

# Governing by Assignment\*

Isaac Cui, Daniel E. Ho, Olivia Martin, Anne Joseph O’Connell†  
*Stanford Law School*

173 U. PA. L. REV. (forthcoming 2024)

## *Abstract*

A pillar of administrative law is expertise, but government is increasingly missing experts. The U.S. federal government faces a personnel crisis of staggering proportions, with sharp pain points in civil service hiring—especially in science and technology—and the political appointments process. With urgent challenges like the rapid development of artificial intelligence, national cybersecurity, and climate change, an inadequate workforce raises fundamental concerns for legitimate governance.

This Article documents a novel and important way that agencies are responding to this crisis: temporary assignments into federal agencies, what we call *governing by assignment*, under the Intergovernmental Personnel Act of 1970 (IPA). To date, legal scholarship, casebooks, and treatises have missed this trend. But Beltway insiders have not. Congressional inquiries question the legality of governing by assignment, raising basic questions about its scope, authority, and utility. We intervene in this pressing debate by providing the first systematic account of the administrative law of governing by assignment and by spelling out key nuances in IPA practice to inform policy discussions about governmental capacity and good governance norms.

*Empirically*, we show that federal agencies have increasingly used the IPA to fill important roles throughout the executive branch, ranging from twelve percent of the National Science Foundation’s staff to the interim head of the Department of Justice’s Civil Rights Division to data scientists analyzing the Internal Revenue Service’s tax auditing data. While neglected by scholarship to date, governing by assignment is pervasive.

*Theoretically*, we offer a framework for understanding these different uses and their drivers. Governing by assignment consists of three modalities: staffing, leadership, and projects. Each responds to different pressures on the administrative state, and each raises unique policy considerations. We show how structural shifts in government personnel have led agencies to rely on governing by assignment to achieve critical missions.

*Legally*, governing by assignment raises significant questions of administrative law. Assignees are sui generis, residing at conceptual boundaries—between employees, contractors, civil servants, and political appointees. We bring them into the light, analyzing governing by assignment against nondelegation, the Appointments and Appropriations Clauses, and conflicts of interest and transparency laws. And we show that the administrative law of assignment should be sensitive to the different modalities of governing by assignment.

---

\* We thank our anonymous interview subjects for insightful conversations, and we are grateful to Kelly Bidwell, Diana Epstein, Dave Lewis, Peter Strauss, Jim Pfiffner, and seminar participants at Stanford’s Regulation, Evaluation, and Governance Lab for helpful feedback and comments.

† Isaac Cui is a J.D. student at Stanford Law School and Graduate Student Fellow, Regulation, Evaluation, and Governance Lab, Stanford University. Daniel E. Ho is the William Benjamin Scott and Luna M. Scott Professor of Law, Professor of Political Science, Senior Fellow at Stanford Institute for Economic Policy Research, and Faculty Director of the Regulation, Evaluation, and Governance Lab. Olivia Martin is a J.D. student, a Ph.D. student in Economics, and a Graduate Student Fellow, Regulation, Evaluation, and Governance Lab. Anne Joseph O’Connell is the Adelbert H. Sweet Professor of Law, Stanford Law School.

Finally, *prospectively*, based on in-depth interviews with former and current government officials, we offer recommendations to capture the substantial benefits of governing by assignment while fostering good governance and constitutional norms under the IPA.

Although first-best solutions would address core personnel hurdles, governing by assignment provides a compelling mechanism for today's administrative state, particularly in frontier fields such as science, technology, and evidence-based policy. Governing by assignment is vastly superior to not governing at all.

*Contents*

I.	The Practice of Intergovernmental Personnel Assignments	4
A.	The IPA's Statutory Background	4
B.	Modalities of the IPA's Usage	6
1.	Localism	6
2.	Staffing	9
3.	Leadership	11
4.	Projects	12
II.	The Pressures Shaping Governmental Personnel	14
A.	The Puzzle of the IPA's Many Lives	16
B.	Challenges of Staffing a Federal Bureaucracy	16
1.	The Civil Service System	17
2.	The Excepted Service System	19
3.	Contracting	19
4.	Research Agreements	21
C.	Challenges of Staffing a Presidential Administration	22
D.	The Potential of Governing by Assignment	23
III.	The Administrative Law of Assignment	25
A.	Assignment to the Federal Government Under the IPA	26
B.	Civil Service Staffing	28
C.	Authority	31
D.	Outside Influence	34
1.	Spending	35
2.	Conflicts of Interest	35
3.	Oversight and Transparency	38
IV.	A Roadmap for the IPA's Future	41
A.	Centralizing Aspects of the IPA to Ensure Consistency	41
B.	Adding Guardrails to the Leadership Modality	42
1.	Department Head Approval for Certain IPAs	42
2.	Improving Public Reporting with More Information for Senior-Level IPAs	43
C.	Reviving Intergovernmental Exchanges	44
D.	Making the IPA More Useful	45
1.	Using IPAs to Improve Contract Management	45
2.	Enabling Access to Noncitizen Talent	45
V.	Conclusion	46

## Governing by Assignment

In early 2023, Senator Chuck Grassley launched a “sweeping review” of federal agencies’ use of the Intergovernmental Personnel Act of 1970 (IPA), a statute that authorizes the temporary assignment of employees from nongovernmental entities into the federal government.<sup>1</sup> That review responded to a *Politico* exposé describing how Eric Schmidt, the “Ex-Google boss,” was “fund[ing] dozens of jobs in Biden’s administration” under the IPA in order to “influence AI policy.”<sup>2</sup> Senator Grassley demanded “[f]ull public transparency” into these arrangements, concerned that agencies relying on labor funded by nongovernmental entities could raise serious conflicts of interest.<sup>3</sup>

At one level, the investigation merely calls into question a somewhat-obscure, decades-old law. But it also encapsulates central normative and legal issues in contemporary governance and administrative law. Government faces immense public pressure to respond to the challenges of the day, such as those posed by technological innovation. Yet we are witnessing a crisis of governmental capacity<sup>4</sup> that brings into question the foundation for legitimate administrative governance—expertise.<sup>5</sup> These dueling pressures make the IPA an obvious tool for agencies because it allows them to bring in experts from nonprofits and universities quickly and at relatively low cost.

In this Article, we document the widespread role of the IPA in staffing agencies through temporary assignment, what we call *governing by assignment*. Governing by assignment responds to real pressures on government. But it entails agencies relying on personnel often funded by outside entities to serve essentially as governmental employees while simultaneously maintaining their employment relationship with the outside entities. This joint employment structure understandably raises concerns—about transparency, accountability, and even constitutional values embodied in the Appointments and Appropriations Clauses.

Growing attention to the IPA is thus both warranted and confused. Attention is warranted because governing by assignment is a manifestation of our government’s dramatic workforce crisis. To take just one salient example: White House officials have acknowledged that “[o]ne of the biggest barriers” to the implementation of President Biden’s recent, sweeping executive order on artificial intelligence is “workforce challenges.”<sup>6</sup> Moreover, as we show in detail below, governing by assignment is widespread. Consider the following examples:

- In 2022, IPA assignees filled nearly one in eight full-time equivalent positions in the National Science Foundation (NSF).<sup>7</sup>

---

<sup>1</sup> *Grassley Launches Sweeping Review of Program Allowing Privately Employed Individuals to Serve in Federal Government Roles*, CHUCK GRASSLEY (Jan. 10, 2023), <https://www.grassley.senate.gov/news/news-releases/grassley-launches-sweeping-review-of-program-allowing-privately-employed-individuals-to-serve-in-federal-government-roles> [<https://perma.cc/63YZ-M788>] (capitalization omitted).

<sup>2</sup> Alex Thompson, *Ex-Google Boss Helps Fund Dozens of Jobs in Biden’s Administration*, POLITICO (Dec. 22, 2022), <https://www.politico.com/news/2022/12/22/eric-schmidt-joe-biden-administration-00074160> [<https://perma.cc/C496-W4TN>] (capitalization omitted).

<sup>3</sup> *Grassley Launches Sweeping Review*, *supra* note 1.

<sup>4</sup> See, e.g., NAT’L COMM’N ON MIL., NAT’L, & PUB. SERV., INSPIRED TO SERVE 65 (2020), <https://www.volckeralliance.org/sites/default/files/attachments/Final%20Report%20-%20National%20Commission.pdf> [<https://perma.cc/99DS-XCEQ>] [hereinafter 2020 NCMNPS Report] (“With just 6 percent of the Federal workforce under the age of 30 and more than a third eligible to retire in the next five years, the Federal Government has reached a critical juncture, and broad changes to personnel policy and practice are necessary to address systemic failures and meet national needs.”).

<sup>5</sup> See, e.g., Giandomenico Majone, *From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance*, 17 J. PUB. POL’Y 139 (1997); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2261–64 (2001) (describing historical political theoretic justifications for agency independence grounded in expertise); see generally Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197 (1887).

<sup>6</sup> Natalie Alms, *The People Problem Behind the Government’s AI Ambitions*, NEXTGOV (Nov. 21, 2023), <https://www.nextgov.com/artificial-intelligence/2023/11/people-problem-behind-governments-ai-ambitions/392212/> [<https://perma.cc/4BET-UBMX>].

<sup>7</sup> See *infra* note 71 and accompanying text.

- The head of the Civil Rights Division in the Department of Justice (DOJ),<sup>8</sup> the Chief Economist in DOJ's Antitrust Division,<sup>9</sup> and the National AI Director<sup>10</sup> were each, in President Biden's Administration, individuals on IPA agreements.
- Government-wide initiatives, like President Biden's Frontiers of Benefit-Cost Analysis initiative<sup>11</sup> and agencies' obligations to create learning agendas and evaluation plans under the Evidence Act, will likely continue to rely on IPA assignees.<sup>12</sup>

But while current scrutiny into the IPA is warranted, it is muddled because it lacks conceptual clarity. The IPA has been used for different ends—to bring in leadership, staff agencies, and execute discrete special projects. Each raises different normative considerations. It's one thing if a presidential administration brings in an IPA assignee who exercises the authority of an office normally requiring Senate confirmation. It's a wholly different matter to recruit an expert to carry out program evaluation, requiring statistical expertise, as a part-time project to meet an agency's Evidence Act obligations. It's a problem, then, if we talk about the IPA as if there were just a single IPA. Different use cases raise different concerns, and untailed criticism may have vast unintended consequences.

Given the growing importance of the IPA, this Article provides a much-needed empirical, conceptual, and legal analysis of governing by assignment.<sup>13</sup> In so doing, we contribute to the literature in four ways.

First, we provide an *account of agencies' IPA practices*, unearthing four distinct modalities across the IPA's half-century of existence. Part I traces this history, showing how the IPA's grants and the early practice of personnel assignments from federal to state and local government served, as the name suggests, an *intergovernmental capacity-building* purpose. Help went downward in our system of federalism: Federal experts advised state and local managers to build competent, meritocratic government. But within half a decade, the direction reversed: Federal agencies began using the IPA to *staff federal bureaucracies*. The IPA has also helped to *staff presidential administrations* by assignments into strategic leadership positions in the bureaucracy. And in recent years, it has generated a fourth modality—to tap expertise to *execute discrete projects*. These last three modalities—unforeseen by the IPA's drafters and missing from scholarly treatments—constitute what this Article calls governing by assignment.

Second, we offer a *theoretical account* of the IPA's evolving practice that encompasses both decades-long developments in the administrative state and institutional design characteristics of the IPA compared to alternative personnel paths. Part II details how, since the Act's enactment, we have witnessed dramatic growth in the federal government's responsibilities and spending. But the federal government has been hampered in terms of personnel, with stagnating numbers of civilian employees and increasingly hard-to-fill agency leadership positions. The government's standard instruments for acquiring talent—the traditional civil

<sup>8</sup> Memorandum from Lee J. Lofthus, Dep't of Just. Assist. Att'y Gen. for Admin., to the Acting Att'y Gen., Detail of Pamela S. Karlan to Principal Deputy Assistant Attorney General, Civil Rights Division under the Intergovernmental Personnel Act (Feb. 2, 2021) (available at <https://nypost.com/wp-content/uploads/sites/2/2022/07/karlan-IPA.pdf> [<https://perma.cc/UCL2-35AS>]).

<sup>9</sup> Cf. Katharine Miller, *Pioneering Tech Economist Susan Athey Joins Federal Antitrust Team*, STAN. GRAD. SCH. OF BUS. (July 7, 2022), <https://www.gsb.stanford.edu/newsroom/school-news/pioneering-tech-economist-susan-athey-joins-federal-antitrust-team> [<https://perma.cc/3WTU-4VEJ>].

<sup>10</sup> Nihal Krishan, *White House Deputy CTO and National AI Director Lynne Parker to Step Down*, FEDSCOOP (Aug. 15, 2022), <https://fedscoop.com/white-house-deputy-cto-and-national-ai-director-lynne-parker-to-step-down/> [<https://perma.cc/VTB3-Z98Q>].

<sup>11</sup> See SUBCOMM. ON FRONTIERS OF BENEFIT-COST ANALYSIS, NAT'L SCI. & TECH. COUNCIL, ADVANCING THE FRONTIERS OF BENEFIT-COST ANALYSIS: FEDERAL PRIORITIES AND DIRECTIONS FOR FUTURE RESEARCH 3, 28, 38 (Dec. 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/12/FINAL-SFBCA-Annual-Report-2023.pdf> [<https://perma.cc/YUV6-FSPM>].

<sup>12</sup> See *infra* notes 107–111 and accompanying text.

<sup>13</sup> Academic law reviews have discussed assignment under the IPA only in brief passing; no article has conceptualized its distinct modalities or comprehensively assessed the associated legal questions. See, e.g., Bridget A. Fahey, *Federalism by Contract*, 129 YALE L.J. 2326, 2338, 2343 (2020); Mary Ann King, *Co-Management or Contracting? Agreements Between Native American Tribes and the U.S. National Park Service Pursuant to the 1994 Tribal Self-Governance Act*, 31 HARV. ENVTL. L. REV. 475, 520 (2007); Joshua D. Sarnoff, *Government Choices in Innovation Funding (with Reference to Climate Change)*, 62 EMORY L. REV. 1087, 1133 (2013); Arti K. Rai, *Growing Pains in the Administrative State: The Patent Office's Troubled Quest for Managerial Control*, 157 U. PA. L. REV. 2051, 2054–55 (2009).

service system and the excepted service, outsourcing through contracts or research agreements, and the nomination and confirmation process—create demand for temporary, flexible assignments, particularly when agencies seek technical or scientific expertise or when presidential administrations need leaders. Indeed, the IPA’s primary strength has been its flexibility. It enables bureaucracies to cut through bureaucracy. Governing by assignment, we argue, therefore rationally responds to policy demands on the administrative state and constraints on other tools available to agencies and presidential administrations.

Third, we develop an *account of the administrative and constitutional law of these assignments*. Governing by assignment raises novel legal questions, which we analyze in Part III. IPA assignees into the federal government may be seen to reside in a liminal space. They temporarily serve in government but retain their employment at their home institution. They are treated for most purposes, including by ethics laws, as employees of the federal government. They are, however, hired outside of the traditional competitive examination or political appointments processes, and they may retain their external employer’s pay-level, which could be much higher than a governmental salary. IPA assignees, in short, are personnel “at the boundary”<sup>14</sup>: neither contractors nor permanent bureaucrats, neither political appointees nor civil servants—neither fully in nor fully out of government. But despite their sui generis position, we show that many practices we call governing by assignment accord with settled legal norms, and that legal risk varies considerably depending on the specific modality of the IPA.

Finally, we evaluate in Part IV a set of *reforms* based on our assessment above and a series of in-depth interviews with agency officials. While the universe of potential reforms is expansive, we argue that any reform to the IPA must grapple with two of our core findings: that governing by assignment operates (1) in different modalities and (2) in response to different kinds of pressure on administrative governance. Appointments Clause concerns, for example, are best addressed not with blanket policies barring IPAs from performing certain functions or requiring all IPA agreements to be made by high-level department officials but rather by calibrating the level of agency supervision based on the IPA assignee’s anticipated duties. Similarly, ethics concerns range in sensitivity, from more worrying with grantmaking bodies to less troubling for basic research positions. Finally, on policy grounds, expanded application of the IPA, especially by using academics to help supervise contractors, sending federal bureaucrats to state and local governments, and bringing in technically talented individuals residing in the United States on temporary visas, might help combat the technical capacity crisis in the public sector.

Our proposals alone will not solve the federal government’s tremendous capacity issues. Temporary assignments cannot fundamentally change the composition of the federal workforce. But in an era of “insecure majorities,”<sup>15</sup> the bipartisan collaboration necessary to make structural changes to the federal bureaucracy is not forthcoming. And urgent problems still demand solutions. From mitigating and responding to climate change to managing the rapid development of artificial intelligence to protecting natural security in cyberspace, the federal government needs technical expertise that agencies often cannot obtain from their normal hiring routes. In some instances, where agencies do not need full-time, permanent capacity, governing by assignment may be optimal. In other instances, the alternative to governing by assignment is not governing at all.

The many benefits of governing by assignment are tragically overshadowed by the current attacks on the IPA. These criticisms, however, are grounded in an intuition that many—including us—share. Executive governance should be guided by experts accountable to democratic institutions. When governance is carried out by nongovernmental employees paid by nongovernmental entities not subject to the appointments or civil service hiring processes, eyebrows rightly furrow. But the analysis shouldn’t stop there. Wholesale criticism of the IPA without careful consideration of why the IPA is being used for different purposes runs the risk of entrenching personnel problems in the administrative state. This Article takes a first step toward clarifying the terms of the debate—and showing what is at stake with governing by assignment.

---

<sup>14</sup> Anne Joseph O’Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841 (2014).

<sup>15</sup> FRANCES E. LEE, *INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN* (2016).

## I. The Practice of Intergovernmental Personnel Assignments

The IPA did not begin as a capacity builder for the federal government. Instead, it focused initially—and successfully—on building up state and local administrative governing. It was part of the New Federalism’s response to novel social programs that Congress designed to be administered by state and local government. And it was widely praised: as one state governor put it, “The IPA program stands out among all federal programs as the best.”<sup>16</sup> In this Part, we tell a conceptual story of the IPA, beginning with its statutory development and then turning to its multiple manifestations.

### A. The IPA’s Statutory Background

Congress originally saw the IPA as a creator of capacity for state and local governments.<sup>17</sup> The Act listed its first purpose as to “reinforce the federal system by strengthening the personnel resources of State and local governments.”<sup>18</sup>

Congress had good reason to worry about state and local governmental capacity.<sup>19</sup> At the time of the IPA’s adoption, state and local governments were expanding rapidly: Total employment was expected to grow from 7.7 million to 11.4 million—nearly 1.5 times—between 1965 and 1975.<sup>20</sup> Congress fueled that growth, at least partially, by pouring money into state and local governments in this period. Federal grants to state and local governments rose from \$11 billion in 1965 to \$77.9 billion in 1978—by the end, accounting for “over one quarter of all state and local expenditures.”<sup>21</sup> Because so many of those novel federal programs were “administered by the State and local governments,” the IPA declared, “a national interest exists in a high caliber of public service in State and local governments.”<sup>22</sup>

The IPA also reflected aspects of the intellectual zeitgeist of the early 1970s. The Nixon Administration’s push for “New Federalism,” including decentralization and the use of closer institutions to address issues, fit well with the IPA’s premise.<sup>23</sup> The IPA’s focus on personnel efficiency meshed with fiscal constraints, including rapid inflation and tighter governmental budgets.<sup>24</sup> In addition, the early 1970s came on

---

<sup>16</sup> 2 THE PRESIDENT’S REORGANIZATION PROJECT, PERSONNEL MANAGEMENT PROJECT: APPENDICES TO THE FINAL STAFF REPORT: APPENDIX IX: FEDERAL, STATE, AND LOCAL INTERACTION IN PERSONNEL MANAGEMENT 1 (1977), <https://books.google.com/books?id=c-JYVDj7qOgC> [<https://perma.cc/KZ3H-FV6Y>] [hereinafter 1977 Task Force App’x IX].

<sup>17</sup> Letter from Norman J. Johnson, Nat’l Ass’n of Schs. of Pub. Affs. and Admin., to Dave Durenberger, S. Subcomm. on Intergovernmental Rels. of the S. Comm. on Governmental Affs., 97th Cong. 120, 120 (1981), <https://books.google.com/books?id=4xlNwQEACAAJ> [<https://perma.cc/7KUB-V7GJ>] [hereinafter 1981 Congressional Hearings].

<sup>18</sup> Intergovernmental Personnel Act of 1970, Pub. L. 91-648, § 1, 84 Stat. 1909, 1909 (Jan. 5, 1971); see also U.S. CIV. SERV. COMM’N, STRENGTHENING THE SYSTEM 48 (1974) [hereinafter 1973 USCSC Annual Report] (describing the “major purpose of the IPA” as “to strengthen the central management capability of State and local governments”); Raymond A. Shapek, *The Intergovernmental Personnel Act Program and Management Capacity Development*, PUB. PERSONNEL MGMT., Mar.-Apr. 1980, at 75, 75 (explaining the IPA was “designed to strengthen the Federal system by developing the personnel management capabilities (now called capacity) of state and local government personnel”).

<sup>19</sup> See O. Glenn Stahl, *Intergovernmental Personnel Act — A Progress Report*, 28 PUB. ADMIN. REV. 182, 182 (1968) (summarizing congressional testimony leading up to the IPA’s passage).

<sup>20</sup> GEN. ACCT. OFF., FPCD-80-11, AN EVALUATION OF THE INTERGOVERNMENTAL PERSONNEL ACT OF 1970, at 3 (1979), <https://www.gao.gov/assets/fpcd-80-11.pdf> [<https://perma.cc/3AWT-XK4Y>] [hereinafter 1979 GAO Report]. By contrast, the federal government’s workforce has mostly flatlined since 1960; in the almost six decades between 1960 and 2018, the number of federal civilian employees grew by only seventeen percent. See David E. Lewis, *Deconstructing the Administrative State*, 81 J. POL. 767, 774 & fig. 1 (2019).

<sup>21</sup> Shapek, *supra* note 18, at 79.

<sup>22</sup> Intergovernmental Personnel Act § 2, 84 Stat. at 1909; see also O.B. Conaway, Jr., *Improved State and Local Personnel Management—A Condition of Effective Intergovernmental Relations*, 3 S. REV. PUB. ADMIN. 32, 33–34 (1979).

<sup>23</sup> See, e.g., U.S. CIV. SERV. COMM’N, A PACE SETTING YEAR 53 (1972) (quoting President Nixon as informing agency heads that the IPA provides “an excellent opportunity to advance the cause of the New Federalism”); see also 1973 USCSC Annual Report, *supra* note 18, at 48 (“In keeping with New Federalism objectives, administration of IPA grants is decentralized, with decisionmaking on all but nationwide project applications at the regional office level.”).

<sup>24</sup> Shapek, *supra* note 18, at 79.

the heels of the Civil Rights Era, when institutionalizing and operationalizing those gains loomed large. The IPA helped promote meritocracy in state and local governments,<sup>25</sup> and key to that endeavor was implementing equal opportunity and affirmative action policies.<sup>26</sup>

The IPA tried to meet these many demands. It created an advisory committee;<sup>27</sup> authorized grants to state and local governments;<sup>28</sup> enabled the Civil Service Commission to provide assistance in personnel administration;<sup>29</sup> established provisions for training state and local government employees;<sup>30</sup> and permitted federal agencies to assign employees to state and local governments and institutions of higher education and vice versa.<sup>31</sup> That last provision—Title IV, the “mobility program”—is what we now refer to as the IPA.<sup>32</sup>

In the 1970s, equating the IPA with the mobility program would not have made sense. Although the IPA’s grant programs were always small,<sup>33</sup> they were lauded for their efficacy.<sup>34</sup> Nevertheless, by the next decade, efforts to shut down the IPA’s grants were in full swing. In April 1981, a proposal would have ended the IPA’s grants, characterizing them as merely “seed money” to state and local governments and calling on those governments “to invest” in their own personnel.<sup>35</sup> Eliminating the IPA’s grants aligned with the new Reagan Administration’s broader policy agenda of seeking to reduce spending, “the number of categorical grant programs,” and “Federal regulation and control of State and local government activities.”<sup>36</sup> The April effort did not succeed, but the IPA’s grants ended later that year through an appropriations provision.<sup>37</sup>

Yet the mobility program survived—and expanded. In 1975, the Indian Self-Determination and Education Assistance Act authorized Tribes and Tribal entities to participate in the mobility program.<sup>38</sup> Similarly, the Civil Service Reform Act of 1978 extended eligibility to federal entities that were not already included in the original IPA (such as the U.S. Postal Service) as well as “other organization[s],” including nonprofit organizations whose work concerns “public management.”<sup>39</sup> And Congress once again broadened eligibility in 1994 to include federally funded research and development centers (FFRDCs).<sup>40</sup>

---

<sup>25</sup> See, e.g., Conaway, *supra* note 22, at 40 (noting a “criticism[]” of the IPA that “the general extension of merit-based personnel administration in many state and most local jurisdictions has been quite slow”); see also Intergovernmental Personnel Act § 2, 84 Stat. at 1909 (laying out merit principles).

<sup>26</sup> See 1979 GAO Report, *supra* note 20, at 7; S. REP. NO. 93–1028, at 38–39 (1974); U.S. CIV. SERV. COMM’N, 1976 ANNUAL REPORT 21 (1977) [hereinafter 1976 USCSC Annual Report] (“Equal employment opportunity is a major emphasis in all IPA technical assistance efforts.”); U.S. CIV. SERV. COMM’N, THE FISCAL 1977 ANNUAL REPORT 17 (1978) (similar); *Amendments to the Intergovernmental Personnel Act of 1970: Hearings Before the Subcomm. on Employee Pol. Rts. & Intergovernmental Progs. of the H. Comm. on Post Office & Civil Service*, 94th Cong. 81 (1975), <https://books.google.com/books?id=wUMqAAAAMAAJ> [<https://perma.cc/Y2SN-L963>] [hereinafter 1975 Congressional Hearings] (statement of Don Benninghoven, League of Cal. Cities Exec. Dir. on behalf of the Nat’l League of Cities) (noting importance of IPA to supporting local equal opportunity programs); see also U.S. COMM’N ON CIV. RTS., PROMISES AND PERCEPTIONS: FEDERAL EFFORTS TO ELIMINATE EMPLOYMENT DISCRIMINATION THROUGH AFFIRMATIVE ACTION 30–33 (1981), <https://www2.law.umaryland.edu/marshall/usccr/documents/cr12p942.pdf> [<https://perma.cc/3CPW-HHFU>] (discussing OPM’s role in enforcing the IPA to promote affirmative action policies in state and local government).

<sup>27</sup> Intergovernmental Personnel Act §§ 102–103, 84 Stat. at 1910–11.

<sup>28</sup> *Id.* §§ 202–203, 84 Stat. at 1911–14.

<sup>29</sup> *Id.* §§ 204–205, 84 Stat. at 1914.

<sup>30</sup> *Id.* §§ 302–305, 84 Stat. at 1916–20.

<sup>31</sup> *Id.* § 402(a), 84 Stat. at 1920–25.

<sup>32</sup> Throughout the Article, we generally use “the IPA” to refer to the statute (and specifically the mobility program), but we also refer to people on mobility assignments—as many agencies do—as “an IPA” or “IPAs”.

<sup>33</sup> See Shapek, *supra* note 18, at 77 tbl. 1 (comparing IPA grants to total federal grants).

<sup>34</sup> See, e.g., 1979 GAO Report, *supra* note 20, at iii; S. REP. NO. 93–1028, at 38 (1974) (summarizing evaluations of IPA grants to conclude that “[a]ll indications are that IPA has been a very effective program, resulting in many benefits at considerably low Federal investment”); Conaway, *supra* note 22, at 36–37 (similar); U.S. CIV. SERV. COMM’N, THE FISCAL 1978 ANNUAL REPORT 17 (1979) (similar); 1981 Congressional Hearings, *supra* note 17, at 2 (statement of Sen. Durenberger) (similar).

<sup>35</sup> 127 Cong. Rec. 7769 (Apr. 29, 1981).

<sup>36</sup> *Id.*; see also 1981 Congressional Hearings, *supra* note 17, at 2 (statement of Sen. Durenberger) (same).

<sup>37</sup> S. REP. NO. 97–67, at 366 (1981) (“[N]o funding for IPA shall be provided after June 5, 1981.”).

<sup>38</sup> Pub. L. 93–638, § 105(d), 88 Stat. 2203, 2208–09 (1975).

<sup>39</sup> Pub. L. 95–454, § 603, 92 Stat. 1111, 1189–91 (1978).

<sup>40</sup> National Defense Authorization Act for Fiscal Year 1995, Pub. L. 103–337, § 1068, 108 Stat. 2663, 2852–53 (1994).



B. *Modalities of the IPA’s Usage*

There is no single IPA. Although the mobility program’s statutory provisions have remained roughly the same over the IPA’s half-century-long life, with changes based only on the scope of eligible organizations, its on-the-ground operation reveals four distinct uses: as a method of *local and state governmental capacity building*; *federal bureaucratic building*; *staffing a presidential administration*; and *executing discrete projects*. Table 1 summarizes these modalities.

	<i>Modality</i>	<i>Assignment Direction</i>	<i>Motivating Purposes</i>	<i>Archetypal Examples</i>
<b>Origins</b>	<i>Localism</i>	Federal → State, Local, Tribal	<ul style="list-style-type: none"> <li>• Enhancing local public management expertise</li> <li>• Implementing federal mandates</li> <li>• Developing “meritocratic” local government</li> </ul>	<ul style="list-style-type: none"> <li>• EPA intergovernmental partnerships</li> <li>• Tribal takeover of IHS hospitals via 638 contracting</li> </ul>
<b>Governing by Assignment</b>	<i>Staffing</i>	Academic, Non-profit → Federal	<ul style="list-style-type: none"> <li>• Addressing federal workforce constraints</li> <li>• Acquiring temporary expertise</li> </ul>	<ul style="list-style-type: none"> <li>• NSF “rotator” program</li> </ul>
	<i>Leadership</i>	Academic, Non-profit → Federal	<ul style="list-style-type: none"> <li>• Facilitating presidential administration during transitions</li> </ul>	<ul style="list-style-type: none"> <li>• DOJ CRD PDAAG under Biden</li> <li>• OSTP Deputy CTO under Biden</li> </ul>
	<i>Projects</i>	Academic → Federal	<ul style="list-style-type: none"> <li>• Acquiring technical and scientific expertise on a discrete or consultative basis</li> </ul>	<ul style="list-style-type: none"> <li>• IRS Joint Statistical Research Program</li> </ul>

Table 1: The IPA’s Four Modalities

1. Localism

The first modality of the IPA centers on *local governmental capacity building*: the movement of federal bureaucrats into state, local, or Tribal governments to train or support their operations, promoting more effective governance. The assignee here sometimes brings particular expertise or implements a program, but at other times, the assignee simply provides needed staffing hours.

