

**TESTIMONY OF DANIEL Z. EPSTEIN, ESQ.  
EXECUTIVE DIRECTOR, CAUSE OF ACTION**



BEFORE THE HOMELAND SECURITY &  
GOVERNMENTAL AFFAIRS COMMITTEE

*“Watchdogs Needed: Top Government Investigator Positions  
Left Unfilled for Years”*

June 3, 2015

Dirksen Senate Office Building  
Washington, DC 20515  
Room SD-342

Good afternoon Chairman Johnson, Ranking Member Carper, and Members of the Committee. My name is Daniel Epstein and I am the Executive Director of Cause of Action, a non-profit government oversight group committed to ensuring that the regulatory process is transparent, fair, and accountable.<sup>1</sup> Cause of Action uses various investigative and legal tools to educate the public about the importance of transparency and accountability in the Federal government. We consider our efforts to be a vital form of public oversight that supplements the important efforts of Congress.

Sens. Johnson and Carper recently commented on the findings made and conclusions reached by Department of Homeland Security's ("DHS") *permanent* Inspector General ("IG") John Roth (after more than two years of utilizing an *acting* IG) in connection with the Secret Service incident at the White House.<sup>2</sup> Cause of Action's own investigations support the need to fill IG vacancies with permanent appointments. Indeed, we believe that the use of acting IGs often interferes with and undermines the goal of IG offices to detect and deter waste, fraud, abuse and mismanagement, and creates the potential for conflict of interest. I highlight three such instances: then-acting DHS IG Charles K. Edwards' abuse of his office; the Council of the Inspectors General on Integrity and Efficiency's ("CIGIE") failure to conduct any independent audit or review of acting IGs; and then-acting State Department IG Harold Geisel's failure to assure transparency in connection with then-Secretary of State Hillary Clinton's e-mails.

### **Cause of Action's Unique Experience with Federal Offices of Inspector General**

Since its founding, Cause of Action has worked productively with federal offices of Inspector General by sharing investigative findings that enhance Office of Inspector General ("OIG") efforts to prevent waste, fraud and abuse in federal programs. In 2011, Cause of Action's investigative work led the Neighborhood Reinvestment Corporation (also known as "NeighborWorks") to disclose for the first time in its history the reports of the Office of Special Audit – its equivalent of an OIG – and require those reports to be publicly accessible in perpetuity.<sup>3</sup> In May 2014, the U.S. Department of Housing and Urban Development ("HUD") OIG confirmed that, based on Cause of Action's work, an investigation was opened into whether HUD violated appropriations laws in promoting the Affordable Care Act.<sup>4</sup> For several years, Cause of Action has been in litigation with the Treasury Inspector General for Tax Administration ("TIGTA") concerning the IG's ability to withhold evidence of investigations into IRS misconduct under taxpayer confidentiality laws. Later in 2014, Obama-appointed district judge Amy Berman

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<sup>1</sup> CAUSE OF ACTION, <http://causeofaction.org/>. I would like to acknowledge the staff at Cause of Action for their assistance in preparing this testimony. Further, I would like to briefly honor my son, Felix Aaron Epstein, born May 28, 2015, and whose happy introduction inspired the research and writing incorporated herein.

<sup>2</sup> See HSGAC (comments by Sens. Johnson and Carper) (May 14, 2015), available at <http://goo.gl/mrGQAa>; <http://goo.gl/Y2mm9V>.

<sup>3</sup> See NeighborWorks Reinvestment Corporation, Office of Special Audit, available at <http://www.neighborworks.org/About-Us/Public-Policy/FOIA/Reading-room>; Charles C.W. Cooke, *ACORN is up to its old tricks*, National Review (Feb. 2012), <http://www.nationalreview.com/article/289948/acorn-its-old-tricks-charles-c-w-cooke>.

<sup>4</sup> Ferdous Al-Faruque, *HUD investigated for promoting ObamaCare*, The Hill (May 2, 2014), <http://thehill.com/policy/healthcare/205079-hud-investigated-for-promoting-o-care>; see also Ashe Snow, *Complaint suggests HUD may have inappropriately promoted Obamacare*, Wash. Exam. (Apr. 14, 2014), <http://www.washingtonexaminer.com/complaint-suggests-hud-may-have-inappropriately-promoted-obamacare/article/2547168>.

