norms. President Trump refused to comply with norms favoring the divestment of assets, and White House aides initially fought OGE's demand to make public the conflict-of-interest waivers granted to many administration officials.¹⁴ After OGE's director resigned, the administration replaced him with an acting head who reportedly interpreted the ethics rules more loosely than longstanding OGE policy.¹⁵ In addition, the Trump transition team initially asked numerous IGs to resign, before the IGs' advocacy and congressional intervention led the White House Counsel to rescind the threat.¹⁶ In the latter case, at least, the convention ultimately held, although IGs may be imperiled if they reach too far into political matters of greatest interest to the President.¹⁷

While the current administration's more general disregard for norms can explain some of these problems, the deeper concern is that intensifying polarization undercuts the very source of advisory institutions' power: the capacity to shame. Imagine that an oversight institution releases a report exposing widespread legal violations by a government agency. In a less polarized environment, large-scale abuses of law might cause an elite and public outcry and instigate broad support for reform. In a more polarized environment, the media, lawmakers, and the public at large all interpret the truth and significance of such findings according to which administration is blamed and whether the problem exposed fits within liberal or conservative narratives about government and social issues. When the political party occupying the White House also controls Congress, and depends largely on its base for electoral support, it can easily dismiss critical findings of oversight institutions as unimportant, if not untrue.

¹⁴ Peter Overby & Marilyn Geewax, *Ethics Office Director Walter Shaub Resigns, Saying Rules Need to Be Tougher*, NPR (July 6, 2017), <https://www.npr.org/2017/07/06/535781749/ethics-office-director-walter-shaub-resigns-saying-rules-need-to-be-tougher>.

¹⁵ Eric Lipton, *New Ethics Chief Has Fought to Roll Back Restrictions*, N.Y. TIMES (July 26, 2017), <https://www.nytimes.com/2017/07/26/us/politics/david-apol-office-of-government-ethics-trump.html>.

¹⁶ See Chase Gunter, *Trump Transition Threatened to Fire IGs*, FCW.COM (Feb. 1, 2017), <https://fcw.com/articles/2017/02/01/inspectors-general-gunter.aspx> (reporting on Trump staffer seeking to replace IGs); Steven Mufson & Juliet Eilperin, *Trump Transition Team Reverses Course on Warnings to Oust Inspectors General*, WASH. POST (Jan. 19, 2017), https://www.washingtonpost.com/business/economy/trump-transition-reverses-course-on-warnings-to-remove-inspectors-general/2017/01/19/09312a12-ddfa-11e6-918c-99ede3c8cafa_story.html?utm_term=.7a2b370399c8 (reporting that after several IGs protested the pressure to step down, the Trump transition team made a second round of calls to explain they would not have to step down).

¹⁷ For speculation as to one potential threat to the Justice Department IG, albeit before the appointment of Special Counsel Robert Mueller lessened the focus on that office, see Jack Goldsmith & Helen Klein Murillo, *The Spotlight Shifts to the DOJ Inspector General*, LAWFARE (May 11, 2017, 11:52 AM), <https://www.lawfareblog.com/spotlight-shifts-doj-inspector-general>.

In light of the structural reasons for democratic erosion, and the limited independence of institutions within the executive branch, these institutions can only marginally resist democratic backsliding. On the other hand, if the prevention of decay requires a systemic response from across government and civil society, even that limited response may be meaningful. How can the norms supporting oversight institutions be strengthened? First, unsurprisingly, it matters enormously that co-partisans of those in power support threatened norms: For instance, it is especially significant that Republican Senator Charles Grassley, a longstanding supporter of IGs and whistleblowers, continues to defend them now.¹⁸ Second, it is important to crystallize conventions into law when political opportunities arise—and before a crisis necessarily frames disputes in hyper-partisan terms. The bipartisan passage of legislation restoring informational access to IGs in late 2016, following a protracted struggle between particular IGs and their agencies, is a singular recent example.¹⁹ Third, institutional independence benefits from the engagement of professional communities that can resist threats to independence, such as the council of IGs that pushed back against the threat of IG removals.²⁰ Ultimately, all such measures to protect the viability of institutional checks and resist democratic erosion depend on political and public support for democratic values outside purely partisan terms.

¹⁸ See, e.g., Jenna McLaughlin, *A Turf War Is Tearing Apart the Intel Community's Watchdog Office*, FOREIGN POL'Y (Oct. 18, 2017, 11:13 AM), <http://foreignpolicy.com/2017/10/18/turf-war-intelligence-community-watchdog-falling-apart/>.

¹⁹ Inspector General Empowerment Act of 2016, Pub. L. No. 114-317, 130 Stat. 1595 (2016); see also Lichtblau, *supra* note 10 (describing struggle over access to information). The legislation reversed the impact of an OLC opinion that had supported the agencies' position against disclosure. Office of Legal Counsel, The Department of Justice Inspector General's Access to Information Protected by the Federal Wiretap Act, Rule 6(e) of the Federal Rules of Criminal Procedure, and Section 626 of the Fair Credit Reporting Act (July 20, 2015).

²⁰ See Gunter, *supra* note 16 (citing Chair of Council of the Inspectors General on Integrity and Efficiency on IG concerns on Trump's hiring freeze); see also Inspector General Act of 1978 § 11, 5 U.S.C. app. § 3 (2016) (establishing Council of the Inspectors General on Integrity and Efficiency).