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Introduction

Good morning. My name is Zack Smith, and I appreciate the invitation to testify before the committee today.¹

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I currently serve as a Legal Fellow in The Heritage Foundation’s Edwin Meese III Center for Legal and Judicial Studies. Prior to joining Heritage, I served as an Assistant United States Attorney in the Northern District of Florida, worked at a large law firm here in Washington, DC, and clerked for the Honorable Emmett R. Cox on the United States Court of Appeals for the Eleventh Circuit.

Good government, accountability, and transparency are all laudable goals—presenting rare opportunities for bipartisan consensus in today’s hyperpartisan atmosphere.

But as the Committee considers many of the proposals before it today, I can’t help but think of the words the late-Justice Antonin Scalia wrote more than thirty years ago. When the Supreme Court was asked to consider the constitutionality of the independent counsel provisions of the Ethics in Government Act of 1978, which allowed for the appointment of an independent counsel to investigate and to prosecute certain high-ranking government officials, he said in his lone dissent that “Frequently an issue of this sort will come before the Court clad, so to speak, in sheep’s clothing . . . But this wolf comes as wolf.”²

So too today, there are wolves lurking among the provisions presented for this Committee’s consideration. As with so many things in life, the goals are good, but the devil is in the details.

When examining these details, I encourage the Committee’s members to keep in mind two overarching considerations—one legal and one practical.

Simply put they are that each member of the Committee has a duty to ensure that each proposed provision is constitutional and that it actually promotes good government.

So, let’s start with the constitutional. It’s indisputable that our Founding Fathers set up a federal government of limited and enumerated powers³ and a system of checks and balances among the different branches of government. In James Madison’s famous words, “Ambition must be made to counteract ambition.”⁴ Of course, in the over two hundred and thirty years since Madison wrote those words, Congress has muddied the

² *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J. dissenting).

³ *See* U.S. CONST. art. I, § 8 (setting forth those enumerated powers); *see also, e.g.*, *NFIB v. Sebelius*, 567 U.S. 519, 533 (2012) (“In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder.”); *United States v. Lopez*, 514 U.S. 549, 552 (1995) (“We start with first principles. The Constitution creates a Federal Government of enumerated powers.”).

⁴ THE FEDERALIST NO. 51.

waters, and the Supreme Court has spilled a lot of ink discussing these principles and how strictly they must be adhered to—especially in the Appointments Clause Context.⁵

But lest this be thought of as some abstract debate with little impact on our day-to-day lives, it should be clear that “[w]ithout a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours.”⁶ In other words, it’s this separation of powers that helps to protect all of our other rights.

You may be saying fair enough; we agree. But what does that have to do with the proposals before us today? Well, for example, one of the proposals before the Committee would make Inspectors General removable only “for cause.”⁷

A recent Congressional Research Service Report entitled “Congress’s Authority to Limit the Removal of Inspectors General” examined the thorny constitutional questions surrounding these issues.⁸ It candidly admitted that “Congress’s constitutional authority in this area is fraught with uncertainty and directly implicates the constitutional separation of powers and the President’s Article II powers.”⁹ And even though it concluded that “it would appear that for cause removal restrictions would likely be a constitutionally permissible means of encouraging independence for most IGs,”—something which is far from certain—it went on to say that it could be constitutionally questionable to place for cause removal restrictions on certain IGs “who would be impermissibly insulated from presidential control by multiple layers of removal

⁵ U.S. CONST. art. II, § 2, cl. 2; *see, e.g.*, *Seila Law, LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020) (holding that the for cause removal protections of the CFPB director violated the separation of powers); *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (finding that the SEC’s method of appointing Administrative Law Judges violated the Constitution’s Appointments Clause); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) (holding that Sarbanes-Oxley’s dual for-cause removal provisions violated the Constitution’s separation of powers); *Edmond v. United States*, 520 U.S. 651 (1997) (holding that a judge on the U.S. Coast Guard Court of Criminal Appeals qualified as an inferior officer); *Freytag v. Comm’r*, 501 U.S. 868 (1991) (holding that a judge on the U.S. Tax Court qualified as an inferior officer); *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding the constitutionality of the independent counsel); *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935) (upholding the for cause removal provisions for FTC commissioners); *Myers v. United States*, 272 U.S. 52 (1926) (holding the President has the authority to remove executive branch officials without the consent of the legislative branch, otherwise it would violate the separation of powers).