Jackson ruled in Cause of Action's favor, ordering TIGTA to disclose certain investigative records, fundamentally changing the rules governing TIGTA's power to withhold information.<sup>5</sup> Most recently, the Health and Human Services ("HHS") IG began "an open and ongoing investigation" into issues concerning lobbying with Affordable Care Act funds based on information obtained by Cause of Action.<sup>6</sup> Even Cause of Action's critics have credited my organization as the reason the HHS IG issued an "early alert" in 2012 on concerns about federal agencies doling out grants to fund the lobbying activities of the recipients.<sup>7</sup>

Cause of Action's work also has motivated requests for IG investigations by members of Congress. In April 2012, based on Cause of Action's investigation on the International Humanities Center ("IHC"), agents from the Department of Energy reached out to Cause of Action in order to further inform a federal investigation on misuse of federal funds.<sup>8</sup> Also in 2012, Congressman John Kline, Chairman of the House Education and Workforce committee, requested a National Labor Relations Board ("NLRB") OIG investigation into concerns about *ex parte* board communications as a result of Cause of Action's investigative findings.<sup>9</sup> Last year, Cause of Action's investigative work of the Federal Trade Commission ("FTC") prompted the House Committee on Oversight and Reform to demand, and the FTC OIG to open, an investigation into whether the FTC's enforcement staff authenticated evidence, later relied upon for purposes of enforcement actions, obtained by third party companies.<sup>10</sup>

As is most relevant to this Committee's work, from 2012 to 2014, Cause of Action conducted an investigation into then-Acting IG Charles Edwards at the Department of Homeland Security ("DHS"). CoA's investigation of Edwards is telling because it signifies the degree to which non-independent IGs will sacrifice the public interest in order to preserve their own self-interest. Edwards used government resources to issue an official public statement attacking the accuracy of a Cause of Action report and claiming that Cause of Action wrongly accused the OIG of promotional item spending.<sup>11</sup> In response, Cause of Action audited its report and confirmed that the OIG, under Mr. Edwards, had indeed engaged in inappropriate promotional item spending.<sup>12</sup>

Subsequently, two whistleblowers contacted Cause of Action. These individuals not only confirmed the facts set forth in Cause of Action's report but also advised that Mr. Edwards was

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<sup>5</sup> Stephen Dinan, *IRS Inspector General to release documents on privacy probe*, Wash. Times (Nov. 25, 2014), <http://www.washingtontimes.com/news/2014/nov/25/irs-inspector-general-to-release-files-on-irs-priv/>.

<sup>6</sup> Conrad Wolf, *Feds Investigate Whether Union Misused Obamacare Funds*, Daily Caller (Apr. 12, 2015), <http://dailycaller.com/2015/04/12/feds-investigate-whether-union-misused-obamacare-funds/>.

<sup>7</sup> Independent Sector, *Lobbying with Government Funds*, [https://www.independentsector.org/lobbying\\_with\\_government\\_funds](https://www.independentsector.org/lobbying_with_government_funds).

<sup>8</sup> E-mail from Shawn Dionida, Dep't of Energy to Cause of Action (Apr. 26, 2012) (on file with Cause of Action).

<sup>9</sup> See Letter from Chrmn. John Kline to IG Berry, NLRB (2012), [http://edworkforce.house.gov/uploadedfiles/04-13-2012\\_kline\\_letter\\_to\\_berry.pdf](http://edworkforce.house.gov/uploadedfiles/04-13-2012_kline_letter_to_berry.pdf).

<sup>10</sup> Jaikum Vijayan, *Congressman questions FTC breach probe amid claims of 'corporate blackmail'*, Computerworld (June 19, 2014), <http://www.computerworld.com/article/2490974/technology-law-regulation/congressman-questions-ftc-breach-probe-amid-claims-of--corporate-blackmail.html>.

<sup>11</sup> See DHS OIG, *Report Misrepresents OIG Employee Award Program* (Oct. 11, 2013), <https://goo.gl/BU7nX9>.