For the first half of the 1970s, the mobility program primarily generated these outgoing assignments to state and local governments. Federal bureaucrats on IPA assignments advised mayors and state legislators. They “developed entire new state job classification systems, implemented pollution control programs, trained legislators, conducted archaeological research, built bridges, and [ran] summer camps.”<sup>41</sup> They created training programs for state universities and “areawide human-care-services plan[s].”<sup>42</sup> And they served as a county’s “first county executive” and as a “State budget officer.”<sup>43</sup> Federal employees on IPAs were often received

<sup>41</sup> Miriam Ershkowitz, *The IPA Mobility Program*, 65 ACADEME 156, 157 (1979).

<sup>42</sup> 1975 Congressional Hearings, *supra* note 26, at 14 (statement of Joseph M. Robertson, U.S. Civ. Serv. Comm’n Bureau of Intergovernmental Personnel Programs Dir.).

<sup>43</sup> *Id.*

with great fanfare by state and local governments. Wyoming, for example, “declared a special IPA Day in 1974 in recognition of the program’s contribution[s].”<sup>44</sup>

The EPA’s use of the IPA exemplifies the local capacity-building aspect of the statute. Between FY 1984 and 1988, the EPA had a total of 231 exchanges with state and local governments (205 of which were outgoing) in comparison to only 63 with academia, 25 with other organizations, and none with Tribes.<sup>45</sup> Around a third worked on program implementation and management; another third “carr[ied] out technical assistance functions”; and the remaining were split between “policy development” and “education or training.”<sup>46</sup>

The EPA’s program advanced effective federalism and supported its mission. Assignments not only helped “lend . . . expertise” but also “develop[ed] a relationship with States.”<sup>47</sup> An EPA official in 1989 testified that enforcement of federal environmental laws requires an “extensive network” of expertise, comprising employees of different levels of government, universities, and non-profit organizations.<sup>48</sup> Without the IPA, the official explained, “it would be extremely difficult for EPA’s partner institutions to get the right skills in the right places, at the right times.”<sup>49</sup>

The Tribal context illuminates other benefits of the IPA. The Indian Self-Determination and Education Assistance Act (ISDA)—the 1975 statute that made Tribal organizations eligible for IPA mobility assignments<sup>50</sup>—allowed Tribes to directly administer federal functions created for Native Americans under so-called “638 contracts.”<sup>51</sup> Tribes took over Indian Health Service (IHS) hospitals that had been administered by the Department of Health and Human Services (HHS) and schools that had been run by the Bureau of Indian Affairs (BIA).<sup>52</sup>

These “takeovers” pose logistical difficulties: What happens to the existing staff, and how will the Tribe staff the hospital or school? Under the ISDA, Tribes had essentially three options: direct hires through traditional hiring processes; direct hires of the federal employees; or IPA agreements with the federal employees.<sup>53</sup> IPA agreements made at the time of the 638 contract are “special purpose assignments”—

---

<sup>44</sup> *Id.* at 74–75 (statement of Lee Galeotos, Nat’l Governors’ Conf. Special Assist.).

<sup>45</sup> GEN. ACCT. OFF., GAO/GGD-89-95, INTERGOVERNMENTAL PERSONNEL ACT: INTERGOVERNMENTAL PURPOSE NO LONGER EMPHASIZED 49 tbl. IV.7 (1989), <https://www.gao.gov/assets/ggd-89-95.pdf> [<https://perma.cc/8TGZ-UMZ4>] [hereinafter 1989 GAO Report].

<sup>46</sup> *Intergovernmental Personnel Act Mobility Program: Hearing Before the Subcomm. on Hum. Res. of the H. Comm. on Post Office & Civil Serv.*, 101st Cong. 29 (1989) (statement of Kenneth F. Dawsey, Envtl. Protection Agency Off. of Hum. Res. Mgmt. Dir.), [https://books.google.com/books/about/Intergovernmental\\_Personnel\\_Act\\_Mobility.html?id=-RcMXODYuEYC](https://books.google.com/books/about/Intergovernmental_Personnel_Act_Mobility.html?id=-RcMXODYuEYC) [<https://perma.cc/RGB2-MMKG>] [hereinafter 1989 Congressional Hearings].

<sup>47</sup> *See id.* at 27–28; *see also* Application of 18 U.S.C. §§ 203 and 205 to Federal Employees Detailed to State and Local Governments, 4B Op. O.L.C. 498, 502 (1980) (describing IPA details as “integral” to national environmental legislation). The localism modality of the IPA highlights two interrelated insights of the national federalists: (1) that contemporary federalism dynamics often stem more from statutory and administrative than constitutional law, since Congress has created space for subnational governments to exercise implementation authority within a national framework; and (2) that intergovernmental political bargaining driven by the intermeshing of federal and state bureaucracies accommodates local authority compared to the alternative of direct federal regulation. *See generally* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1276–78 (2009); Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 2020 (2014); Abbe R. Gluck, *Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists’ Gamble*, 81 FORDHAM L. REV. 1749, 1761–65 (2013).

<sup>48</sup> 1989 Congressional Hearings, *supra* note 46, at 28 (statement of Kenneth F. Dawsey, Envtl. Protection Agency Off. of Hum. Res. Mgmt. Dir.).

<sup>49</sup> *Id.*

<sup>50</sup> *See supra* note 38 and accompanying text.

<sup>51</sup> *See, e.g.*, Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777, 779 (2006).

<sup>52</sup> *See, e.g.*, Kevin K. Washburn, *Facilitating Tribal Co-Management of Federal Public Lands*, 2022 WIS. L. REV. 263, 271 [hereinafter Washburn, *Tribal Co-Management*].

<sup>53</sup> *See, e.g.*, INDIAN HEALTH SERV., PERSONNEL ASPECTS OF THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT PUBLIC LAW 93–638, at 1–2 (1986), <https://books.google.com/books?id=8xCRAAAAMAAJ> [<https://perma.cc/N4DY-T9YN>] [hereinafter 1986 ISDA PERSONNEL MANUAL].

authorized under a bespoke provision passed in 1983<sup>54</sup>—that “may be extended indefinitely in increments of two years or less.”<sup>55</sup> The IPA thus smoothed operational transitions, allowing Tribes to assume control over a hospital without interrupting employee benefits or needing to make immediate personnel decisions.<sup>56</sup> The IPA’s flexibility in pay and benefits also helped the 638 process. Staffing is a core problem for 638 contractors because of the isolation of many hospitals as well as many Tribes’ “inability to match Federal salaries and fringe benefits.”<sup>57</sup> Having qualified employees with federal-level compensation supported these contracts.<sup>58</sup> As a representative of various Alaska Native Tribes explained to Congress, “The 638 contracting of major health programs cannot succeed without substantial use of the IPA process.”<sup>59</sup>

Both cases reflect the value of the IPA’s flexibility in making assignment agreements. They also show the importance of assignees retaining their home institution’s level of pay. And the special carveout for Tribal assignees reflects how duration limits on an IPA agreement may not be desirable given certain use cases. We return to pay and duration issues below.

As a general matter, this localism form of the IPA has largely disappeared.<sup>60</sup> The EPA had only eighteen IPA assignees between June 1, 2016, and May 31, 2019.<sup>61</sup> Few EPA employees, in other words, have been sent to nonfederal governments in recent years. And while a nontrivial number of special purpose IPAs likely remain from the 638-contracting context,<sup>62</sup> contemporary discussions of the IPA largely omit this modality.<sup>63</sup> The localism modality could, however, make a comeback in an area where the federal government develops a comparative advantage in building expertise, such as artificial intelligence.

---

<sup>54</sup> Pub. L. 98–146, tit. II, 97 Stat. 919, 946 (1983).

<sup>55</sup> 1986 ISDA PERSONNEL MANUAL, *supra* note 53, at 2–6; *see* 5 U.S.C. § 3372(a). Such special purpose IPA assignments are not uncommon. *See* GEN. ACCT. OFF., GAO-01-1016, NATIONAL SCIENCE FOUNDATION: EXTERNAL ASSIGNMENTS UNDER THE INTERGOVERNMENTAL PERSONNEL ACT MOBILITY PROGRAM 3 & n.3 (2001), <https://www.gao.gov/assets/gao-01-1016.pdf> [<https://perma.cc/K2M4-TX33>] [hereinafter 2001 GAO Report on NSF] (noting that in FY 2000, there were 1,386 IPA agreements in effect, excluding “more than 850 special purpose IPA agreements” approved that fiscal year by the Indian Health Service).

<sup>56</sup> *See* Washburn, *Tribal Co-Management*, *supra* note 52, at 273; *see also* BUREAU OF INDIAN AFFS., HANDBOOK FOR DECISION MAKERS ON TITLE I OF THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT 49 (rev. ed. 1976); 1986 ISDA Personnel Manual, *supra* note 53, at 1–2.

<sup>57</sup> *See* 1986 OTA Report, *supra* note 53, at 226; *see also id.* at 34. Even though the ISDA purports to give equal funding to 638 contractors that IHS had to provide the services, *see supra* note 53, Tribes often view the funding as inadequate, which has led to cutting support costs along with offering noncompetitive salaries. *See, e.g.*, GEN. ACCT. OFF., GAO/RCED-99-150, INDIAN SELF-DETERMINATION ACT: SHORTFALLS IN INDIAN CONTRACT SUPPORT COSTS NEED TO BE ADDRESSED 7, 39–40 (1999), <https://www.gao.gov/assets/rced-99-150.pdf> [<https://perma.cc/M7GR-H5PY>]; *see generally* U.S. COMM’N ON CIV. RTS., A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 45 (2003), <https://www.usccr.gov/files/pubs/na0703/na0204.pdf> [<https://perma.cc/FS3G-NF3N>] (noting in the early 2000s that 638 contracts with IHS would require an estimated \$1 billion but IHS received less than \$500 million per year).

<sup>58</sup> *Indian Self-Determination and Education Assistance Act, Public Law 93–638: Hearing Before the S. Select Comm. on Indian Affs.*, 100th Cong. 164–65 (Apr. 22, 1987) [hereinafter Apr. 1987 ISDA Amendments Hearings] (prepared statement on behalf of Standing Rock Sioux Tribe, N. & S.D. et al.); *see also Indian Self-Determination and Education Assistance Act Amendments: Hearing Before the S. Select Comm. on Indian Affs.*, 100th Cong. 53 (Sept. 21, 1987) [hereinafter Sept. 1987 ISDA Amendments Hearings].

<sup>59</sup> Sept. 1987 ISDA Amendments Hearings, *supra* note 58, at 45 (statement of Margaret Roberts, Kodiak Area Native Ass’n Chairman).

<sup>60</sup> *See* 1989 GAO Report, *supra* note 45.

<sup>61</sup> ENVTL. PROT. AGENCY OFF. OF INSPECTOR GEN., 20-P-0245, EPA NEEDS TO STRENGTHEN CONTROLS OVER REQUIRED DOCUMENTATION AND TRACKING OF INTERGOVERNMENTAL PERSONNEL ACT ASSIGNMENTS 5–6 (2020), [https://www.epa.gov/sites/default/files/2020-08/documents/\\_epaoig\\_20200810-20-p-0245.pdf](https://www.epa.gov/sites/default/files/2020-08/documents/_epaoig_20200810-20-p-0245.pdf) [<https://perma.cc/6KR7-R49F>] [hereinafter 2020 EPA IG Report].

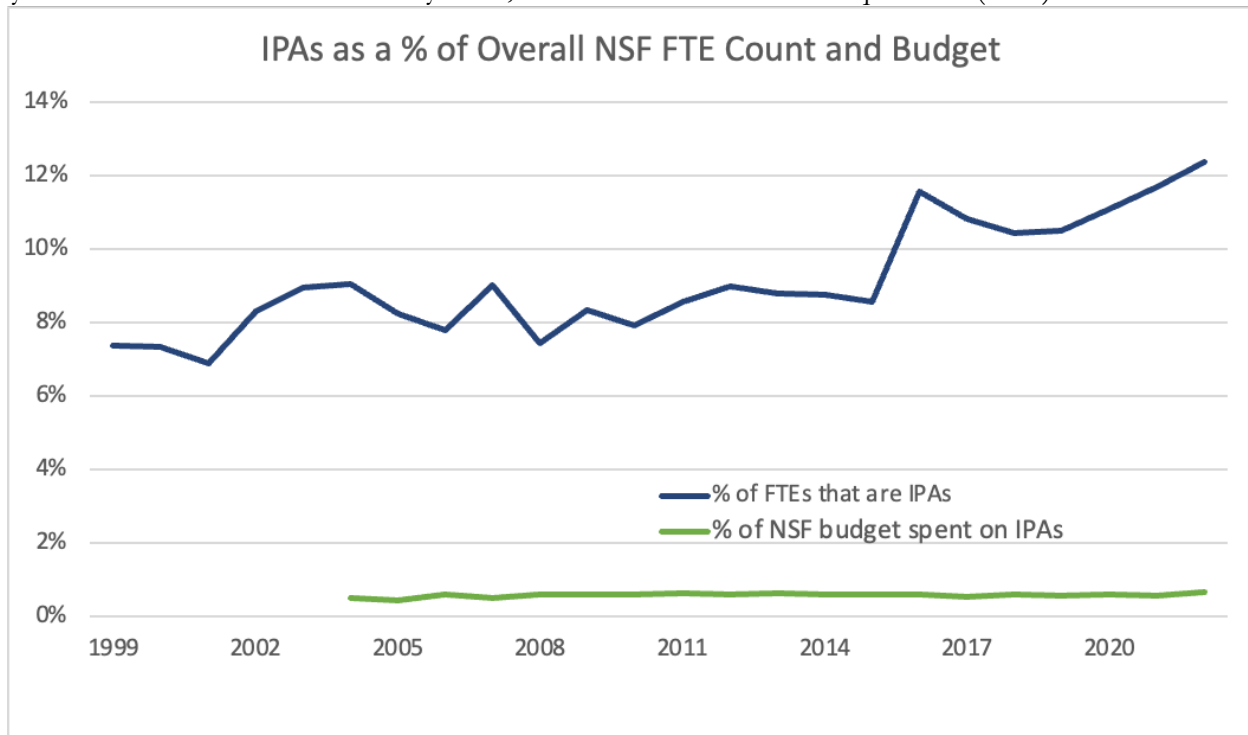
<sup>62</sup> *See supra* note 55.

<sup>63</sup> *See, e.g.*, GOV’T ACCT. OFF., GAO-22-104414, PERSONNEL MOBILITY PROGRAM: IMPROVED GUIDANCE COULD HELP FEDERAL AGENCIES ADDRESS SKILLS GAPS AND MAXIMIZE OTHER BENEFITS 1 (2022), <https://www.gao.gov/assets/gao-22-104414.pdf> [<https://perma.cc/XXC9-3D2S>] [hereinafter 2022 GAO Report] (framing the IPA as a way for federal agencies to “address skills gaps”).

## 2. Staffing

The second modality of the IPA is to *staff the federal bureaucracy*. Unlike the first, here the intergovernmental nature of the IPA is underemphasized. Instead, the IPA helps to build *federal capacity*, generally through bringing in academics or employees of nonprofit organizations into agencies.<sup>64</sup> In short, the point is to bring in outside expertise.<sup>65</sup> Although IPA staffing is temporary, the flexibility of the IPA’s duration can benefit the agency, and the limited duration (and full-time return to the home institution) makes some assignments possible that would not have otherwise occurred. Specifically, an agency might not be able to pull an academic away from “their university security, their security system, their benefit programs,” but a temporary assignment is often more tenable.<sup>66</sup>

The National Science Foundation’s (NSF) use of the IPA demonstrates the staffing modality. The NSF relies on the IPA because it needs researchers at the frontier of science and engineering fields and desires a “constant flow of new ideas.”<sup>67</sup> In 1989, the NSF had 1,200 employees, of which over four hundred were scientists or engineers; within that, over one hundred were “rotators”—assignees into NSF from universities, other agencies, or even private firms, including through the IPA.<sup>68</sup> That year, NSF had 58 IPAs at all levels of its organizational hierarchy.<sup>69</sup> The NSF’s reliance on the IPA has only grown since the late 1980s, tripling between 1990 and 1997.<sup>70</sup> While the pace of growth has slowed since then, the number of IPAs at NSF has nearly doubled from 1999 to 2023.<sup>71</sup> By 2022, 12.3% of NSF’s full-time equivalent (FTE) staff were IPAs.



<sup>64</sup> There are some assignees from state, local, or Tribal governments. Such assignments may both promote federal capacity and intergovernmental cooperation. For example, when an employee of the Leech Lake Band of Ojibwe was assigned to the U.S. Forest Service to serve as a district ranger, the assignment was helpful both to share the assignee’s expertise in land management and to strengthen the Tribe’s relationship to with the Forest Service concerning jointly managed lands in the Chippewa National Forest. See *Forest Service Names Deer River District Ranger for Chippewa National Forest*, KAXE (Mar. 21, 2023), <https://www.kaxe.org/local-news/2023-03-21/forest-service-names-deer-river-district-ranger-for-chippewa-national-forest> [<https://perma.cc/EE9C-ZKMJ>].

<sup>65</sup> 1989 Congressional Hearings, *supra* note 46, at 49 (statement of Chair Kanjorski).

<sup>66</sup> *Id.* at 29 (statement of Thomas S. McFee, Dep’t of Health and Hum. Servs. Personnel Admin. Assist. Sec’y).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 46 (statement of Jeff M. Fenstermacher, Nat’l Sci. Found., Directorate of Admin. Assist. Dir.).

<sup>69</sup> *Id.* at 47.

<sup>70</sup> *Id.*

<sup>71</sup> Nat’l Sci. Found., Budget Request to Congress, Fiscal Years 2001-2024.

Figure 1: IPA Assignees in Proportion to NSF's FTE Count and Budget

The Office of Science and Technology Policy (OSTP), which advises the President on science and technology policy,<sup>72</sup> provides another example. OSTP's permanent staff "represent a fraction of those working at OSTP" due to its heavy reliance on alternative staffing mechanisms.<sup>73</sup> For example, while OSTP reported forty-six FTEs in FY 2023, up from twenty-two in FY 2022, a staff list from October 2022 showed a total of 136 employees.<sup>74</sup> In 2020, under the Trump Administration, OSTP had four political appointees, twenty-one career staff, and forty-six employees through other hiring mechanisms, which included three consultants (paid and unpaid), thirty-four detailees, four IPAs, and five fellows.<sup>75</sup> In the preceding three Administrations, OSTP consistently had dozens of temporary employees—comparable to or greater than the number of permanent employees.<sup>76</sup> For a third example, some fifty percent of staff at the Defense Advanced Research Projects Agency (DARPA) are rotators through the IPA.<sup>77</sup>

An August 12, 2022 response to a FOIA request seeking IPA assignments approved by OSTP listed thirty-two IPAs from January 21, 2021 to the response date.<sup>78</sup> Unlike NSF, many of these assignments are from nonprofit organizations or FFRDCs rather than universities.<sup>79</sup> While we do not know for certain why OSTP has relied heavily on temporary methods of staffing, contributing factors likely include budgetary pressures<sup>80</sup> and a belief that temporary and rotating staff can provide novel ideas, thereby enabling OSTP, like NSF, to keep up with science and technology developments.<sup>81</sup>

A distinct manifestation of the staffing modality involves the use of IPAs to prop up an office. For example, when the Obama Administration launched its Social and Behavioral Sciences Team—the "nudge unit"—the original staff were all on IPA agreements, enabling the creation of a new office before the

---

<sup>72</sup> See 42 U.S.C. § 6614.

<sup>73</sup> OSTP commissioned a report in 2013 to survey the mechanisms for personnel exchange with the federal government, including from for-profit organizations. See SUSANNAH V. HOWIESON, ELMER YGLESIAS, SAMUEL L. BLAZEK & EMMA D. TRAN, INST. FOR DEF. ANALYSES SCI. & TECH. POL'Y INST., D-4906, FEDERAL PERSONNEL EXCHANGE MECHANISMS iii (2013), <https://www.ida.org/-/media/feature/publications/f/fe/federal-personnel-exchange-mechanisms/d-4906.ashx> [<https://perma.cc/MFB3-P5CP>].

<sup>74</sup> EMILY G. BLEVINS, CONG. RES. SERV., R47410, THE OFFICE OF SCIENCE AND TECHNOLOGY POLICY (OSTP): OVERVIEW AND ISSUES FOR CONGRESS 10 (2023), <https://sgp.fas.org/crs/misc/R47410.pdf> [<https://perma.cc/L95A-QHX8>].

<sup>75</sup> *Id.*

<sup>76</sup> See *id.* at 10–11 & fig. 3; see also JOHN F. SARGENT, JR. & DANA A. SHEA, CONG. RSCH. SERV., RL34736, THE PRESIDENT'S OFFICE OF SCIENCE AND TECHNOLOGY POLICY (OSTP): ISSUES FOR CONGRESS 14 (2014), <https://crsreports.congress.gov/product/pdf/RL/RL34736/33> (ten IPAs out of ninety-three staff, only twenty of whom were careerists, and forty FTEs in 2012).

<sup>77</sup> NAT'L ACAD. OF PUB. ADMIN., NATIONAL SCIENCE FOUNDATION: USE OF COOPERATIVE AGREEMENTS TO SUPPORT LARGE SCALE INVESTMENT IN RESEARCH 70 (2015), [https://s3.us-west-2.amazonaws.com/napa-2021/studies/national-science-foundation-use-of-cooperative-agreements-to-support-large/NSF\\_Phase\\_2\\_Comprehensive\\_Report.pdf](https://s3.us-west-2.amazonaws.com/napa-2021/studies/national-science-foundation-use-of-cooperative-agreements-to-support-large/NSF_Phase_2_Comprehensive_Report.pdf) [<https://perma.cc/ZSE3-A9AT>].

<sup>78</sup> See *IPA Mobility Program Agreements*, MUCK ROCK (submitted Aug. 2, 2022; response Aug. 12, 2022), <https://www.muckrock.com/foi/united-states-of-america-10/ipa-mobility-program-agreements-132328/> [<https://perma.cc/6MJJK-4SH7>] (download "2022.08.12 RELEASE 22-092\_Red\_PRODUCED" for spreadsheet of OSTP's IPA assignments).

<sup>79</sup> See *id.* (listing eighteen IPAs whose "Agency" is not a university or college, with three from an FFRDC and one from RAND, which is classifiable either as an FFRDC or a nonprofit).

<sup>80</sup> BLEVINS, *supra* note 74, at 8 (noting that OSTP's budget has "varied considerably over time"); Alex Thompson, *A Google Billionaire's Fingerprints Are All Over Biden's Science Office*, POLITICO (Mar. 28, 2022), <https://www.politico.com/news/2022/03/28/google-billionaire-joe-biden-science-office-00020712> [<https://perma.cc/7SAN-YPHY>] (discussing Eric Schmidt's funding assignees in OSTP); *Statement on Science Funding*, SCHMIDT FUTURES (Mar. 28, 2022), <https://www.schmidtfutures.com/our-work/statement-on-science-funding/> [<https://perma.cc/PZL8-7GGH>] (responding by describing OSTP as "chronically underfunded" and noting that a group of non-profit organizations have pooled funds to "support fellowships in the federal government," including at OSTP).

<sup>81</sup> See EMILY G. BLEVINS & RACHEL D. ROAN, CONG. RES. SERV., R47635, THE WHITE HOUSE OFFICE OF SCIENCE AND TECHNOLOGY POLICY: ISSUES AND OPTIONS FOR THE 118TH CONGRESS 8 (2023), <https://sgp.fas.org/crs/misc/R47635.pdf> [<https://perma.cc/YZM6-G66M>].

Administration could secure funding from Congress.<sup>82</sup> Similarly, IPA assignees filled much of the early staff at the Advanced Research Projects Agency for Health (ARPA-H),<sup>83</sup> an agency that seeds funding for speculative but high-impact biomedical innovation.<sup>84</sup> In both cases, administration leaders created new agencies by relying on the IPA to quickly staff what they viewed as bureaucratic start-ups, thereby bringing in experts to serve as a kind of proof of concept demonstrating the viability of the office.<sup>85</sup> Staffing, in other words, catalyzed bureaucratic innovation.

### 3. Leadership

In its leadership modality, the IPA can *staff a presidential administration*. In the Biden Administration, IPA assignments filled such positions as the temporary head of the Civil Rights Division of the Department of Justice,<sup>86</sup> the Antitrust Division’s Chief Economist,<sup>87</sup> the head of the National AI Initiative,<sup>88</sup> two NSF divisional directors,<sup>89</sup> and various senior advisors.<sup>90</sup>

These IPA assignees serve as important agency leaders. The Attorney General in the Obama Administration tapped an IPA assignee to “quarterback” major civil rights litigation.<sup>91</sup> The Biden Administration had an IPA assignee “run” an office of DOJ normally headed by an Assistant Attorney General “for at least three or four months” as the Administration waited for the Senate to confirm its nominee.<sup>92</sup> The Antitrust Division’s Chief Economist, an IPA assignee, co-led the DOJ’s team working on the new draft horizontal merger guidelines.<sup>93</sup> The Obama Administration employed an IPA at HUD to launch an office and to liaise across agencies and the White House to “create . . . a six-year program that represented the largest federal investment in comprehensive, integrated planning across agencies in 40 years.”<sup>94</sup> The Deputy Chief Technology Officer in OSTP, on an IPA agreement, issued recommendations on how to strengthen the nation’s AI research ecosystem and contributed to the National Artificial Intelligence Research

---

<sup>82</sup> Interview 4 (Sept. 21, 2023); *see also* Sarah Stillman, *Can Behavioral Science Help in Flint?*, NEW YORKER (Jan. 15, 2017), <https://www.newyorker.com/magazine/2017/01/23/can-behavioral-science-help-in-flint> (describing the nudge unit as starting out with “no budget, no mandate, no bona-fide employees”).

<sup>83</sup> Interview 2 (Aug. 16, 2023).

<sup>84</sup> *See A Growing Number of Governments Hope to Clone America’s DARPA*, *Economist* (June 3, 2021), <https://www.economist.com/science-and-technology/2021/06/03/a-growing-number-of-governments-hope-to-clone-americas-darpa> [<https://perma.cc/44SM-ZP5Q>].

<sup>85</sup> *Cf.* Interview 5 (Sept. 21, 2023) (noting a plan to bring in IPA assignees one by one and then, after establishing their value to the agency, presenting a formal proposal for a new team comprising IPA assignees to HR officials).

<sup>86</sup> *See supra* note 8.

<sup>87</sup> *See supra* note 9.

<sup>88</sup> *See supra* note 10.

<sup>89</sup> Nathan Kahl, *Getting to Know School of Computing Divisional Dean Gurdip Singh*, GEO. MASON UNIV. (Dec. 13, 2022), <https://www.gmu.edu/news/2022-12/getting-know-school-computing-divisional-dean-gurdip-singh> [<https://perma.cc/6MUA-5QV7>] (noting IPA assignee into a directorship at the NSF); Ryan Scarpino, *VanBriesen Named Division Director of the National Science Foundation’s CBET*, CARNEGIE MELLON UNIV. (Aug. 3, 2021), <https://www.cmu.edu/news/stories/archives/2021/august/vanbriesen-cbet.html> [<https://perma.cc/PLS6-MBGF>] (same).

<sup>90</sup> *See, e.g., Elizabeth Cisar*, JOYCE FOUND., <https://www.joycefdn.org/staff/elizabeth-cisar> [<https://perma.cc/5QNA-HBUC>]; *Purdue University Names Chiang Its Next President*, PURDUE UNIV. (June 10, 2022), <https://www.purdue.edu/newsroom/releases/2022/Q2/purdue-university-names-chiang-its-next-president.html> [<https://perma.cc/Z329-3YTW>].

<sup>91</sup> Interview 1 (July 27, 2023).

<sup>92</sup> *Id.*

<sup>93</sup> *See Ashley Belanger, FTC Rewrites Rules on Big Tech Mergers with Aim to Ease Monopoly-Busting*, ARSTECHNICA (July 19, 2023), <https://arstechnica.com/tech-policy/2023/07/ftc-rewrites-rules-on-big-tech-mergers-with-aim-to-ease-monopoly-busting/2/> [<https://perma.cc/6RQ2-78HT>] (noting that DOJ’s team on the horizontal merger guidelines was led by its Antitrust Division’s policy director and chief economist).

<sup>94</sup> P’SHIP FOR PUB. SERV., IPA CASE STUDY — DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT 1, <https://gogovernment.org/wp-content/uploads/sites/12/2022/04/IPA-Case-Study-%E2%80%93-Department-of-Housing-and-Urban-Development.pdf> [<https://perma.cc/PE38-NYTK>].

and Development Strategic Plan.<sup>95</sup> And the VA brought in its inaugural Director of Artificial Intelligence under what appears to be an IPA.<sup>96</sup>

Assignees thus run the gamut of agency leadership responsibilities. They have represented their agencies while testifying before Congress.<sup>97</sup> They have issued statements on behalf of their agencies, including warnings to potential opposing parties about compliance with federal law.<sup>98</sup> They have signed consent decrees<sup>99</sup> and settlement agreements.<sup>100</sup> In one instance, an IPA assignee was the top DOJ official on a filed complaint.<sup>101</sup> At times, IPA assignees' duties have overlapped with those traditionally performed by a presidential appointee.<sup>102</sup> IPAs in such leadership positions have understandably garnered the most political interest.