⁶ *Morrison*, 487 U.S. at 697 (Scalia, J. dissenting).

⁷ IG Independence and Empowerment Act, H.R. 2662, 117th Congress (2021), *available at* <https://www.congress.gov/bill/117th-congress/house-bill/2662?s=1&r=6>.

⁸ TODD GARVEY, CONG. RSCH. SERV., R46762, CONGRESS’S AUTHORITY TO LIMIT THE REMOVAL OF INSPECTORS GENERAL (2021), *available at* https://www.everycrsreport.com/files/2021-04-16_R46762_448657b39be3943d06fae44f9d488ced9e8cd2bd.pdf.

⁹ *Id.* at 9.

protections.”¹⁰ The current bill doesn’t reflect this latter concern, and at a minimum it should.

More to the point, given the uncertainty and the separation of powers concerns, would the potential damage to a foundational principle of our system of government be worth any corresponding benefits? After all, Inspectors General are not the only mechanism Congress possesses for combatting fraud, waste, and abuse or for seeking to set good government on firmer footing. Among its many powers, Congress can conduct oversight hearings, subpoena witnesses to appear before it, receive whistleblower complaints, and, most importantly, control the power of the purse if Executive Branch Officials do not comply with its requests.¹¹ And while attempts have been made to institute a better system to “watch the watchmen,” that’s ultimately the responsibility of the President, who may, of course, end up paying a political price if he improperly removes an inspector general.

But setting aside the constitutional concerns, what about the practical ones?

For an example from the past, look no further than the previously-mentioned independent counsel provisions of the Ethics in Government Act of 1978. Although the Supreme Court upheld their constitutionality in *Morrison v. Olson*, Congress and the public came to see those provisions as being “severely flawed,” and Congress ultimately declined to renew them.¹²

Consider that the proposals before the Committee today would simultaneously expand the power of Inspectors Generals—through the administrative subpoena process—while further insulating them from political accountability.¹³ This should give Committee members pause, especially given the vision of the Constitution’s Framers.¹⁴

¹⁰ *Id.* at 38.

¹¹ THE FEDERALIST NO. 58 (stating that this “power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutatory measure.”); *see generally* CONG. OVERSIGHT MAN., CONG. RSCH. SERV., RL20240 (Updated Mar. 31, 2021), *available at* <https://fas.org/sgp/crs/misc/RL30240.pdf>.

¹² Phil Kuntz, *Independent Counsels Facing Extinction; Panel at ABA Calls Act ‘Severely Flawed,’* WALL. ST. J. (Nov. 20, 1998, 11:59 PM ET), <https://www.wsj.com/articles/SB911524345107083500>.

¹³ And occasionally, they need to be held accountable. *See, e.g.*, Press Release, Sen. Chuck Grassley, Grassley, Johnson Call For Removal of FHFA Inspector General Following Findings of Misconduct, Reprisal (Apr. 28, 2021), *available at* <https://www.grassley.senate.gov/news/news-releases/grassley-johnson-call-for-removal-of-fhfa-inspector-general-following-findings-of-misconduct-reprisal>.

¹⁴ *See, e.g.*, THE FEDERALIST NO. 51.

And to what end is the proposal to transfer the responsibilities of the Justice Department’s Office of Professional Responsibility (OPR) to the Justice Department’s Office of Inspector General offered? Justice Department Inspector General Michael Horowitz has previously said that he doesn’t “see a principled reason why [his office] should be able to look at FBI agents’ misconduct, but not misconduct by Federal prosecutors.”¹⁵

Well, federal prosecutors occupy a unique role. An FBI agent—acting as an agent—does not have the authority to initiate a prosecution or have independent ethical obligations as an officer of the court. Besides, Justice Department lawyers are already subject to OIG oversight for routine fraud, waste, and abuse investigations. OPR only reviews potential ethical breaches by Justice Department attorneys. As explained on OPR’s website, “OPR has exclusive jurisdiction to investigate allegations of misconduct made against Department attorneys and law enforcement personnel that relate to the attorney’s exercise of their authority to investigate, litigate, or provide legal advice.”¹⁶ The website goes on to explain:

Therefore, the OIG ordinarily will refer to OPR allegations that reflect on the professional ethics of a Department attorney. Similarly, OPR ordinarily will refer to the OIG complaints involving Department attorneys that are unrelated to their authority to investigate, litigate, or provide legal advice. For example, OPR would investigate an allegation that a Department attorney failed to comply with the government’s discovery obligations in a criminal case, but would refer to the OIG an allegation that a Department employee failed to comply with time and attendance or travel rules and regulations.¹⁷

Having a unique entity to address ethical concerns about the United States’ primary litigators, may continue to make some sense. After all, Department attorneys are familiar with two other entities that help ensure they meet their ethical obligations as well.¹⁸

¹⁵ *Hearing on Recommendations and Reforms from the Inspectors General Before the H. Comm. On Oversight and Reform*, 115th Cong. (2017) (testimony of Michael Horowitz), available at <https://www.govinfo.gov/content/pkg/CHRG-115hhr28508/pdf/CHRG-115hhr28508.pdf>.

¹⁶ *Frequently Asked Questions, What is the difference between OPR and the Office of the Inspector General (OIG)?*, DEPT. OF JUST., <https://www.justice.gov/opr/frequently-asked-questions#8-1> (last visited May 1, 2021).

¹⁷ *Id.*

¹⁸ One is the Professional Responsibility Advisory Office (PRAO), which gives ethical advice to DOJ attorneys. PRO. RESP. ADVISORY OFF., DEPT. OF JUST., <https://www.justice.gov/prao> (last visited May 1, 2021). Additionally, DOJ attorneys are subject to local bar rules as well under what is known as the McDade Amendment. See 28 U.S.C. §530B (2018). And, of course, defense counsel and courts play a role in ensuring that Justice Department lawyers comply with their ethical obligations. See, e.g., Tom McParland, *SDNY Judge Calls for DOJ Probe of Prosecutorial Misconduct in Iran Sanctions Case*,

Then there's the broader concern that many of these acts are meant to "look good" without actually accomplishing much, if anything, in the way of substantive change. In that way, some of these proposals can actually do more harm than good for two reasons.

First, the bills would impose new duties and responsibilities on government personnel—including IG personnel—without giving them additional personnel or resources to carry out their functions. It sets them up for failure.

And second, many of these bills deceive the public into believing that these proposals address pressing concerns or accomplish something positive when in fact, they simply give the appearance of taking action against real or perceived problems while doing little to actually address them.

Because of this, close scrutiny should be given to these anodyne-sounding proposals such as the Periodically Listing Updates to Management Act (the PLUM Act).¹⁹ Every four years, the U.S. Government publishes the *United States Government Policy and Supporting Positions*, commonly called the Plum Book, which contains information about many of the federal government's highest-ranking positions. The PLUM Act would seek to move this online and have it continuously updated. If a new position is created, it would be added to the website. If someone new moves into a position, it would be added to the website, etc.

This proposal sounds fine if taken at face value. The goal of providing timely updates of appointed positions in government sounds good. But could there be unintended consequences to providing these updates that would make it easier to track and doxx our nation's highest Executive Branch officials?²⁰ Surely all of the committee members are familiar with these concerns, which should be adequately considered before this bill passes. In fact, just last year a bill was introduced to combat the availability of information online about federal officials given concerns over doxxing and threats to their safety and the safety of their families.²¹

LAW.COM (Feb. 17, 2021, 5:46 PM), <https://www.law.com/newyorklawjournal/2021/02/17/sdny-judge-calls-for-doj-probe-of-prosecutorial-misconduct-in-iran-sanctions-case/>.

¹⁹ PLUM Act, H.R. 2043, 117th Cong. (2021).

²⁰ The Department of Homeland Security says that doxxing "refers to gathering an individual's Personally Identifiable Information (PII) and disclosing or posting it publicly, usually for malicious purposes . . ." It also says that doxxers "may target government employees for such purposes as identifying law enforcement or security personnel, demonstrating their hacking capabilities, or attempting to embarrass the government." HOW TO PREVENT ONLINE HARASSMENT FROM "DOXXING," DEP'T OF HOMELAND SECURITY (Apr. 2017), *available at* <https://www.dhs.gov/sites/default/files/publications/How%20to%20Prevent%20Online%20Harrassment%20From%20Doxxing.pdf>.

²¹ See Public Servant Protection Act of 2020, S. 4965, 116th Cong. (2020).