<sup>12</sup> See Cause of Action, *Report for Public Release: Internal Review of CoA Report re: DHS OIG Expenditures*, at 45-47, 77, 80 (Oct. 12, 2012), <http://goo.gl/oVq400>; see also Zach Rausnitz, *OIG: 95 percent of criticized spending was for routine bonuses*, Fierce HomelandSecurity.com (Oct. 12, 2012), <http://goo.gl/AqVkrM>.

concerned that negative publicity would reveal additional inappropriate spending and that a number of complaints for abuse of power had been filed against him. The whistleblowers also disclosed to Cause of Action that, in 2012, Mr. Edwards had instructed the DHS OIG FOIA office to deny FOIA requests seeking records about placing several OIG employees on administrative leave as well as records of the complaints filed against him.<sup>13</sup> There also were allegations that Mr. Edwards abused his position to seek the destruction of such documents. Cause of Action submitted a FOIA request (and was forced to file a lawsuit) seeking, *inter alia*, documents relating to these complaints against Mr. Edwards, but such records were never produced.<sup>14</sup> This Committee's Subcommittee on Financial and Contracting Oversight also sought documents from Mr. Edwards, but he never fully responded before resigning.<sup>15</sup>

Cause of Action's investigation concluded that acting IG Edwards had billed private costs as work expenses, improperly used a government vehicle, engaged in nepotism, disregarded FOIA, removed or destroyed records, and created a toxic environment at DHS OIG, leading to a letter to the President to ask for Mr. Edwards' removal from office.<sup>16</sup> Mr. Edwards continued to use government resources to publicly respond to the allegations.<sup>17</sup> Ultimately, however, the Subcommittee's conclusions confirmed Cause of Action's investigative work,<sup>18</sup> and then-acting IG Edwards resigned in December 2013.<sup>19</sup>

### **CIGIE's Failure to Review Acting IGs**

CIGIE's function is to "continually identify, review, and discuss areas of weakness and vulnerability in Federal programs and operations with respect to fraud, waste, and abuse."<sup>20</sup> To this end, CIGIE has an Integrity Committee that investigates complaints "that are made against Inspectors General and staff members of the various Offices of Inspector General."<sup>21</sup>

CIGIE claims, however, that it lacks any independent audit or review authority over IGs.<sup>22</sup> In connection with then-acting IG Edwards, Cause of Action obtained records indicating that

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<sup>13</sup> See DHS OIG, 2012 Office of Inspector General FOIA Log – Fourth Quarter, <https://goo.gl/xWJv8F>.

<sup>14</sup> See Letter from Stephanie L. Kuehn, Senior FOIA/PA Disclosure Specialist, DHS OIG to Cause of Action (Jul. 2, 2013), <http://goo.gl/9PqLQv> (on file with Cause of Action).

<sup>15</sup> See Stephanie Russell-Kraft, *Senators Push DHS Inspector General To Resign*, Law360.com (Nov. 17, 2013), <http://goo.gl/E8c7QQ>.

<sup>16</sup> Letter from Cause of Action to President Barack Obama (July 1, 2013), <http://goo.gl/84eFbT>; Kellie Lunney, *Group Wants Obama to Fire Homeland Security Watchdog*, Gov. Exec. (July 1, 2013), <http://goo.gl/S38w4L>.

<sup>17</sup> See, e.g., Statement of Deputy Inspector General Charles K. Edwards (July 2, 2013), <http://goo.gl/FDtSCf>; see also Jack Moore, *Embattled DHS IG convinced Senate probe will clear his name*, Fed. News Radio.com (July 23, 2013), <http://goo.gl/k9EkVA>.

<sup>18</sup> See Zach Rausnitz, *Spotlight: DHS IG accused of variety of misconduct*, FierceGovernment.com (July 3, 2013), <http://goo.gl/qJn3U7>.

<sup>19</sup> See Philip Swarts, *IG faced internal complaints at Homeland Security, record show*, Wash. Times (Dec. 18, 2013), <http://goo.gl/gLtTql>.

<sup>20</sup> 5 U.S.C. App. § 11(c)(1)(A).

<sup>21</sup> See *id.* § 11(d)(1). That Committee is chaired by a senior level official of the Federal Bureau of Investigation, who is designated by the Director of the FBI. *Id.* §§ 11(b)(1)(D), (d).