#### 4. Projects

The IPA's final modality engages *experts to execute discrete projects related to core agency missions*. Research-oriented work, for example, has long fit this project-based model with IPA assignments from academic institutions.<sup>103</sup> Both sides benefit from structuring certain research initiatives through a more flexible, project-

---

<sup>95</sup> See Lynne Parker, *Bridging the Resource Divide for Artificial Intelligence Research*, WHITE HOUSE OSTP BLOG (May 25, 2022), <https://www.whitehouse.gov/ostp/news-updates/2022/05/25/bridging-the-resource-divide-for-artificial-intelligence-research/> [<https://perma.cc/SF6E-SPA6>]; SELECT COMM. ON A.I., NAT'L SCI. & TECH. COUNCIL, *THE NATIONAL ARTIFICIAL INTELLIGENCE RESEARCH AND DEVELOPMENT STRATEGIC PLAN: 2019 UPDATE* (2019), <https://www.nitrd.gov/pubs/National-AI-RD-Strategy-2019.pdf> [<https://perma.cc/VLD6-5T5Q>].

<sup>96</sup> *Gil Alterovitz*, PhD, FACMI, ACT-LAC, <https://www.actiac.org/bio/gil-alterovitz-phd-facmi-famia> [<https://perma.cc/HT36-QG6L>] (stating that Alterovitz "is also a professor" while serving as the AI director, suggesting he is in under an IPA); *VA NAIL Director Wins 2023 Disruptive Tech Change Agent*, DEP'T OF VETERANS AFFS. (Mar. 29, 2023), <https://research.va.gov/about/awards/awardee.cfm?award=217252> [<https://perma.cc/49RB-5K2N>] (same); Gil Aterovitz, PhD, FACMI, FAMILIA, LINKEDIN, <https://www.linkedin.com/in/gilalterovitz/> (last visited Aug. 25, 2023) (same).

<sup>97</sup> Samuel Bagenstos has testified before both the Senate and House Judiciary Committees as an IPA. *Human Rights at Home: Mental Illness in U.S. Prisons and Jails: Hearing Before the Subcomm. on Hum. Rts. & L. of the S. Comm. on the Judiciary*, 111th Cong. 8–10 (2009); *Achieving the Promises of the Americans with Disabilities Act in the Digital Age—Current Issues, Challenges, and Opportunities: Hearing Before the Subcomm. on the Const., Civ. Rts., & Civ. Liberties of the H. Comm. on the Judiciary*, 111th Cong. 5–22 (2010). Richard Buckius served at the NSF under the IPA from 2014 to 2016 and in this capacity, testified before Congress in 2015 and 2016. Jeffrey Mervis, *Departing Senior NSF Manager Offers Hopeful Assessment of Agency's Future*, SCI. (Feb. 24, 2017), <https://www.science.org/content/article/departing-senior-nsf-manager-offers-hopeful-assessment-agency-s-future> [<https://perma.cc/NFZ2-8PJ>]?type=standard]; *Is NSF Properly Managing Its Rotating Staff?: Hearing Before the Subcomm. on Oversight & Subcomm. on Rsch. & Tech. of the H. Comm. on Sci., Space & Tech.*, 114th Cong. 25–32 (2016); *A Review of Recommendations for NSF Project Management Reform: Hearing Before the Subcomm. on Oversight & Subcomm. on Rsch. & Tech. of the H. Comm. on Sci., Space & Tech.*, 114th Cong. 31–37 (2015).

<sup>98</sup> For example, when Pamela Karlan served as the Principal Deputy Assistant Attorney General at the Department of Justice Civil Rights Division as an IPA, she issued a statement and resource guide on civil rights challenges related to the COVID-19 pandemic and wrote a letter in her official capacity to the Arizona Senate advising of potential civil rights violations. Off. of Public Aff., *Statement by the Principal Deputy Assistant Attorney General for Civil Rights Leading a Coordinated Civil Rights Response to Coronavirus (COVID-19)*, U.S. DEP'T OF JUST. (Apr. 2, 2021), <https://www.justice.gov/opa/pr/statement-principal-deputy-assistant-attorney-general-civil-rights-leading-coordinated-civil> [<https://perma.cc/9227-T9RC>]; Letter from Pamela S. Karlan, Principal Deputy Assistant Att'y Gen., Dep't of Just., to Karen Fann, President, Pres. Ariz. State Senate (May 5, 2021), <https://www.justice.gov/crt/case-document/file/1424586/download> [<https://perma.cc/VD3A-SU5L>].

<sup>99</sup> Consent Decree, *United States v. Cnty. of Ventura, Cal.*, No. CV09-06413-MMM(CWx) (C.D. Cal., July 16, 2010), [https://archive.ada.gov/ventura\\_ca.htm](https://archive.ada.gov/ventura_ca.htm) [<https://perma.cc/LCP2-GY6U>].

<sup>100</sup> Settlement Agreement between the United States of America and Beginning Montessori Academy, Baldwin Park, California, Dep't of Justice (2011), available at [https://archive.ada.gov/ventura\\_ca.htm](https://archive.ada.gov/ventura_ca.htm) [<https://perma.cc/2QFM-DDEX>].

<sup>101</sup> See Compl. 5, *United States v. City of West Monroe, No. 3:21-cv-0988* (W.D. La. Apr. 14, 2021), <https://www.justice.gov/crt/case/united-states-v-city-west-monroe-la> (listing top officials signing off on a civil complaint as an Acting United States Attorney and the Principal Deputy Assistant Attorney General of the Civil Rights Division, who was performing the functions of the position under the IPA).

<sup>102</sup> See Interview 1 (July 27, 2023) (explaining that their duties, as an IPA assignee, were effectively the same as those of an acting official whose position was normally subject to presidential nomination and Senate confirmation but for a few circumstances specified in agency regulations).

<sup>103</sup> 1989 Congressional Hearings, *supra* note 46, at 40 (statement of Joyce Felder, Assoc. Dir., Dep't of Veterans Affs.).

based model than full-time hiring.<sup>104</sup> Agencies obtain policy insights from teams with high levels of technical expertise who likely would not be willing to leave their full-time jobs; researchers get access to important data. Such coordinated research work is increasingly being mandated under the Evidence Act,<sup>105</sup> which requires agencies to develop multi-year evidence-building “learning agendas” and evaluation plans.<sup>106</sup> Those tasks are well suited for academic social science researchers who have built careers evaluating policies and building evidence bases.<sup>107</sup>

The IPA offers a clear pathway for agencies needing additional personnel to meet the requirements of the Evidence Act, particularly because the Act does not include funding to support these new mandates.<sup>108</sup> Non-reimbursable IPAs, especially on a part-time basis, offer a fiscally palatable alternative to building out expensive internal evaluation teams—a mechanism that advisors within and outside government have recommended for evidence-building work.<sup>109</sup> The GSA’s Office of Evaluation Sciences even made an internal guide on how the IPA can support agency evidence needs.<sup>110</sup> Agencies have begun to build out more formal research programs through the IPA. The Department of Labor and GSA’s Office of Evaluation Sciences, for example, have both established IPA fellowships to bring in experts to work on policy evaluation.<sup>111</sup>

The IPA’s project modality is not, however, limited to the Evidence Act. The IPA could help build out the federal government’s new AI Centers for Excellence.<sup>112</sup> The IRS has used the IPA to build out an entire Joint Statistical Research Program, where outside researchers come in on IPAs to access microdata.<sup>113</sup> Other agencies have used the IPA to fill specific gaps in research capabilities, such as a professor brought in by the U.S. Army Corps of Engineers on an “as-needed basis” to develop camouflage technologies or another brought in by the Defense Advanced Research Projects Agency to manage voice recognition technology research.<sup>114</sup> Back in 1989, a Department of Veterans Affairs official described these IPA assignees as “rather

---

<sup>104</sup> GEN. SERVS. ADMIN., INTERGOVERNMENTAL PERSONNEL ACT TOOLKIT: INTERNAL GUIDE FOR IPAS 3–4 (2022), <https://oes.gsa.gov/assets/files/ipa-toolkit-oes.pdf> [<https://perma.cc/SG5X-SE3U>] [hereinafter GSA IPA Toolkit]; *CEO Intergovernmental Personnel Act (IPA) Fellowship*, DEP’T OF LAB.: OFF. OF THE ASSISTANT SEC’Y FOR POL’Y, <https://www.dol.gov/agencies/oasp/evaluation/ceo-intergovernmental-personnel-act-fellowship> [<https://perma.cc/GMG7-75FN>]; *VA Ann Arbor Healthcare System Research Services*, DEP’T OF VETERANS AFFS., <https://www.annarbor.research.va.gov/ipa.asp> [<https://perma.cc/TEP4-XVKQ>].

<sup>105</sup> Foundations for Evidence-Based Policymaking Act of 2018, Pub. L. 115–435, 132 Stat. 5529 (2019).

<sup>106</sup> See Memorandum for Heads of Executive Dep’ts & Agencies from Russel T. Vought, Off. of Mgmt. & Budget Acting Dir., M–19–23, at 5–8 (July 10, 2019), <https://www.whitehouse.gov/wp-content/uploads/2019/07/M-19-23.pdf> [<https://perma.cc/NNC5-3FPB>].

<sup>107</sup> GEN. SERVS. ADMIN., EVIDENCE ACT TOOLKIT 1, [https://oes.gsa.gov/assets/toolkits/A\\_Guide\\_to\\_Developing\\_Your\\_Agency's\\_Learning\\_Agenda\\_updated.pdf](https://oes.gsa.gov/assets/toolkits/A_Guide_to_Developing_Your_Agency's_Learning_Agenda_updated.pdf) [<https://perma.cc/N5U8-SGYE>] [hereinafter GSA Evidence Act Toolkit].

<sup>108</sup> *How federal agencies can use IPAs to bolster evidence capacity and help implement the Evidence Act: An interview with Dayanand Manoli, Professor, Georgetown University – Episode #178*, GOV INNOVATOR PODCAST (Jan. 8, 2021), <https://govinnovator.com/day-manoli-2021/> [<https://perma.cc/8PXP-KBF2>].

<sup>109</sup> See, e.g., GSA Evidence Act Toolkit, *supra* note 107, at 12; Christina Ciocca Eller, Mariam Gulaid & OMB Evidence Team, *Year of Evidence for Action Kicks Off!*, EVALUATION.GOV (Apr. 8, 2022), <https://www.evaluation.gov/2022-4-7-year-of-evidence-for-action/> [<https://perma.cc/M2DT-R7WV>]; *Fact Sheet: Biden-Harris Administration Launches Year of Evidence for Action to Fortify and Expand Evidence-Based Policymaking*, WHITE HOUSE (Apr. 7, 2022), <https://www.whitehouse.gov/ostp/news-updates/2022/04/07/fact-sheet-biden-harris-administration-launches-year-of-evidence-for-action-to-fortify-and-expand-evidence-based-policymaking/> [<https://perma.cc/Z58H-FKRE>]; Andrew Feldman, *Creating the Foundation for Building an Agency Culture That Values Evidence*, GOV’T EXEC. (Nov. 19, 2019), [govexec.com/management/2019/11/creating-foundation-building-agency-culture-values-evidence/161394/](http://govexec.com/management/2019/11/creating-foundation-building-agency-culture-values-evidence/161394/) [<https://perma.cc/C6LT-9R49>].

<sup>110</sup> GSA IPA Toolkit, *supra* note 104.

<sup>111</sup> *CEO Intergovernmental Personnel Act (IPA) Fellowship*, *supra* note 104; *OES Annual Fellowship Overview*, GEN. SERVS. ADMIN.: OFF. OF EVALUATION SCIS., <https://oes.gsa.gov/opps/> [<https://perma.cc/GB3N-588D>].

<sup>112</sup> GOV’T ACCOUNTABILITY OFF., GAO-21-519SP, ARTIFICIAL INTELLIGENCE ACCOUNTABILITY FRAMEWORK 51 (2021), <https://www.gao.gov/assets/720/716110.pdf> [<https://perma.cc/3MUF-JW8V>].

<sup>113</sup> INTERNAL REVENUE SERV., STATISTICS OF INCOME—JOINT STATISTICAL RESEARCH PROGRAM: CALL FOR PROPOSALS, <https://www.irs.gov/pub/irs-soi/23jsrapapplication.pdf> [<https://perma.cc/9BGS-KFZW>].

<sup>114</sup> 2022 GAO Report, *supra* note 63, at 14–15.



special hires”—technically or scientifically skilled people hired on a temporary, often part-time basis, allowing the VA to acquire “expertise that’s almost impossible to recruit for a short time to Federal service.”<sup>115</sup>

This modality overlaps with the second, on federal staffing. Yet it differs from the staffing seen at NSF, OSTP, or DARPA: IPAs in this modality fulfill discrete *projects* rather than standard *roles*. Due to this project-based structure as well as the ongoing nature of many research projects, IPAs in this modality are often part-time, unlike in the staffing modality. And while the other modalities focus more on the receiving party—the local or state institution, the federal agency, the presidential administration—the projects modality provides more even-handed benefits to the two sides of the agreement.<sup>116</sup>

\* \* \* \* \*

Agency use of the IPA reveals that there is no single type of assignment. There are, rather, four distinct ways in which the IPA has operated in practice. Even if the IPA’s original manifestation built local capacity, reflecting its *intergovernmental* roots, the statutory text allows broader applications. The IPA enables exchanges between entities throughout the federal government and a wide variety of institutions outside of it—from states to localities to Tribes to nonprofits.

Yet the shifting uses of the IPA were not random. As we show in the next Part, the IPA’s different modalities reflect various pressures on government staffing. Those same underlying pressures, we suggest, reveal the enduring—and, in fact, growing—importance of governing by assignment.

## II. The Pressures Shaping Governmental Personnel

The IPA’s original expected application—and its actual practice in its first years of existence—was to build local governmental capacity, what we call the localism modality. Yet, as we document below, under the staffing modality, the IPA began to help build *federal* governmental capacity within a decade. How did a statute whose original purpose was to build up state and local bureaucracies come to be used to overcome limitations of the federal civil service system and the political appointments process?

This Part contextualizes the IPA’s modalities within larger movements that, over the past half century, have profoundly reshaped the administrative state. There’s the federal government’s scope: It expanded drastically in the years since the IPA’s passage, including by environmental laws like the Clean Air and Water Acts, the growth of a domestic-facing national security apparatus in the post-9/11 period, and federal intervention in the nation’s workplaces and schools through civil rights and public education laws. And there’s money: As shown in Figure 2, between 1970 and 2020, federal spending nearly quadrupled in real terms, with much of the increase coming from expansions in federal aid programs like Medicare and Social Security, as well as transfers to states to support cooperative programs like Medicaid and unemployment insurance.

But the number of civilian employees in the federal government has not grown apace. Moreover, getting leaders in place has become more difficult.<sup>117</sup> Since the IPA was enacted, the administrative state has more to do with stagnant hiring authorities for nonpolitical workers and increasingly cumbersome processes for filling agency leadership positions.

---

<sup>115</sup> 1989 Congressional Hearings, *supra* note 46, at 43 (statement of Richard Greene, Dep’t of Veterans’ Affs. Assist. Chief Medical Dir., Res. & Dev.).

<sup>116</sup> See Matt Clancy, Dan Correa, Jordan Dworkin, Paul Niehaus, Caleb Watney & Heidi Williams, Comment, *To Speed Scientific Progress, Understand How Science Policy Works*, 620 NATURE 724, 725 (2023) (noting the IPA as a mechanism for helping researchers understand how to better translate their research into practical solutions).

<sup>117</sup> P’SHP FOR PUB. SERV., SENATE CONFIRMATION PROCESS SLOWS TO A CRAWL 1 (2020), <https://presidentialtransition.org/wp-content/uploads/sites/6/2020/01/Senate-Confirmations-Issue-Brief.pdf> [<https://perma.cc/DFF3-9JCZ>] [hereinafter PPS SENATE CONFIRMATION PROCESS].

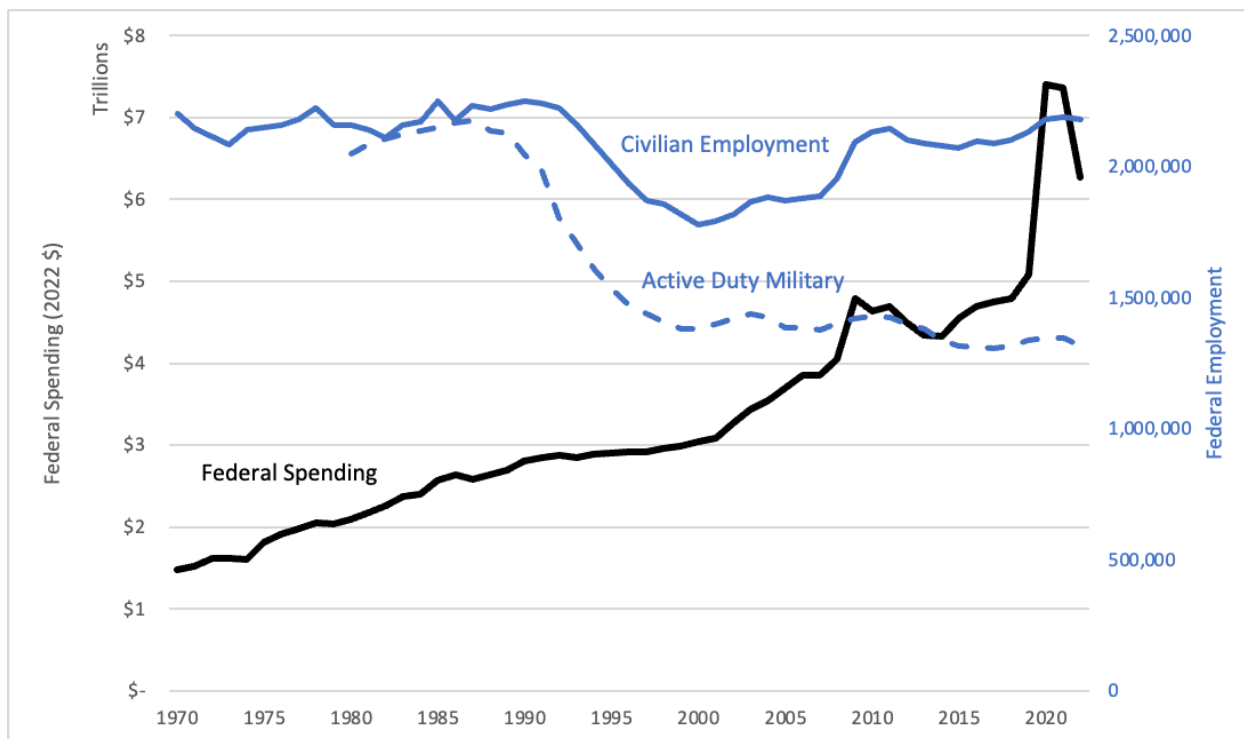


Figure 2: Federal Spending and Employment from 1970-2022<sup>118</sup>

These difficulties flow from deeply rooted ideals in American politics. Given the enduring popularity of “draining the swamp” and growing distrust of government,<sup>119</sup> voter demands for governmental programs in the last half century have not translated to embracing the growth of “big government”; instead, Congress and the presidency have consistently maintained tight limits on FTEs.<sup>120</sup> Political scientists have documented how these cross-cutting dynamics—the demand for better social outcomes coupled with the unpopularity of expanding the federal bureaucracy—have manifested in the outsourcing of governmental functions to contractors (what some deride as the “hollowing out” of the state<sup>121</sup>) as well as the distinctively American reliance on courts as policymaking institutions.<sup>122</sup>

These dynamics have created pressures on agencies and the White House to take unilateral actions to achieve their policy agendas. This Part documents how the wider context of personnel politics creates incentives for governing by assignment. While we do not claim to tell a causal history that explains the timing of different modalities, these larger themes can help explain the IPA’s operation. We note the changes in IPA practice and then review the challenges associated with current systems of talent acquisition, first for staffing

<sup>118</sup> Budget data is derived from OMB historical tables, adjusted to 2022 dollars using the CPI-U. *Historical Tables*, OFF. MGMT. & BUDGET, <https://www.whitehouse.gov/omb/budget/historical-tables/> [<https://perma.cc/N9B3-L6C5>] (select “Table 1.1—Summary of Receipts, Outlays, and Surpluses or Deficits (-): 1978–2028”). Federal civilian employment excludes Postal Service employment and comes from the OPM. *Executive Branch Civilian Employment Since 1940*, OFF. OF PERS. MGMT., <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/executive-branch-civilian-employment-since-1940/> [<https://perma.cc/CX4Q-XKQ8>] (data from 1980–2014); *Federal Workforce Data*, OFF. OF PERS. MGMT., <https://www.fedscope.opm.gov/> [<https://perma.cc/CM67-UZ4Z>] (select “Year-to-Year” under “Employment Trend,” using data from 2014 to present). Active duty military data is sourced from the Defense Manpower Data Center. *Active Duty Military Personnel by Service by Rank/Grade*, DEF. MANPOWER DATA CTR., <https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/stats-reports>.

<sup>119</sup> See, e.g., Dan Balz, *Crisis Exposes How America Has Hollowed Out Its Government*, WASH. POST (May 16, 2020), <https://www.washingtonpost.com/graphics/2020/politics/government-hollowed-out-weaknesses/> [<https://perma.cc/X6W7-JMNT>] (noting growing distrust in government).

<sup>120</sup> See Lewis, *supra* note 20, at 775.

<sup>121</sup> Cf. PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY* 5–6 (2007).

<sup>122</sup> See ROBERT KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 41–45 (2019).

a federal bureaucracy and then for staffing a presidential administration. We then compare the IPA to policy alternatives across a set of institutional design characteristics.<sup>123</sup>

#### A. *The Puzzle of the IPA's Many Lives*

Given its origins, the IPA's current modalities present a profound irony. How did a statute designed to build state and local capacity, with the specific aim of professionalizing local bureaucracies, come to be used to staff federal bureaucracies—especially as an alternative to the civil service system?

The IPA's original purpose, as we described above, was to build state and local governmental capacity. Until 1975, the predominant application of the IPA was “outgoing,” with federal employees seconded to outside entities—most often state and local governments.<sup>124</sup> After 1975, assignment direction flipped, with the predominant use of the IPA becoming academics entering the federal bureaucracy.<sup>125</sup> By the latter half of the 1980s, nearly nine in ten incoming IPAs were academics.<sup>124</sup> This shift marked a change from we call the localism modality to the staffing modality, and it has endured.<sup>126</sup>

The change did not go unnoticed.<sup>127</sup> And it generated controversies. A 1977 task force noted how using the IPA in its staffing modality might contradict the Carter Administration's commitments to merit hiring by seeming to circumvent “ceiling constraints,” create unfair pay differentials, and function as “a buddy-buddy system.”<sup>128</sup> Similarly, Inspectors General (IGs) have flagged concerns with high-level IPA assignments for insufficiently following disclosure requirements<sup>129</sup> and creating conflicts of interest when setting policies.<sup>130</sup>

The drivers of the later IPA modalities, we show in the next two sections, require understanding broader pressures on personnel politics.

#### B. *Challenges of Staffing a Federal Bureaucracy*

The federal government has various mechanisms for acquiring nonpolitical staff and technical expertise. Each poses distinct challenges—and, together, we argue that those challenges create incentives for governing by assignment. In this Section, we review the two main mechanisms for hiring full-time employees (the traditional civil service system and its increasingly used counterpart, the excepted service system) as well as two ways the government temporarily accesses outside talent—private contracting and research agreements.

The primary vehicle for hiring full-time employees—the civil service system—makes it difficult for agencies to attract technical talent given the long time-to-hire, rigid assessment mechanisms, peculiarities with the application process, and a pay scale that cannot compete with private industry or academia. While the excepted service alleviates some of these burdens, it also suffers from similar problems of noncompetitive pay as well as FTE caps and budgetary constraints. And while the federal government has increasingly turned to private contracting and research agreements to access expertise, agencies' ability to oversee that external talent effectively has been inhibited by the problems associated with hiring permanent talent.

---

<sup>123</sup> This analysis speaks to the staffing, leadership, and projects modalities, given the limited usage of the IPA today to address intergovernmental capacity building. But the IPA can again address intergovernmental capacity building today. *See infra* Part IV.C.

<sup>124</sup> *See* 1989 GAO Report, *supra* note 45, at 22; *see also* Conaway 1979, *supra* note 22, at 36.

<sup>125</sup> 1989 GAO Report, *supra* note 45, at 23; *see also* 1979 GAO Report, *supra* note 22, at 56.

<sup>126</sup> 2001 GAO Report on NSF, *supra* note 55, at 3 (noting eighty-two percent of IPAs in 2000 were incoming); *see also* *IPA Mobility Program Agreements*, MUCK ROCK, <https://www.muckrock.com/search/?q=iPA+mobility+program+agreements> [<https://perma.cc/RyJ5-EKS5>] [hereinafter Muck Rock FOIA Requests] (compiling over 170 IPA assignments in 2022, mostly from FTC, DOE, OSTP, EPA, and DOJ, the vast majority of which appear to be incoming).

<sup>127</sup> *See generally* GAO 1989 Report, *supra* note 45.

<sup>128</sup> *See* 1977 Task Force App'x IX, *supra* note 16, at 11.

<sup>129</sup> NAT'L AERONAUTICS & SPACE ADMIN. OFF. OF INSPECTOR GEN., SEMI-ANNUAL REPORT TO CONGRESS OCTOBER 1, 1999-MARCH 31, 2000, at 51 (2000), <https://oig.nasa.gov/docs/sar0300.pdf> [<https://perma.cc/3Q5D-QNAU>].

<sup>130</sup> *See, e.g., infra* notes 307 and 313.

## 1. The Civil Service System

Over two-thirds of the federal government’s employees fill competitive service positions, selected through rules-based staffing, commonly referred to as the “civil service” or “merit” system.<sup>131</sup> Most of these positions are staffed through the competitive examining system,<sup>132</sup> which requires agencies to publicize the job posting, screen candidates based on minimum qualification standards, apply selection priorities such as veterans’ preferences, and test candidates’ abilities against job-related criteria.<sup>133</sup> Agencies also have access to other hiring authorities within the civil service staffing system, often with fewer procedural hurdles than the competitive examining authority. For example, OPM authorizes agencies to use a direct hire authority to hire for a position where there is “either a severe shortage of candidates or a critical hiring need.”<sup>134</sup>

The civil service system aims to create a transparent hiring system based on competence rather than opaque connections. In theory, hiring individuals based on their ability to do a specific job should lead to higher organizational performance.<sup>135</sup> Notably, employees who perceive they have been hired based on merit principles—specifically, fairness, protection, and stewardship—experience greater satisfaction with their work and produce better work output.<sup>136</sup>

There are, however, several drawbacks to this staffing system.<sup>137</sup> To start, the hiring process is long. In 2017, it took an average of 106 days to complete a hire through the competitive hiring process, with many candidates waiting six months or more, although OPM’s government-wide goal is eighty days.<sup>138</sup> The average

---

<sup>131</sup> OFF. PERS. MGMT., EXCEPTED SERVICE HIRING AUTHORITIES: THEIR USE AND EFFECTIVENESS IN THE EXECUTIVE BRANCH 8 (2018),

[https://chcoc.gov/sites/default/files/OPM%20Special%20Study%20%E2%80%93%20Excepted%20Service%20Hiring%20Auth](https://chcoc.gov/sites/default/files/OPM%20Special%20Study%20%E2%80%93%20Excepted%20Service%20Hiring%20Authorities.pdf)  
<https://perma.cc/BBY8-HDRQ> [hereafter OPM Excepted Service].

<sup>132</sup> Agencies generally use only 20 of 105 available hiring authorities. GOV’T ACCOUNTABILITY OFF., GAO-16-521, FEDERAL HIRING: OPM NEEDS TO IMPROVE MANAGEMENT AND OVERSIGHT OF HIRING AUTHORITIES 3 (2016), <https://www.gao.gov/assets/gao-16-521.pdf> [<https://perma.cc/5NEE-ZABE>] [hereinafter 2016 GAO Report].

<sup>133</sup> GOV’T ACCOUNTABILITY OFF., GAO-19-181, FEDERAL WORKFORCE: KEY TALENT MANAGEMENT STRATEGIES FOR AGENCIES TO BETTER MEET THEIR MISSION 28 n.63 (2019), <https://www.gao.gov/assets/gao-19-181.pdf> [<https://perma.cc/YCM8-6EEN>] [hereinafter 2019 GAO Federal Workforce Report]; 5 U.S.C. §§ 3304-3319; 5 C.F.R. Parts 332 and 337.

<sup>134</sup> 2016 GAO Report, *supra* note 132, at 6. Agencies have steadily increased their reliance on the direct hire authority, reaching 27% of all new competitive hires in 2018. MERIT SYS. PROT. BD., DIRECT-HIRE AUTHORITY UNDER 5 U.S.C. § 3304: USAGE AND OUTCOMES 3 (2021),

[https://www.mspb.gov/studies/researchbriefs/Direct\\_Hire\\_Authority\\_Under\\_5\\_USC\\_%C2%A7\\_3304\\_Usage\\_and\\_Outcomes\\_1803830.pdf](https://www.mspb.gov/studies/researchbriefs/Direct_Hire_Authority_Under_5_USC_%C2%A7_3304_Usage_and_Outcomes_1803830.pdf) [<https://perma.cc/JH3R-P9BP>].

<sup>135</sup> See, e.g., David E. Terpstra & Elizabeth J. Rozell, *The Relationship of Staffing Practices to Organizational Level Measures of Performance*, PERSONNEL PSYCH., Spring 1993, at 46 (finding a positive relationship in the private sector between organizational performance and hiring practices focused on job-specific competencies). But see, e.g., Emmanuel S. Savas, and Sigmund G. Ginsburg, *The Civil Service—a Meritless System?*, 32 PUB. INT. 70, 71 (1973) (listing a number of counterproductive aspects of federal competitive hiring practices); Diana Moreira & Santiago Pérez, *Civil Service Exams and Organizational Performance: Evidence from the Pendleton Act* 24–33 (Nat’l Bureau of Econ. Rsch., Working Paper No. 28665, 2022),

[https://www.nber.org/system/files/working\\_papers/w28665/w28665.pdf](https://www.nber.org/system/files/working_papers/w28665/w28665.pdf) [<https://perma.cc/P44Q-R6KG>] (finding that the Pendleton Act did reduce employee turnover and increase the average occupational status of hired employees, but that it did not increase cost-effectiveness and incentivized increased hiring in exam-exempted positions).

