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Legal Sidebar

Presidential Objections to Special Inspector General for Pandemic Recovery Reporting Requirements

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President Trump signed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or Act) on March 27, 2020. But when doing so, he issued a signing statement identifying his "constitutional concerns" with provisions that he viewed as either infringing on executive power or exceeding the powers of Congress. Notwithstanding the President's statement, the identified provisions have the force and effect of law as the CARES Act was approved by the House and Senate and signed by the President in accord with the Constitution's "finely wrought" process of lawmaking. A signing statement does not, and constitutionally cannot, amount to a veto of specific provisions in an enrolled bill. Despite their lack of direct legal force, signing statements are frequently employed to announce a President's interpretation of statutory language or to object to specific provisions that the President feels conflict with the executive branch's conception of the Constitution. Signing statements can, therefore, signal how a law may be administered in the future, so long as the President directs executive branch officials to implement the contested provisions in accordance with the President's, rather than Congress's wishes.

President Trump's signing statement made a number of constitutional objections, all of which related to congressional involvement in or oversight of new CARES Act authorities. One that may be of particular interest to Congress relates to a requirement that the newly-established Special Inspector General for Pandemic Recovery (SIGPR)—tasked with overseeing the distribution of funds provided under the law—notify Congress of agency refusals to comply with SIGPR requests for information. This is not the first presidential objection to a provision that requires inspectors general to report directly to Congress, but the statement is nonetheless likely to impact not only the practical relationship between Congress and the new SIGPR, but also the larger constitutional struggle over the various tools Congress may use to supplement its oversight of executive branch activities.

SIGPR Reporting Requirements

The CARES Act established the SIGPR within the Treasury Department and directs the office to oversee—through audits and investigations—loans, investments, and other programs undertaken by the Secretary of the Treasury under the Act. SIGPR is then to issue various reports, including quarterly

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reports describing its activities to Congress. In carrying out these functions, the Act authorizes the SIGPR to make requests for necessary information from federal agencies. Agency officials must comply with these requests "to the extent practicable," but "not in contravention of any existing law." If a SIGPR request for information is "unreasonably refuse[d]," the Act provides that the SIGPR "shall report the circumstances to the appropriate committees of Congress without delay."

The President questioned this requirement in his statement, asserting that the executive branch "will not treat, this provision as permitting the SIGPR to issue reports to the Congress without the presidential supervision required by the Take Care Clause…." The President's claim appears to be that if the SIGPR was required to communicate directly with Congress without first obtaining approval from the President or another responsible officer, it would violate the President's Article II "power to oversee executive officers." Although there is some ambiguity in the statement, the objection appears to be only to the immediate notification requirement on the SIGPR triggered by an "unreasonable" refusal by executive entities to comply with an information request, rather than to SIGPR's other congressional reporting requirements.

Direct Reporting Requirements in the IG Context

Provisions requiring executive branch officials to report to Congress information relevant to the House and Senate's exercise of their legislative powers are, in the words of one court, "legion in federal law." These provisions can serve a variety of purposes. Some operate as a formal mechanism for keeping Congress and its committees informed, others serve to "permit Congress to monitor and, if it sees fit, to correct Executive Branch actions to which it objects," and still others encourage independent communication by giving an agency or an official the ability to convey information and views directly to Congress. No matter the purpose, congressional reporting requirements date back as far as the First Congress, where the statute creating the Department of the Treasury required the Secretary to "make report…to either branch of the legislature, respecting all matters referred to him by the Senate or House of Representatives." For both practical and legal reasons, reporting requirements have only rarely been the subject of judicial consideration, but the Supreme Court has endorsed them under various circumstances as a legitimate exercise of legislative power, especially as a means to ensure that executive branch "action … squares with the Congressional purpose"

Nevertheless, the Executive has repeatedly objected to those statutory provisions that require an executive branch official to report directly to Congress *without presidential supervision,* including when the reporting is done by an inspector general (IG). Provisions that require an IG to report directly to Congress, the executive branch has argued, infringe on the President's authority to maintain "general administrative control" over all executive branch officials, which, it is asserted, includes the ability to "supervise the content, and particularly any classified or privileged content, of official Executive Branch communications with Congress." Congress, on the other hand, has usually viewed its receipt of unfiltered information from IGs as both a constitutionally permissible method of obtaining information necessary to assist it in its legislative and oversight functions and an important aspect of IG independence. Nor has Congress accepted the proposition that "the President, as Chief Executive, has a constitutional right to authorize all contact between executive branch employees and Congress." This disconnect in constitutional understanding has led to a long-running dispute between the branches over IG reporting requirements.

This conflict is evident in the legislative history of the Inspector General Act of 1978 (IG Act) which reveals some difference of opinion among the House, Senate, and DOJ. The DOJ Office of Legal Counsel (OLC) objected to the envisioned flow of information in an initial House version of the IG Act that would have required IGs to provide information to Congress "upon request" and transmit their reports to Congress "without executive branch clearance or approval." The report associated with the House-passed bill rejected the executive branch position, responding that if the executive was correct, then "only the

President would have constitutional authority to clear communications from the executive branch, and the Congress would be powerless to require reports not only from subordinate officers but from agency heads as well." "That this is not the case," the House noted, "is clearly demonstrated by the many existing statutes requiring agency heads to provide specified reports to Congress." In reaching this conclusion, the House relied on Supreme Court caselaw in which the Court held that statutory duties imposed on executive branch officials "grow out of and are subject to the control of the law, and not to the direction of the President."