<sup>22</sup> See Jolie Lee, *OGE missed signs of GSA ethics violations, memo says*, Fed. News Radio (Aug. 6, 2012), <http://goo.gl/8bGtUO>.

internal agency complaints had been referred to CIGIE, which declined to open investigations.<sup>23</sup> Similarly, in late 2013, former Senator Tom Coburn requested a number of records from USAID-OIG concerning allegations that then-Acting Inspector General Michael Carroll had engaged in professional retaliation and altered and removed negative findings from audit reports before releasing them to the public.<sup>24</sup> Records produced to Cause of Action as a result of a FOIA investigation confirmed the allegations and also demonstrated that USAID-OIG had failed to report recommendations from a peer-conducted audit.<sup>25</sup> Relying on information from CIGIE, Mr. Carroll deleted these recommendations, against the advice from his own lawyers.<sup>26</sup>

### **State Department's Failure to Assure Transparency with Clinton E-mails**

The problems associated with acting IGs extends to the State Department, as recently highlighted by the revelations that former-Secretary of State Hillary Clinton exclusively used a private email system for official government business.<sup>27</sup> During Mrs. Clinton's entire tenure, the State Department's acting IG was Harold Geisel, an ambassador under former President Bill Clinton and a donor to President Barack Obama's first presidential campaign.<sup>28</sup>

As a career member of the Foreign Service, Mr. Geisel was prohibited by statute from becoming a permanent IG.<sup>29</sup> Indeed, in testimony before the House Committee on Foreign Affairs, the Government Accountability Office criticized the appointment of acting IGs at the State Department from career foreign service officers because of their inherent lack of independence, and noted in particular that Mr. Geisel had "25 years in senior State Department positions."<sup>30</sup>

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<sup>23</sup> See *id.*; see also Letter from Phyllis K. Fong, Chairperson, CIGIE to Cause of Action (June 19, 2012) (attached as Exhibit 1) (CIGIE stating it was "not charged with or allocated independent resources to conduct audits, investigations, or evaluations" in response to Cause of Action's request to investigate GSA).

<sup>24</sup> See, e.g., Scott Higham & Steven Rich, *Whistleblowers say USAID's IG removed critical details from public reports*, Wash. Post (Oct. 22, 2014), <http://goo.gl/HNQe0b>; see also Sean Reilly, *Senator raises questions about USAID inspector general's independence*, Fed. Times (Dec. 9, 2013), <http://goo.gl/8RRabn>. Mr. Carroll resigned his position at the end of 2014 as a result of these allegations. Scott Higham & Steven Rich, *USAID watchdog Michael Carroll retires in wake of whistleblower claims*, Wash. Post (Dec. 8, 2014), <http://goo.gl/k13IzG>.

<sup>25</sup> E.g., OIG Responses to Questions in [Sen. Coburn's] 11/12/13 Letter, Enclosure B, at 1-3 (FOIA Production, July 16, 2014) (on file with Cause of Action).

<sup>26</sup> See *id.* at 3; see also Letter from Lisa Goldfluss, Legal Counsel to the Inspector Gen., USAID-OIG, to Robert Ross, Assistant Inspector Gen. for Mgmt., USAID-OIG & Tim Cox, Assistant Inspector Gen. for Audits, USAID-OIG (Oct. 16, 2012) (on file with Cause of Action).

<sup>27</sup> See Michael S. Schmidt, *Hillary Clinton Used Personal Email Account at State Dept., Possibly Breaking Rules*, N.Y. Times (Mar. 2, 2015), <http://goo.gl/wma5Jf>.

<sup>28</sup> Dep't of State Archive, *Biography, Harold W. Geisel*, <http://goo.gl/mj6mVx>; OpenSecrets.org, *Donor Lookup, Harold W. Geisel*, <https://goo.gl/Z94ZL6>.

<sup>29</sup> See 22 U.S.C. § 4861(d) ("No career member of the Foreign Service, as defined by section 3903 of this title, may be appointed Inspector General of the Department of State.")