<sup>136</sup> Gene A. Brewer, J. Edward Kellough & Hal G. Rainey, *The Importance of Merit Principles for Civil Service Systems: Evidence from the U.S. Federal Sector*, 42 REV. PUB. PERSONNEL ADMIN. 686, 686 (2022); see also Eloy Oliviera et al., *What Does the Evidence Tell Us About Merit Principles and Government Performance?*, 2023 PUB. ADMIN. (2023) (summarizing literature across countries finding that merit principles are strongly associated with higher government performance and lower corruption); Pablo Alonso & Gregory B. Lewis, *Public Service Motivation and Job Performance: Evidence from the Federal Sector*, 31 AM. REV. PUB. ADMIN. 363, 376 (2001) (finding that federal employees who expected to receive a fair and material reward for performance attained higher grades and performance ratings).

<sup>137</sup> See generally NAT’L ACAD. PUB. ADMIN., NO TIME TO WAIT, PART 2: BUILDING A PUBLIC SERVICE FOR THE 21<sup>ST</sup> CENTURY 8 (2018) [https://napawash.org/uploads/Academy\\_Studies/NTTW2\\_09192018\\_WebVersion.pdf](https://napawash.org/uploads/Academy_Studies/NTTW2_09192018_WebVersion.pdf) [<https://perma.cc/NJ8H-CCLR>] [hereinafter NAPA No Time to Wait Part 2].

<sup>138</sup> 2019 GAO Federal Workforce Report, *supra* note 133 at 25.

time to hire in the private sector is about thirty-three days.<sup>139</sup> Many government hiring officers cite the complex competitive examining process as a primary cause.<sup>140</sup> In addition, current assessment methods, such as multiple-choice questions and ratings of competencies, may not match the skills needed for the job<sup>141</sup> and, when combined with rigid scoring systems (e.g., the strong weight of veterans' preferences), may inhibit the agency from securing its preferred candidate.<sup>142</sup>

The application process is also generally not applicant friendly. Over half of all searches for positions where a competitive exam is administered end without a hire.<sup>143</sup> USAJobs—the federal job board—is notoriously difficult to use.<sup>144</sup> The process does not match private sector conventions, raising the costs of applying for those in the private sector. Specifically, agencies require resumes to fit a particular format—multiple pages long—when a private sector resume runs one-to-two pages.

Finally, the civil service system mostly uses the General Schedule (GS) pay scale for its white-collar workers, which has a maximum base rate of \$152,771.<sup>145</sup> Increasing pay faces political obstacles: Pay caps in the competitive service are tied to congressional salaries, and members of Congress typically do not want the political blowback of voting to raise their own salaries.<sup>146</sup> The rigid compensation system has made the federal government less competitive in attracting senior and technically skilled talent and has contributed to increased agency usage of alternative personnel systems with more flexible pay schedules to compete with the private market.<sup>147</sup> Appropriately compensating and attracting technical talent has been particularly challenging in the areas of cybersecurity and AI, where qualified individuals who would receive high compensation in the private sector may only be eligible for lower compensation through the GS-scale due to, say, a lack of a master's degree.<sup>148</sup>

---

<sup>139</sup> Jamie Ross & Karen Werner, *Staffing Metrics: 'Time to Fill' Can Kill Prospects of Landing Top Talent*, SHRM (Jan. 18, 2012), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/timetofillcankilllandingtoptalent.aspx> [<https://perma.cc/G47Q-6WVW>].

<sup>140</sup> 2019 GAO Federal Workforce Report, *supra* note 133, at 28.

<sup>141</sup> *Id.* at 30.

<sup>142</sup> Interview 1 (July 27, 2023) (explaining that agencies may avoid using the traditional merit system out of concern that they may be stuck with a less desirable candidate whom they are obligated to hire); *see also* 2020 NCMNPS Report, *supra* note 4, at 67 (noting that rigidity of veterans' preference may make “preference-eligible veterans . . . automatically categorized as highest qualified” such that the policy “frequently results in highly qualified nonveterans having little chance at Federal employment, while also contributing to a lack of diversity at some agencies”).

<sup>143</sup> 2020 NCMNPS Report, *supra* note 4, at 64.

<sup>144</sup> Jeff Neal, *Is It Time to Kill USAJobs?*, FEDSMITH (June 10, 2019), <https://www.fedsmith.com/2019/06/10/time-kill-usajobs/> [<https://perma.cc/KC6Z-G2V8>].

<sup>145</sup> *Salary Table 2023-GS*, OFF. OF PERS. MGMT., <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/23Tables/html/GS.aspx> [<https://perma.cc/35NP-5R6P>].

<sup>146</sup> Nathan Abse, *Pay Caps: Fed Exec Lobby Group Says Reform Is Past Due*, GOV'T EXEC. (Mar. 22, 2023), <https://www.govexec.com/pay-benefits/2023/03/pay-caps-fed-exec-lobby-group-reform-past-due/384254/> [<https://perma.cc/69E6-ANKS>].

<sup>147</sup> Employees with a bachelor's degree or less are compensated more in the government than in the private sector (including benefits); those with advanced degrees are compensated 18% less than in the private sector. CONG. BUDGET OFF., *COMPARING THE COMPENSATION OF FEDERAL AND PRIVATE-SECTOR EMPLOYEES ix* (2012), <https://www.cbo.gov/sites/default/files/cbofiles/attachments/01-30-FedPay.pdf> [<https://perma.cc/X6N6-ERBM>]; *see also* GOV'T ACCOUNTABILITY OFF., GAO-14-677, *HUMAN CAPITAL: OPM NEEDS TO IMPROVE THE DESIGN, MANAGEMENT, AND OVERSIGHT OF THE FEDERAL CLASSIFICATION SYSTEM 11* (2014), <https://www.gao.gov/assets/gao-14-677.pdf> [<https://perma.cc/7LJ5-ASVT>].

<sup>148</sup> *See* NAT'L SEC. COMM'N ON A.I., *FINAL REPORT 366* (2021), <https://www.nscai.gov/wp-content/uploads/2021/03/Full-Report-Digital-1.pdf> [<https://perma.cc/4G8X-VKEQ>] [hereinafter 2021 NSCAI Report] (“[A] 19-year-old software developer or AI practitioner might have a proven track record on cybersecurity or in AI competitions, but can only enter the government as a GS-7.”).

In sum, well-intentioned principles about merit-based assessment and set pay scales may inhibit the government from acquiring the best candidates.<sup>149</sup> The civil service system, particularly in science and technology, may in fact strain to draw the most meritorious candidates.

## 2. The Excepted Service System

The excepted service presents an alternative approach to civil service hiring, providing streamlined hiring processes for eligible positions. OPM classifies many excepted service positions into lettered categories<sup>150</sup> such as Schedule A (covering those who are “impracticable to examine,” but realistically a catch-all category spanning many novel agencies like 18F, a digital services agency within GSA, and the U.S. Digital Service<sup>151</sup>), Schedule C (covering political appointments to policy positions), and Schedule D (covering recent graduate programs like the Pathways internship program and the Presidential Management Fellows Program). Congress has staffed entire agencies with excepted service positions, such as the Central Intelligence Agency and the Tennessee Valley Authority.<sup>152</sup> The excepted service has grown over the past several decades. In 1995, it made up 19.1% of employment in the executive branch; in 2015, the proportion was 29.7%.<sup>153</sup> Many excepted service positions use the GS pay scale, but agencies can also create and use their own pay scale for these positions.<sup>154</sup>

Because applicants do not go through the competitive examination system, the process of getting hired under the excepted service is generally faster, more flexible, and more applicant friendly than through the civil service staffing system.<sup>155</sup> Despite their differences, the competitive service and excepted service systems share one key constraint: FTE caps imposed by Congress.

## 3. Contracting

Contracting allows the federal government to purchase private talent temporarily, though many federal contracts are long-term. In FY 2019, the federal government spent \$926.5 billion, or 13.9% of overall spending, on prime and sub-prime contracts, with over half this amount going to the Department of Defense.<sup>156</sup> In some agencies, procurement costs comprise the majority of overall expenses; for example, procurement accounted for seventy-eight percent of NASA’s 2020 budget.<sup>157</sup> Prime contracting spending has remained relatively constant over the past several decades, with some increase since 2016.<sup>158</sup>

---

<sup>149</sup> *Cf.*, e.g., NAPA No Time to Wait Part 2, *supra* note 137, at 27–29 (arguing that current civil services rules reflect a “blind pursuit of horizontal equity” that “handcuffs the system and prevents it from accommodating” differences across agencies, thereby hindering agencies’ ability to hire the best candidates for their individual missions).

<sup>150</sup> OPM Excepted Service, *supra* note 131, at 1.

<sup>151</sup> GOV’T ACCOUNTABILITY OFF., GAO-16-602, DIGITAL SERVICE PROGRAMS: ASSESSING RESULTS AND COORDINATING WITH CHIEF INFORMATION OFFICERS CAN IMPROVE DELIVERY OF FEDERAL PROJECTS 7 (2016), <https://www.gao.gov/assets/gao-16-602.pdf> [<https://perma.cc/278R-9U56>].

<sup>152</sup> *See* USAJOBS, EXCEPTED SERVICE INFORMATION & EMPLOYMENT OPPORTUNITIES, [https://www.usajobs.gov/Content/pdfs/excepted\\_service.pdf](https://www.usajobs.gov/Content/pdfs/excepted_service.pdf) [<https://perma.cc/C3JF-EHC4>]; GOV’T ACCOUNTABILITY OFF., GAO-97-72, THE EXCEPTED SERVICE: A RESEARCH PROFILE (1997), <https://www.govinfo.gov/content/pkg/GAOREPORTS-GGD-97-72/html/GAOREPORTS-GGD-97-72.htm> [<https://perma.cc/XVQ4-2FCJ>].

<sup>153</sup> OPM Excepted Service, *supra* note 131, at 8.

<sup>154</sup> For example, the National Science Foundation has an excepted service pay scale that caps out at \$206,541, well above the GS pay scale. NAT’L SCI. FOUND., COMPENSATION AND BENEFITS, <https://new.nsf.gov/careers/working-nsf/compensation-and-benefits> [<https://perma.cc/NLE8-NTM2>].

<sup>155</sup> OPM Excepted Service, *supra* note 131, at i–ii.

<sup>156</sup> *FY 2023 Spending by Object Class*, USASPENDING, [https://www.usaspending.gov/explorer/object\\_class](https://www.usaspending.gov/explorer/object_class) [<https://perma.cc/XB5M-UDNM>].

<sup>157</sup> NAT’L AERONAUTICS & SPACE ADMIN., FY 2020 ANNUAL PROCUREMENT REPORT 4 (2020), [https://www.nasa.gov/sites/default/files/atoms/files/annual\\_procurement\\_report\\_fy20.pdf](https://www.nasa.gov/sites/default/files/atoms/files/annual_procurement_report_fy20.pdf) [<https://perma.cc/NB5Q-NUPN>].

<sup>158</sup> Data from 2008–2002 comes from USASpending. *Spending by Prime Award*, USASPENDING, <https://www.usaspending.gov/search/?hash=ef98b96f7a747de23d8a6513f0626d99> [<https://perma.cc/M876-9SEE>]. Data from 1984–2007 comes from annual Federal Procurement Reports from SAM.gov’s Data Bank. *Federal Procurement Reports*, SAM.GOV, <https://sam.gov/reports/awards/static> [<https://perma.cc/899T-SK8N>].

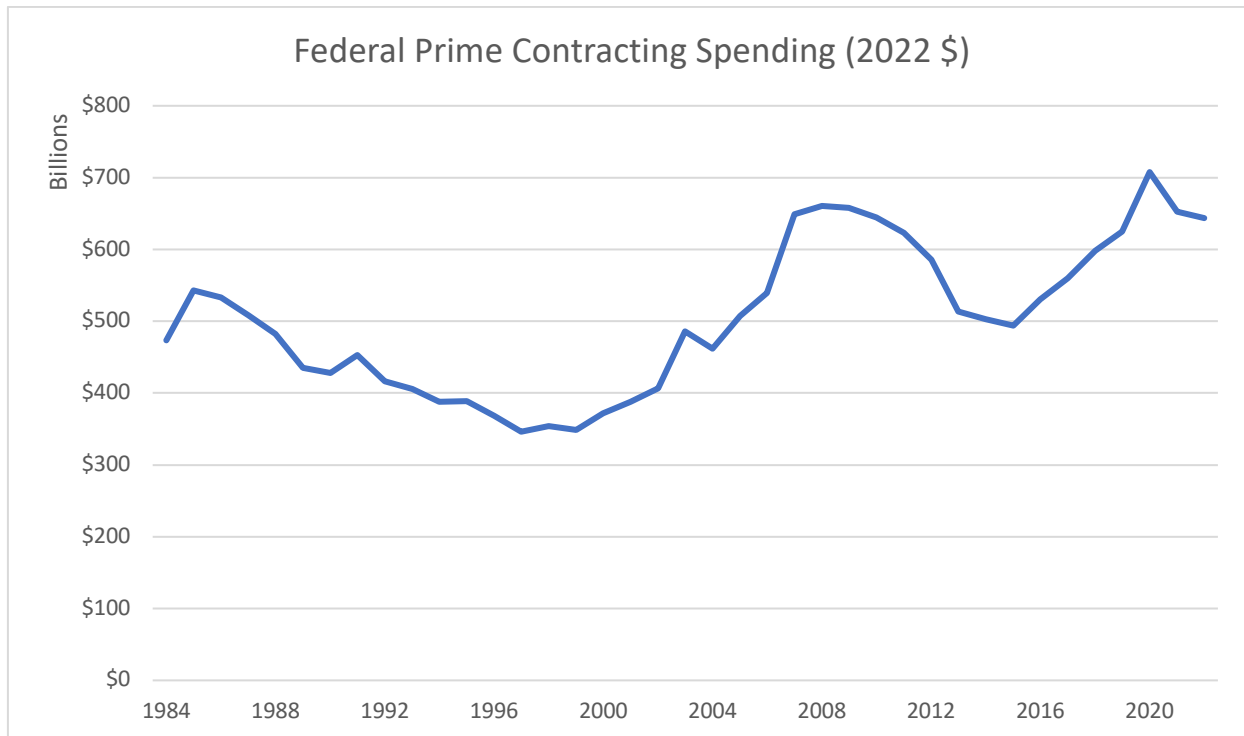


Figure 3: Federal Prime Contract Spending, 1984-2022

On the plus side, contracting theoretically allows the government to tap into private sector talent and management systems where it might be inefficient for the government to develop those in house. By default, the government accesses quality services through a competitive bidding process governed by the Federal Acquisition Regulation (FAR).<sup>159</sup> But more than one-third of the federal government’s procurement budget is spent on contracts that are not competitively awarded.<sup>160</sup> And over one-third of IT contracts put up for competition in a recent study received just one bid.<sup>161</sup> Even when there is competition, there are not that many players: Over a third of defense contracting dollars went to ten vendors in FY 2020.<sup>162</sup>

While contracting may permit agencies to carry out their missions, it comes with significant drawbacks. Considerable reliance on contracting may lead to the hollowing out of the government. Paul Verkuil noted that “government officials are in such short supply that they are virtually limited to serving as figureheads rather than operating officials.”<sup>163</sup> Oversight reports have also repeatedly found that contracting can be excessively costly: A 2019 analysis of dozens of defense contracts with one company concluded that the contracts “had profit percentages ranging from 17 to 4,451 percent.”<sup>164</sup> And there is the revolving door.

<sup>159</sup> Defense-related contracts are additionally governed by the slightly different, but still similar, Defense Federal Acquisition Regulation Supplement. See *Defense Federal Acquisition Regulation Supplement*, ACQUISITION.GOV, <https://www.acquisition.gov/dfars> [<https://perma.cc/Y7LB-J9DE>].

<sup>160</sup> GOV’T ACCOUNTABILITY OFF., GAO-17-244SP, CONTRACTING DATA TRENDS 10 (2017), <https://www.gao.gov/assets/gao-17-244sp.pdf> [<https://perma.cc/6LBB-HR98>].

<sup>161</sup> Karam Kang & Robert A. Miller, *Winning by Default: Why Is There So Little Competition in Government Procurement?* 89 REV. ECON. STUD. 1495, 1502 (2021) (analyzing a sample of roughly 17,000 IT and telecommunications contracts under FAR drawn from the Federal Procurement Data System).

<sup>162</sup> *A Snapshot of Government-Wide Contracting for FY 2020 (infographic)*, GOV’T ACCOUNTABILITY OFF. (June 22, 2021), <https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2020-infographic> [<https://perma.cc/DVR2-FHCV>].

<sup>163</sup> VERKUIL, *supra* note 121, at 24.

<sup>164</sup> U.S. DEP’T OF DEF. INSPECTOR GEN., DODIG-2019-060, REVIEW OF PARTS PURCHASED FROM TRANSDIGM GROUP, INC., ii (2019), <https://media.defense.gov/2019/Feb/27/2002093922/-1/-1/1/DODIG-2019-060.PDF> [<https://perma.cc/5E8Y-JYFU>]; see also Neil Gordon, *Spare Us Already: Investigators Find More Instances of Gross Overbilling on Defense Contracts*, PROJECT ON GOV’T

Senior government officials, particularly in the Defense Department, often leave for consulting positions, only to be hired back by the agency on a contract basis at higher pay, raising concerns of regulatory capture.<sup>165</sup> Government outsourcers—including procurement officials—may lack the needed expertise (and training) to understand adequately the technical aspects of the work for which they are contracting. For example, the FAA engaged in a \$875-million contract for technical support services without ensuring that the contractor was qualified.<sup>166</sup> These issues are particularly acute in contracts servicing legacy IT systems, which the GAO considers a high-risk area.<sup>167</sup>

Finally, many contracts are very large, creating strategic bargaining holdup issues that contribute to high costs as well as the completion of otherwise undesirable contracts.<sup>168</sup> There has, however, been momentum to improve government contracting, especially for technology services. For instance, the mission of 18F is to improve government technology contracting, specifically pushing for a movement toward agile, “modular contracting” rather than massive, multi-year contracts.<sup>169</sup>

#### 4. Research Agreements

Research agreements offer an alternative to contracting for accessing nongovernmental talent, particularly for scientific and technical subjects. The line between contracting and research agreements is not always clear; for example, one of the most prominent forms of research collaboration undertaken by the federal government are FFRDCs, which are long-term public-private partnerships between the government and universities or corporations, governed by the same FAR that regulates federal contracting.<sup>170</sup> To distinguish between the two, we primarily consider research agreements that are uncompensated and not governed by the FAR, in addition to FFRDCs.

The Cooperative Research and Development Agreement (CRADA) is arguably the most well-known research agreement. It authorizes federal agencies (typically labs) to form agreements with other research institutions, including those in industry and at universities, and negotiate license agreements for discoveries made through the collaboration.<sup>171</sup> Research agreements, however, can take many forms with varying levels of commitment, including long-term data use agreements and even the highly short-term research competitions sponsored by Challenge.gov.

Research agreements allow the government to access expertise that may not otherwise be available through traditional contracting. FFRDCs, for example, are supposed to fill needs of the government that

---

OVERSIGHT (Aug. 1, 2011), <https://www.pogo.org/analysis/2011/08/spare-us-already-investigators-find-more-instances-of-gross-overbilling-on-defense-contracts/> [<https://perma.cc/5WBH-JMR3>].

<sup>165</sup> See VERKUIL, *supra* note 121, at 23–46.

<sup>166</sup> In this contract, the FAA specifically “paid over \$200,000 for engineering services from contractor employees who do not meet the contract standards for required education and experience levels.” OFF. OF INSPECTOR GEN., DEP’T OF TRANS., AV-2000-127, TECHNICAL SUPPORT SERVICES CONTRACT: BETTER MANAGEMENT OVERSIGHT AND SOUND BUSINESS PRACTICES ARE NEEDED 13 (2000), <https://www.oig.dot.gov/sites/default/files/av2000127.pdf> [<https://perma.cc/4SDY-7JTP>]; GOV’T ACCOUNTABILITY OFF., GAO-01-753T, CONTRACT MANAGEMENT: TRENDS AND CHALLENGES IN ACQUIRING SERVICES 6 (2001), <https://www.gao.gov/assets/gao-01-753t.pdf> [<https://perma.cc/C8DZ-K4WK>]. Another issue for procurement officials is that they often face unsustainable workloads; for example the GAO found that over half of VA contracting officers said that their “workload was not reasonable.” GOV’T ACCOUNTABILITY OFF., GAO-19-157SP, HIGH-RISK SERIES: SUBSTANTIAL EFFORTS NEEDED TO ACHIEVE GREATER PROGRESS ON HIGH-RISK AREAS 23 (2019), <https://www.gao.gov/assets/gao-19-157sp.pdf> [<https://perma.cc/H7ZG-ZKNY>]. Perhaps as a result of this workload and lack of technical expertise, the GAO found in 2018 that “the majority of 22 agencies did not identify all of their IT acquisition contracts, totaling about \$4.5 billion” in unreported costs. *Id.* at 67.

<sup>167</sup> GOV’T ACCOUNTABILITY OFF., GAO-15-290, HIGH-RISK SERIES: AN UPDATE 23 (2015), <https://www.gao.gov/products/gao-15-290> [<https://perma.cc/FX6H-RMDT>].

<sup>168</sup> GOV’T ACCOUNTABILITY OFF., GAO-22-104806, FEDERAL CONTRACTING: OPPORTUNITIES EXIST TO REDUCE USE OF TIME-AND-MATERIALS CONTRACTS 10, 13 (2022), <https://www.gao.gov/assets/gao-22-104806.pdf> [<https://perma.cc/LH9H-MF34>].

<sup>169</sup> Mark Headd & Robin Carnahan, *Pulling Back the Curtain on IT Procurement*, 18F BLOG (Oct. 11, 2017), <https://18f.gsa.gov/2017/10/11/pulling-back-the-curtain-on-it-procurement/> [<https://perma.cc/E6AS-Y2QS>].

<sup>170</sup> FAR § 35.017.

<sup>171</sup> 15 U.S.C. § 3710a.



“cannot be met as effectively by existing in-house or contractor resources.”<sup>172</sup> Nonetheless, data use agreements can still be highly resource intensive to negotiate. One public health initiative spent more than \$32,000 developing the primary data use agreement alone, *excluding* any time or money spent negotiating with potential participants or on participants’ final legal review.<sup>173</sup> The process for negotiating agreements is inconsistent across agencies.<sup>174</sup> University data agreement negotiators, in one survey, called the process a game of “bureaucratic hot potato” and wondered, “Why isn’t there just one template for everything?”<sup>175</sup> Agreements also typically impose constraints on researchers that may bring security to the agency but generate burdens for researchers, ranging from requiring them to access data only at an onsite facility to limiting the period they can use the data.<sup>176</sup> While advocates have succeeded in passing significant legislation to address some of these problems such as the Foundations for Evidence-Based Policymaking Act of 2018, issues persist.<sup>177</sup>

Contracting and research agreements share some concerns. Shorter-term contracts and research agreements allow the government to skirt around important systemic human capital issues. Longer-term agreements and contracts both contribute to the hollowing out the government.

### C. *Challenges of Staffing a Presidential Administration*

Staffing a presidential administration presents distinct challenges that also create incentives for governing by assignment. There are four major categories of political appointees: presidential appointments with Senate confirmation (PAS) (roughly 1,300 positions in 2020), presidential appointments without Senate confirmation (PA) (around 300 positions), Senior Executive Service positions filled by noncareer appointment (about 700 positions), and Schedule C roles (some 1,500 positions).<sup>178</sup> Political appointees are often paid according to the EX pay scale, which caps out at \$246,400.

There are increasing delays for staffing PAS positions—from the White House and the Senate. The last three completed Administrations did not submit a single nomination to the Senate in their first two years for,

---

<sup>172</sup> FAR § 35.017.

<sup>173</sup> Claudia Allen et al., *Data Governance and Data Sharing Agreements for Community-Wide Health Information Exchange: Lessons from the Beacon Communities*, 2 EGEMS 9 (2014).

<sup>174</sup> See DANIEL E. HO, JENNIFER KING, RUSSELL C. WALD & CHRISTOPHER WAN, STANFORD UNIV. HUMAN-CENTERED ARTIFICIAL INTELLIGENCE, BUILDING A NATIONAL AI RESEARCH RESOURCE: A BLUEPRINT FOR THE NATIONAL RESEARCH CLOUD 37 (2021), [https://hai.stanford.edu/sites/default/files/2022-01/HAI\\_NRCR\\_v17.pdf](https://hai.stanford.edu/sites/default/files/2022-01/HAI_NRCR_v17.pdf) [<https://perma.cc/DX8C-59BQ>]; Amy O’Hara & Carla Medalia, *Data Sharing in the Federal Statistical System: Impediments and Possibilities*, 675 ANNALS AM. ACAD. POL. & SOC. SCI. 138, 140-41 (2018).

<sup>175</sup> Michelle Mello et al., *Waiting for Data: Barriers to Executing Data Use Agreements*, 367 SCI. MAG. 150 (Jan. 10, 2020), DOI: 10.1126/science.aaz7028.

<sup>176</sup> *Special Sworn Research Program*, BUREAU OF ECON. ANALYSIS, <https://www.bea.gov/research/special-sworn-researcher-program> [<https://perma.cc/Q9GC-E3XH>]; NAT’L CTR. FOR EDUC. STAT., RESTRICTED-USE DATA PROCEDURES MANUAL (2011), <https://nces.ed.gov/pubs96/96860rev.pdf> [<https://perma.cc/PVZ8-AWLX>]; cf. Julia Lane & Claudia Schur, *Balancing Access to Health Data and Privacy: A Review of the Issues and Approaches for the Future*, 45 HEALTH SERVS. RSCH. 1456, 1460 (2010).

<sup>177</sup> See, e.g., ADVISORY COMM. ON DATA FOR EVIDENCE BLDG., YEAR 1 REPORT 15 (2021), <https://www.bea.gov/system/files/2021-10/acdeb-year-1-report.pdf> [<https://perma.cc/G6WG-9FZ3>] (noting challenges in data sharing agreements despite the Evidence Act). Furthermore, the Evidence Act did not adopt the National Secure Data Service (NSDS), which would have enhanced access to high-quality government data; the CHIPS & Science Act of 2022 does provide for a NSDS demonstration project at NSF, though the success of this demonstration remains to be determined. See *CHIPS+ Act Advances Evidence-Based Policymaking via National Secure Data Service*, AM. IDEA FOUND. (Aug. 9, 2022), <https://americanideafoundation.com/2022/08/09/chips-act-advances-evidence-based-policymaking-via-national-secure-data-service/> [<https://perma.cc/7Q6X-VPAM>].

<sup>178</sup> H. COMM. ON OVERSIGHT & GOV’T REFORM, 116TH CONG., POLICY AND SUPPORTING POSITIONS (2020), <https://www.govinfo.gov/content/pkg/GPO-PLUMBOOK-2020/pdf/GPO-PLUMBOOK-2020.pdf> [<https://perma.cc/TS9W-WPC6>] [hereinafter 2020 Plumbook]. The actual number of Senate confirmed positions is somewhat unclear; by one count, the most commonly cited source—the Plumbook—actually misses nineteen percent of positions subject to Senate confirmation. See David E. Lewis & Mark D. Richardson, *The Very Best People: President Trump and the Management of Executive Personnel*, 51 PRESIDENTIAL STUD. Q., Mar. 2021, at 57.

on average, nearly thirty percent of vacant Senate-confirmed agency positions.<sup>179</sup> At the end of December 2021, compared to the past four Administrations, President Biden had made fewer agency nominations than everyone but President Trump.<sup>180</sup>

The Senate is taking longer too. Under President Trump, the average wait time for the Senate to confirm a nominee was 115 days (for those picks who were confirmed and not returned)—over twice as long as under President Reagan.<sup>181</sup> The process is not only longer but harder. In 1993, President Clinton’s Treasury nominee, Lloyd Bentsen, had to answer thirty-three questions for the record during his confirmation process; President Obama’s Treasury nominee, Jacob Lew, faced 444.<sup>182</sup> There is repetitive and time-consuming background vetting (from the White House and Senate) that can require private (and costly) lawyers. Talented individuals may therefore be dissuaded from going through the traditional appointments process.<sup>183</sup>

As Paul Light remarked, “The greatest cost of the current process . . . is in the lingering vacancies that pockmark an administration throughout its term.”<sup>184</sup> As of January 27, 2024, over three years in, for the 811 positions being tracked by the Partnership for Public Service and the Washington Post, the Biden Administration had 554 confirmed leaders (and eighty-six term appointees or holdovers). Over seventy-five nominations were pending in the Senate, and over ninety jobs lacked a formal nominee.<sup>185</sup> The positions with no nominee included the U.S. Chief Technology Officer, the Inspector General of the National Security Agency, the Comptroller of the Currency, and Chief Financial Officers for a number of agencies (including the Treasury Department).<sup>186</sup> These vacancies have led to increased use of “actings” and delegations of authority, which raise a constellation of legal and policy issues.<sup>187</sup>

#### D. *The Potential of Governing by Assignment*

Traditional hiring authorities, we argued above, make it difficult for agencies to attract technical talent and to fill leadership positions. We contend in this section that governing by assignment rationally responds to that pressure so that agencies can carry out their missions.

We begin with institutional design. The federal government’s methods of acquiring talent vary substantially across different attributes because they serve different purposes. Rather than compare their objectives, we assess the hiring methods across five institutional design features, summarized in Appendix Table 1, to show the IPA’s comparative advantages. These features—(1) ease of application; (2) time to hire; (3) duration of hiring authority; (4) competitiveness of compensation; and (5) public reporting obligations—suggest that the IPA is comparatively advantageous for bringing in talent that an administration or agency needs imminently or can’t acquire on a permanent basis. (For example, it may be hard to hire an academic away from a university’s offer of tenure and research capital.)

---

<sup>179</sup> Lewis & Richardson, *supra* note 178, at 7.

<sup>180</sup> Anne Joseph O’Connell, *End of Year Appointments Press*, BROOKINGS INST. (Dec. 29, 2021), <https://www.brookings.edu/blog/up-front/2021/12/29/end-of-year-appointments-press/> [<https://perma.cc/D6YN-4JFP>].

<sup>181</sup> PPS SENATE CONFIRMATION PROCESS, *supra* note 117.