The Senate, which then took up the House bill, does not appear to have fully accepted either OLC's or the House's position regarding IG reporting to Congress. It altered certain provisions of the House-passed bill in an effort to reduce the "potential for tension" between the IG and his agency, and between the "executive and legislative branches." The provision requiring IGs to submit information to Congress upon request was deleted, according to the accompanying Senate report, to "allay[] … fears" that the Inspector General could be used as a conduit of sensitive executive branch materials to Congress." The provision requiring submission of reports to Congress "without further clearance or approval" was also deleted, but with no reasoning expressly given.

Ultimately, the House acceded to the Senate version and a compromise reporting provision that required IGs to submit reports to their agency head, "who was then required to submit that report to Congress, unchanged, but with comments, within 30 days." The mix of reporting requirements in today's IG Act reflects both Congress's desire to receive direct communications from IGs—in the form of direct reporting requirements—and the compromise over the Executive's desire to supervise potentially sensitive communications with Congress—in the form of provisions requiring IG reports to be transmitted to Congress through the agency head.

Presidents have sought to implement their views of IG reporting requirements through signing statements various times since 1978, but mostly when a disclosure implicates either national security or other executive branch confidentiality interests, including executive privilege. President Reagan issued signing statements objecting to a Central Intelligence Agency (CIA) IG reporting provision on the ground that it would "conflict with the constitutional protection afforded the integrity and confidentiality of the internal deliberations of the Executive branch…." Another Reagan signing statement, arguably analogous to President Trump's, questioned various reporting provisions including one that required the CIA IG to immediately report to the House and Senate intelligence committees whenever he had been denied access to information. The statement reasoned that the provision raised "concerns about the disclosure of confidential national security information," and may "undermine the President's authority over the deliberative processes of the executive branch." Presidents Clinton and Obama issued signing statements voicing their interpretation of provisions requiring the Intelligence Community IG to submit certain reports directly to House and Senate intelligence committees. Although acknowledging disagreement with Congress over the "operative constitution principles" both Presidents interpreted the law as "not requiring the disclosure of privileged or otherwise confidential law enforcement information."

In September 2019, OLC issued an opinion addressing provisions of the IG Act and 50 USC § 3033 that require "urgent concerns" uncovered by the Intelligence Community IG be transmitted directly to the congressional intelligence committees. Although noting that it had previously "recognized constitutional concerns with statutory requirements that subordinate executive branch officials disclose" either classified or diplomatic information to Congress, OLC resolved the question before it on statutory grounds and did not need to "consider constitutional limits on congressional reporting requirements" in the IG context. However, the OLC recently questioned a non-IG direct reporting provision on constitutional grounds, noting that "[t]his Office has long objected to so-called 'direct reporting' requirements based upon the applicability of executive privilege to statutory reports."

Based on these examples, it would appear that most executive branch objections to IG reporting provisions, though grounded in the President's authority to supervise subordinate executive branch

officials, have also been tethered to a concern for the potential disclosure of classified or privileged information to Congress. President Trump's objection to the SIGPR provision, on the other hand, appears to be based solely in the Take Care Clause and the President's asserted authority to control the actions of executive branch officials. This is reflected both in the language of the President's signing statement directed toward the SIGR—which makes no reference to the protection of privileged information—and the nature of the SIGPR provision—which requires only that the SIGPR "report the circumstances" of a denied request for information to specific congressional committees. The report appears to be descriptive in nature, rather than substantive; in essence requiring that Congress be notified of an "unreasonable refusal." Nor is it likely that SIGPR investigations or audits, which will generally relate to combating fraud, waste and abuse in the distribution of CARES Act funds, will regularly implicate national security or other confidentiality interests. Indeed, because the SIGPR will not have access to requested information following a refusal, it seems unlikely that the required notification would imperil privileged information (at least so long as the IG doesn't disclose the contents of deliberative executive branch communications giving rise to the denial).

Absent a concern for the disclosure of privileged or sensitive information, reliance on the Take Care Clause to block an official from complying with a statutory reporting requirement would appear to create some friction with the Supreme Courts warning that for the executive "[t]o contend that the obligation imposed on the President to see the laws faithfully executed implies a power to forbid their execution is a novel construction of the Constitution, and entirely inadmissible." While the Court has since held that Article II confers upon the President "general administrative control" of the executive branch, and has specifically relied on the Take Care Clause to invalidate statutory restrictions on the President's removal power [and could soon do so again], that line of reasoning has never been used to invalidate statuary provisions unrelated to removal that may otherwise impact presidential supervision of subordinates.

In any event, enforcement of this, and other, reporting requirements is largely left to Congress. While there have been times in which courts have entertained challenges to congressional reporting requirements (including when an agency's "complete failure" to submit a required report harms a private party), federal appellate courts have generally suggested that "[h]aving requested the report," it is Congress that "is in the best position to decide whether it's gotten what it wants." The goal of the reporting provision appears to be to make Congress aware of a potential breakdown in the IG investigative structure. As one federal appellate court observed, if the executive branch frustrates the purpose of a reporting requirement "it scarcely bears more than passing mention that the most representative branch is not powerless to vindicate its interests or ensure Executive fidelity to Legislative directives," so long as there is support for a response.

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