<sup>30</sup> Gov't Accountability Office, Testimony before the H. Comm. on Foreign Affairs, State Department Inspector General: Actions to Address Independence and Effectiveness Concerns are Under Way, at 1 (Apr. 5 2011), <http://goo.gl/f0eNwx> (noting that "the appointment of management and Foreign Service officials to head the State OIG in an acting capacity for extended periods of time is not consistent with professional standards for independence"); *id.* at 8 ("We found that acting IG positions continue to be used and are filled by officials with prior management positions at the department. Independence concerns surrounding such acting appointments are additionally troublesome when the acting IG position is held for such prolonged periods."); *id.* at 12 ("This use of temporarily assigned State Department management staff to head the State OIG can affect the perceived independence of the entire office in its oversight of the department's operations, and the practice is questionable when compared to the

Nevertheless, during Mrs. Clinton's tenure, the White House never made any attempt to appoint a permanent IG<sup>31</sup> and Mr. Geisel ended up serving as acting IG for more than five years.<sup>32</sup> In 2013, both the Chairman and Ranking Member of the House Committee on Foreign Affairs signed a joint letter sent to newly-appointed Secretary of State John Kerry, as well as another letter to President Obama, noting that the "gap of more than 1,840 days is the longest vacancy of any of the 73 Inspector General positions across the federal government[,]" and urging the appointment of a permanent IG as "an issue essential to the proper functioning of the Department of State."<sup>33</sup>

Earlier this year, Cause of Action sought documents from the State Department OIG and the National Archives and Record Administration ("NARA") regarding Mrs. Clinton's use of a private server to conduct official State Department business.<sup>34</sup> The OIG claimed that there were no responsive documents from Mr. Geisel's time.<sup>35</sup> NARA, however, confirmed that responsive OIG records existed, though it claimed exemption(s) over any such document(s).<sup>36</sup>

Other records produced by NARA show that, as early as 2012, NARA officials were concerned that Mrs. Clinton might alienate federal records from government control.<sup>37</sup> Despite this (and the obligation imposed on NARA by the Federal Records Act), there is no indication that NARA ever notified Department of Justice or Congress about the possible alienation or destruction

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independence requirements of Government Auditing Standards and other professional standards followed by the IGs. Further, career members of the Foreign Service are prohibited by statute from being appointed as State IG. This exclusion helps to protect against the personal impairments to independence that could result when a Foreign Service officer reviews the bureaus and posts of fellow Foreign Service officers and diplomats."); *id.* at 7, Table 1.

<sup>31</sup> See White House, *Nominations & Appointments*, <https://goo.gl/IeRtlb>; Joseph E. Schmitz, *Obama's Inspector General Negligence*, Wall St. J. (June 4, 2013), <http://goo.gl/fJaaT1> ("For years, President Obama has neglected his duty to fill vacant inspector-general posts at the departments of State, Interior, Labor, Homeland Security and Defense and at the Agency for International Development. The president has nominated only two candidates to fill any of these six vacancies, and he subsequently withdrew both nominations. All told, an IG has been missing in action at each of those cabinet departments and the AID agency for between 18 months and five years.").

<sup>32</sup> See *supra* note 28 (noting appointment as acting IG on June 2, 2008); Mark Flatten, *IGs form front line of war on waste and fraud, but weak links remain*, Wash. Examiner (Dec. 1, 2014), <http://goo.gl/XAj03v> (noting that Mr. Geisel served until the current permanent IG, Steve Linick, was confirmed in September 2013); see also 5 U.S.C. § 3346 (imposing 210-day limit for interim positions); U.S. Gov't Accountability Office, *Violation of the 210-Day Limit Imposed by the Federal Vacancies Reform Act of 1998* (B-326480: Mar 30, 2015), <http://goo.gl/o5BnGr> (pursuant to 5 U.S.C. § 3349(b), reporting to President a violation of 5 U.S.C. § 3346 at Department of Veterans Affairs with respect to IG position because Acting IG served longer than 210 days).

<sup>33</sup> See H. Comm. on Foreign Affairs, Press Release, *Royce, Engel Request Secretary Kerry's Support in Filling Five-year Inspector General Vacancy at State Department* (Feb. 5, 2013), <http://goo.gl/Dp8aSE> (attaching text of letters, which noted that "[f]or more than five years, since January 16, 2008, the Department has lacked a presidentially-nominated, Senate-confirmed Inspector General").