<sup>182</sup> George E. Condon Jr. & National Journal, *Why the Confirmation Process is Completely Broken*, ATL. (July 18, 2013), <https://www.theatlantic.com/politics/archive/2013/07/why-the-confirmation-process-is-completely-broken/442935/> [<https://perma.cc/8RAP-K57Q>].

<sup>183</sup> A 2001 survey found that only about a third of Fortune 500 executives, university presidents, and think tank scholars felt “very favorabl[y]” about serving as a presidential appointee. PAUL C. LIGHT & VIRGINIA L. THOMAS, BROOKINGS INST., *POSTS OF HONOR: HOW AMERICA’S CORPORATE AND CIVIC LEADERS VIEW PRESIDENTIAL APPOINTMENTS* 9 (2001), <https://www.brookings.edu/wp-content/uploads/2016/06/januarysurvey.pdf> [<https://perma.cc/AJ49-HZG5>]. More than half viewed the presidential appointment process as “embarrassing” due to both the confirmation process and the financial disclosure forms. *Id.* at 10, 16.

<sup>184</sup> Paul C. Light, *Our Tottering Confirmation Process*, BROOKINGS INST. (Mar. 1, 2002), <https://www.brookings.edu/articles/our-tottering-confirmation-process/> [<https://perma.cc/W6CC-VJUD>].

<sup>185</sup> P’SHP FOR PUB. SERV, POLITICAL APPOINTEE TRACKER, <https://ourpublicservice.org/performance-measures/political-appointee-tracker/> [<https://perma.cc/A5TT-CPY5>].

<sup>186</sup> *Id.* (as of January 27, 2024).

<sup>187</sup> See generally Anne Joseph O’Connell, *Actings*, 120 COLUM. L. REV. 613 (2020).

Those advantages align with governing by assignment. An administration may seek to bring in friendly talent while waiting for the Senate confirmation process (the leadership modality). Agencies may want technical talent that wouldn't join the agency permanently or that would require substantially longer time through contracting or research agreements (the staffing and projects modalities).

These advantages also align with historical understandings and debates over the use of the IPA. When the GAO reported to Congress in 1989 that the IPA was no longer serving its original intergovernmental purpose, OPM responded by stressing the changing pressures on the federal bureaucracy that pushed agencies to seek connections with academia.<sup>188</sup> The Carter-chartered task force, in 1977, similarly defended using the IPA to staff a bureaucracy in its report: To the extent that an “innovative Federal manager” brings in an assignee “because of ceiling constraints and thereby accomplishes his job better,” the manager “should be commended”<sup>189</sup> rather than criticized. After all, the IPA is an assignment authority;<sup>190</sup> it can be used for several purposes, including to build federal capacity through the staffing, leadership, and projects modalities.

Agencies' historical reliance on the IPA adds texture to our claim that the IPA offers a valuable mechanism to enhance federal bureaucratic capacity. First, agencies understood the IPA provided a workaround to salary caps for traditional government hiring. As an NSF representative explained in 1989, government salaries often are not competitive with industry or universities for technical talent; because federal pay scales make it difficult to attract NSF's desired talent, the IPA served as “a bit of a relief valve.”<sup>191</sup> Second, agencies saw the staffing modality as a second-best option given top-down hiring constraints. In a 1997 interview about the NSF's use of the IPA, a deputy director portrayed the IPA as a response to FTE caps despite a growing workload: “we had to work with what we were given.”<sup>192</sup>

Other constraints pushed administrations to use the IPA in its leadership modality. With an increasingly dysfunctional presidential appointments system, incoming administrations feel pressure to find alternative methods for staffing top agency jobs, including through acting officials and delegations of authority<sup>193</sup> but also temporary assignments under the IPA. As with the staffing modality, the IPA also allows assignees to preserve their home institution's pay, subject to cost-sharing negotiated at the agreement-by-agreement level. The IPA may therefore make service in an administration more attractive for academics in high-paying fields.

Finally, the IPA's projects modality comes out of budgetary and personnel pressures as well. Notably, conducting certain research and evaluation projects using IPAs is likely cost-saving compared to hiring outside consultants and contractors. This even holds true for fully reimbursed IPAs, though many academics come in on a non-reimbursed or cost-sharing basis. GSA, for example, runs a robust program bringing in academics to undertake research and evaluation work. The agency fully reimburses senior academics at \$175,000 per year and more junior academics at \$125,000 per year, which comes out to a rough hourly rate of \$62-\$88 per hour.<sup>194</sup> GSA reports that contractors performing similar evaluation tasks cost \$239 per hour, on average, which is significantly greater than fully reimbursing a senior-level incoming IPA.<sup>195</sup> This accords with

---

<sup>188</sup> 1989 Congressional Hearings, *supra* note 46, at 17 (statement of Leonard R. Klein, Off. of Pers. Mgmt., Career Entry and Employee Dev. Grp. Dep'y Assoc. Dir.).

<sup>189</sup> 1977 Task Force App'x IX, *supra* note 16, at 12.

<sup>190</sup> 1989 Congressional Hearings, *supra* note 46, at 20–21 (statement of Ardery Harris, Off. of Pers. Mgmt. Pers. Mobility Prog. Chief).

<sup>191</sup> *Id.* at 47 (statement of Jeff M. Fenstermacher, Nat'l Sci. Found., Directorate of Admin. Assist. Dir.).

<sup>192</sup> Jeffrey Mervis, *Revolving Door Brings in Scientists—at a Price*, 227 SCI. 1599, 1599 (1997), <https://www.science.org/doi/full/10.1126/science.277.5332.1599> [hereinafter Mervis, *Revolving*].

<sup>193</sup> See generally O'Connell, *Actings*, *supra* note 187.

<sup>194</sup> E-mail from GSA Off. of Evaluation Scis. official to authors (Nov. 15, 2023). Hourly calculations assume 2,000 hours per year from 50 weeks worked at 40 hours per week.

<sup>195</sup> *Id.*

government-wide data on research and evaluation contracts, which suggests average costs of at least \$200 per hour.<sup>196</sup>

Beyond cost-savings, the IPA also offers unique access to part-time hires.<sup>197</sup> Agencies and academics may value the flexibility of such part-time or intermittent assignments, especially for more research- or project-oriented tasks.<sup>198</sup> From the assignee’s perspective, academic resources at the home institution and settled life might make it difficult to move to Washington, D.C. for even a two-year assignment. But because access to administrative data is often a challenge, easier ways to access data—such as through a remote, part-time IPA assignment—may be very attractive for academics.<sup>199</sup> And from the agency’s perspective, research requirements—though perhaps central to its mission—may not justify a full-time hire or even going through the cumbersome process of a research agreement. The IPA’s flexibility responds to these dynamics by enabling agencies to acquire contingent, intermittent expertise in an efficient fashion.

\* \* \* \* \*

To return to the animating puzzle for this Part, the IPA’s multiple modalities suggest the statute has strayed from its original intended purpose. Few IPA agreements today seem to be targeted toward building state and local governmental capacity. And the IPA can seem in tension with, rather than furthering, principles of competitive examination based on rigid, impersonal standards of evaluation—what the 1970s-era Congress established as the benchmark for implementing what it believed was meritocratic governance.<sup>200</sup> These concerns go back decades to the early years of the IPA, when critics in the late 1970s alleged the IPA was being abused to bring academics into the federal bureaucracy to circumvent hiring caps, creating a seeming buddy-buddy system closer to patronage than competitive examination.

In a sense, those critics were right. The IPA provides a special tool for bringing talent to the federal bureaucracy—it bypasses constraints on other hiring authorities. But that brings benefits too. When conventional hiring processes fall short, IPA assignments can identify meritorious candidates. As a Reagan Administration official testified to Congress when advocating for the repeal of the *other* provisions of the original IPA, the mobility provision “provides a unique way of meeting special, temporary needs.”<sup>201</sup> Changing manifestations of the IPA reveal the wider pressures on the administrative state: cross-cutting demands for expanding social goods while avoiding “big government” has resulted in the federal government relying on a somewhat arcane statute to temporarily staff and lead agencies and to acquire technical talent. Governing by assignment is a byproduct—but also a reflection—of the broader politics of personnel.

These policy pressures help contextualize the rise of governing by assignment. In the next Part, we turn to the administrative law of assignment to understand how legal constraints may apply to the IPA’s modalities.

### III. The Administrative Law of Assignment

Policy and political pressures on the administrative state make governing by assignment an understandable method for agencies to achieve their missions and for presidential administrations to promote their policy agendas. But the practice raises novel administrative and constitutional law questions, which we turn to now. After all, IPA assignees’ positions in the federal bureaucracy are *sui generis*. Assignees serve, in most respects, as federal employees. Yet they are still employed by (indeed, are often paid by) their home

---

<sup>196</sup> Analysis of service contracts mentioning research or evaluation in their requirements with non-zero amounts invoiced as well as more than 10 hours invoiced. *Service Contract Inventory*, ACQUISITION.GOV, <https://www.acquisition.gov/content/service-contract-inventory>.

<sup>197</sup> 1989 Congressional Hearings, *supra* note 46, at 43.

<sup>198</sup> 2022 GAO Report, *supra* note 63, at 14–15.

<sup>199</sup> Jeffrey Mervis, *How Two Economists Got Direct Access to IRS Tax Records*, SCI. MAG. (May 22, 2014), <https://www.science.org/content/article/how-two-economists-got-direct-access-irs-tax-records> [<https://perma.cc/6CZQ-AETF>] [hereinafter Mervis, *IRS Tax Records*].

<sup>200</sup> We emphasize, as highlighted above, *see supra* Part II.B.1., that the current civil service staffing system has laudable goals but should not be synonymous with meritocracy.

<sup>201</sup> 1981 Congressional Hearings, *supra* note 17, at 15–16 (recording OPM Director’s testimony in favor of eliminating the IPA’s grants but not modifying “in any . . . way” Title IV of the IPA).

institutions. They are assigned, formally, by agency leaders and are subject to federal ethics regulations, but their duties are potentially unbounded, subject only to an agreement negotiated between the assignee, agency, and assignee’s home institution.

We take as our starting point current criticisms of the IPA—concerns that public managers face when seeking to use the IPA—and assess the discrete legal questions they raise. Specifically, we consider arguments that IPA assignees circumvent the civil service hiring process and the mandate that governmental employees alone exercise inherently governmental functions; that IPA assignees exercise problematic kinds of authority; and that IPA assignees allow outside entities to exert unjustified influence on governmental decisions. These policy concerns, as we show below, map onto doctrinal questions; answering those provides guidance on the risks of governing by assignment.

We focus here on the three modalities of IPA assignments bringing talent into the federal bureaucracy, assessing agencies’ “internal administrative law”<sup>202</sup> as well as publicly documented practice. We show that legal risk varies based on the IPA’s different modalities, which informs our policy reforms in Part IV. Before turning to each of the criticisms, however, we begin with an overview of the mechanics of assignment into the federal government through the IPA.

#### A. *Assignment to the Federal Government Under the IPA*

The IPA and its implementing regulations create a process for making assignments, but they mostly do not limit when agencies can make an IPA agreement or what kinds of duties an IPA assignee can perform. Some agencies’ internal regulations and policies impose additional constraints.

Under the IPA, the “head of a Federal agency” can “arrange” for an employee of a nonfederal organization to be “assign[ed]” to the agency.<sup>203</sup> That arrangement occurs through a “written agreement recording the obligations and responsibilities of the parties,” which must be approved by the “Federal agency,” the nonfederal organization, and the “assigned employee.”<sup>204</sup> The assignment “may not exceed two years,” but the “head” of the agency (or her designee) may extend the assignment for up to two additional years.<sup>205</sup>

The IPA provides for two types of assignments: “appoint[ments]” and “detail[s].”<sup>206</sup> An *appointed* assignment places the employee in a “classified” position (in the sense of civil service classification),<sup>207</sup> which renders her an “employee of the Federal agency for all purposes except” specified retirement-related statutes.<sup>208</sup> By contrast, a *detailed* assignee is not paid by the federal government and is an “employee of the agency” only for specific ethics-related laws.<sup>209</sup> (Note that we use the term employee more broadly in the Article than in this technical sense.)

---

<sup>202</sup> See generally Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017).

<sup>203</sup> 5 U.S.C. § 3372(a).

<sup>204</sup> 5 C.F.R. § 334.106(a).

<sup>205</sup> 5 U.S.C. § 3372(a)(2); see also 5 C.F.R. § 334.104 (specifying extra details on duration and who may make an assignment). Special provisions allow longer assignments to Tribes, 5 U.S.C. § 3372(a)(2), and when NASA is the federal agency, *id.* § 9808.

<sup>206</sup> 5 U.S.C. § 3374(a).

<sup>207</sup> See, e.g., U.S. AGENCY FOR INT’L DEV., ADS CHAPTER 437, TEMPORARY ASSIGNMENTS UNDER THE INTERGOVERNMENTAL PERSONNEL ACT (IPA) § 437.3.3 (2012), <https://www.usaid.gov/sites/default/files/2022-12/437.pdf> [<https://perma.cc/7KGG-2NJV>] [hereinafter USAID IPA Policy] (IPA appointments “must be assigned to a position that has been established and classified.”). In contrast, a detailee may be “assigned to an established, classified position in the Federal agency, or may be given a set of ad hoc, unclassified duties, relevant only to the specific assignment project.” OFF. PERS. MGMT., FEDERAL PERSONNEL MANUAL ch. 334, at 4–2(a) (1983), [https://www.google.com/books/edition/Federal\\_Personnel\\_Manual/t\\_dZAAAAYAAJ?hl=en&gbpv=1&pg=RA2-SA334-PA1&printsec=frontcover](https://www.google.com/books/edition/Federal_Personnel_Manual/t_dZAAAAYAAJ?hl=en&gbpv=1&pg=RA2-SA334-PA1&printsec=frontcover) [<https://perma.cc/6AFR-6A4J>] [hereinafter 1983 FPM].

<sup>208</sup> 5 U.S.C. § 3374(b).

<sup>209</sup> *Id.* § 3374(c). Because the appointed assignee is deemed a federal “employee” generally and a detailed assignee is not, an IPA assignment may be counted differently for FTE purposes based on the type of assignment. See, e.g., State Employees Detailed to Federal Government, 54 Comp. Gen. 210 (1974) (“A detailed assignee . . . remains an employee of the state or local government, and is not counted against the federal agency’s manpower ceiling.”).

Regarding a detailee’s duties, pay, and position, the IPA provides only skeletal requirements. The “supervision of the duties of” a detailee “may be governed by agreement” made between the agency and the nonfederal organization, and that agreement can include federal “reimbursement” of some (or all) of the detailee’s pay to the nonfederal organization (sometimes referred to as the home institution).<sup>210</sup> The “President” also has general authority to “prescribe regulations for the administration” of the IPA.<sup>211</sup> While systematic reporting is scarce, there is reason to think that most assignees into the federal government— incoming assignees—are detailees, not appointees.<sup>212</sup>

An IPA assignment ends when the agreement runs out, but both the agency and the home institution can end the assignment “at any time” otherwise.<sup>213</sup> In addition, if the “employer-employee relationship ceases to exist between the assignee or original employer,” then the assignment “automatically” terminates.<sup>214</sup> Furthermore, OPM may “direct Federal agencies to terminate assignments” made in violation of the IPA.<sup>215</sup>

The statute and its implementing regulations also establish a framework for funding IPA agreements. The IPA authorizes spending for two general purposes: pay/benefits and travel. Appointees into government are “entitled to pay” according to the GS scale,<sup>216</sup> and contributions for retirement benefits “may be made from the appropriations of the Federal agency concerned” for appointed assignees whose home institution does not provide such benefits.<sup>217</sup> Detailees, however, are “not entitled to pay from the agency” unless their home institutions’ pay is “less than the appropriate rate of pay which the duties would warrant” for the federal position.<sup>218</sup> An IPA agreement can provide for “reimbursement” from the agency to the home institution for a detailee’s “pay” as well as “the contribution of” the home institution to relevant “employee benefit systems.”<sup>219</sup> The IPA also permits reimbursement for specified travel expenses.<sup>220</sup>

The statute and its implementing regulations do not define the scope of authority an IPA assignee can exercise. Unsurprisingly, agencies employing IPA agreements have inconsistently dealt with the scope of permissible duties under the IPA. For example, agency guidance differs on the question whether an IPA assignee may supervise federal employees.<sup>221</sup> We turn, next, to the criticisms of the IPA.

---

<sup>210</sup> 5 U.S.C. § 3374(c)(3).

<sup>211</sup> *Id.* § 3376.

<sup>212</sup> See Memorandum from Robert I. Cusick, Off. Gov’t Ethics Dir., to Designated Agency Ethics Officials, DO–06–031, Intergovernmental Personnel Act Summary 3 (Oct. 19, 2006), [https://www.oge.gov/Web/OGE.nsf/0/8A557728B96731E7852585BA005BED04/\\$FILE/do-06-031.pdf](https://www.oge.gov/Web/OGE.nsf/0/8A557728B96731E7852585BA005BED04/$FILE/do-06-031.pdf) [<https://perma.cc/5LPW-F5P5>] [hereinafter 2006 OGE Memo] (“[O]ur understanding is that IPA assignments to Federal agencies are virtually always accomplished through details.”); see also 2022 GAO Report, *supra* note 63, at 4 (noting reviewed agencies only used details under the IPA).

<sup>213</sup> 5 C.F.R. § 334.107(a). The regulations do note that “[w]here possible, the party terminating the assignment prior to the agreed upon date should provide 30-days advance notice along with a statement of reasons, to the other parties to the agreement.” *Id.*

<sup>214</sup> *Id.* § 334.107(c).

<sup>215</sup> *Id.* § 334.107(d).

<sup>216</sup> 5 U.S.C. § 3374(b).

<sup>217</sup> *Id.* § 3374(e).

<sup>218</sup> *Id.* § 3374(c)(1).

<sup>219</sup> *Id.* § 3374(c)(3).

<sup>220</sup> 5 U.S.C. § 3375(a).

<sup>221</sup> See, e.g., 2022 GAO Report, *supra* note 63, at 17–18 (discussing different agency perspectives on allowing detailees to supervise federal employees); *id.* at 29 (noting OPM’s position that detailees “can serve as project leads and perform project management leadership activities such as assigning work” but not “other aspects of the federal supervisory function, such as conducting an employee’s annual performance rating”). Compare OFF. OF HUM. RES., U.S. DEP’T OF HEALTH & HUM. RES., INSTRUCTION 300-3: DETAIL AND INTERGOVERNMENTAL PERSONNEL ACT (IPA) ASSIGNMENTS § 300-3-70H(1)(c) (2023), <https://www.hhs.gov/about/agencies/asa/ohr/hr-library/300-3/index.html> [<https://perma.cc/3KRU-TPGS>] [hereinafter HHS IPA Policy] (noting that detailees may “supervise a project and perform certain team lead duties” but “cannot perform supervisory or team lead functions that impact an employee”), OFF. OF THE CHIEF HUM. CAPITAL OFFICER, U.S. DEP’T OF HOUS. & URB. DEV., DETAILS, INTERAGENCY AGREEMENT ASSIGNMENTS, AND INTERGOVERNMENTAL PERSONNEL ACT ASSIGNMENTS POLICY (FOR NON-BARGAINING UNIT AND NFFE EMPLOYEES ONLY) § 6–1(4), at 16 (2016) <https://www.hud.gov/sites/documents/750.1CHCH.PDF> [<https://perma.cc/FSL9-DKV8>] [hereinafter HUD Non-Bargaining

## B. *Civil Service Staffing*

One important criticism of the IPA is that it circumvents the traditional civil service system for hiring staff.<sup>222</sup> Forms of this criticism have existed throughout the IPA's history, where the IPA has been accused of enabling a "buddy-buddy" hiring process or allowing an assignee to earn more than a normal governmental employee.<sup>223</sup>

As a practical matter, whether the IPA undermines the civil service staffing system may well depend on specific use cases. For example, IRS's Joint Statistical Research Program and at least some of NASA's searches for IPA assignments proceed through open solicitations for applications, which facially are similar to USAJobs postings. But such examples are not typical, and, at core, the IPA does provide an alternative method of acquiring talent, just as the excepted service does.

The more fundamental issue raised by the IPA concerns whether there are limits to the kinds of activities an IPA assignee can perform. The Constitution's nondelegation principles require "inherently governmental functions" to be performed by governmental employees.<sup>224</sup> Office of Management and Budget (OMB) guidance details these functions.<sup>225</sup> Two questions thus arise for governing by assignment: What are "inherently governmental functions," and are IPA assignees governmental employees?

OMB defines an "inherently governmental function" as "a function that is so intimately related to the public interest as to require performance by Federal Government employees."<sup>226</sup> It describes such functions in terms of decisionmaking that involves the "interpretation and execution" of federal law.<sup>227</sup> The guidance notes that "providing advice, opinions, or recommended actions" is a proper function for a nongovernmental worker (namely, a contractor in the guidance) so long as that worker "does not have the authority to decide on the overall course of action" and the agency employee "has the ability to override the contractor's action."<sup>228</sup>

OMB lists examples that are inherently governmental, such as the conduct of criminal investigations and prosecutions; "determination of agency policy"; "selection," "direction," and "control" of federal employees; "selection of grant and cooperative agreement recipients"; and "[r]epresentation of the

---

Assignments Policy] (noting IPA detailees may not "occupy a supervisory/management position or assume a supervisory/management role whereby he/she supervises federal employees"), and OFF. OF THE CHIEF HUM. CAPITAL OFFICER, U.S. DEP'T OF HOUS. & URB. DEV., DETAILS, INTERAGENCY AGREEMENT ASSIGNMENTS, AND INTERGOVERNMENTAL PERSONNEL ACT ASSIGNMENTS POLICY (FOR AFGE BARGAINING UNIT EMPLOYEES ONLY) § 6-1(4), at 16 (2016), <https://www.hud.gov/sites/documents/750.1AFGECHCH.PDF> [<https://perma.cc/T9XN-4VE4>] (same); with Hum. Capital, *Intergovernmental Personnel Act (IPA) Mobility Program Guidance*, U.S. GEOLOGICAL SURV., <https://www.usgs.gov/human-capital/intergovernmental-personnel-act-ipa-mobility-program-guidance> [<https://perma.cc/7PZW-NNCB>] [hereinafter USGS IPA Policy] ("A non-Federal employee who is assigned to a Federal position, either by detail or appointment, may exercise supervision of Federal employees."); U.S. AGENCY FOR INT'L DEV., IPA ASSIGNMENTS – FREQUENTLY ASKED QUESTIONS: AN ADDITIONAL HELP DOCUMENT FOR ADS CHAPTER 437, at 5 (2012), <https://www.usaid.gov/sites/default/files/2022-05/437saa.pdf> [<https://perma.cc/2D2U-CRFH>] (similar); DEP'T OF VETERANS AFFS., VA HANDBOOK 5005/32, § C(2)(c) (2010), [https://www.research.va.gov/programs/nppo/docs/VA\\_HANDBOOK\\_5005.doc](https://www.research.va.gov/programs/nppo/docs/VA_HANDBOOK_5005.doc) [<https://perma.cc/JKD3-JFQ9>] [hereinafter VA IPA Policy] (similar). The *Federal Personnel Manual* authorized IPA assignees to exercise supervision, but its rules on the IPA were abolished in the early 1990s. See 1983 FPM, *supra* note 207, ch. 334, at 4-1(b); U.S. OFF. OF PERS. MGMT., FPM SUNSET DOCUMENT 7 (1993), [https://books.google.com/books?id=BC-OcsfN-3EC&printsec=frontcover&source=gbs\\_ViewAPI#v=onepage&q&f=false](https://books.google.com/books?id=BC-OcsfN-3EC&printsec=frontcover&source=gbs_ViewAPI#v=onepage&q&f=false) [<https://perma.cc/VXG4-K9P2>] [hereinafter FPM Sunset] (noting Chapter 334 was abolished).

<sup>222</sup> See, e.g., PRESS RELEASE, HOUSE OVERSIGHT COMM., COMER PROBES SEC SKIRTING FEDERAL HIRING PRACTICES (Aug. 1, 2023), <https://oversight.house.gov/release/comer-probes-sec-skirting-federal-hiring-practices> [<https://perma.cc/28A6-T84F>] (expressing concern that the SEC is "improperly using the IPA to avoid normal hiring practices").

<sup>223</sup> See, e.g., 1977 Task Force App'x IX, *supra* note 16, at 11.

<sup>224</sup> A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Carter v. Carter Coal Co., 298 U.S. 238 (1936).

<sup>225</sup> Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56,227, 56,236 (Sept. 12, 2011).

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 56,237.

government before administrative and judicial tribunals.”<sup>229</sup> When considering a function not in OMB’s list, the guidance instructs agencies to make a “case-by-case” assessment of whether the function: (1) “involve[s] the exercise of sovereign powers of the United States” and thus is “governmental by [its] very nature”; and (2) includes discretion to “commit[] the government to a course of action” absent oversight by agency officials.<sup>230</sup>

These are not clear tests. Agencies, unsurprisingly, find it difficult to draw the line for an “inherently governmental function.”<sup>231</sup> As one policy analyst memorably put it: “Trying to define the term is like trying to nail Jell-O to the wall; only nailing Jell-O is easier.”<sup>232</sup>

In addition to constituting a fuzzy line, there are limited opportunities to contest determinations. Those opportunities fall primarily within the political branches, not the courts. Circular A-76, an OMB memorandum that bars outsourcing of inherently governmental functions,<sup>233</sup> and other statutes provide an internal mechanism for challenging an agency’s decisions on whether an activity qualifies as an inherently governmental function. For example, under the FAIR Act of 1998, agencies must publish a list of agency functions and classify them as inherently governmental or not; interested parties can challenge a designation within the agency and appeal it to the head of the agency.<sup>234</sup> In 2003, Circular A-76 expanded the FAIR Act’s mandate and gave analogous procedures for challenging designations within each agency.<sup>235</sup> Under the Competition in Contracting Act of 1984,<sup>236</sup> GAO can hear federal procurement protests and issue advisory opinions, which has led to “caselaw” in specific contexts.<sup>237</sup>

But the courts are largely not hearing challenges. OMB’s guidance disclaims the force of law, making it nonfinal under the Administrative Procedure Act for many courts (and hence unreviewable).<sup>238</sup> Standing is a significant bar.<sup>239</sup> And courts likely do not want to wade into disputes over what look like core executive branch decisions about administrative organization.<sup>240</sup> Plus, there’s an asymmetry—outsourcing functions may be open to challenge but keeping functions inhouse is not. In short, the designation of a function as

---

<sup>229</sup> See *id.* at 56,240–41.

<sup>230</sup> *Id.* at 56,237.

<sup>231</sup> See BRIDGET C.E. DOOLING & RACHEL AUGUSTINE POTTER, CONTRACTORS IN RULEMAKING 44 (Rep. for the Admin. Conf. of the U.S. 2022),

<https://www.acus.gov/sites/default/files/documents/Contractors%20in%20Rulemaking%20Final%20Report.pdf>

[<https://perma.cc/7G67-7AAR>] [hereinafter Dooling & Potter, 2022 ACUS Report] (describing agency officials as having a “widespread but incomplete awareness of the existence of an inherently governmental function line with respect to rulemaking”).

<sup>232</sup> David Isenberg, *To Be, or Not to Be, Inherent: That Is the Question*, HUFF POST: THE BLOG (June 15, 2010; updated May 25, 2011), <https://perma.cc/2KHS-P4QZ>.

<sup>233</sup> Thomas J. Laubacher, *Simplifying Inherently Governmental Functions*, 46 PUB. CONT. L.J. 791, 799–800 (2017); Dooling & Potter, 2022 ACUS Report, *supra* note 231, at 12. On Circular A-76, see VALERIE ANN BAILEY GRASSO, CONG. RSCH. SERV., R40854, CIRCULAR A-76 AND THE MORATORIUM ON DOD COMPETITIONS: BACKGROUND AND ISSUES FOR CONGRESS 1–5 (2013), <https://sgp.fas.org/crs/misc/R40854.pdf> [<https://perma.cc/2CR4-8A96>] (detailing history and policy debates over A-76).

<sup>234</sup> Federal Activities Inventory Reform Act of 1998, Pub. L. 105–270, §§ 2–3, 112 Stat. 2382, 2382–83 (1998); see also Laubacher, *supra* note 233, at 812.

<sup>235</sup> Laubacher, *supra* note 233, at 813 (citing OFF. OF MGMT. & BUDGET, CIRCULAR NO. A-76 (REVISED), PERFORMANCE OF COMMERCIAL ACTIVITIES, at A-4 (2003) [<https://perma.cc/F68P-MTW7>]).

<sup>236</sup> Competition in Contracting Act of 1984, Pub. L. 98–369, § 2741(a), 98 Stat. 494, 1199–203 (1984) (codified at 31 U.S.C. § 3552(a)).

<sup>237</sup> See Laubacher, *supra* note 233, at 815 n.182.

<sup>238</sup> See Policy Letter 11–01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56,227, 56,240 (Sept. 12, 2011) (“[T]his policy letter is not intended, and should not be construed, to create any substantive or procedural basis on which to challenge any agency action or inaction on the ground that such action or inaction was not in accordance with this policy letter.”); KATE M. MANUEL, CONG. RSCH. SERV., R42325, DEFINITIONS OF “INHERENTLY GOVERNMENTAL FUNCTION” IN FEDERAL PROCUREMENT LAW AND GUIDANCE 12 (2014), <https://sgp.fas.org/crs/misc/R42325.pdf> [<https://perma.cc/K7M7-SGSX>]; see also *Pac. Gas & Elec. Co. v. Fed. Power Comm’n*, 506 F.2d 33, 38 (D.C. Cir. 1974).

<sup>239</sup> See Bridget C.E. Dooling & Rachel Augustine Potter, *Regulatory Body Shops* (manuscript at 14) (Jan. 27, 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4186402](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4186402) [<https://perma.cc/KQ3K-PTD5>] [hereinafter Dooling & Potter, *Body Shops*]; Laubacher, *supra* note 233, at 816; Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 452–54 (2006) [hereinafter Verkuil, *Public Law*].

<sup>240</sup> See Verkuil, *Public Law*, *supra* note 239, at 451.