And then, of course, are the two proposals to ensure that government employees are not retaliated against for exercising their own rights under the Freedom of Information Act (FOIA) or for functioning as a whistleblower.²² It doesn't take much imagination to see how these provisions could have unintended consequences and could even be abused to the detriment of the stated goal of good government.

Federal law enumerates specific conduct that can be considered retaliatory if taken after a federal employee has taken certain actions or has exercised certain rights.²³ One proposal here today would add to that list of prohibited personnel actions “the opening of any investigations as a result of a [protected] disclosure” It's a noble goal, but in everyday practice, this could easily be manipulated and abused. If an employee is suspected of wrongdoing, all that employee needs to do to insulate himself from investigation is to make a whistleblower complaint against the supervisor or other person who would initiate an investigation. Under current practice, making this whistleblower complaint could be as simple as having an informal hallway conversation with the supervisor the employee intends to accuse of wrongdoing. If the supervisor—or even someone else within the office or agency—subsequently initiates an investigation into that employee, it, could trigger protracted litigation and make the employee's supervisor or others less willing to hold that employee or other problematic employees appropriately accountable.

Although this may seem far-fetched to some of you here today, it unfortunately happens more often than you might imagine. Early in my career as an Assistant United States Attorney, I handled a lot of employment litigation. It was not uncommon for a problematic employee to file a complaint with their agency's Equal Employment Opportunity Office, a whistleblower complaint, or a union grievance, and then claim retaliation whenever a supervisor took any action against him. Even if the underlying complaint might not hold up, lawyers representing problematic employees seemed to think that the retaliation claims were easier to prove or, at the very least, more likely to survive a motion for summary judgment. By engaging in such tactics, the problematic employee's underlying issues often went unredressed because the employee's supervisor wouldn't want to deal with the administrative process or the lawsuit, if it got that far, especially if the supervisor had seen one of his or her colleagues go through this painful and time-consuming process.

Of course, this isn't to suggest that every—or even most whistleblowers—have performance or conduct issues. Many come forward for noble reasons and should be applauded, but we must be honest about the system's current shortcomings and potential

²² Federal Employee Access to Information Act, H.R. 2042, 117th Cong. (2021); Whistleblower Protection Improvement Act of 2020 (WPIA), H.R. 7935, 116th Cong. (2020).

²³ See 5 U.S.C. §2302 (2018).

for abuse—which could have an equally pernicious effect on good government and accountability.²⁴

To be clear, everyone here wants to hold government officials accountable for wrongdoing and to combat fraud, waste, and abuse of government resources, but we should do so in a way that stays within constitutional bounds, avoids unintended consequences, and actually promotes good-government policies.²⁵

While my testimony may be interpreted by some as offering a slightly discordant note, that is not my intention. I share this Committee’s desire to improve government accountability and transparency. But just as we should demand that government officials perform their duties in an ethical manner, we must ensure that any oversight of their conduct complies with the Constitution and avoids, to the maximum extent possible, the law of unintended consequences. I would be happy to provide any additional information the Committee might find helpful.²⁶ I welcome your questions.

²⁴ Furthermore, causation standards have been thorny issues in whistleblower litigation around the country. See Nancy M. Modesitt, *Causation in Whistleblowing Claims*, 50 U. Rich. L. Rev. 1193 (2016), available at https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1958&context=all_fac. Because of that this Committee should make sure that it has not introduced ambiguity or confusion into the process with its new language.

²⁵ My colleague, Paul J. Larkin, Jr., has proposed that in the law enforcement context it’s important that we begin a discussion on the best ways to measure federal law enforcement’s success. See Paul J. Larkin, Jr., *A New Law Enforcement Agenda for a New Attorney General*, 17 GEO. J. L. & PUB. POL’Y 231 (2019), available at <https://www.law.georgetown.edu/public-policy-journal/wp-content/uploads/sites/23/2019/06/17-1-Larkin.pdf>. A similar discussion is needed in the government accountability and oversight context as well.

²⁶ My written testimony today has not addressed the Federal Advisory Committee Transparency Act, H.R. 1930, 117th Cong. (2021); the Accountability for Acting Officials Act, H.R. 6689, 116th Cong. (2020); or the Presidential Records Preservation Act, H.R. 1929, 117th Cong. (2021). However, I am happy to supply information on these to the Committee at a later date if requested.