<sup>34</sup> Letter from Cause of Action to Steve A. Linick, Inspector Gen., Office of Inspector Gen., Dep't of State (Mar. 9, 2015) & Letter from Cause of Action to David S. Ferriero, Archivist of the U.S., Nat'l Archives & Records Admin. (Mar. 9, 2015) (on file with Cause of Action).

<sup>35</sup> See Letter from Erich O. Hart, General Counsel, Dep't of State OIG to Cause of Action (May 15, 2015) (attached as Exhibit 2).

<sup>36</sup> See Letter from Joseph A. Scanlon, FOIA Officer, NARA to Cause of Action (May 20, 2015) (attached as Exhibit 3).

<sup>37</sup> See E-mail from Paul M. Wester, Jr., Chief Records Officer, NARA to Margaret Hawkins, NARA, *et al.* (Dec. 11, 2012) (attached as Exhibit 4); see also, *e.g.*, Sarah Westwood, *National Archives feared Clinton would leave with State Dept. records*, Wash. Examiner (May 21, 2015), <http://goo.gl/QQzWuK>; Josh Gerstein, *Archives officials worried about preserving Hillary's records*, Politico.com (May 21, 2015), <http://goo.gl/FJjzsF>.

of federal records. To the contrary, NARA publicly commended the State Department for its record management practices.<sup>38</sup> Indeed, by 2012, the State Department had replaced its outdated cable communication system with the State Messaging and Archive Retrieval Toolset (“SMART”), which “contains an email management component for capturing record email.”<sup>39</sup>

And yet, in 2014, the OIG concluded that the Bureau of Conflict and Stabilization Operations “does not have a uniform process for the storage and organization of files. Files and records are stored in several locations, including the bureau’s network shared drive, SharePoint document libraries, personal emails, and hard drives.”<sup>40</sup> The Bureau also permitted “[c]ontracting officer’s representatives [to] keep emails and other materials on their personal computers instead of using shared drives or paper files.”<sup>41</sup> And a 2015 OIG report found that “Department of State employees have not received adequate training or guidance on their responsibilities for using those systems to preserve ‘record emails.’”<sup>42</sup>

Similarly, since 2009, NARA consistently identified problems with the SMART system as a permanent recordkeeping system at the State Department, but no action was taken to address the issues.<sup>43</sup> Despite this, NARA, under then-acting IG James E. Springs, had the opportunity to secure Mrs. Clinton’s emails in July 2014.<sup>44</sup> At the time, NARA was aware of the failures across the State Department to retain record emails.<sup>45</sup> In fact, NARA noted that the “adoption of Google Ap at [Department of the Interior] has almost been a total disaster[.]”<sup>46</sup> And in October 2014,

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<sup>38</sup> See, e.g., Dep’t of State, *Open Government Plan*, at 12 (Apr. 9, 2012), <http://goo.gl/rx8m7h> (“The Department is recognized by [NARA] as ‘best in government’ for many of its records management practices and procedures.”).

<sup>39</sup> Dep’t of State, Summary Current State of Records Management at the State Department at 2 (Mar. 27, 2012), available at <http://goo.gl/jXCv1u>. SMART operates such that when “Department personnel send cables and record emails, a copy of the message is automatically sent to the Department’s official archive, which is an enterprise-wide electronic repository.” *Id.* at 5.

<sup>40</sup> Dep’t of State OIG, Inspections of the Bureau of Conflict and Stabilization Operations, at 20 (Mar. 2014), <http://goo.gl/pgWsYi>.

<sup>41</sup> *Id.* at 25.

<sup>42</sup> Dep’t of State OIG, Office of Inspections: Review of State Messaging and Archive Retrieval Toolset and Record Email, at 1 (ISP-I-15-15 March 2015), <http://goo.gl/Sq6OuL> (noting that State Department personnel only “created 61,156 record emails out of more than a billion emails sent” in 2011 and only “41,749 record emails in 2013”).