“inherently governmental” remains within the agency’s determination, subject only to GAO—and larger congressional—oversight.<sup>241</sup>

Agencies seem aware of a need to prevent IPA assignees from performing inherently governmental functions.<sup>242</sup> But some functions, such as supervising federal employees or contributing to policy decisions, may come close to the line (and the first arguably crosses it under OMB guidance). Legal concerns for an IPA assignee performing an inherently governmental function rest on two subsidiary questions.

First, does this limit even apply to an IPA assignee? After all, IPA assignees may not be contractors under the law of procurement. *Formally*, the IPA differentiates between an *appointee*, who is basically an employee,<sup>243</sup> and a *detailee*, who is treated as an “employee” only for specific purposes (mainly ethics requirements).<sup>244</sup> It may make sense to restrict inherently governmental functions to “employees” and therefore to IPA appointees but not to detailees—a line that some agencies have chosen to adhere to.<sup>245</sup>

*Functionally*, IPA assignees exist in a middle ground between contractors and full employees. OMB emphasizes two values associated with the prohibition on contractors performing inherently governmental functions: “ensur[ing] that the act of governance is performed . . . by officials who are [(1)] ultimately accountable to the President and [(2)] bound by laws controlling the conduct and performance of Federal employees.”<sup>246</sup> On the one hand, like federal employees, assignees must follow government ethics laws. Moreover, all assignees remain employed at their home institution, where they will normally return after their IPA assignment (and many, such as university academics, will have tenure protections). The financial incentives therefore differ from private contractors, who earn money by providing services or products to the government. On the other hand, to the extent that “accountab[ility] to the President” is controlling for who should be able to exercise governmental functions, then an IPA assignee, by virtue of her continuing home employment, may be less accountable than a permanent federal employee who (ostensibly) has a single principal (ultimately, the President). Tenured professors may generate less concerns here as their home institution employment is guaranteed.

Overall, we see IPA assignees as closer to government employees than contractors, on formalist and functional grounds, and contend that the inherently government function limit does not apply to them—especially for appointees. Not all agency overseers agree. For example, the IG for DOD in the 1990s criticized an office for allowing IPA assignees to perform seemingly inherently governmental functions.<sup>247</sup> Notably, the agency responded that that guidance was not intended to apply to IPA assignees.<sup>248</sup>

If IPA assignees should not exercise inherently governmental functions, contrary to our legal view, solutions are easy. Agencies should ensure that IPAs are supervised by federal employees—in other words that assignees serve, at most, in an advisory position rather than exercising ultimate authority. IPA agreements can impose sufficient limits and supervision. Although a typical IPA agreement is concise and, presumably, non-exhaustive of what assignees end up doing at the agency,<sup>249</sup> all IPA agreements require listing an

---

<sup>241</sup> In the same way, as shown throughout this Part, the administrative law of the IPA is primarily a creature of the internal rules set by agencies subject to oversight by Congress, GAO, and IGs, rather than being subject to judicial review.

<sup>242</sup> *E.g.*, Interview 7 (Nov. 21, 2023) (describing NASA’s restrictions on placing IPAs on committees in charge of mission selection).

<sup>243</sup> See 5 U.S.C. § 3374(b).

<sup>244</sup> See 5 U.S.C. § 3374(c); see also 2006 OGE Memo, *supra* note 212, at 3.

<sup>245</sup> For example, HHS rules specify that detailees may not exercise inherently governmental functions but include no such provision for appointees. See HHS IPA Policy, *supra* note 221, § 300–3–70(H)(1)(c). USAID’s regulations are similar. See USAID IPA Policy, *supra* note 207, § 437.3.3.

<sup>246</sup> Policy Letter 11–01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56,227, 56,236 (Sept. 12, 2011).

<sup>247</sup> DEP’T OF DEF. OFF. OF THE INSPECTOR GEN., NO. 98–036, INTERGOVERNMENTAL PERSONNEL ACT EMPLOYEES IN THE OFFICE OF THE ASSISTANT TO THE SECRETARY OF DEFENSE (NUCLEAR AND CHEMICAL AND BIOLOGICAL DEFENSE PROGRAMS) 7 (1997), [https://media.defense.gov/2018/Aug/29/2001959886/-1/-1/1/REPORT%20NO.%2098-036%20\(REDACTED\).PDF](https://media.defense.gov/2018/Aug/29/2001959886/-1/-1/1/REPORT%20NO.%2098-036%20(REDACTED).PDF) [<https://perma.cc/D2LS-GCAY>] [hereinafter 1997 DOD IG Report].

<sup>248</sup> *Id.* at 18.

<sup>249</sup> Dooling and Potter note that contracts can “grow” as agencies are willing to give more tasks to the contractor and as more support is needed. See Dooling & Potter, *Body Shops*, *supra* note 239 (manuscript at 13). That seems possible in the IPA context too, where an IPA might be brought in for one set of duties but end up being useful in other capacities.

“immediate supervisor”<sup>250</sup> who can assure that the assignee does not make final decisions. If the assignee’s supervisor ratifies decisions recommended by the assignee, then the prohibition on outsourcing inherently governmental functions should be met. This is how it works in contracting.<sup>251</sup> And if it works in contracting, where contractors have different economic incentives than IPA assignees, it should work in the IPA context.

### C. Authority

A second major criticism of the IPA is that some assignees exercise too much authority—that there is something improper, the argument goes, with a temporary person employed outside the government playing an important leadership role in a presidential administration<sup>252</sup> or an agency.<sup>253</sup> The Constitution directly addresses the authority a governmental employee may properly exercise.<sup>254</sup> Under the Appointments Clause, individuals whose duties and positions make them “officers” must be appointed through specific mechanisms.<sup>255</sup> That constraint applies most when the IPA is used to staff a presidential administration under the leadership modality.

The Appointments Clause raises two separate issues: first, whether the position falls under the Clause (i.e., whether the assignee is an “Officer[] of the United States” within the meaning of the Clause or “simply [an] employee[] of the Federal Government”<sup>256</sup>); and second, what method of appointment is called for by the Clause.

Starting with the distinction between an “officer and “employee,” the Supreme Court explained in *Lucia v. SEC* that the “basic framework for distinguishing between officers and employees” requires assessing two questions: (1) whether the officer “occup[ies] a ‘continuing’ position established by law”; and (2) whether the officer “exercise[s] significant authority pursuant to the laws of the United States.”<sup>257</sup>

Many IPA assignees do not hold a “continuing” position. Typical assignments for IPAs are, for example, to “lead major research projects” or to participate on an “as-needed basis” for “research on developing guidance.”<sup>258</sup> In both cases, the assignee’s position is “of such a nature that it will terminate ‘by the very fact of performance,’”<sup>259</sup> in OLC’s phrasing. Her position is like that of the special masters distinguished in *Freytag*, whom the Supreme Court described as nonofficers because they were “hired . . . on a temporary, episodic basis,” unlike the special tax judges at issue.<sup>260</sup>

In addition, an assignee’s position arguably is not “established by Law” as courts have understood that term. To be sure, the IPA authorizes certain employment relationships. But the statute creates only authority for assignment agreements. An IPA detailee’s position—unless she is detailed to a preexisting position in the bureaucracy—is formed by the IPA agreement itself.<sup>261</sup> Thus, for example, IPA assignees differ from the

---

<sup>250</sup> See OFF. OF PERS. MGMT., OF 69 # (rev. 2-89), [https://www.opm.gov/forms/pdf\\_fill/of69.pdf](https://www.opm.gov/forms/pdf_fill/of69.pdf) [<https://perma.cc/QXK2-X5NN>] (providing template for IPA assignment agreement).

<sup>251</sup> Dooling & Potter, *Body Shops*, *supra* note 239 (manuscript at 13).

<sup>252</sup> See, e.g., Letter from Chuck Grassley, Senator, to Arati Prabhakar, Off. of Sci. & Tech. Pol’y Dir. 1 (Jan 10, 2023), [https://www.grassley.senate.gov/imo/media/doc/grassley\\_to\\_office\\_of\\_science\\_and\\_technology\\_policy\\_-\\_ipa\\_oversight.pdf](https://www.grassley.senate.gov/imo/media/doc/grassley_to_office_of_science_and_technology_policy_-_ipa_oversight.pdf) [<https://perma.cc/CMP6-HRGF>].

<sup>253</sup> See, e.g., NAT’L AERONAUTICS & SPACE ADMIN. OFF. OF INSPECTOR GEN., G-99-018, INTERGOVERNMENTAL PERSONNEL ACT ASSIGNMENTS TO NASA 3 (July 21, 2000), <https://perma.cc/XMK7-HYZ5> (describing “[m]any IPA detailees to NASA” as “hold[ing] positions of supervisory or managerial responsibility”: they “manage NASA programs, make significant decisions involving NASA resources, and supervise civil servants”).

<sup>254</sup> A related concern is that the IPA’s authority is improper because of ethical concerns, such as conflicts of interest. Those are discussed below. See *infra* notes 300–326 and accompanying text.

<sup>255</sup> U.S. Const., art. II, § 2, cl. 2.

<sup>256</sup> *Lucia v. Sec’y & Exchange Comm’n*, 138 S. Ct. 2044, 2051 (2018).

<sup>257</sup> *Id.* (citations omitted).

<sup>258</sup> See 2022 GAO Report, *supra* note 63, at 15, 17.

<sup>259</sup> Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 111 (2007) [hereinafter 2007 OLC Memo] (citation omitted).

<sup>260</sup> *Freytag v. Comm’r*, 501 U.S. 868, 881 (1991).

<sup>261</sup> Note that this is not true for an appointment under the IPA, where the assignee takes a classified position in the federal bureaucracy. But, as noted above, most IPA assignments seem to be details rather than appointments. See *supra* note 212.

members of the Preventive Services Task Force (PSTF)—a group of part-time, volunteer experts who make determinations on the scope of the Affordable Care Act’s insurance-coverage requirements for preventive care—whose appointment process was successfully challenged in a district court in *Braidwood*.<sup>262</sup> The PSTF was “convene[d],” according to statute, by the Director of the Agency for Healthcare Research and Quality;<sup>263</sup> in other words, Congress “created” the office of the PSTF.<sup>264</sup> Unlike for IPA assignees, whose positions may only exist for the duration of an IPA agreement, the PSTF “will continue until Congress amends or repeals the statute creating them.”<sup>265</sup> On the other hand, courts have viewed agency housekeeping statutes, which allow agency heads to create positions, as qualifying for “established by Law.”<sup>266</sup>

The IPA assignee’s “duties” and “salary” are also defined by a case-by-case negotiation of an IPA agreement with the agency, assignee, and assignee’s home institution, subject to time limits.<sup>267</sup> In contrast, the duties and salary of *Freytag*’s special tax judges were defined in statute,<sup>268</sup> as were those of the PSTF members in *Braidwood* (the periodic reports and updates to the PSTF’s recommendations were mandated by statute,<sup>269</sup> and the positions were unpaid beyond compensation for trainings and meetings<sup>270</sup>).

Finally, while the IPA “specifie[s]” the “means of appointment” of an IPA assignee,<sup>271</sup> it does not include any other constraints on who may be appointed. By contrast, the PSTF’s members have “qualifications” as well as “four-year terms,”<sup>272</sup> defined by law (in regulations).<sup>273</sup> In sum, the IPA often creates temporary, often bespoke positions for assignees, who are seconded under the terms of a contract negotiated between the home institution, the agency, and the assignee. The typical IPA assignee therefore lacks a “continuing office” within the meaning of *Lucia*.

There are, however, times when agencies use the IPA to fill preexisting positions. In these cases, the assignees could more easily meet the first threshold for being an “officer,”<sup>274</sup> particularly in the staffing and leadership modalities. Think, for example, of the NSF’s IPA assignees serving as program officers

---

<sup>262</sup> *Braidwood Mgmt. Inc. v. Becerra*, 627 F. Supp. 3d 624, 631–32, 641 (N.D. Tex. 2022). This litigation is ongoing.

<sup>263</sup> *Id.* at 632 (quoting 42 U.S.C. § 299b-4(a)(1)).

<sup>264</sup> *Id.* at 642.

<sup>265</sup> *Id.*

<sup>266</sup> See, e.g., *Willy v. Admin. Rev. Bd.*, 423 F.3d 483, 491–92 (5th Cir. 2005) (holding that statute enabling agency head to delegate “any function of the Secretary” to officers or employees of the agency along with statute giving her authority to “prescribe regulations for the government of [her] department” were sufficient to create and appoint board members and assuming that those members were “officers” subject to the Appointments Clause (citing Reorganization Plan No. 6 of 1950, § 2, 15 Fed. Reg. 3174, 3174 (1950) and 5 U.S.C. § 301)); *In re Grand Jury Investigation*, 916 F.3d 1047, 1053–54 (D.C. Cir. 2019) (concluding that DOJ organic statutes vested the Attorney General with authority “by law” to appoint a special counsel who was an inferior officer).

<sup>267</sup> The two-year cap is subject to some exceptions, such as for NASA and outgoing assignments to Tribes or Tribal organizations. See *supra* note 205.

<sup>268</sup> See 26 U.S.C. § 7443A(b) & (d) (assigning proceedings over which special trial judges may preside and defining their salary).

<sup>269</sup> *Braidwood*, 627 F. Supp. 3d at 642.

<sup>270</sup> Solicitation for Nominations for Members of the U.S. Preventive Services Task Force (USPSTF), 87 Fed. Reg. 2436, 2437 (2022) (PSTF members “are all volunteers and do not receive any compensation beyond support for travel to attend the thrice yearly meetings and trainings.”)

<sup>271</sup> *Freytag v. Comm’r*, 501 U.S. 868, 881 (1991).

<sup>272</sup> *Braidwood*, 627 F. Supp. 3d at 642.

<sup>273</sup> See 87 Fed. Reg. at 2437 (defining qualifications and term for PSTF members).

<sup>274</sup> Appointees under the IPA are given an “excepted appointment” and are therefore assigned into positions within the federal paygrade system. See 1983 FPM, *supra* note 207, ch. 334, at 4–3(a); HHS IPA Policy, *supra* note 221, § 300-3-70(H)(2)(a); USAID IPA Policy, *supra* note 207, § 437.3.3. In contrast, a detailee may be “assigned to an established, classified position in the Federal agency, or may be given a set of ad hoc, unclassified duties, relevant only to the specific assignment project.” 1983 FPM, *supra* note 207, ch. 334, at 4–2(a); HHS IPA Policy, *supra* note 221, § 300-3-70(H)(1)(b)(i)–(ii) (noting that details can have “unclassified duties”); USAID IPA Policy, *supra* note 207, § 437.3.3 (same). However, our understanding is that most IPA assignees into the federal government are detailees rather than appointees. See *supra* note 212 and accompanying text.

administering the NSF’s merit review system<sup>275</sup> or of the assignee who served as the Principal Deputy Assistant Attorney General (PDAAG) for the Department of Justice’s Civil Rights Division.<sup>276</sup>

Turning to the second requirement for an “officer” under the Appointments Clause—whether the officer “exercise[s] significant authority pursuant to the laws of the United States”—the *Lucia* Court noted that exercising “significant discretion” in “important functions” within the meaning of *Freytag* sufficed for the special judges there to qualify as “officers.”<sup>277</sup> Applying the doctrine to the IPA requires a specific agreement to analyze. But if the assignee exercises significant discretion without supervision<sup>278</sup> or makes binding decisions on the United States or third parties (such as being the top person signing off on a complaint or contract),<sup>279</sup> that authority would likely meet the second requirement. The leadership modality thus raises Appointments Clause concerns if the assignee carries out a sufficiently significant duties.

Even if an IPA assignee is an “officer,” the next question is whether she is a “principal” or “inferior” officer—and therefore what method of appointment comports with the Appointments Clause. The Clause allows the “Heads of Departments” to appoint inferior officers. Under the IPA, the “head of a Federal agency may arrange for”<sup>280</sup> the assignment, although implementing regulations permit the head’s “designee” to “make” the assignment as well.<sup>281</sup> For the staffing modality, where presumably the agency seeks to fill lower-level (non-officer) positions through the IPA, Appointments Clause concerns are less pressing and, as such, agencies might choose to subdelegate the authority to make the IPA assignment down the chain of command. For the leadership modality, however, two interrelated questions arise.

First, is there a difference between the “Departments” referred to in the Constitution and the “Federal agenc[ies]” referred to in the IPA? There is a slight one. The Court has defined a “Department” for Appointments Clause purposes as a “freestanding component of the Executive Branch, not subordinate to or contained within any other such component.”<sup>282</sup> But the IPA includes government corporations and independent establishments as well as certain legislative and judicial agencies.<sup>283</sup>

Second, which entity is the “Federal agency” whose “head” makes the IPA assignment? Suppose the United States Geological Survey (USGS), a bureau within the Department of the Interior (DOI),<sup>284</sup> seeks an incoming IPA assignment. DOI’s Office of the Secretary has delegated authority to make IPA assignments to

---

<sup>275</sup> NAT’L SCI. FOUND. OFF. OF INSPECTOR GEN., OIG 17–2–008, NSF CONTROLS TO MITIGATE IPA CONFLICTS OF INTEREST 1 (2017), [https://oig.nsf.gov/sites/default/files/reports/2022-01/17-2-008\\_COI.pdf](https://oig.nsf.gov/sites/default/files/reports/2022-01/17-2-008_COI.pdf) [<https://perma.cc/A4WH-K44Y>] [hereinafter 2017 NSF IG Report].

<sup>276</sup> *Former Principal Deputy Assistant Attorney General Pamela S. Karlan*, U.S. DEP’T OF JUST. ARCHIVES (last updated May 27, 2021), <https://www.justice.gov/archives/crt/staff-profile/former-principal-deputy-assistant-attorney-general-pamela-s-karlan> [<https://perma.cc/W6AE-M3V6>]. The PDAAG is a “continuing” position. *See generally How Is the Civil Rights Division Organized?*, U.S. DEP’T OF JUST. (last updated May 27, 2021), <https://www.justice.gov/crt/how-civil-rights-division-organized> [<https://perma.cc/YZ9W-NJFG>].

<sup>277</sup> *Lucia v. Sec’y & Exchange Comm’n*, 138 S. Ct. 2044, 2051 (2018).

<sup>278</sup> *See id.* at 2052 (noting that “exercis[ing] significant discretion” implies the individuals “were officers”); 2007 OLC Memo, *supra* note 259, at 93 (noting that discretion, while not necessary to officer status, “is of course relevant” because “discretion in administering the laws typically will constitute the exercise of delegated sovereign authority”).

<sup>279</sup> *See Lucia*, 138 S. Ct. at 2052 n.4 (noting final decisionmaking authority is not a “*sine qua non* of officer status”); 2007 OLC Memo, *supra* note 259, at 87 (describing delegated sovereign authority as including “power . . . to bind third parties, or the government itself”); *Ass’n of Am. R.R. v. U.S. Dep’t of Transp.* (*Ass’n of Am. R.R. III*), 821 F.3d 19, 37–38 (D.C. Cir. 2016) (holding private arbitrators with authority to bind the federal government in developing performance metrics for trains were “officers”).

<sup>280</sup> 5 U.S.C. § 3372(a).

<sup>281</sup> 5 C.F.R. § 334.104 (2022). OPM added recognition that an agency head’s designee could make the IPA agreement in response to a DOJ comment noting that many agencies had delegated the authority internally. *See Intergovernmental Personnel Act Mobility Program*, 62 Fed. Reg. 23,126, 23,126 (Apr. 29, 1997).

<sup>282</sup> *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 511 (2010).

<sup>283</sup> *See* 5 U.S.C. § 3371(3) (defining “agencies”); *see also* 5 C.F.R. § 334.102 (incorporating Section 3371(3)’s definition).

<sup>284</sup> DEP’T OF THE INTERIOR, DEPARTMENTAL MANUAL, 105 DM 2.1.B (Nov. 24, 2020), <https://www.doi.gov/sites/doi.gov/files/clips/documents/105-dm-2.pdf> [<https://perma.cc/WWR4-4FB6>].

the “Bureau directors (or their designee),”<sup>285</sup> and USGS in turn has placed the “approval level” for IPA assignment agreements “with Office Chiefs reporting to the USGS Director/Deputy Director; and managers/supervisors who report directly to an Associate Director or Regional Executive.”<sup>286</sup> In this context, the “agency” authorizing the IPA assignment appears to be USGS, but it would be DOI if it retained approval authority.<sup>287</sup> If an IPA assignee to the USGS qualifies as an inferior officer, the delegation almost certainly raises Appointment Clause concerns. After *Lucia*, agencies like the SEC stopped delegating final selection of ALJs downward to an office within the agency, and such delegations could similarly cease with high-level IPA assignments.

A final concern involves whether IPA assignees could ever qualify as principal officers. As the Court has explained, “[g]enerally speaking,” what separates an “inferior” from a “principal” officer is whether the officer’s work is “directed and supervised at some level” by a principal officer.<sup>288</sup> Legal issues could therefore arise if an IPA assignee were given unilateral power to make decisions binding the United States. Interestingly, the Court has permitted temporary service in principal positions, seeing the interim person as an *inferior* officer despite the lack of direction and supervision.<sup>289</sup> In theory, then, an IPA assignment could fill even a principal office, at least for some amount of time, as a constitutional matter. But there seems to be a statutory bar, at least when it comes to titles. When a Principal Deputy Assistant Attorney General position was staffed through an IPA assignment, the assignee could not use the “acting” title for the vacant Assistant Attorney General job under the Federal Vacancies Reform Act. But she could carry out most duties of the vacant position through delegation orders.

#### D. *Outside Influence*

A third major criticism of the IPA is that it enables outsiders to influence the work of government in problematic ways. Senator Grassley’s “sweeping review” of the use of the IPA under President Biden was couched in these terms: he sought information about IPA assignees whose salaries were covered by a nonprofit funded by the former Google CEO Eric Schmidt, arguing the assignments “raised conflicts of interest concerns given Schmidt’s significant investments in technology companies.”<sup>290</sup>

This criticism implicates at least three potential legal areas, which we turn to below. First, although there is currently no concern outside the Fifth Circuit, a pending Supreme Court case may imply that outside entities funding IPA assignees raises an Appropriations Clause issue. Second, various ethics laws cover conflicts of interest, which have been the basis for much previous scrutiny of agencies’ IPA usage by their IGs. Third, the concern generates questions about the institutional infrastructure that exists to oversee usage of the IPA—both internal to each agency and across agencies.

---

<sup>285</sup> DEPT’ OF THE INTERIOR, PERSONNEL BULLETIN NO. 21–05, at 2 (May 5, 2021), <https://www.doi.gov/sites/doi.gov/files/elips/documents/personnel-bulletin-21-05-ipa-mobility-program-5.5.21-final.pdf> [<https://perma.cc/8WSZ-T8EQ>]. That personnel bulletin was signed off by the Director of the Office of Human Capital, *see id.* at 5, who in turn has been delegated “[a]ll program and management authority necessary to carry out the functions of the position,” DEPT’ OF THE INTERIOR, DEPARTMENTAL MANUAL, 212 DM 15.1.A (May 10, 2013), <https://www.doi.gov/sites/doi.gov/files/elips/documents/212-dm-15.pdf> [<https://perma.cc/4FUK-HZAE>]; among those functions is to “[d]evelop[] effective human capital management . . . policies.” DEPT’ OF THE INTERIOR, DEPARTMENTAL MANUAL, 112 DM 15.2.A (Oct. 23, 2019), <https://www.doi.gov/sites/doi.gov/files/elips/documents/112-dm-15.pdf> [<https://perma.cc/33EX-BAXR>].

<sup>286</sup> USGS IPA Policy, *supra* note 221.

<sup>287</sup> *See Lucia v. Sec’y & Exchange Comm’n*, 138 S. Ct. 2044, 2050 (2018) (noting that the SEC did not appoint the administrative-law judge because it delegated that power to “SEC staff members”).

<sup>288</sup> *Edmond*, 520 U.S. 651, 662–63 (1997).

<sup>289</sup> *See United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1985 (2021) (citing *United States v. Eaton*, 169 U.S. 331, 343 (1898), for the proposition that “an inferior officer can perform functions of principal office on acting basis); *see also* *Rop v. Fed. Hous. Fin. Agency*, 50 F. 4th 562, 570 (6th Cir. 2022) (noting *Eaton* “clearly addressed inferior officers taking on the responsibilities of principal officers when vacancies arise” and held them to be “a constitutionally permitted practice”).

<sup>290</sup> *Grassley Launches Sweeping Review*, *supra* note 1 (capitalization altered).

## 1. Spending

As a matter of statute, outside funding of IPA assignees is lawful. One statutory constraint exists to bar outside influence of this kind: Section 209 of the Ethics in Government Act generally bans employees from receiving any “salary” from “any source other than the Government of the United States.”<sup>291</sup> But while Section 209 applies to IPA assignees who are paid by their home institution,<sup>292</sup> the Office of Government Ethics has explained that a cost-sharing agreement does not violate Section 209 because the IPA specifically provides for this reimbursement system.<sup>293</sup>

Cost-sharing pursuant to an IPA agreement also does not currently pose any constitutional problem. The Constitution constrains agency spending through the Appropriations Clause, whose “straightforward and explicit command” bars spending federal money “unless it has been appropriated by an act of Congress.”<sup>294</sup> With few exceptions, the Appropriations Clause does not limit Congress;<sup>295</sup> it instead restricts spending money *absent* affirmative acts by Congress. But in *Community Financial Services Association*, the Fifth Circuit determined that the funding structure of the Consumer Financial Protection Bureau (CFPB) violates the Appropriations Clause.<sup>296</sup> Because the CFPB’s funding does not come through the appropriations process or even from an agency subject to the appropriations process, and because the CFPB’s money is not held in a Treasury account, the Fifth Circuit found the agency’s structure to violate the Constitution.<sup>297</sup> That decision is currently pending review by the Supreme Court. If the Fifth Circuit’s reasoning is upheld, the Appropriations Clause could jeopardize some IPA practices, as assignees into the federal government may be funded exclusively by the home institution. If the formal source of funding itself is critical, cost-sharing arrangements where funding comes from the external institution, especially if the federal agency has many such arrangements (such as under the staffing modality), would raise concerns. No other court has accepted this theory.<sup>298</sup> Commentators predict the Court will not affirm the Fifth Circuit.<sup>299</sup> But if it does so, it may implicate the IPA.

## 2. Conflicts of Interest

Conflict of interest (COI) laws are the primary way federal law addresses concerns about outside influence in the federal bureaucracy. Two aspects of the IPA make COI analysis particularly salient: first, an IPA assignee retains employment at her home institution, so her interests may not always align with those of her federal agency; and second, many IPA assignees work in federal grant-making bodies but come from positions that can apply for those grants. We focus here on COI mandates under the Ethics in Government Act. For most ethics rules, the distinction between an IPA “appointee” and “detailee” is irrelevant, and so this section discusses IPA assignees generally. The key constraints in the Ethics in Government Act, as relevant here, relate to restrictions on representation and financial conflicts.

---

<sup>291</sup> 18 U.S.C. § 209.

<sup>292</sup> 5 U.S.C. § 3374(c)(2).

<sup>293</sup> See 2006 OGE Memo, *supra* note 212, at 10.

<sup>294</sup> *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937)); see also *Am. Fed’n of Gov’t Employees, AFL-CIO, Local 1647 v. Fed. Lab. Rels. Auth. (AFGE)*, 388 F.3d 405, 409 (3d Cir. 2004).

<sup>295</sup> See, e.g., *AFGE*, 388 F.3d at 409 (“Congress itself may choose, however, to loosen its own reins on public expenditure.”).

<sup>296</sup> *Cnty. Fin. Servs. Ass’n of Am. v. Consumer Fin. Prot. Bureau (CFSA)*, 51 F.4th 616, 638 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 978 (2023)

<sup>297</sup> *Id.* at 638–39.

<sup>298</sup> See Pet. for Cert. 2, *Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass’n of Am., Ltd.*, No. 22-448 (Nov. 2022) (“No other court has ever held that Congress violated the Appropriations Clause by passing a statute authorizing spending.”).

<sup>299</sup> Jess Bravin & Andrew Ackerman, *Supreme Court Justices Wary of Argument Against Financial Watchdog’s Funding*, WALL ST. J. (Oct. 3, 2023), <https://www.wsj.com/finance/regulation/supreme-court-case-could-upend-rules-for-mortgages-credit-cards-and-more-2f96be03>.

a. Restrictions on Representation

Ethics laws govern how employees can represent people outside the government. Section 203 bars individuals from receiving “compensation for any representational services” while being an “employee . . . in any agency of the United States” “in relation to” any “matter in which the United States is a party or has a direct and substantial interest.”<sup>300</sup> Similarly, Section 205 prohibits “prosecuting any claim against the United States” and “act[ing] as agent or attorney for anyone . . . in connection with” a proceeding “in which the United States is a party or has a direct and substantial interest.”<sup>301</sup> Both provisions provide more flexibility for special government employees (SGEs), with extra flexibility for SGEs serving for fewer than 60 days.<sup>302</sup> SGEs are also eligible for certain waivers.<sup>303</sup> An IPA assignee will therefore have similarly fewer constraints if she falls in the SGE category.

Sections 203 and 205 often apply to IPA assignments in the staffing modality because many such assignees contribute to decisions concerning federal grants.<sup>304</sup> For instance, the Defense Department’s IG identified in 1997 potential COIs among managers working in the office of the Assistant Secretary of Defense (Nuclear, Chemical, Biological). One manager, whose home institution was Lawrence Livermore National Laboratory (LLNL), was hired through an IPA agreement where DOD paid for the manager’s FY1993 salary but where LLNL covered it after. The manager directed the office’s FY1995 and 1996 procurements, “totaling \$40.8 million[] to specific contractors, including about \$11 million to” LLNL.<sup>305</sup> The office sought a waiver after the manager had started working to rectify the potential for a conflict of interest. The IG noted that such waivers should have been issued in advance.<sup>306</sup> IGs have raised similar concerns over the years.<sup>307</sup>

The IPA also raises the converse question—when may an IPA assignee hold herself out as an employee of the government? Governmental employees (including IPA assignees into the government<sup>308</sup>) are generally restricted from using their public office for private gain. The restriction covers activities ranging from explicit inducements that favor family members to actions implying governmental endorsement of a personal activity.<sup>309</sup> Every federal employee must navigate the line between acting in her official versus individual capacity; the IPA assignee’s obligation is in principle no different even if slightly more complicated by the mix of her employment in her nongovernmental institution as well as her assignment in government.