<sup>43</sup> See, e.g., Email from David Langbart, NARA to Michael Kurtz, NARA (Nov. 2, 2009) (attached as Exhibit 5) (discussing major problems with SMART’s technical handling of email attachments); Email from David Langbart, NARA to Michael Kurtz, NARA (Jan. 22, 2010) (attached as Exhibit 6) (discussing problems with State employees not properly using SMART’s “record email” retention function); Email from Paul M. Wester, Jr., Chief Records Officer, NARA to Gregory Lepore, NARA, *et al.* (July 1, 2011) (attached as Exhibit 7) (analyzing major technical issues in test transfer on SMART system); Email from Paul M. Wester, Jr., Chief Records Officer, NARA to David Ferriero, Archivist of the U.S., NARA, *et al.* (Mar. 12, 2015) (attached as Exhibit 8) (discussing State OIG’s audit of the SMART system, which identified, among other matters, failure of State Department personnel to properly save email records); Letter from Paul M. Wester, Jr., Chief Records Officer, NARA to Margaret Grafeld, Deputy Ass’t Sec’y for Global Info. Servs., Dep’t of State (May 21, 2015) (attached as Exhibit 9) (describing problems with a test transfer of data from the SMART system).

<sup>44</sup> See NARA – State Dep’t Meeting Notes, eRSC Meeting (July 17, 2014) (attached as Exhibit 10) (rollout should “move in to [deputy secretary] on to the Office of the Secretary” and “[a]ll submitted to NARA by Dec. 2016”; explaining that senior officials’ emails serve as a “catchers mitt” to preserve departing officials emails).

<sup>45</sup> See *id.* (NARA was aware of “program office using gmail with no [recordkeeping] system” and State’s emails “must be maintain[ed] in the r/k system \*which should be the eRSC\*”).

<sup>46</sup> *Id.*

NARA had reason to know that the State Department was seeking a legal justification for noncompliance with applicable regulations relating to email records.<sup>47</sup> Given NARA's stated concerns with SMART, its knowledge in 2012<sup>48</sup> and its opportunity in 2014, it either was aware of the failure to preserve Mrs. Clinton's emails or was extremely negligent in its efforts to monitor senior officials' emails.<sup>49</sup>

Then-acting IG Geisel did not identify the material risks of failing to implement the SMART system at the time, or otherwise take steps to assure transparency. And when this story broke in March 2015, it became clear that the then-acting IG Springs did not understand NARA's role in overseeing the government's use of emails.<sup>50</sup>

### **Conclusions**

The evidence obtained by Cause of Action indicates that the time, effort and resources now being utilized to uncover the lack of transparency created by the failure to secure then-Secretary of State Hillary Clinton's emails may have been solved with permanent and independent IGs (both at the State Department and more recently at NARA).

Unlike other federal officials appointed by the President, IGs partner with congressional oversight committees in order to oversee their resident federal agencies. This creates unique incentives for IGs to be more politically accountable to Congress than the President, which serves a democratic purpose rendered impossible when no Senate confirmation takes place.

I thank the Committee for the opportunity to testify on these important issues.

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<sup>47</sup> Email from William P. Fischer, Agency Records Officer, Office of Info. Programs & Servs., Dep't of State to Lisa Haralampus, NARA, *et al.* (Oct. 20, 2014) (attached as Exhibit 11) (Fischer (formerly of NARA) seeking "to ensure that whatever we say is consistent with law and regulation" with respect to a "Draft Email Policy"); Email from Paul M. Wester, Jr., Chief Records Officer, NARA to Gary M. Stern, Gen. Counsel, NARA, *et al.* (Mar. 2, 2015) (attached as Exhibit 12) (Wester forwarding discussions about Clinton's email use, reflecting concerns about Mr. Fischer's attempt to justify what was later to be disclosed as Clinton's potential alienation or destruction of federal records).

<sup>48</sup> See Exhibit 4 (discussing concerns that Mrs. Clinton would take federal records with her when she left the State Department).

<sup>49</sup> See Email from Gary M. Stern, Gen. Counsel, NARA to David Ferriero, Archivist of the U.S., NARA, *et al.* (Mar. 1, 2015) (attached as Exhibit 13) (discussing NARA's response to *New York Times* reporter questioning Clinton's email practices and revealing NARA was not providing proper oversight); Email from James Springs, Acting IG, NARA to Paul M. Wester, Jr., Chief Records Officer, NARA (Mar. 3, 2015) (attached as Exhibit 14) (following public revelation of Clinton's use of a private emails system for government work, questioning agency's oversight of State Department's email practices).

<sup>50</sup> See Exhibit 14.