That said, in some cases (likely in the projects modality), an IPA assignment requires or anticipates that the assignee conduct similar activities to her position in her home institution—for example, if the assignment is a part-time research project that the assignee conducts with researchers at her home institution. In those cases, agencies might issue guidance to specify when the assignee’s acts count as being in her official capacity. The Department of the Agriculture has issued ethics guidance specific to co-located scientists—USDA scientists “assigned to perform duties at Federal laboratories located on university campuses”—which creates

---

<sup>300</sup> 18 U.S.C. § 203(a).

<sup>301</sup> *Id.* § 205(a).

<sup>302</sup> *See id.* §§ 203(c)(2) & 205(c)(2); *see also* Memorandum from Stephen D. Potts, Off. of Gov’t Ethics Dir., to Designated Agency Ethics Officials, General Counsels and Inspectors General, OGE 00x1, Regarding Summary of Ethical Requirements Applicable to Special Government Employees 8–11 (Feb. 15, 2000), [https://www.oge.gov/Web/oge.nsf/Legal%20Docs/445ECB1FB63809DA852585BA005BED9E/\\$FILE/00x1.pdf?open](https://www.oge.gov/Web/oge.nsf/Legal%20Docs/445ECB1FB63809DA852585BA005BED9E/$FILE/00x1.pdf?open) [<https://perma.cc/P268-RK9Q>] [hereinafter 2000 OGE Memo on SGEs]; 2006 OGE Memo, *supra* note 212, at 6 n.9.

<sup>303</sup> *See* 18 U.S.C. §§ 203(e) & 205(f); *see also* 2000 OGE Memo on SGEs, *supra* note 302, at 9.

<sup>304</sup> *See* 2006 OGE Memo, *supra* note 212, at 5–6.

<sup>305</sup> 1997 DOD IG Report, *supra* note 247, at 10.

<sup>306</sup> *See id.* at 10–11.

<sup>307</sup> *See, e.g.*, AUDIT DIV., DEP’T OF JUST. OFF. OF THE INSPECTOR GEN., AUDIT REP. 09–38, U.S. DEPARTMENT OF JUSTICE AUDIT OF THE NATIONAL INSTITUTE OF JUSTICE’S PRACTICES FOR AWARDING GRANTS AND CONTRACTS IN FISCAL YEARS 2005 THROUGH 2007, at 54–56 (2009), <https://www.oversight.gov/sites/default/files/oig-reports/a0938.pdf> [<https://perma.cc/6MAJ-CDRP>]; 2017 NSF IG Report, *supra* note 275 at 4; GOV’T ACCOUNTABILITY OFF., GAO–06–206, HOMELAND SECURITY: DHS NEEDS TO IMPROVE ETHICS-RELATED MANAGEMENT CONTROLS FOR THE SCIENCE AND TECHNOLOGY DIRECTORATE 4 (2005), <https://www.gao.gov/assets/gao-06-206.pdf> [<https://perma.cc/8LBR-RSMY>] [hereinafter 2005 GAO Report on DHS Ethics].

<sup>308</sup> 5 C.F.R. § 2635.102(h) (2022) (“Employee includes . . . employees of a State or local government or other organization who are serving on detail to an agency, pursuant to 5 U.S.C. 3371, *et seq.*”).

<sup>309</sup> *See id.* § 2635.702.

a presumption that the scientist's actions are taken in her official capacity "in the absence of a conclusive showing otherwise" because of the nature of those positions.<sup>310</sup> Agencies should take care, however, to calibrate the ethics commitments with the nature of the IPA assignment. It would make little sense to apply a blanket presumption about actions taken in official capacity to both assignees in the projects modality, who may be serving on an ad hoc capacity and only working a few hours per week for the agency, and assignees serving full-time in another modality.

#### b. Financial Conflicts

Section 208 bans a government employee from "participat[ing] personally and substantially" in any "proceeding . . . or other particular matter in which" the employee or an "organization in which" she is "serving as . . . employee" has a "financial interest."<sup>311</sup> IPA assignees raise potential Section 208 concerns because they are also employed by their home institutions.<sup>312</sup> For example, from 2011 to 2014, an IPA assignee served as Deputy Assistant Secretary of the Office of Policy, Program and Legislative Initiatives in the Office of Public and Indian Housing (PIH) in HUD while also being deputy director for an industry-focused nonprofit. The IG for HUD described an "inherent conflict of interest" when she was placed "in charge of PIH's policy-making division, the division responsible for developing and coordinating the regulations applicable to the entities that" her home institution "represents."<sup>313</sup>

Regulations do exempt generally applicable acts done by an employee on a leave of absence from an institution of higher education.<sup>314</sup> A full-time IPA assignee, for example, can help write a regulation governing federal grantmaking at the receiving agency even if her home educational institution receives such grants, as in the staffing modality.<sup>315</sup> But IPA assignees in part-time positions, common in the projects modality, are not "on leave" within the meaning of the regulatory exemption.<sup>316</sup> Such part-time IPA agreements may therefore raise potential COI concerns.

Other regulations shape how IPA assignees should comply with COI mandates. To start, they clarify that Section 208's "particular matter[s]" include "only matters that involve . . . action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons."<sup>317</sup> Just as Section 208 does not implicate "broad policy options that are directed to the interests of a large and diverse group of persons,"<sup>318</sup> much basic research performed by an IPA assignee thus should fall outside of COI restrictions because it does not focus on specific persons' interests. In addition, while regulations define "financial interest[s]" under Section 208 to mean "the potential for gain or loss," they anticipate real or personal property interests or other kinds of business and employment interests.<sup>319</sup> Although academics serving in the projects modality—and their home institutions—certainly have personal interests in accessing data held by the government, such data access does not appear to qualify as a "financial interest." Finally, the mere fact that an IPA assignee's

---

<sup>310</sup> See *09-1 Ethics Issues Related to USDA Scientists*, U.S. DEP'T OF AGRICULTURE, <https://www.usda.gov/oe/rules-road/ethics-issuances/09-1-ethics-issues-related> [<https://perma.cc/H6WK-UMDX>].

<sup>311</sup> 18 U.S.C. § 208(a).

<sup>312</sup> See 2006 OGE Memo, *supra* note 212, at 6; see also 2005 GAO Report on DHS Ethics, *supra* note 307, at 4 (raising concern when agency provided only "the same new employee and annual ethics training" for IPAs as for other agency employees because of IPAs' "unique situation"); cf. 2000 OGE Memo on SGEs, *supra* note 302, at 14 ("Because SGEs typically have substantial outside employment . . . , issues under section 208 frequently arise.").

<sup>313</sup> Memorandum from Gerald R. Kirkland, Regional Inspector Gen. for Audit, 6AGA, to Nani A. Coloretti, Deputy Sec'y, Michael A. Anderson, Chief Hum. Cap. Officer, and Jemine A. Bryon, Acting Assistant Sec'y for Pub. & Indian Hous., Memorandum No. 2015-FW-0801, Intergovernmental Personnel Act Appointment Created an Inherent Conflict of Interest in the Office of Public and Indian Housing 3 (Jan. 20, 2015), <https://www.hudoig.gov/sites/default/files/documents/2015-FW-0801.pdf> [<https://perma.cc/6C84-KXV8>] [hereinafter 2015 HUD IG Report on COIs].

<sup>314</sup> See 5 C.F.R. § 2640.203(b); see also 2006 OGE Memo, *supra* note 212, at 7.

<sup>315</sup> See 5 C.F.R. § 2640.203(b) (example 1).

<sup>316</sup> 2006 OGE Memo, *supra* note 212, at 7.

<sup>317</sup> 5 C.F.R. § 2635.402(b)(3).

<sup>318</sup> *Id.*

<sup>319</sup> See *id.* § 2640.103(b) (noting such interests might "arise from ownership of certain financial instruments or investments" or "derive from a salary, indebtedness, job offer, or any similar interest").



personal interests align with those of the agency does not insulate the assignee from Section 208 scrutiny. The question is not whether the interests actually conflict but rather whether the assignee has a “financial interest” within the meaning of Section 208.

A 1993 OLC opinion—still on the books—illustrates some of these issues. It assessed how Section 208 applies to a governmental employee who assigned her retained foreign patent rights over an invention to a licensee where that licensee, at the same time, was granted the domestic rights to exploit that invention by the federal government and where the government entered into a CRADA with that licensee for the licensee to develop and test the invention.<sup>320</sup> OLC noted that the federal government’s “best interest,” in this sort of situation, is often “to allow inventors who hold foreign rights to develop their work”<sup>321</sup>—in other words, to allow the governmental employee to keep working on the invention. But OLC concluded that the licensing agreement for the employee’s foreign patent rights was a “financial interest” sufficient to bar her from working on research, even though that research would have been pursuant to the CRADA as part of her official government duties.<sup>322</sup> (Note that OLC did not determine whether the foreign rights themselves constitute a “financial interest” that would bar her from working on the research.<sup>323</sup>)

Unlike basic research that many IPA assignees in the projects modality perform, the OLC opinion dealt with an invention vesting intellectual property rights in “specific persons,” where the research was related to a “particular matter” within the meaning of Section 208.<sup>324</sup> And unlike the generalized interest that educational institutions have in their reputation for promoting robust research, the interest identified by OLC was a concrete, pecuniary “property right[]”<sup>325</sup> that could be imputed to the employee because of the licensing agreement.<sup>326</sup> In sum, even though the government, as the original holder of the domestic patent rights, had an interest in research and development of the invention (i.e., the government’s interest was aligned with that of the employee), the employee was still barred from participating directly in the research because of her individual “financial interest.”

### 3. Oversight and Transparency

Finally, institutional mechanisms within the executive branch that create transparency and conduct oversight address outside influence. We start with OPM’s declining role overseeing IPA use across the federal bureaucracy. While OPM formally has centralized authority under the IPA, it has delegated all meaningful oversight to the agencies themselves, limiting its own role mostly to issuing guidance. Other institutions—GAO, GSA, and the Office of Governmental Ethics—currently play small roles in supervising agency IPA practices. We next briefly discuss internal agency guidance, noting some common oversight mechanisms that they employ, and IG review. We conclude by flagging disclosure laws that provide transparency into individual IPA agreements.

#### a. Cross-Agency Executive Branch Oversight of Agency IPA Usage

The IPA vested authority in the President to issue regulations governing the implementation of the mobility program.<sup>327</sup> The President immediately delegated that power to the Civil Service Commission,<sup>328</sup> which promulgated implementing regulations later the year the IPA was enacted.<sup>329</sup> The Commission also could require reports from agencies upon request.<sup>330</sup>

---

<sup>320</sup> Ethics Issues Related to the Federal Technology Transfer Act of 1986, 17 Op. O.L.C. 46, 52 (1993).

<sup>321</sup> *Id.*

<sup>322</sup> *See id.* at 52–53.

<sup>323</sup> *Id.* at 53.

<sup>324</sup> *See* 5 C.F.R. § 2635.402(b)(3).

<sup>325</sup> *Id.* § 2635.403(c)(1).

<sup>326</sup> *See id.* §§ 2635.403(c)(2), .402(b)(2)(iii).

<sup>327</sup> *See* Intergovernmental Personnel Act of 1970, Pub. L. 91–648, § 402(a), 84 Stat. 1909, 1925 (1971) (codified at 5 U.S.C. § 3376).

<sup>328</sup> *See* Exec. Order No. 11589, 36 Fed. Reg. 6343 (1971).

<sup>329</sup> Part 334—Temporary Assignment of Employees Between Executive Agencies and States, Local Governments, and Institutions of Higher Education, 36 Fed. Reg. 6488 (1971).

<sup>330</sup> *See id.* at 6489 (codified at 5 C.F.R. § 334.106 (1976)).

In the latter part of the 1970s, OPM (the successor agency to the Civil Service Commission for our purposes) pushed agencies to report on their IPA agreements and their efficacy.<sup>331</sup> OPM took a more central role in overseeing the IPA through regulations. It required agencies to send it a copy of every IPA agreement.<sup>332</sup> It also gave itself the exclusive authority to certify eligibility of “other organization[s]” and the ability to direct federal agencies to terminate assignments that did not meet the IPA’s requirements.<sup>333</sup>

But with the turn of the decade came a drastic decline in OPM’s practical ability to oversee the IPA. In 1981, Congress ended funding for the IPA’s grants, which led to the elimination of the OPM Office of Intergovernmental Personnel programs—an office dedicated to oversight of the IPA.<sup>334</sup> In 1989, OPM maintained only two full-time positions dedicated to overseeing the mobility program.<sup>335</sup> As the GAO concluded that year, “OPM has curtailed its IPA efforts to the point that it is providing, at best, minimal guidance and oversight to the mobility program.”<sup>336</sup>

OPM also loosened its stringent rules over time to vest oversight responsibility with the agencies.<sup>337</sup> It eliminated in 1993 the Federal Personnel Manual<sup>338</sup>—and along with it, an entire chapter governing IPA assignments.<sup>339</sup> In 1996, it revised its regulations so that individual agencies, rather than OPM, determined “other organization” status.<sup>340</sup> Agencies also no longer had to send each IPA agreement to OPM.<sup>341</sup> In 2022, the GAO concluded that OPM “has delegated day-to-day oversight of the mobility program’s use to agencies.”<sup>342</sup> But OPM still maintains its power to require agencies to report on their uses of the IPA<sup>343</sup> and to order agencies to terminate assignments that violate the IPA’s rules.<sup>344</sup>

Other institutions play a role in supervising agencies’ IPA practices. GAO—through the legal opinions of the Comptroller General—has fleshed out the meaning of the spending-related provisions of the IPA.<sup>345</sup> GSA’s oversight of travel regulations<sup>346</sup> and OGE’s ethics guidance<sup>347</sup> have played similar roles. But the main institution, even today, is still OPM; its website declares: “The Office of Personnel Management will maintain oversight over agencies’ use of the Intergovernmental Personnel Act program.”<sup>348</sup>

## b. Intra-Agency Oversight of Agency IPA Usage

---

<sup>331</sup> 1979 GAO Report, *supra* note 22, at 58 (noting OPM instructed agencies in 1977 to establish “mobility coordinator position[s]” to evaluate their use of the IPA’s assignment provisions and to submit reports summarizing data).

<sup>332</sup> 44 Fed. Reg. 25,394, 25,395 (1979); *see also* 5 C.F.R. § 334.106(c) (1981).

<sup>333</sup> 45 Fed. Reg. 995 (1980) (codified at 5 C.F.R. §§ 334.103, 334.107(d) (1981)).

<sup>334</sup> 1989 GAO Report, *supra* note 45, at 20.

<sup>335</sup> *Id.* at 21.

<sup>336</sup> *Id.* at 10.

<sup>337</sup> Intergovernmental Personnel Act Mobility Program, 61 Fed. Reg. 65,189, 65,189 (1996).

<sup>338</sup> FPM Sunset, *supra* note 221, at 1.

<sup>339</sup> *Id.* at 7.

<sup>340</sup> 61 Fed. Reg. at 65,189. Some agencies also delegated “other organization” certification down their bureaucratic chain of command. *See* Memorandum from Lawrence Wachs, U.S. Dep’t of Agric. Off. of the Assistant Sec’y for Admin. Pol’y Analysis & Coordination Ctr. Hum. Res. Mgmt. Acting Dir., to Mission Area Personnel Officers, Delegation of Authority to Mission Areas to Certify Organizations for Participation in the Intergovernmental Personnel Act Program (Oct. 14, 1998), [https://www.usda.gov/sites/default/files/documents/IPA\\_Delegation\\_of\\_Authority\\_to\\_Mission\\_Areas.pdf](https://www.usda.gov/sites/default/files/documents/IPA_Delegation_of_Authority_to_Mission_Areas.pdf) [<https://perma.cc/D3JG-SLV8>] (delegating certification decision was part of “an effort to eliminate unnecessary layers of review”).

<sup>341</sup> 61 Fed. Reg. at 65,189.

<sup>342</sup> 2022 GAO Report, *supra* note 63, at 27.

<sup>343</sup> 5 C.F.R. § 334.108 (2022).

<sup>344</sup> *Id.* § 334.107(d) (2022).

<sup>345</sup> *See, e.g.*, Reimbursement by Forest Service of expenses under Intergovernmental Personnel Act, B-209132, at 5 (Comp. Gen. Oct. 3, 1983), <https://www.gao.gov/assets/b-209132.pdf> [<https://perma.cc/YV5L-J3S4>] (noting reimbursement is only authorized for detailed employees for salary and certain travel expenses); Reimbursement for Expenses Incident to Training Assignment, B-193197 (Comp. Gen. Jan. 10, 1980), <https://www.gao.gov/products/b-193197-2> [<https://perma.cc/26U5-FTBH>] (similar).

<sup>346</sup> 2001 GAO Report on NSF, *supra* note 55, at 16 (noting role of GSA in issuing travel regulations).

<sup>347</sup> *See, e.g.*, 2006 OGE Memo, *supra* note 212.

<sup>348</sup> *Intergovernmental Personnel Act: Provisions*, OFF. OF PERS. MGMT., <https://www.opm.gov/policy-data-oversight/hiring-information/intergovernment-personnel-act/#url=Provisions> [<https://perma.cc/485V-YKNQJ>].

Some agencies have issued internal agency guidelines and controls on the IPA. Many of these internal policies assign responsibility to specific entities to review and authorize IPA assignments. HHS, for example, assigns to its Office of Human Resources under the Assistant Secretary for Administration responsibility to “assure conformance with HHS and OPM policy and guidance, and all applicable federal laws and regulations.”<sup>349</sup> DOJ requires the Deputy Attorney General to approve any IPA agreements.<sup>350</sup> Agencies may require higher levels of review for reauthorizations than for initial IPA agreements,<sup>351</sup> and some require heightened signoff for certain positions.<sup>352</sup> IPA regulations sometime specify how the agency can fund an IPA,<sup>353</sup> and some include requirements of program evaluation.<sup>354</sup>

IGs, who Congress has tasked with preventing and identifying waste, fraud, and abuse in their agencies,<sup>355</sup> also investigate agency IPA practices and flag concerns.

### c. Disclosure Obligations

Congress has mandated certain disclosures from executive branch employees, including IPA assignees. The Ethics in Government Act applies financial reporting obligations to two kinds of executive branch employees: public filers under Section 101 and confidential filers under Section 107.<sup>356</sup> Whether a specific IPA assignee must report depends on the “position, rather than the individual.”<sup>357</sup> OGE has advised that “[a]n IPA detailee who is ‘given a set of ad hoc, unclassified duties, relevant only to the specific assignment project’ is not required to file an SF 278 [now known as OGE Form 278, for public filers].”<sup>358</sup> But under Section 101(f)(3), OGE can require public filing based on a determination that the IPA assignee’s position is of “equal classification” to other covered positions based on various functional factors.<sup>359</sup>

---

<sup>349</sup> HHS IPA Policy, *supra* note 221, § 300-3-50(B)(6); *see also id.* § 300-3-90(C) (noting a separate division and OPM “may conduct accountability reviews” for IPA usage); DEP’T OF THE INTERIOR OFF. OF THE SEC’Y, PERSONNEL BULLETIN NO 21–05, INTERGOVERNMENTAL PERSONNEL ACT (IPA) MOBILITY PROGRAM 2 (2021), <https://www.doi.gov/sites/doi.gov/files/elips/documents/personnel-bulletin-21-05-ipa-mobility-program-5.5.21-final.pdf> [<https://perma.cc/ZA6Z-EJ2P>] [hereinafter INT IPA Policy] (mandating that the Servicing Human Resources Office “review[] all [IPA] agreements for accuracy and compliance with the act”).

<sup>350</sup> Memorandum from Jolene Ann Lauria, Dep’t of Just. Acting Assist Att’y Gen. for Admin., to Heads of Dep’t Components, Policy Memorandum #2023-01, Revised DOJ Order 1200.1, Chapter 1-1, *Intergovernmental Personnel Act Assignments* \*2 (Apr. 4, 2023), <https://www.justice.gov/jmd/page/file/1578516/download> [<https://perma.cc/9QFX-GUM8>] [hereinafter 2023 DOJ IPA Policy Revision].

<sup>351</sup> VA IPA Policy, *supra* note 221, § C(4)(a)(3).

<sup>352</sup> *See, e.g.*, ENVTL. PROTECTION AGENCY, EPA 210-B-97-001, INTERGOVERNMENTAL PERSONNEL ACT POLICY AND PROCEDURES MANUAL (IPA) 4–3 (1997), <https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=2000AN2V.txt> [<https://perma.cc/3DKZ-WNXX>] [hereinafter 1997 EPA IPA Manual] (requiring special approval for SES appointments); NAT’L AERONAUTICS & SPACE ADMIN., NPR 3300.1C, CHAPTER 5. IPA ASSIGNMENTS § 5.4.3 (2015), [https://nodis3.gsfc.nasa.gov/npg\\_img/N\\_PR\\_3300\\_001C\\_/N\\_PR\\_3300\\_001C\\_\\_Chapter5.pdf](https://nodis3.gsfc.nasa.gov/npg_img/N_PR_3300_001C_/N_PR_3300_001C__Chapter5.pdf) [<https://perma.cc/Y43F-8Y97>] [hereinafter NASA IPA Policy] (requiring Administrator signoff for IPA agreements with organizations in the DC area).

<sup>353</sup> USAID IPA Policy, *supra* note 207, § 437.3.8.1 (noting that USAID can reimburse “from either program or OE funds” but that “[u]se of program funds is strongly encouraged”).

<sup>354</sup> *Id.* § 437.3.9(d) (requiring every IPA to be “evaluated at its conclusion to document the benefit(s) accrued to the participating organizations”).

<sup>355</sup> *See* 5 U.S.C. § 404(a).

<sup>356</sup> 5 U.S.C. app. §§ 101 & 107.

<sup>357</sup> 2006 OGE Memo, *supra* note 212, at 11; *see also* 2022 GAO Report, *supra* note 63, at 11 n.27. Positions require public versus confidential filing based on their pay and duties. *See* 5 U.S.C. app. § 101(f)(3) (public filers); *id.* § 101(f)(5) (confidential and policymaking exception); 5 C.F.R. § 2634.203 (clarifying exceptions under Section 101(f)(5)); 5 U.S.C. app. § 107(a)(1) (confidential filers); 5 C.F.R. § 2634.904(a) (same).

<sup>358</sup> 2006 OGE Memo, *supra* note 212, at 11 (citing Memorandum from Amy L. Comstock, Off. of Gov’t Ethics Dir., to Designated Agency Ethics Officials, OGE 02x11, Regarding Application of the Financial Disclosure Requirements to Detailees under the Intergovernmental Personnel Act (IPA) (Dec. 9, 2002), [https://www.oge.gov/web/oge.nsf/News+Releases/73116164416B67F1852585BA005BED56/\\$FILE/dc36bda6a75d4a6f9dc993d44c74081e1.pdf](https://www.oge.gov/web/oge.nsf/News+Releases/73116164416B67F1852585BA005BED56/$FILE/dc36bda6a75d4a6f9dc993d44c74081e1.pdf) [<https://perma.cc/VR4P-VEX9>] [hereinafter 2002 OGE Memo]).

<sup>359</sup> 2002 OGE Memo, *supra* note 358, at 3–4.

FOIA also permits interested persons to obtain some information on IPA agreements. *The Intercept*, for example, requested from the Treasury Department IPA agreements for “all officials at the Office of the Secretary appointed under [the IPA] program” for almost all of the Trump Administration.<sup>360</sup> Other requests have targeted the Biden Administration.

#### IV. A Roadmap for the IPA’s Future

We now turn to the significant policy implications and reforms based on our account of governing by assignment. An overarching theme from our account is that the IPA is not monolithic. Many legal analyses and policy critiques misstep by treating it so.<sup>361</sup> The IPA has taken different forms, responding to distinct human capital needs of state governments, the federal bureaucracy, and presidential administrations. These modalities—localism, staffing, leadership, and projects—were shaped by challenges within existing talent pipelines and raise differentiated policy considerations. Even within a modality, the IPA may be used to staff dissimilar roles, with varying policy concerns. For example, an agency should not treat IPA assignees in grantmaking, research, and operational roles the same for conflicts of interest.

Our recommendations focus on reforms of the IPA itself, even if governing by assignment illustrates acute needs to reform the civil service staffing system and the political appointments process. We do so because reforms to the civil service or appointments systems are hard to achieve, even after decades of advocacy and with extensive attention.<sup>362</sup> The IPA instead presents a much lower-lift opportunity to improve the federal government’s approach to human capital management. Overall, we endorse governing by assignment, particularly to meet difficult-to-fill science and technology needs, and offer recommendations to properly calibrate its use.

We first assess options for further centralizing the IPA to help dispel incorrect interpretations of its provisions and to increase its usage across agencies. Next, we consider how policymakers can better oversee the IPA process, with particular attention to the types of senior roles filled through the leadership modality. We then explore ways in which to rekindle the intergovernmental nature of the IPA and conclude by offering proposals to make the IPA more effective.

##### A. *Centralizing Aspects of the IPA to Ensure Consistency*

Making the most of the IPA’s potential involves balancing its inherent flexibility with broader application across agencies. This balancing raises an important question: What is the right level of centralization for the IPA’s future? The IPA’s current decentralization is a double-edged sword. On one hand, it enables quicker hiring for temporary needs by bypassing some of the burdensome mandates from OPM and MSPB that govern the civil service staffing system. But this decentralization also breeds inconsistent and sometimes incorrect interpretations of the IPA across different agencies, often stymying its adoption. Increasing the efficacy of the IPA through more centralized dissemination of best practices could take several forms, while preserving needed agency flexibility.

First, OPM could issue a regulation ruling out incorrect understandings of the IPA, such as the interpretation that IPAs can’t engage with their home organization because doing so would create a financial conflict of interest. Practically speaking, that prohibits part-time IPAs. While OPM already attempts to clarify

---

<sup>360</sup> DEP’T OF TREASURY, FOIA LOG JULY 1 - SEPTEMBER 30, 2020, <https://home.treasury.gov/system/files/236/2020-4th-Quarter-FOIA-Log.pdf>.

<sup>361</sup> Even OPM has articulated “myths” around the use of the IPA. *Intergovernmental Personnel Act: Overview*, OFF. OF PERS. MGMT., <https://www.opm.gov/policy-data-oversight/hiring-information/intergovernment-personnel-act/#url=Overview> [<https://perma.cc/W68A-Y7EJ>].

<sup>362</sup> Advocates have long called for GS-classification reforms. *See, e.g.*, GOV’T ACCOUNTABILITY OFF., GAO-14-677, HUMAN CAPITAL: OPM NEEDS TO IMPROVE THE DESIGN, MANAGEMENT, AND OVERSIGHT OF THE FEDERAL CLASSIFICATION SYSTEM (2014), <https://www.gao.gov/assets/gao-14-677.pdf> [<https://perma.cc/DUZ5-CR5V>]; NAPA No Time to Wait Part 2, *supra* note 137, at 41–42.

“myths” about the IPA on its website,<sup>363</sup> the information is at best guidance, not a legislative rule with legal force.<sup>364</sup> OPM has the authority to prescribe IPA-related regulations,<sup>365</sup> but in order to get at the ethics-related interpretations that may be at the crux of IPA roadblocks, the regulation may have to be issued cooperatively with OGE.<sup>366</sup> Such a regulation should specifically clarify that IPAs taking on discrete projects may be part-time and that continuing to work with their home institution does not immediately create a conflict of interest for all roles. Joint guidance could also affirmatively clarify IPA best practices, focusing on the value and legitimacy of using the IPA to take on technical project-oriented challenges.

While such actions from OPM and OGE could help disrupt the development of siloed, inconsistent interpretations of the IPA, they may also have drawbacks. First, any rule may be poorly constructed and hamstring existing, positive uses of the IPA. Even a relatively well-constructed rule could disrupt the delicate arrangements that IPA champions within agencies have developed with agency lawyers, ethics officials, and HR representatives. Second, central rulemaking (and guidance) could invite greater central review of the IPA hiring process, leading to hiring roadblocks and lengthier timelines for agencies.

An alternative to OPM rulemaking binding other agencies would be to house a matching program for project-based IPA hires within a single agency, such as GSA. Such an arrangement could be opt-in, allowing agencies with large, established programs like NSF and NASA to continue their independent hiring. GSA is a strong candidate due both to its positioning as an agency empowered to promote more high-performing and efficient government and its large and well-supported practice of bringing in IPAs on a coordinated timeline aligned with academic calendars for a range of agencies.<sup>367</sup> In fulfilling this role, GSA could canvass agency project-based needs and match needs to talent in an annual or biannual application system similar to that of the Presidential Innovation Fellows (PIF) or Presidential Management Fellows (PMF). Institutionalizing an IPA matching program out of GSA would enable efficiency and time savings by leveraging GSA’s expertise in managing such a program and reducing the startup costs for new agencies to begin using the IPA. It would also enable agencies to access a type of talent that is not currently accessible via PIF or PMF: established experts who are unable to join a full-time role but are eager to contribute to well-scoped, part-time projects matching their skillsets.

## B. *Adding Guardrails to the Leadership Modality*

### 1. Department Head Approval for Certain IPAs

Agency leadership could exercise more control over some IPA assignments. As discussed above, many IPA assignees do not qualify as officers under the Appointments Clause.<sup>368</sup> Some positions filled by IPA assignments—such as Deputy Director of the NSF or Director of the Bureau of Economics at the FTC—may, however, be constitutional offices due to the continuing nature of the positions.

---

<sup>363</sup> *Intergovernmental Personnel Act: Overview*, OFF. OF PERS. MGMT., <https://www.opm.gov/policy-data-oversight/hiring-information/intergovernment-personnel-act/#url=Overview> [<https://perma.cc/W68A-Y7EJ>].

<sup>364</sup> See, e.g., *Pac. Gas & Elec. Co. v. Fed. Power Comm’n*, 506 F.2d 33, 38 (D.C. Cir. 1974) (describing policy guidance as “not finally determinative of the issues or rights to which it is addressed”).

<sup>365</sup> See 5 U.S.C. § 3376 (giving the President the power to prescribe regulations for the administration of the IPA); Exec. Order No. 11589, 36 Fed. Reg. 6343 (1971) (delegating this power to OPM).

<sup>366</sup> It is less clear whether OPM’s authority extends to writing regulations that shape the application of the Ethics in Government Act to IPA employees, which seems to be the root of most misunderstandings regarding the IPA. While IPA appointees were always considered employees for federal ethics considerations, OGE specifically amended the definition of employee in the Ethics in Government Act in 2006 to also include IPA detailees, clarifying that the Act’s standards applied to them. 5 C.F.R. § 2635; 71 Fed. Reg. 45735 (Aug. 10, 2006).

<sup>367</sup> See Interview 4 (Sept. 21, 2023); GEN. SERVS. AGENCY, NO. 9110.1 HRM, GENERAL SERVICES ADMINISTRATION (GSA) POLICY FOR TITLE 5, MOBILITY OF FEDERAL, STATE AND LOCAL EMPLOYEES, INTERGOVERNMENTAL PERSONNEL ACT OF 1970 (IPA) (2019), <https://www.gsa.gov/directives-library/general-services-administration-gsa-policy-for-title-5-mobility-of-federal-state-and-local-employees-intergovernmental-personnel-act-of-1970-ipa#> [<https://perma.cc/M8WE-V9VH>] (“The IPA Mobility Program allows Federal agencies to operate in a more efficient and productive manner.”); GSA IPA Toolkit, *supra* note 104.

<sup>368</sup> See *supra* Part III.C. For example, when looking through the titles of the IPAs in our 175-person sample from FOIA requests and news articles, many hold positions such as “Advisor” or “Program Manager,” which do not suggest a continuing position established by law. See Muck Rock FOIA Requests, *supra* note 126.

These few positions qualify, at most, as inferior offices because IPA assignees' work is generally "directed and supervised at some level" by principal officers.<sup>369</sup> The issue would be whether those who appoint such officers are "Heads of Departments."<sup>370</sup> Statutorily, an IPA assignment is "arrange[d]" by the "head of a Federal agency,"<sup>371</sup> so if the agency qualifies as a "Department[]," then the IPA assignment may comport with the Appointments Clause. Challenges may arise, however, if an IPA agreement for an important position is arranged by those below the department head level. This can happen when a department has explicitly designated a lower-level official to approve IPA agreements, as allowed by the IPA's implementing regulations.<sup>372</sup>

To avoid these constitutional concerns, agencies should flag assignees who serve in continuing positions with meaningful authority—potential inferior officers—and obtain department head approval for these roles. But agencies should limit this requirement to sufficiently high-level roles that might face constitutional scrutiny. Were such procedures to be required for all IPA agreements—say, for data scientists who are far from raising Appointments Clause concerns—the IPA would lose its comparative advantage of quickly staffing difficult-to-fill roles, because requiring department head approval could bottleneck the IPA assignments.

This solution wouldn't, of course, address concerns for IPA assignees serving as principal officers, who would still require presidential approval and Senate consent. Current caselaw seems to permit IPA agreements to staff principal offices temporarily.<sup>373</sup> But we are not aware of any IPA assignees staffing principal offices: Even when an IPA assignee served as the Principal Deputy Assistant Attorney General at DOJ's Civil Rights Division when the Assistant Attorney General position was vacant, the assignee nevertheless operated under the Associate Attorney General (and Attorney General). Regulations limited what the official could authorize, with important decisions surrounding prosecutions requiring Assistant Attorney General signoff—in other words, the Principal Deputy serving with a vacant Assistant Attorney General couldn't authorize those prosecutions.<sup>374</sup> To ease concerns, agencies could, through guidance or IPA agreement addendums, publicly clarify the temporary nature of the assignment and ensure that IPA assignees do not possess unilateral and unreviewable power to make binding decisions.

## 2. Improving Public Reporting with More Information for Senior-Level IPAs

Oversight and accountability over governing by assignment depend on understanding actual agency IPA practices. There is, however, currently little to no transparency about who is serving under the IPA and how they are compensated and managed, despite repeated calls to change this reality.<sup>375</sup> What little information exists on IPA assignees largely comes from scattered news coverage and occasional FOIA requests. Disclosing information about positions, compensation, and duties of IPA assignees would greatly enhance the transparency and accountability of the IPA system. Such disclosure could be modeled on the recently enacted PLUM Act.<sup>376</sup> Ideally, OPM would release yearly reports identifying the number of IPA assignees in federal agencies and the average cost-share percentage across the IPA agreements.

---

<sup>369</sup> *Edmond v. United States*, 520 U.S. 651, 663 (1997).

<sup>370</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>371</sup> 5 U.S.C. § 3372(a).

<sup>372</sup> 5 C.F.R. § 334.104. For example, DOJ requires the Deputy Attorney General approve all IPA agreements. 2023 DOJ IPA Policy Revision, *supra* note 350.

<sup>373</sup> *See supra* note 289.

<sup>374</sup> For example, 28 C.F.R. § 0.51 explicitly assigns enforcement actions within the Civil Rights Division to the Assistant Attorney General and 28 C.F.R. § 0.168 only allows AAGs to delegate certain authorities downward and requires all redelegation to be approved by the DAG or the Associate AG.

<sup>375</sup> *See, e.g.*, 2020 EPA IG Report, *supra* note 61, at 9-10 (noting that the EPA does not comply with documentation requirements for IPAs); 2022 GAO Report, *supra* note 63 at 27; OFF. INSPECTOR GENERAL, NAT'L SCI. FOUND., AUDIT OF NSF'S VETTING PROCESS FOR INDIVIDUALS ASSIGNED UNDER THE INTERGOVERNMENTAL PERSONNEL ACT 10 (2023), <https://www.oversight.gov/sites/default/files/oig-reports/NSF/Audit-NSFs-Vetting-Process-Individuals-Assigned-Under-Intergovernmental-Personnel-Act.pdf> [<https://perma.cc/6Y72-WJEA>].

<sup>376</sup> *See infra* notes 410 & 414 and accompanying text.

In addition, the reports would also include the name, position, home institution, and compensation arrangement for IPA assignees in more senior roles. These could be assignees required to make financial disclosures under the Ethics in Government Act, such as those serving in roles compensated at the equivalent of GS-15 and above.<sup>377</sup> Agency staff would collect this information and report it to OPM, which would aggregate and publish it. Yearly reports should strike a balance between increasing transparency but not overwhelming agencies with procedural hurdles like those that have greatly slowed the civil service and political appointments hiring systems.<sup>378</sup>

### C. *Reviving Intergovernmental Exchanges*

The IPA might also expand by coming back full circle—with renewed attention to the localism modality and engaging with state, local, and Tribal governments. While the IPA initially sought to address workforce challenges in state government, such capacity building is no longer core to the current IPA, despite often worse capacity issues at the state level.<sup>379</sup> Revitalizing this initial modality would complement enormous new grants to states through recent legislation such as the Inflation Reduction Act (IRA). For example, the IRA directs \$27 billion to the EPA to establish a green bank, much of the operations of which will be delegated down to nonprofit lending institutions and state and local governments.<sup>380</sup> Such new funding will likely exacerbate already strained state and local government human capital systems with the steep demand of building a sophisticated financial lending system. Federal agencies could renew the original IPA practice of sharing talent with state governments, a system that would certainly benefit states<sup>381</sup> and also the federal government in areas of particular state competence.<sup>382</sup> While federal agencies have cited their own capacity constraints to justify not participating in the outgoing IPA mobility program,<sup>383</sup> perhaps some of the additional funding in recent legislation could cover, at least in part, these staffing gaps so that federal employees can share their unique expertise.<sup>384</sup> For example, Treasury employees expert in running (or overseeing) a bank could help states best use new funding opportunities.

---

<sup>377</sup> Cf. 5 U.S.C. app. § 101(f)(3).

<sup>378</sup> OPM objected to the GAO's 2022 recommendation that they collect more complete data about IPA assignees, arguing it would create an unnecessary burden and disincentivize use of the IPA. 2022 GAO Report, *supra* note 63, at 29–30.

<sup>379</sup> CENTER FOR STATE & LOCAL GOVERNMENT EXCELLENCE, SURVEY FINDINGS: STATE AND LOCAL GOVERNMENT WORKFORCE: 2016 TRENDS 2 (2016), <https://slge.org/wp-content/uploads/2016/05/State-and-Local-Government-Workforce-2016-Trends.pdf> [<https://perma.cc/J5YW-69Q9>]; CENTER FOR STATE & LOCAL GOVERNMENT EXCELLENCE, SURVEY FINDINGS: STATE AND LOCAL GOVERNMENT WORKFORCE 2021, at 10 (2021), <https://slge.org/wp-content/uploads/2021/05/statelocalworkforce2021.pdf> [<https://perma.cc/P53C-K8T3>].

<sup>380</sup> Matthew Daly, *EPA Outlines \$27B 'Green Bank' for Clean Energy Projects*, AP (Feb. 14, 2023), <https://apnews.com/article/climate-and-environment-financial-services-us-environmental-protection-agency-business-664750a30b238523bc025663f4a1f002>.

<sup>381</sup> Cf. UNIVERSAL ACCESS TO CLEAN WATER FOR TRIBES, RECOMMENDATIONS FOR OPERATIONAL, ADMINISTRATIVE, POLICY, AND REGULATORY REFORM 39 (2021), <https://tribalcleanwater.org/wp-content/uploads/2021/11/Full-Report-11.21-FINAL.pdf> [<https://perma.cc/4MRR-YFDK>] (advocating for using the IPA to assign federal employees to Tribal governments to help with water infrastructure).

<sup>382</sup> For example, California is a national leader on data privacy issues and could share expertise from its California Privacy Protection Agency with federal officials through the IPA. See David McCabe, *How California Is Building the Nation's First Privacy Police*, N.Y. TIMES (Mar. 15, 2022), <https://www.nytimes.com/2022/03/15/technology/california-privacy-agency-ccpa-gdpr.html> [<https://perma.cc/62B7-CL8X>]; cf. JONATHAN WOMER & KATHY STACK, BROWN POL'Y LAB, BLENDING AND BRAIDING FUNDS: OPPORTUNITIES TO STRENGTHEN STATE AND LOCAL DATA AND EVALUATION CAPACITY IN HUMAN SERVICES 30 (2023), <https://ssrn.com/abstract=4403532> [<https://perma.cc/2ZH5-P6SW>] (advocating greater use of the IPA to bring state and local integrated data system experts to the federal government to promote intergovernmental collaboration and communication).

<sup>383</sup> 2022 GAO Report, *supra* note 63, at 16 (noting “[r]eluctance of the home agency/organization to temporarily lose employees” as a limiting factor on agency usage of outgoing IPAs).

<sup>384</sup> See, e.g., 1989 Congressional Hearings, *supra* note 46, at 66–67 (statement of Jeffrey Schiff, Nat'l Ass'n of Towns and Townships Exec. Dir.) (noting local governments' “desperate[] need” for federal officials to “understand the reality of local government” as well as the value of federal expertise through outgoing IPA assignments but describing lack of funding as a key barrier).

Another way states can prepare to take on new challenges and opportunities is to enact legislation to create their own state-level talent exchanges similar to the IPA.<sup>385</sup>

#### D. *Making the IPA More Useful*

##### 1. Using IPAs to Improve Contract Management

The IPA could also help the government make better use of other systems of accessing talent: specifically, federal contracting. Government contract management, discussed earlier, demands considerable federal employee time and expertise. Procurement officials often lack sufficient technical expertise to manage complex contracts efficiently,<sup>386</sup> and agencies have sought support from Presidential Innovation Fellows and GSA’s 18F as information intermediaries. Academic IPAs could serve as effective intermediaries by lending their technical expertise to help the government distinguish science from snake oil.<sup>387</sup> NASA has taken some steps in this direction by allowing IPA detailees to serve as contracting officer representatives (after checking for conflicts of interest) who help contracting officers assess the technical merits of potential contracts but cannot actually sign or terminate contracts.<sup>388</sup> Agencies handling highly technical contracts, especially in new fields like AI,<sup>389</sup> should consider following NASA’s example by using the IPA to bring in expertise to advise on procurement strategy, with similar limits on signing contracts.<sup>390</sup>

##### 2. Enabling Access to Noncitizen Talent

In a practice dating to the 1940s, Congress has restricted federal agencies from hiring noncitizens in each annual appropriations bill. Specifically, federal agencies may only “pay the compensation” of any “employee of the Government” if she is a citizen, a lawful permanent resident seeking citizenship, a refugee or asylee intending to become a citizen, or a person who “owes allegiance to the United States.”<sup>391</sup> Some agencies, such as the Department of Defense, have an exemption from these limits.<sup>392</sup> Federal regulations also prohibit any person from being “appoint[ed] in the competitive service unless such person is a citizen or national of the United States.”<sup>393</sup>

---

<sup>385</sup> See DANIEL E. HO, ANNE JOSEPH O’CONNELL & ISAAC CUI, STAN. INST. FOR ECON. POL’Y RSCH., TALENT EXCHANGES FOR STATE GOVERNMENTS (2023), <https://siepr.stanford.edu/publications/policy-brief/talent-exchanges-state-governments> [<https://perma.cc/Z6PU-EFDM>].

<sup>386</sup> See, e.g., JENNIFER PAHLKA, RECODING AMERICA 63 (2023) (quoting a government technology official discussing technical choices: “I’ve spent my entire career training my team *not* to have an opinion on business requirements . . . . If they ask us to build a concrete boat, we’ll build a concrete boat”).

<sup>387</sup> This shift would likely require more IPAs to file a confidential financial disclosure report, which is required if a detailee participates in contracting activities without substantial supervision. 5 C.F.R. § 2634.904(a)(1). Distinguishing beneficial tech products from misleading ones is particularly a challenge in the AI space, where researchers have found a number of companies to be selling products of dubious legitimacy. See ARVIND NARAYANAN, HOW TO RECOGNIZE AI SNAKE OIL, <https://www.cs.princeton.edu/~arvindn/talks/MIT-STS-AI-snakeoil.pdf> [<https://perma.cc/5UNX-AVLT>].

<sup>388</sup> NAT’L AERONAUTICS & SPACE ADMIN., NASA FAR SUPPLEMENT § 1801.602-2(d) (2015), <https://www.hq.nasa.gov/office/procurement/regs/NFS.pdf> [<https://perma.cc/92Y9-IJJ4>].

<sup>389</sup> Between 2017 and 2022, there was already over \$1 billion in “AI”-related government contracts. Gregory S. Dawson, Kevin C. Desouza & James S. Denford, *Understanding Artificial Intelligence Spending by the U.S. Federal Government*, BROOKINGS INST. (Sept. 22, 2022), <https://www.brookings.edu/articles/understanding-artificial-intelligence-spending-by-the-u-s-federal-government/> [<https://perma.cc/2ZPZ-BC58>].

<sup>390</sup> AI policymakers have encouraged the government to increase coordination in AI-related procurement to ensure that new contracts align with developing AI principles. NAT’L ARTIFICIAL INTELLIGENCE ADVISORY COMM., YEAR 1 REPORT 17, 24 (May 2023), <https://www.ai.gov/wp-content/uploads/2023/05/NAIAC-Report-Year1.pdf> [<https://perma.cc/Y3H3-VU7X>] (recommending OMB guidelines on procurement practices that reflect risk management priorities set by NIST and calls on agencies, where appropriate, to designate AI procurement leaders); 2021 NSCAI Report, *supra* note 148, at 137 (similar).

<sup>391</sup> See Financial Services and General Government Appropriations Act, 2023, § 704, Pub. L. 117–328, 136 Stat. 4459, 4705 (2022) (codified at 5 U.S.C. § 3101 notes).

<sup>392</sup> See Department of Defense Appropriations Act, 2023, § 8002, Pub. L. 117–328, 136 Stat. 4459, 4584–85 (2022) (codified at 10 U.S.C. § 1584 notes); see also 10 U.S.C. § 1584 (citizenship requirement for employment not applicable to DOD).

<sup>393</sup> Exec. Order No. 11,935 (Sept. 2, 1976), 41 Fed. Reg. 37,301 (Sept. 3, 1976) (codified at 5 C.F.R. § 7.3(b) (2023)).



The restriction for many visa holders especially hurts the federal government’s ability to acquire technical talent. NSF’s survey of research doctorate recipients found that 37.3% of research doctorates in science and engineering awarded by U.S. universities in 2022 were to temporary visa holders.<sup>394</sup> In absolute terms, temporary visa holders received 17,091 of the 45,924 doctoral degrees awarded that year.<sup>395</sup> The inability to recruit from temporary visa holders therefore severely restricts the federal government’s access to technical and scientific talent.

Non-reimbursed IPAs may offer a solution. Recall that the IPA authorizes a detail into the federal government “without reimbursement” by the federal agency for the assignee’s “pay.”<sup>396</sup> Such a situation should satisfy the appropriations requirement—after all, the agency would not “pay the compensation” of any noncitizen. Some agencies seem to be aware of this possibility: for example, HHS’s IPA regulations provide that a manager seeking to bring a noncitizen into HHS via a detail should consult with the Office of the General Counsel to assure its legality.<sup>397</sup> Although we are unaware of whether agencies have sought to use this possibility, it is worth serious consideration for agencies that struggle to acquire technical talent.

## V. Conclusion

Our Article has provided a systematic descriptive, legal, and policy account of the rising phenomenon of *governing by assignment*. Over the past half century, the IPA has produced three unique modalities of assignment—for leadership, staffing, and projects. In contrast to its original premise, which had the federal government *exporting* expertise to the states, the IPA has in fact been used primarily for *importing* expertise. This striking shift challenges a central legitimating premise of the administrative state—expertise—and underscores the extent and severity of government’s personnel crisis. Our Article has also provided a rigorous analysis of the constitutional and administrative law issues implicated by governing by assignment. And, by conceptualizing and theorizing the IPA’s many lives, we have provided a set of policy recommendations to best realize the IPA’s tremendous promise while ensuring that governing by assignment operates legally and accountably.

In a first-best world, governing by assignment would likely be rare. The White House would promptly nominate, and the Senate would expeditiously confirm, agency leaders. Agencies would quickly fill lower-level positions through the civil service system with top-flight talent. High-level government research would be performed in-house or through skilled, supervised contractors.

But we do not live in this world. Federal agencies struggle in acquiring talent, leaving large leadership gaps filled with “actings” and unfulfilled mandates. And these problems are only getting worse with lackadaisical intergenerational interest in public sector careers. These trends threaten the ability to govern in rapidly advancing fields like science and technology. While Congress has flirted, for instance, with regulating artificial intelligence given the profound questions around catastrophic risk, national security, and misinformation raised by such technology, the empirical record shows that bureaucratic capacity is exceptionally thin to implement even existing regulations.<sup>398</sup>

In light of such “hollowing out” of government, we have documented important mechanisms that agencies have innovated and adapted through the IPA. Our Article brings light to these important innovations—to help agencies, home institutions, and the public better understand the IPA’s promise and limits and the constraints that it ultimately aims to address. Governing by assignment may not always be the first-best solution, but it is vastly superior to not governing at all.

---

<sup>394</sup> NAT’L SCI. FOUND. NAT’L CTR. FOR SCI. & ENGINEERING STATISTICS, NSF 24–300, TABLE 8-1, <https://nces.nsf.gov/pubs/nsf24300/assets/data-tables/tables/nsf24300-tab008-001.pdf> [<https://perma.cc/6C83-G3W7>].

<sup>395</sup> *Id.*; NAT’L SCI. FOUND., NSF 24–300, 2022 DOCTORATE RECIPIENTS FROM U.S. UNIVERSITIES 8 (2023), <https://nces.nsf.gov/pubs/nsf24300/assets/report/nsf24300-report.pdf> [<https://perma.cc/39EC-76VB>].

<sup>396</sup> 5 U.S.C. § 3374(c)(3).

<sup>397</sup> HHS IPA Policy, *supra* note 221, § 300-3-70(H)(3).

<sup>398</sup> *See, e.g.*, Christie Lawrence, Isaac Cui & Daniel E. Ho, *The Bureaucratic Challenge to AI Governance: An Empirical Assessment of Implementation at U.S. Federal Agencies*, 2023 AIES: AAAI/ACM CONFERENCE ON AI, ETHICS & SOC’Y 606; 2021 NSCAI Report, *supra* note 148, at 227–29 (noting lack of implementation of existing policies).

## Appendix

In the table that follows, we compare various hiring authorities based on five institutional design features:

- (1) *Applicant Friendly*: To solicit the best applicants to fill positions, applications should not be unduly cumbersome so as to pose a barrier to applying in the first place. Programs are compared in terms of the steps required in an application process or finalizing an agreement.
- (2) *Time-to-Hire*: Accessing talent in an expedient manner allows the government to respond to new challenges as they arise. Programs are compared in terms of average time to hire, where available, or in terms of barriers to speedy hiring.
- (3) *Duration*: Different positions require varying time horizons, and programs are compared in terms of their limits on position duration.
- (4) *Competitive Compensation*: Another major factor for attracting top talent, particularly in the technology space, is providing compensation competitive with that in the private sector or academia. Programs are compared in terms of their compensation ceiling.
- (5) *Public Reporting*: Lacking information about who is filling public positions and what their duties are, as well as who is authorizing certain government decisions, can present constitutional and other policy concerns.<sup>401</sup> Programs are compared in terms of their public reporting on positions and the individuals that fill them.

	<i>Applicant Friendly</i>	<i>Time-to-Hire</i>	<i>Duration</i>	<i>Competitive Compensation</i>	<i>Public Reporting</i>
<b><i>Civil Service Staffing</i></b>	Applicants generally apply through USAJobs with a federal resume. Requirements vary by agency and security clearance required (e.g., the SF 86, required for high security positions, is 136 pages), which may take several months.	It takes 106 days on average to hire through the civil service staffing process. <sup>402</sup>	There are no official limits on duration.	Many are paid at the GS scale (max: \$159,950 <sup>403</sup> ). The SES, however, offers higher pay (max: \$221,900 <sup>404</sup> ).	Agencies must make public job postings, vet candidates by merit principles, and make positions/salary public through OPM. Still, it may not be straightforward to identify which employee signed off on a particular authority. <sup>405</sup>
<b><i>Excepted Service</i></b>	Application requirements vary by position: e.g., PMFs must only fill out several forms, similar to	Hiring timelines vary greatly from position to position	Some excepted service positions may institute their	Agencies can devise their own pay scales subject	It is generally more difficult to identify individuals hired through the excepted service, though

<sup>401</sup> See, e.g., *Federally Incurred Cost of Regulatory Changes and How Such Changes Are Made: Hearing Before the Subcomm. on Fed. Spending Oversight & Emergency Mgmt. of the H. Comm. on Homeland Sec. & Gov't Affs.*, 116th Cong. 1–2 (2019) (statement of Thomas Berry, Research Fellow, Pacific Legal Foundation), <https://www.hsgac.senate.gov/wp-content/uploads/imo/media/doc/Berry%20Testimony.pdf> [<https://perma.cc/8QS7-VSQ7>].

<sup>402</sup> 2019 GAO Federal Workforce Report, *supra* note 133.

<sup>403</sup> OFF. OF PERS. MGMT., SALARY TABLE 2024-GS, <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2024/GS.pdf> [<https://perma.cc/7NV5-EH5H>].

<sup>404</sup> OFF. OF PERS. MGMT., SALARY TABLE 2024-ES, <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2024/ES.pdf> [<https://perma.cc/CQL4-KHPU>].

<sup>405</sup> See, e.g., *Washington Post Co. v. Special Inspector General for Afghanistan Reconstruction*, No-18-2622, 2021 WL 4502106 (D.D.C. Sept. 30, 2021) (finding that lower-level employees have a privacy interest that generally outweighs the public interest in their identities in a FOIA request case seeking documents including employee identities).

	paperwork in the private sector. <sup>406</sup> All undergo some level of background investigation.	(e.g., the PMF application timeline is five months <sup>407</sup> ). Background checks and security clearance requirements may add weeks or months to hiring time.	own limits or be tied to political terms (e.g., Schedule C).	to aggregate limitations (max: \$246,400, or if covered by a performance appraisal system, \$284,600—the Vice President’s pay). <sup>408</sup>	some agencies might voluntarily make their employees publicly available <sup>409</sup> and many Excepted Service positions are likely subject to disclosure under the new PLUM Act. <sup>410</sup> Positions do not have to be posted on USAJobs.
<b>Political Appointments</b>	In addition to standard forms dependent on clearance, most candidates fill out a public financial disclosure report (OGE 278e) though some may submit a confidential report. <sup>411</sup> PAS candidates must additionally go through extensive White House and Senate vetting.	The average Senate confirmation takes 115 days for a successful nomination (and many are not). Non-PAS positions may take less time, though administrations are often inundated in	Appointees are limited by their appointment term or political term.	Appointees are generally not bound by the GS scale and often paid at the EX scale (max: \$246,400 <sup>413</sup> ).	PAS individuals must undergo extensive examination on the public record through the Senate confirmation process. Non-PAS individuals are identifiable by the data reporting requirements of the new PLUM Act. <sup>414</sup>

<sup>406</sup> See OFF. PERS. MGMT., PRES. MGMT. FELLOWS, PARTICIPANT HANDBOOK 42–84 (2022), <https://www.pmf.gov/media/vumhfhkh/pmf-participant-handbook-draft-04-04-2022.pdf> [<https://perma.cc/6Q89-NQBW>].

<sup>407</sup> *Become a PMF: 2023 Application*, OFF. PERS. MGMT., PRES. MGMT. FELLOWS, <https://www.pmf.gov/become-a-pmf/2023-application/> [<https://perma.cc/9NBC-9B4B>].

<sup>408</sup> See Memorandum from Kiran A. Ahuja, Director of the Off. of Pers. Mgmt., to Heads of Executive Departments and Agencies (Dec. 21, 2023), <https://chcoc.gov/sites/default/files/January-2024-Pay-Adjustment-Memo-Attachments.pdf> [<https://perma.cc/KYX4-338B>].

<sup>409</sup> The PMF publicly posts its fellows and their placements. *Current Finalists*, OFF. PERS. MGMT., PRES. MGMT. FELLOWS, <https://apply.pmf.gov/finalists.aspx> [<https://perma.cc/6UBU-FH54>]. However, searching the OPM database for employees at the CIA or the Tennessee Valley Authority, both excepted agencies, returns no results. *Enterprise Human Resources Integration-Statistical Data Mart (EHRI-SDM)*, OFF. PERS. MGMT., [https://www.fedscope.opm.gov/datadefn/achri\\_sdm.asp](https://www.fedscope.opm.gov/datadefn/achri_sdm.asp) [<https://perma.cc/CTJ2-H7MY>].

<sup>410</sup> See James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, H.R. 7776, § 5322(a), Pub. L. 117–263, 136 Stat. 3255, 3255–58 (2022) (codified at 5 U.S.C. § 3330f(a)(5) & (b)) (requiring disclosure of any position that would be published in the Plum Book, including potentially any position “on any level of the Executive Service under subchapter II of chapter 53, or another position with an equivalent rate of pay,” any position in the SES, and any position “of a confidential or policy-determining character” under 5 C.F.R. § 213.3301–.3302, i.e., Schedule C of the Excepted Service) [hereinafter PLUM Act].

<sup>411</sup> Financial Disclosure and Ethics, P’SHP FOR PUB. SERV., <https://presidentialtransition.org/readytoserve/financial-disclosure-and-ethics/> [<https://perma.cc/A9Q5-NH7F>].

<sup>413</sup> OFF. OF PERS. MGMT., SALARY TABLE 2024-EX, <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2024/EX.pdf> [<https://perma.cc/K85X-BMH3>].

<sup>414</sup> The PLUM Act moves from reporting on political appointees every four years to yearly updates, as well as a modern, online directory. See 5 U.S.C. § 3330f(e) & (f)(4).

		early days and candidates must get security clearance. <sup>412</sup>			
<b>Contracting</b>	Contractors must fill out a number of forms and engage in a bidding or negotiation process. <sup>415</sup>	The FAR process can be complicated and lengthy.	Contracts can range from very short to a series of multi-year engagements.	Contract compensation is generally unbounded, though the bid must be accepted.	Federal contracts are generally available in the Federal Procurement Data System.
<b>Research Agreements</b>	Requirements vary: e.g., CRADAs may require COI forms, licensing/confidentiality agreements, and more. <sup>416</sup>	Many research agreements require expensive and lengthy negotiations.	Agreements can range from very short to a series of multi-year engagements.	Agreements may be uncompensated or can take the form of a grant or reimbursement.	It is unclear what organizations and individuals currently hold research agreements with the federal government.
<b>IPA</b>	Candidates fill out an IPA agreement and an MOU with their home institution. Those detailed to positions requiring financial disclosure will also have to fill out an OGE 278e form. <sup>417</sup>	The IPA process is relatively quick.	Agreements are generally for two years and can be extended to four years.	IPAs can be paid at their home institution salary.	It is unclear who is currently serving as an IPA and what their role and duties are.

Table 1: Comparison of Hiring Authorities

<sup>412</sup> For example, an administration may receive between 150,000 to 300,000 applications for political appointees during the transition and in the early days of an administration. Alex Tippett & Carter Hirschorn, *How (Not) To Get a Job in an Administration: Five Lessons from Transition Experts*, P'SHIP FOR PUB. SERV. BLOG (Oct. 15, 2020), <https://presidentialtransition.org/blog/how-not-to-get-a-job/> [<https://perma.cc/ZH4M-4Z9A>].

<sup>415</sup> See FED. DEPOSIT INS. CORP., INTRODUCTION TO THE FEDERAL ACQUISITION REGULATION (FAR), <https://www.fdic.gov/about/diversity/sbrp/45.pdf> [<https://perma.cc/7689-ND7M>].

<sup>416</sup> For example, see *Forms, Templates, and Model Agreements*, DEP'T OF VETERANS AFFS. OFF. OF RSCH. & DEV., [https://www.research.va.gov/programs/tech\\_transfer/model\\_agreements/default.cfm](https://www.research.va.gov/programs/tech_transfer/model_agreements/default.cfm) [<https://perma.cc/5JHK-D93B>].

<sup>417</sup> See P'SHIP FOR PUB. SERV., IPA AGENCY AND CANDIDATE GUIDEBOOK 12 (2021), [https://gogovernment.org/wp-content/uploads/sites/12/2022/04/IPA-Guidebook\\_2021.pdf](https://gogovernment.org/wp-content/uploads/sites/12/2022/04/IPA-Guidebook_2021.pdf) [<https://perma.cc/J8BJ-U6Y7>].

